Human rights implications of the climate change regulatory framework on indigenous peoples' lands in Africa

by

Ademola Oluborode Jegede

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Supervisor: **Professor Michelo Hansungule**

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
Faculty of Law

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Dedication

Bolaji (BJ), your sacrifice is much!

Acknowledgments

It takes a mix of insanity and bravery to embark on this challenging race. If I have been successful, I could not have done it alone but only because I have been greatly helped. My appreciation goes to my ever present help in this journey, the one who came to save his own, the Lord Jesus, for ordering my path aright, Emmanuel, you have done all things well!

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Abstract

There is increasing certainty about the global reality of climate change and its negative effects on society. In Africa, owing to a way of life that is culturally and collectively dependent on land and its natural resources, actual and projected evidence shows that indigenous peoples are affected than other populations by the adverse impact of climate change. Indigenous peoples will also be adversely affected by the impact of climate change response measures, particularly adaptation process in accessing funds and the REDD+ mitigation initiatives on their land. Consequently, this thesis examines the extent of protection accorded to indigenous peoples' land tenure and use against the backdrop of relevant global, national and regional climate change regulatory frameworks. Using Zambia, Tanzania and Nigeria as case studies, the thesis finds that there is a trend towards inadequate protection of indigenous peoples' land tenure and use in the domestic climate change regulatory framework for addressing the adverse effects of climate change and response measures in Africa. The inadequate protection of land use and tenure has negative implications for indigenous peoples' participation, carbon rights (a new form of property rights in the forests) and benefit-sharing, as well their access to grievance mechanism and remedies.

In response to the inadequacy, the thesis demonstrates that it is incompatible with the obligations of states and a breach of crucial rights guaranteed to indigenous peoples under regional human rights instruments. The thesis then highlights the potential in the regional climate change regulatory framework and particularly, the promotional, protective, interpretive and assembly entrusted functions of the African Commission on Human and Peoples' Rights (the Commission) as specific channels by which the regional application of human rights can protect the land rights of indigenous peoples in the context of climate change in Africa. Notwithstanding these potentials, reforms are necessary at the international, national and regional levels for effective protection of indigenous peoples' land rights in the context of climate change impact in Africa. These reforms include the reconceptualization of principles of 'sovereignty', 'country-driven' and 'national legislation' at the international level, and at the national level, the creation of a new stand-alone regulatory framework or harmonisation of national legislation relating to climate change to respect indigenous peoples' land rights. At the regional level, there is need for an improved interaction between climate change related institutions and initiatives with human rights mechanisms and an official regional policy statement on the protection of indigenous peoples' land rights in the light of climate change impact in Africa.

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List of Abbreviations

AA -	Administrative Agent
ACJP -	Australian Climate Justice Programme
ACP-	Africa, Carribean Pacific Group of States
ACPC -	African Climate Policy Centre
AEC -	African Economic Community
AfDB -	African Development Bank
AF -	Adaptation Fund
AFB -	Adaptation Fund Board
AGN-	African Group of Negotiators on Climate Change
AMCEN -	African Ministerial Conference on the Environment
AMESD -	African Monitoring of Environment for Sustainable Development
APRM -	African Peer Review Mechanism
ASF -	African Standby Force
AU -	African Union
AUC -	African Union Commission
AWG-KP -	Ad-hoc Working Group on Further Commitment for Annex 1 Parties under the Kyoto Protocol
AWG-LCA -	Ad-hoc Working on Long Term Cooperative Action Under the Convention
CAHOSCC -	Committee of African Heads of State and Government on Climate Change
CANA -	Climate Action Network Australia
CBD -	Convention on Biological Diversity
CBFM -	Community Based Forest Management
CCBA -	Climate, Community and Biodiversity Alliance
CCDA -	Climate Change and Development in Africa Conference
CCDU -	Climate Change and Desertification Unit
CDM -	Clean Development Mechanism
CDSC -	ClimDev Programme Steering Committee
CDSF -	ClimDev Special Fund

CERD -	Convention on the Elimination of Racial Discrimination
CESCR -	Committee on Economic, Social and Cultural Rights
CEWS -	Continental Early Warning System
CIEL –	Centre for International Environmental Law
CKGR -	Central Kalahari Game Reserve
COP/CP -	Conference of Parties
CRC -	Committee on the Rights of the Child
CRMAS -	Climate Risk Management and Adaptation Strategy
CRMC -	Climate Response Measures Commission
CRN -	Coalition for Rainforest Nations
CRS -	Cross River State
CSD-	Commission on Sustainable Development
DRC -	Democratic Republic of Congo
DREA -	Department of Rural Economy and Agriculture
ECHR -	European Court of Human Rights
ECOWAS -	Economic Community of West African States
EIA -	Environmental Impact Assessment
ECCAS-	Economic Community of Central African States
ENRMMP-	Environment and Natural Resources Management and Mainstreaming Programme
EU-	European Union
FAO -	Food and Agricultural Organisation
FCPF-	Forest Carbon Partnership Facility
FIELD -	Foundation for International Environmental Law and Development
FPIC -	Free Prior Informed Consent
FR-	Forest Reserves
FRIN -	Forestry Research Institute of Nigeria
GCF-	Green Climate Fund
GDP-	Gross Domestic Products
GEF -	Global Environment Facility
GEFTD -	Global Environment Facility Trust Fund

HRC - Human Rights Committee
ICAO - International Civil Aviation Organisation
ICCPR- International Covenant on Civil and Political Rights
ICESCR - International Covenant on Economic, Social and Cultural Rights
ICHRP - International Council on Human Rights Policy
ICJ - International Commission of Jurists
ICJ - International Court of Justice
IDDC - International Disability and Development Consortium
IDP- Internally Displaced Persons
IFAD - International Fund for Agricultural Development
IFC - International Finance Corporation
IFF- Intergovernmental Forum on Forests
IGAD - Intergovernmental Authority on Development
IIPFCC - International Indigenous Peoples Forum on Climate Change
IITC - International Indian Treaty Council
ILO - International Labour Organisation
IMO - International Maritime Organisation
IOC - Indian Ocean Commission
IPAF - Indigenous Peoples Assistance Facility
IPCC - Intergovernmental Panel on Climate Change
IPF - Intergovernmental Panel on Forests
IPFP - Indigenous Peoples Focal Points
IUCN - International Union for Conservation of Nature
JSWG - Joint Secretariat Working Group
LAC- Lands Acquisition Act
LDC - Least Developing Countries
LDCF - Least Developed Countries Trust Fund
LULUCF - Land Use, Land-Use Change and Forestry
MAFS - Ministry of Agriculture and Food Security
MALE - Ministry of Agriculture, Livestock and Environment
MEA - Multilateral Environmental Agreements

MEM -	Ministry of Energy and Minerals
MFEA -	Ministry of Finance and Economic Affaires
MFIC-	Ministry of Foreign Affairs and International Co-operation
MFLD -	Ministry of Fisheries and Livestock Development
MITC -	Ministry of Industry, Trade and Cooperatives
MJCA -	Ministry of Justice and Constitutional Affaires
MJK -	Movimiento de la Juventud Kuna
MLHC -	Ministry of Lands Housing and Settlements
MNRT -	Ministry of Natural Resources and Tourism
MOP/CMP -	Meeting of Parties
MPTF -	Multi-Partner Trust Fund Office
MRGI -	Minority Rights Group International
MRV -	Monitoring and Measurement, Report and Verification
MTENR-	Ministry of Tourism, Environment and Natural Resources
NAPA -	National Adaptation Plan of Action
NASRDA -	Nigeria Air Space Research and Development Agency
NCCSC -	National Climate Change Steering Committee
NCCTC -	National Climate Change Technical Committee
NECC-	Negotiators/Experts on Climate Change
NEPAD -	New Partnership for African Development
NHRI -	National Human Rights Institutions
NNPC-	Nigerian National Petroleum Corporation
NP-	National Programmes (NP)
NPD-	National Programme Document
NRTF-	National REDD+ Task Force
NTFP -	Non-timber Forest Products
OHCHR -	Office of the High Commissioner on Human Rights
PAP -	Pan-African Parliament
PFM -	Participatory Forest Management
PGA/REDD+ -	Participatory Governance Assessments and their role in REDD+
PMO -	Prime Minister‘s Office

POW -	Panel of the Wise
PRI -	Penal Reform International
PS -	Permanent Secretaries
PSC -	Peace and Security Council
REC -	Regional Economic Communities
REDD-	Reduced emissions from deforestation and forest degradation
REDD+ -	Reducing emissions from deforestation and forest degradation, and fostering conservation, sustainable management of forests, and enhancement of forest carbon stocks
R-PP -	REDD+ Readiness Proposal
SADC -	Southern African Development Community
SAP-	Structural Adjustment Programmes
SAEP -	Stakeholder Assessment and Engagement Plan
SBI-	Subsidiary Body for Implementation
SBSTA -	Subsidiary Body for Scientific and Technological Advice
SCCF -	Special Climate Change Fund
SPRAT -	Social Principles Risk Assessment Tools
STAP -	Scientific and Technical Advisory Panel
TAP -	Technical Advisory Panel
TC -	Transitional Committee
TWG -	Technical Working Groups
UDHR -	Universal Declaration of Human Rights
UNCCD -	United Nations Convention on Combating Desertification
UNCED -	United Nations Conference on Environment and Development
UNDP -	United Nations Development Programme
UNDRIP -	United Nations Declaration on the Rights of Indigenous Peoples
UNECA -	United Nations Economic Commission for Africa
UNFCCC -	United Nations Framework on Climate Change Convention
UNFF -	United Nations Forests Forum
UNGGIPI-	United Nations Development Group Guidelines on Indigenous Peoples Issues

UNHCR-	United Nations High Commissioner for Refugees
UNHRC -	United Nations Human Rights Council
UNIFEM -	United Nations Development Fund for Women
UNITAR -	United Nations Institute for Training and Research
UNPFIP -	United Nations Permanent Forum on Indigenous Peoples
UN-REDD-	United Nations Reduced Emissions from Deforestation and forest Degradation
UPR -	Universal Periodic Review
USAID -	United States Agency for International Development
VLRF -	Village Land Forest Reserves
VNRC -	Village Natural Resources Committee
WFP -	World Food Programme
WHO -	World Health Organisation
WILDAF -	Women in Law and Development in Africa
WMO -	World Meteorological Organisation
WSSDPI -	World Summit on Sustainable Development

Chapter 1

Introduction

1.1. Background

The evidence of the reality of climate change and its negative effects on society has moved beyond a mere global consensus.[1] According to the report of the Intergovernmental Panel on Climate Change (IPCC) released in 2014, 'the warming of the earth is unequivocal', and 'human influence on the climate system is clear'.[2] Echoing and strengthening the findings of the IPCC, a recent report released by the United States notes that the warming of the planet is 'unambiguous' and is primarily driven by human activities.[3] Human activities are substantially increasing the concentration of greenhouse gases in the atmosphere, thus enhancing the greenhouse effect, which, in turn, has led to increased warming of the earth surface resulting in climate change.[4] The activities which put pressure on the global environment, historically, are attributed to a range of factors, including the economic development path of developed nations in the North,[5] and the over consumption or 'way of life' of this hemisphere.[6] In contemporary time, they have been associated with the pursuit of a similar development path that has come with large scale

[1]On the literature dealing with climate change, its impacts and the law, see M Haritz *An incovenient deliberation: The precautionary principles's contribution to the uncertainties surrounding climate change liability* (2011)11-33; C Wold, D Hunter & M Powers *Climate change and the law* (2009); P Collier, G Conway & T Venables 'Climate change and Africa'(2008) 24 *Oxford Review of Economic Policy* 337; H Reid & S Huq *How we are set to cope with the impacts* (2007) 1-4; A Gore *An inconvenient truth: The planetary emergency of global warming and what we can do about it* (2006)

[2] Established by the World Meterorogical Organisation and the United Nations Environment Programme in 1988, the IPCC reviews and accesses the most recent scientific, technical and socio-economical information relating to climate change, see 'Protection of global climate for present and future generations of mankind' UNG.A. Res. 43/53, 70th plenary meeting 6 December 1988 (UNGA Resolution 43/53). Its most recent report summary is IPCC 'Summary for policymakers' in TF Stocker *et al* (eds) *The physical science basis. Contribution of Working Group I to the 5th Assessment Report of the Intergovernmental Panel on Climate Change* (2013) 8, 15 (IPCC Summary for policymakers); for a more detail description of the IPCC and its function, see chapter 4 of the thesis

[3] JM Melillo (eds) *Climate change impacts in the United States: The 3rd national climate assessment* (2014) 7

[4] H Le Treut *et al* 'Historical overview of climate change' in S Solomon *et al* (eds) *Climate change 2007: The physical science basis: Contribution of Working Group I to the 4th Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 95-127

[5] The historical responsibility of the developed countries for the state of the climate is recurringly acknowledged as underlying the principle of common but differentiated responsibility in international environmental law; see for instance, principle 7 of the Rio Declaration which provides as follows '[i]n view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment…'; but see, L Rajamani 'The changing fortunes of differential treatment in the evolution of international environmental law' (2012) 88 *International Affairs* 605, arguing that the popularity of this principle is waning

[6] B Mckibben *The end of nature: Humanity, climate change and the natural world* (2003)

agriculture, mining, construction and logging, which according to the findings of scientific research, are a substantial driver of climate change and its adverse impacts the world over.[7]

Not every impact is negative, though. In Africa, the effects of climate change vary in different parts: some parts, such as northern and southern Africa, as projected, will become drier; others, such as East Africa may become wetter, with different results for food production and health conditions.[8] However, there will be more negative consequences than positive implications from climate change for Africa, more than in other regions,[9] despite the fact that the continent contributes little to its cause.[10] In general terms, established vulnerable sectors to the impact of climate change in Africa, actual and projected, are documented as water resources, food security, natural resource management and biodiversity, human health, settlements and infrastructure, and desertification.[11] However, in Africa, as elsewhere, even though indigenous peoples have contributed least to climate change, according to United Nations Development Group Guidelines on Indigenous Peoples Issues (UNGGIPI), 'they are the first to face its impact'.[12] This is not surprising considering that their collective cultural and physical survival depends on land and its natural resources,[13] which are now increasingly being affected by climate change.[14]

An examination of indigenous peoples in the context of climate change impacts, however, is challenging, given the fluid and contested nature of the concept and other overlapping features about the climate change rule-making process which do not lend to a straight forward analysis. Hence, certain preliminary clarification is necessary as a background to this study.

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[7] G Rist *The history of development: From western origins to global faith* (2009) 21-24; on the negative impacts of these activities on the climate, see RW Gorte & PA Sheikh 'Deforestation and climate change' (March 2010) CRS Report for Congress (March 2010) CRS Report for Congress; J Helmut & EF Lambin '*What drives tropical deforestation: A meta-analysis of proximate and underlying causes of deforestation based on subnational case study evidence'* (2001) Land-Use and Land-Cover Change (LUCC) Project IV; J Quan & N Dyer 'Climate change and land tenure: The implications of climate change for land tenure and land policy' (2008) 7-8

[8] Collier et *al* (n 1 above)

[9] Collier et *al* (n 1 above)

[10] Collier *et al* (n 1 above) 337; AfDB *Investing in Africa's future* (2008) 45

[11] MI Boko *et al* 'Africa: Climate change, impacts, adaptation and vulnerability' Boko, MI *et al* 'Africa' in ML Parry *et al* (eds) (2007) *Climate change, impacts, adaptation and vulnerability: Contribution of Working Group II to the 4th Assessment Report of the Intergovernmental Panel on Climate Change* 433-467

[12] 'United Nations Development Group Guidelines on Indigenous Peoples Issues', February 2008 <www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf> (accessed 20 May 2013) 8 (UNDG Guidelines on Indigenous Peoples); also see N Stern *The economics of climate change* (2006) 95

[13] E Daes 'Principal problems regarding indigenous land rights and recent endeavours to resolve them' in A Eide, J Möller & I. Ziemele (eds) *Making peoples heard- Essay on human rights in honour of Gudmundur Alfreðsson* (2011) 465; E Daes *Study on indigenous peoples and their relationship to land* (UN Doc.E/CN.4/Sub.2/1999/18) para18 (Daes study)

[14] RS Abate & EA Kronk 'Commonality among unique indigenous communities: An introduction to climate change and its impacts on indigenous peoples' in RS Abate & EA Kronk (eds) *Climate change and indigenous peoples: The search for legal remedies* (2013) 5

1.1.1 Intersecting terms? Indigenous peoples, forest-dependent peoples, local populations

The concept of 'indigenous peoples' opens up a debate about who these peoples really are.[15] It also opens up a discussion about their rights regime, which, according to Swepston and Alfreðsson, have for long existed in flux.[16] Illustrating the diverging viewpoints in anthropological scholarship on the term, Kuper notes that the recognition of certain groups as indigenous peoples is needless in that it will confer 'privileged rights equal in effect as apartheid'.[17] Contending against this position, however, Kenrick and Lewis validate not only the need for the recognition of indigenous peoples but the protection of their collective rights.[18] Thus, the meaning of this notion as well as who these people really are merit some consideration.

In some jurisdictions, the term 'indigenous peoples' emerged from the conquests which resulted from the European discovery of the New World in the late 15th century. The victims of this drive were known as 'natives', 'aboriginal' or 'indigenous people'.[19] In the historical context, 'indigenous peoples' are viewed as communities who were the original inhabitants of territories which today are under the domination of 'descendants of European settler populations' in south and central America.[20]

This understanding, however, is questioned by experiences in Africa and Asia where the notion of 'first' peoples-'second peoples or settlers' dichotomy lacks historical basis.[21] Therefore, it is not surprising that the African Commission's Working Group on Indigenous Populations/Communities (Working Group) has adopted an approach which focuses on the following criteria:

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[15] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Study of the problems of discrimination against indigenous population', UNESCO, 1986 UN Doc E/CN4 Sub2 1986/7/Adds 1-4, (Cobo's Report) para 379; also see M Hansungule 'Indigenous peoples and minorities in Africa: Who are these people?' (2006) A paper prepared for the two-day Symposium on Indigenous Peoples and Minorities organised by the Kenyan National Commission on Human Rights on 30-31 October, 2006 at Holiday Inn, Nairobi, Kenya (on file with the author)

[16] L Swepston & G Alfreðsson 'The rights of indigenous peoples and the contribution by Erica Daes' in G Alfreðsson &M Stavropoulou (eds) *Justice pending: Indigenous peoples and other good causes: Essays in honour of Erica-Irene Daes* (2000) 70-78

[17] A Kuper 'The return of the native' (June 2003) 44*Current Anthropology* 389

[18] J Kenrick & J Lewis 'Indigenous peoples' rights and the politics of the term 'indigenous' (April 2004) 20 *Anthropology Today*

[19] SJ Anaya 'The evolution of the concept of indigenous peoples and its contemporary dimensions' in SA Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 23-42

[20] P Thornberry *Indigenous peoples and human rights* (2002) 33-60

[21] B Kingsbury 'Indigenous peoples' in international law: A constructivist approach to the Asian controversy' (1998) 92 *American Journal of International Law* 414

> Self-identification as indigenous and distinctly different from other groups within a state[...] special attachment to and use of their traditional land whereby their ancestral land and territory[...] an experience of subjugation, marginalisation, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.[22]

From the above, self-identification, distinct difference, particularly, special attachment to and use of ancestral land and experience of subjugation or marginalisation as a result of their different way of life are key criteria in adjudging a group as indigenous.[23] The foregoing criteria are also emphasised in the International Labour Organisation (ILO) Convention 169[24] and later United Nations Declaration on the Rights of Inidgenous Peoples (UNDRIP).[25]

However, the requirements laid down by the Working Group are not fool proof. As Bojosi argues, they are a product of a 'long enduring external mission to have the concept of indigenous peoples [...] applied to certain pre-determined peoples in Africa'.[26] Some scholars, particularly Viljoen, have similarly faulted the criteria, especially the requirement of attachment to the use of land, arguing that most populations in Africa are agrarian and, to some extent, remain culturally attached to the use of land.[27] The argument is also made that reliance on 'attachment to the use of land' in defining the concept, along with an informal title of land tenure will exclude poor or rural Africans who do not fit into 'indigenous peoples' criteria, but are dependent on informally held land.[28] Equally, there are viewpoints arguing for the need to move away from protecting

[22] 'Advisory Opinion of the Africa Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples', adopted by the African Commission on Human and Peoples' Rights at its 41st ordinary session held in May 2007 in Accra, Ghana (Advisory Opinion) paras 9-13; Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005) (Working Group Report), adopted by the African Commission at its 28th ordinary session 93; also see DL Hodgson *Being Maasai, becoming indigenous: Post colonial politics in a neoliberal world* (2011) 36-40

[23] G Alfreðsson 'Minorities, indigenous and tribal peoples, and peoples: Definitions of terms as a matter of international law' in N Ghanea & A Xanthaki (eds) *Minorities, peoples and self-determination. Essays in honor of Patrick Thornberry* (2005) 163-172.

[24] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989 (ILO Convention 169). For instance, according to art 1(2), self-identification of indigenous peoples is a fundamental element in determining the people. Also, in calling for the protection of indigenous peoples' land rights, art 14 emphasies centrality of land to their subsistence and survival

[25] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly on 13 September 2007 , arts 3 and 4 emphasise their right to self-determination , while arts 25 and 26 call for the protection of their land rights

[26] KN Bojosi 'The African Commission Working Group of Experts on the rights of the indigenous communities/populations: Some reflections on its work so far' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 95-137, 96

[27] F Viljoen 'Reflections on the legal protection of indigenous peoples rights in Africa' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 75-94, 77; GM Wachira 'Vindicating indigenous peoples rights in Kenya' (2008) LLD dissertation, University of Pretoria, 30

[28] W Wilcomb & H Smith 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision' (2011) 11 *African Human Rights Law Journal* 422; but see Communication 276/03, *Centre for Minority*

land rights based on a formal finding that a community is 'indigenous' as inevitable. The preference, it is argued, must turn toward a pragmatic approach that emphasises the protection of land rights based on dependence upon and attachment to informally held land obtainable among many of the world's poorest and most vulnerable citizens, even if not indigenous.[29] Finally, along similar line of pragmatism, Bojosi argues that it is not yet clearly proven that the minority rights regime cannot generally achieve protection for sub-groups without resorting to the use of the term 'indigenous' in Africa.[30] In all, the foregoing viewpoints signify that a case on the dependence on land for the survival of culture and lifestyle can be made by populations even if they do not strictly meet the requirements of the description envisaged for indigenous peoples under international human rights law.

Even if unintended, the foregoing viewpoints, in calling for a wider application of the concept of indigenous peoples, favour what can be termed an 'inclusive approach' towards the construction and use of the term 'indigenous peoples' which finds support in key instruments on climate change. Climate-related instruments use an inclusive terminology to accommodate and describe sub-national groups existing within countries that are culturally attached to land. Along with referring to some groups as 'indigenous peoples', examples of phrases employed in climate-related instruments include 'indigenous people', 'indigenous communities', 'indigenous populations', 'tribal peoples', 'forest dwellers', and 'local communities'.[31] For instance, the United Nations Conference on Environment and Development (UNCED) prefers the description 'indigenous people and their communities.'[32] The foregoing sense of the use of the term in an inclusive manner is discernible in Agenda 21 which refers to 'indigenous people and their communities.'[33] As Viljoen explains, the word 'people' refers to all human beings in an inclusive sense when used with a definite article 'the', but 'a people' and its plural form

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Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) (*Endorois* case) 27th Activity Report: June - November 2009 which remains a landslide regional case-law for the protection of indigenous peoples in Africa

[29] RC Williams 'The African Commission "Endorois Case" – Toward a global doctrine of customary tenure?' http://terra0nullius.wordpress.com/2010/02/17/the-african-commission-endorois-case-toward-a-global-doctrine-of-customary-tenure/ (accessed 23 March 2012)

[30] KN Bojosi 'Towards an effective right of indigenous minorities to political participation in Africa' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 294-296

[31] Centre for International Environmental Law (CIEL) 'REDD legal issues: Indigenous peoples and local communities ' http://www.conservation.org/Documents/Joint_Climate_Policy_Positions/Indigenous_Peoples_Local_Communities_REDDplus_English.pdf (accessed 23 March 2012)

[32] UN Doc. A/CONF.151/26 (vol. III), ch. 26; UN Doc. A/CONF.157/24 (Part I)

[33] 'Agenda 21' Ch. 26, http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm (accessed 20 March 2013)

'peoples' connote a restrictive scope suggesting territorial boundary or nationality.[34] Construed in this context, the word 'indigenous people' as used in the instruments is more inclusive than 'indigenous peoples' who seek peculiar protection of their rights.

Although the United Nations Framework on Climate Change Convention (UNFCCC)[35] does not mention 'indigenous people', 'indigenous peoples' or 'local communities', the decisions reached under the framework identify 'indigenous peoples', 'indigenous communities', or 'local communities' as the focus of attention. For example, it is the case with the UNFCCC Conference of Parties (COP) 13, which, in its decisions, indicated, in the context of reducing emissions from deforestation and forest degradation in developing countries, that the needs of 'local and indigenous communities' should be addressed.[36] Also, UNFCCC COP16 meeting in Cancun affirmed that the 'respect for the knowledge and rights of indigenous peoples and members of local communities' is part of the safeguards which should be supported and promoted in implementing processes relating to the reduction of emissions from deforestation.[37]

The use of terminology in a manner that encompasses a broader suite of sub-national groups is also visible in other legal instruments. The International Labour Organisation (ILO) Convention 169 applies to indigenous peoples and Tribal Communities.[38] There is no reference to 'indigenous peoples' under the Convention on Biological Diversity (CBD),[39] however, the phrase that is employed is 'indigenous and local communities' embodying traditional lifestyles.[40] Without offering any definition, the 'Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests' uses the term 'forest dwellers'.[41] Also, the Working Group Report prefers 'indigenous populations/communities' and in that context refers to communities which are forest dwellers, such as the Batwas, as belonging to such groups.[42]

[34] F Viljoen *International human rights law in Africa* (2012) 219-220
[35] United Nations Framework Convention on Climate Change (UNFCCC) (1992) ILM 851
[36] UNFCCC 'Reducing emissions from deforestation in developing countries: Approaches to stimulate action' (Decision 2/CP.13) FCCC/CP/2007/6/Add.1
[37] UNFCCC 'The Cancun Agreements: Outcome of the work of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention' (Decision 1/CP.16) FCCC/CP/2010/7/Add.1
[38] ILO Convention 169
[39] The Convention on Biodiversity (CBD) (1992) 31 ILM 822
[40] CBD, preamble and art 8(j)
[41] 'Non-legally binding instrument on all types of forests' A/C.2/62/L.5
[42] Working Group Report (n 22 above)

In addition, the guidelines designed to support programmes relating to responses to climate change embody the description of groups in a wider sense. For instance, the Guidelines relating to effective stakeholder engagement in the context of the activities under the programme known as Reducing emissions from deforestation and forest degradation, and fostering conservation, sustainable management of forests, and enhancement of forest carbon stocks (REDD+),[43] focus on the participation of indigenous peoples and other forest-dependent communities.[44] Stakeholders national programme documents such as the REDD+ Readiness Proposal (R-PP), filed in relation to such activities, follow a similar pattern. Alleging, for instance, that the application of 'indigenous peoples' may be controversial in Nigeria, the terminology, 'forest-dependent communities and other identified marginal or vulnerable groups', as well as 'local communities' is used in the Nigeria R-PP.[45] The Zambia national programme document uses the words 'indigenous peoples and other forest-dependent communities' without definition.[46]

It can be argued that the foregoing development is not inconsistent with the view of the Working Group on the notion of 'indigenous peoples'. This is because, although certain groups such as the pastoralists and hunter-gatherers are cited by the Working Group as representing a lifestyle which describes indigenous peoples, it indicates that the concept is still evolving and that the categories are not closed and may include other groups not mentioned in the report. In the words of the Working Group:

> The examples provided in this report are by no means conclusive, but are meant to provide tangible content to what would otherwise be pure theory. Those identifying as indigenous peoples in Africa have different

[43] Reducing Emissions from Deforestation and Forest Degradation (REDD+) is a mitigation initiative developed under the UNFCCC. It does not only aim at deforestation and forest degradation, but also at incentivising conservation, sustainable management of forests and enhancement of forests as stock of carbons in developing countries; Bali Action Plan paragraph 1(b)(iii) of this decision is the basis for negotiations on REDD+. The 'plus' refers to role of conservation, and enhancement of forest carbon stocks in developing countries; see Centre for International Environmental Law *Know your rights related to REDD+: A guide for indigenous and local community leaders* (2014) 5; J Wllem den Besten, B Arts & P Verkooijen 'The evolution of REDD+: An analysis of discursive institutional dynamics' (2014) 35 *Environmental Science &Policy* 40; see generally chapters 4 and 5 of this thesis where the initiative is examined in detail

[44] Forest Carbon Partnership (FCP) & the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD Programme) 'Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities' April 20, 2012 (revision of March 25th version)

[45] Federal Republic of Nigeria 'REDD+ readiness preparation proposal (R-PP)' dated November 2013 for consideration by Forest Carbon Partnership Facility (FCPF) & UN-REDD Programme 16

[46] Zambia 'National Programme Document' 114

> names, are tied to very differing geographical locations and find themselves with specific realities that have to be evoked for a comprehensive appreciation of their situation and issues.[47]

Jurisprudence from the Inter-American human rights system indicates that the concept of the 'indigenous peoples' does not necessarily exclude peoples with similar features who may not be indigenous. In *Saramaka v Suriname*,[48] the state contested the right to action of the Saramaka on the ground that they are not a tribal community for the purpose of recognising their collective rights. However, in coming to a conclusion that the Saramaka people make up a tribal community whose legal status is comparable with an indigenous identity, the Inter-American Court of Human Rights noted:

> The Court observes that the Saramaka people are not indigenous to the region they inhabit; they were instead brought to what is now known as Suriname during the colonization period (infra, para. 80). Therefore, they are asserting their rights as alleged tribal peoples, that is, not indigenous to the region, but that share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.[49]

Particularly, the Saramaka people exclusively based their case on the fact that they are forest-dependent, stressing the intricate connection they share with the forests. The Court relied on the the submission of one of the applicants during the public hearing which stressed that:

> [t]he forest is like our market place; it is where we get our medicines, our medicinal plants. It is where we hunt to have meat to eat. The forest is truly our entire life. When our ancestors fled into the forest they did not carry anything with them. They learned how to live, what plants to eat, how to deal with subsistence needs once they got to the forest. It is our whole life.[50]

Hence, in the light of the foregoing, there is a logical basis to view that with an inclusive approach, it is possible for groups which share indigenous peoples' cultural relationship with land to benefit from indigenous peoples' regime of rights, even if they are not indigenous.

However, the foregoing analysis may appear pragmatic as earlier mentioned, but must be treated with caution, particularly with the advent of climate change and related actions.There are reasons

[47] Working Group Report (n 22 above) 15
[48] *Saramaka People v Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172 (*Saramaka* case)
[49] *Saramaka* case (n 48 above) see generally paras 78-86, 79
[50] *Saramaka* case (n 48 above) para 82

for this viewpoint. Foremost is that the inclusion of indigenous peoples along with a suite of sub-groups may blur their identity and offer a basis for states to divert special obligations owed to indigenous peoples under international human rights law. Also, an inclusive approach, in calling for emphasis on cultural relevance and marginalisation, rather than the 'indigenousness' of populations, may encourage a differential treatment of 'indigenous populations', allowing one state in Africa to ignore or delay the claims of indigenous sub-groups with similar characteristics recognised and embraced elsewhere. For instance, such a differential approach will justify the behaviour of both South Africa, which calls for the protection of cultural communities in article 31(a) of its Constitution and taking efforts at addressing their land claims, and, on the other hand, sadly validate Rwanda's position that the Batwa are not indigenous but only a vulnerable minority group.[51] This difference in approach signifies that each state unilaterally can decide whether indigenous peoples exist for the purpose of protection of collective land rights under the UNDRIP in its country or not. Such a political choice definitely is neither a true reflection nor the intended consequence of indigenous peoples' rights regime.[52]

The use of the word 'minority' to refer to peoples who self-identify as indigenous has an inclusive potential which may divert political attention away from core issues that are pertinent to the claims of this population, such as a collective claim to land tenure and use, compensation, and benefit-sharing in climate-related actions. These issues certainly are not covered under the minority rights regime. The minority rights regime, aside largely from recognising individual rights, does not specifically recognise claims relating to land which are at the heart of an indigenous peoples' rights regime.[53] Additionally, the minority platform is conceptually problematic as it focuses on numerical inferiority.[54] For instance, it is a framework that can be used in supporting claims of populations on other grounds beyond being national, ethnic, religious and linguistic minorities. As Kugelmann argues, it can accommodate foreigners living

[51] See African Peer Review Mechanism *Country Review Report of the Republic of Rwanda*' (2005) para 153, which finds that this approach by government largely aims at assimilating the Batwas into the mainstream culture of the state of Rwanda
[52] As part of its requirement on who is indigenous, the Working Group Report allows aspiring groups to 'self-identify' not 'state-identify', see Working Group Report (n 22 above) 93
[53] S Wiessner 'Rights and status of indigenous peoples: A global comparative and international legal analysis' (1999) 12 *Harvard Human Rights Journal* 57, 98
[54] United Nations Subcommission on Prevention of Discrimination and Protection of Minorities, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, 568, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1 (1979)

in another state as refugees or asylum seekers.[55] As has also been argued, it can be employed in addressing the situations of populations who are discriminated against on other grounds, such as gender, disability or sexual orientation.[56] To be sure, while the concerns of indigenous peoples may overlap with the above grounds,[57] the essential basis for indigenous peoples' claim is their culturally distinct and historical linkage with land now subordinated, threatened, and, in some cases, totally destroyed by the dominant worldview of the modern state,[58] a trend that may be exacerbated by climate change.

Besides, the use of an inclusive approach indeed may be further exploited for the benefit and protection of the historical oppressors of indigenous peoples who may also be part of the groups considered as local, agrarian or rural populations in climate change discussions and literature on the subject. It may include these other populations in compensation and benefit-sharing which cannot be the intent and desire of indigenous peoples who crave and deserve a peculiar platform in which they can pursue 'climate change justice' which is here used to entail the pursuit of judicial and non-judicial remedies in relation to the adverse impacts of climate change on indigenous peoples' cultural reliance on land and its resources. That this is not yet the case is evident in climate change negotiation which continues to discuss 'climate change justice' in a strictly state-centric sense, referring to the principles of 'intergenerational and intra-generational equities' which developing nations advance to bring developed nations into account for their historical and disproportionate contribution to the state of global climate.[59] The concept of 'climate change justice' is not engaged with emphasis on the clear distinction among populations to highlight special and differential obligations which states, whether developed or developing, hold toward their citizens. It is certainly not engaged in the sense of what vulnerable communities such as indigenous peoples can do to achieve accountability of states in the light of adverse impacts of climate change.

Yet, the merit in the claim of 'climate change justice' for indigenous peoples should be seen in the above context. Indigenous peoples will be negatively impacted more than other populations

[55] D Kugelmann 'The protection of minorities and indigenous peoples respecting cultural diversity' (2007) 11 *Max Planck Yearbook of United Nations Law* 233, 238
[56] OHCHR 'Minorities under international law' http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx (assessed 3 July 2014)
[57] Kugelmann (n 55 above) 236
[58] n 53 above; also see Hodgson (n 22 above) 25
[59] EA Posner & CR Sunstein 'Climate change justice' (2008) 96 *The Georgetown Law Journal* 1565

despite the fact that their activities are least responsible for the state of the climate. This is not only owing to its impacts on their environment but also, as shall soon manifest in the study, because global climate change response initiatives may lead to the expropriation of their land. No doubt, addressing this effectively is difficult to achieve under a platform that fails to distinguish the peculiar claims of indigenous peoples from that of other populations. However, indigenous peoples' platform, considering its associated rights regime, addresses their peculiar claims effectively. This is in the sense that it affords indigenous peoples the opportunity to make a claim in their capacity and avoid the use of an inclusive term which may include for protection the authors, actors or representatives of their historical problem: the dispossession of their land.[60] This study employs the word 'indigenous peoples' in the foregoing sense, bearing in mind the controversies surrounding its meaning and usage.

1.1.2 Overlapping issues? Climate change, environment, forests and indigenous peoples' lands

The issues of 'climate change', 'environment' and 'forests' in relation to indigenous peoples' lands, overlap. It is important to set the background for the usage of these words by explaining the link of climate change to their meanings.

Climate change refers to the long term weather condition of a region and its pattern of change over time. Underlying this change is the warming of the earth through the contribution of human emission to greenhouse gases which increases the greenhouse effect. Before the Industrial Revolution, the natural status had been relatively stable for about 10,000 years.[61] The natural greenhouse effect allows for sunlight to warm the earth's surface and release the heat radiated by the earth.[62] However, the emergence of fossil fuel burning technology to support industry, automobiles and the energy demands of modern day, as well as other human related activities, such as large scale agricultural production, result in serious interference with the composition of

[60] For a closer look at the concept of indigenous peoples within the meaning of intergenerational and intragenerational equities see, 83-89 of chapter 2 of this study; for a discussion on the link of indigenous peoples' lands with adverse impacts of climate change and how human rights can be used to address inadequate protection of indigenous peoples' land tenure and use in the light of adverse impacts of climate change, see respectively, chapters 3 and 6 of this study
[61] HS Kheshgi, SJ Smith & JA Edmonds 'Emissions and atmospheric CO2 stabilisation' (2005)10 *Mitigation &Adaptation Strategies for Global Change* 213, 214; IPCC Summary for policymakers (n 2 above); Le Treut *et al* (n 4 above)
[62] As above

the natural greenhouse effect.[63] The interference of human activities has brought about increase in greenhouse effect leading to global warming and change in climate condition.[64]

However, it should be noted that the reality of climate change, for long, has been a hotly contested issue with climate change deniers outrightly refuting the existence of climate change or arguing, even if it exists, that it is a natural phenomenon and not due to human activity.[65] Notwithstanding this skepticism, there is no categorical official statement of any state denying its existence. Rather, what is clear is that the decisions of states through the institutions established under the aegis of the UNFCCC and the emerging resolutions of the United Nations Human Rights Council (UNHRC), show that climate change is real and reflect a global trend towards acknowledging and addressing climate change as a challenge.[66]

Indigenous peoples' lands is the main focus of this thesis, though they are entitled to the enjoyment, individually and collectively, all the rights guaranteed under their group specific instruments such as the ILO Convention 169,[67] the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), as complemented by other international human rights instruments.[68] This focus is because the land is fundamental to indigenous peoples' identity, livelihood and sustenance,[69] and critical to the enjoyment of every other right.[70] More importantly, the worldview of indigenous peoples in respect of their land accommodates the environment and forests; the latter is particularly true of forest-dependent communities. Supporting this position, the ILO Convention 169 defines 'land' as including 'the concept of

[63] Gore (n 1 above) 23-37; F Pearce 'World lays odds on global catastrophe' (April 8 1995) *New Science* 4
[64] J Hansen 'Defusing the global warming time bomb' *Scientific American Magazine* March 2004 71
[65] Greenpeace *Dealing in doubt: The climate denial machine v climate science* (2013)
[66] On the scientific basis of climate change, the IPCC has produced five reports with the most recent released in 2014, see IPCC Summary for policymakers (n 2 above); also, the United Nations Human Rights Council has passed at least four resolutions on the existence of climate change and link with human rights, these are namely, Human Rights Council 'Human rights and climate change' Res. 7/23 of 28 March 2008, U.N. Doc. A/HRC/7/78 (Resolution 7/23), Human Rights Council Resolution 10/4, adopted at the 41st meeting, 25 March 2009 (Resolution 10/4), 'Human rights and climate change' Resolution 18/22 of 17 October 2011, A/HRC/RES/18/22 (Resolution 18/22) and 'Human rights and climate change' Resolution 26 of 23 June 2014, A/HRC/26/L.33 (Resolution 26); and as far back as 1988, the United Nations General Assembly passed a resolution acknowledging climate change as a global challenge, see UNG.A. Res. 43/53 (n 2 above)
[67] ILO Convention 169
[68] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly on 13 September 2007; other instruments include, Universal Declaration on Human Rights (UDHR) 1948; International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976
[69] Daes (n 13 above) para 18; SJ Anaya *Indigenous peoples in international law* (2004)141; J Asiema & FDP Situma 'Indigenous peoples and the environment: The case of the pastoral Massai of Kenya' (1994) 5 *Colorado Journal of International Environmental Law & Policy* 150
[70] Daes (n 13 above)

territories, which covers the total environment of the areas inhabited by indigenous peoples'.[71] Hence, when indigenous peoples make claim to the protection of their land, it is often linked with an understanding that includes environment and resources. For instance, the case of the Ogoni people in *Social and Economic Rights Action Center* (SERAC) *and Center for Economic and Social Rights* (CESR) *v Nigeria* (*Ogoniland* case) hinges on the environmental degradation within their territories.[72] The Endorois community argued that displacement from their land offends their subsistence pastoral way of life.[73] An argument which confirms the viewpoint of Alfreðsson and Ovsiouk that the environmental concerns of indigenous peoples are linked to their land and the natural resources, on the one hand' and their 'identities, lifestyles and cultures on the other hand'.[74]

The intersection of forests with climate change is significant considering that, according to the United Nations Environmental Programme (UNEP), 80 per cent of land containing forests is the traditional land and territories of indigenous peoples.[75] While the relationship of this with climate change will be examined more closely later in the study,[76] it is noteworthy that the most important greenhouse gas underlying climate change is carbon dioxide, which is attributable to fossil fuel burning and the change in the use of land. The drilling and consumption of crude oil and coal account for 77% of fossil fuel carbon dioxide emissions into the atmosphere.[77] Energy related human activities are not the only source of carbon emissions, forests, as a storehouse of carbon, play an important role in influencing the climate.[78] According to the discussions at the international level on climate change, a forest is defined as:

> [A] minimum area of land of 0.05-1.0 hectares with tree crown cover (or equivalent stocking level) of more than 10-30 per cent with trees with the potential to reach a minimum height of 2-5 meters at maturity *in situ*. A forest may consist either of closed forest formations where trees of various storeys and undergrowth cover

[71] ILO Convention 169, art 13(2)
[72] Communication 155/96, *Social and Economic Rights Action Center* (SERAC) *and Center for Economic and Social Rights* (*CESR*) *v Nigeria* (*Ogoniland* case)
[73] *Endorois* case (n 28 above) paras 16, 123 and 248
[74] G Alfreðsson & A Ovsiouk 'Human rights and the environment' (1991) 60 *Nordic Journal International Law* 19, 24
[75] EC Diaz 'Climate change, forest conservation and indigenous peoples rights' Briefing paper http://www.cbd.int/doc/external/cop-09/gfc-climate-en.doc. (accessed 20 December 2013); see UNEP 'Conclusion of the document' UNEP/GC.23/INF/23 4 November 2004 www.unep.org (accessed 20 December 2013)
[76] See chapter 3 of this study
[77] R Bierbaum *et al* 'Confronting climate change: Avoiding the unmanageable and managing the unavoidable'. Scientific Expert Group Report on Climate Change and Sustainable Development Prepared for the 15th session of the Commission on Sustainable Development http://www.whrc.org/news/pressroom/pdf/SEG_Report.pdf.(accessed 4 July 2014)
[78] C Streck & S Scholz 'The role of forests in global climate change: whence we come and where we go' (2006) 82 *International Affairs* 861

> a high proportion of the ground or open forest. Young natural stands and all plantations which have yet to reach a crown density of 10-30 per cent or tree height of 2-5 meters are included under forest, as are areas normally forming part of the forest area which are temporarily unstocked as a result of human intervention such as harvesting or natural causes but which are expected to revert to forest.[79]

From this definition, when a forest is cleared, evidence shows that it releases stored carbon into the atmosphere and thus becomes a source of greenhouse gas emissions.[80] The clearance of forests, or deforestation, is associated with human activities, including agriculture, mining, and logging.[81] By contrast, when forests are restored, they remove carbon from the atmosphere.[82] This thus signifies that forests can add to the problem of climate change, or constitute a means of mitigating it.[83]

Indigenous peoples' lands is connected to this situation because actions related to climate change such as oil drilling, mining, and large scale agricultural practices often implicate their land. There are changes which they experience to the remaining land which they occupy which put beyond question the reality of the adverse impacts of climate change on their land.[84] This signifies that the discussions around the solution to the crisis of climate change will affect in several forms the relationship of indigenous peoples with their land. As Daes observes:

> Indigenous peoples have a distinctive and profound spiritual and material relationship with their lands and with the air, waters, coastal sea, ice, flora, fauna and other resources. This relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities.[85]

Considering the centrality of land and its resources to the lifestyle of indigenous peoples which are now threatened by climate change, as negotiations continue on the subject of climate change,

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[79] UNFCCC CP 'Annex: Definitions, modalities, rules and guidelines relating to land use, land-use change and forestry activities under the Kyoto Protocol' FCCC/CP/2001/L.11/Rev.1; this definition is also largely adopted by the Food and Agricultural Organisation, see, Food and Agriculture Organisation of the United Nations, *Global forest resources assessment 2000: Main report* (2000)

[80] G Bala *et al* 'Combined climate and carbon cycle effects of large scale deforestation' (2007) 104 *Proceedings of the National Academy of Sciences of the United States of America* 6550; Gorte & Sheikh (n 7 above); Helmut & Lambin (n 7 above)

[81] IWGIA 'Land rights and indigenous peoples' http://www.iwgia.org/environment-and-development/land-rights (accessed 20 December 2013)

[82] UNFCCC 'Land use, land-use change and forestry' http://unfccc.int/methods/lulucf/items/4122.php (Accessed 20 December 2013)

[83] Streck & Scholz (n 78 above)

[84] HS Elvarsdóttir 'Climate change and human rights: The implications that climate change has on the human rights of the Inupiat in Barrow, Alaska' Master's degree thesis submitted as part of studies for the LLM degree in Polar Law studies, February 2010 where the author makes similar point about the environment of the Inuit in Alaska

[85] EA Daes 'Indigenous peoples and their relationship to land' E/CN.4/Sub.2/2001/21 para 121

the protection of their lands, inclusive of the forest resources, will be crucial in the discussion of the adverse impacts of climate change and the regulatory framework in response.[86]

1.1.3 Intersecting governance: Defining a climate change regulatory framework

Since it is a key component of this study, it is necessary to explain what is meant by a 'climate change regulatory framework'. The term is used in the context of climate change 'governance'. Scholars use the word 'governance' in relation to the environmental field interchangeably with phrases such as 'architecture', and 'regime'. Definitions have been proffered along this line. Generally, according to Le Preste, 'governance' connotes either 'architecture' or 'regime' and refers to:

> A set of interrelated norms, rules and procedures that structure the behaviour and relations of international actors so as to reduce the uncertainties that they face and facilitate the pursuit of a common interest in a given area of issue.[87]

Governance has been explained as entailing the institutions, norms, mechanisms and decision-making procedures.[88] Deere-Birkbeck defines climate change governance as referring to the processes, traditions, institutional arrangements and legal regimes through which authority is exercised, and decisions taken at the global level for implementation. In the author's further view, these arrangements may be formal, involving interaction among governments, or informal, requiring the relations of a range of stakeholders with or without direct involvement of government.[89] In agreeing with this description, Thompson *et al* note that governance connotes structures, arguably institutional and policy, through which decisions are made and resources are managed.[90] This structure, in the view of den Besten *et al*, may be shaped by various actors and groups with which it interacts in negotiation.[91] What is certain is that all the definitions agree that

[86] Rights and Resources Initiative *What future reform? Progress and slowdown in forest tenure reform since 2002* (2014) 9; EN Ajani *et al* 'Indigenous knowledge as a strategy for climate change adaptation among farmers in Sub-saharan Africa: Implications for policy'(2013) 2 *Asian Journal of Agricultural Extension, Economics & Sociology* 23-40; KG McLean *Advanced guards: Climate change impacts, adaptation, mitigation and indigenous peoples- A compendium of case studies* (2010) 56; J Woodke *The impact of climate change on nomadic people* (2008)
[87] Cited in MC Smouts 'The issue of an international forest regime' (2008) 10 *International Forestry Review* 429-432
[88] F Biermann *et al* 'Navigating the anthropocene: The earth system governance project strategy paper` (2010) 2 *Current Opinion in Environmental Sustainability* 202
[89] C Deere-Birkbeck 'Global governance in the context of climate change: The challenges of increasingly complex risk parameters' (2009) 85 *International Affairs* 1173-1194
[90] MC Thompson *et al* 'Seeing REDD+ as a project of environmental governance'(2011) 14 *Environmental Science & Policy* 100
[91] Willem den Besten *et al* (n 43 above) 40

governance is made up of rules and institutions,[92] and that the state is the focus. According to Conca:

> The state is both the subject and the object of most environmental regimes. National governments as agents of states are taken as authoritative subjects of regimes, their bargaining, concurrence and ratification determine whether a legitimate regime exists, and they assume responsibility for compliance. States are also the primary objects of regimes, governmental compliance is the presumed key to regime effectiveness, and governmental implementation is the regime's primary task as a means to that end.[93]

However, it is not certain or appropriate whether to refer to the instruments underlying and emanating from climate governance as a set of law or policy. This uncertainty will remain problematic even though there are negotiations under the Durban platform of a new international agreement to be completed by 2015 and binding on all parties in 2020.[94] Some scholars largely reflect an uncritical use of the term 'law' in referring to climate instruments,[95] others show a preference for usage of 'policy'.[96] There is merit and confusion in both approaches. On one hand, it can be argued that referring to these instruments as laws is legitimate considering that the Kyoto Protocol seeks to have a binding effect.[97] The use of 'law' connotes a detailed legislative process and judicial enforcement in courts.[98] Also, the negotiation of a future treaty by 2015 suggests that the use of the term 'law' to describe emerging instruments in climate change negotiation is not out of order. Nonetheless, the challenge in relation to an instrument such as the Kyoto Protocol lies with its compliance which is largely facilitative or consensual and has no adversarial or confrontational means of enforcement, except for the provision emphasising recourse to the International Court of Justice (ICJ) where negotiation fails as a means of

[92] E Corbera & H Schroeder 'Governing and implementing REDD+' (2011) 14 *Environmental Science & Policy* 89-99; O Young 'International regimes: Toward a theory of institutions' (1986) 39 *World Politics* 104; RO Keohane 'The demand for international regimes' (1982) 36 *International Organisation* 325
[93] K Conca 'Old states in new bottles? The hybridization of authority in global environmental governance' in J Barry &R Eckersley (eds) *The state and the global ecological crisis* (2005) 181-206
[94] Conference of the Parties 17th session, Durban, 28 November to 9 December 2011, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, FCCC/CP/2011/L.10, para 5
[95] See Wold *et al* (n 1 above)
[96] B Maripe 'Development and the balancing of interests in environmental law: The case of Botswana' in M Faure & Willemien du Plessis (eds) *The balancing of interests in environmental law in Africa* (2011) 58-59
[97] The Kyoto Protocol commits parties to internationally binding emission reduction targets, see UNFCCC 'Kyoto Protocol' http://unfccc.int/kyoto_protocol/items/2830.php (accessed 20 December 2013); Kyoto Protocol was adopted under art 17 of the UNFCCC, and entered into force on 16 February 2005. Presently, 50 African countries are parties to the Kyoto Protocol http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (accessed 24 February 2014)
[98] D Kennedy 'The disciplines of international law and policy' (1999) 12 *Leiden Journal of International Law* 9

resolving a dispute.[99] Also, even if the future instrument under negotiation by 2015 assumes an adversarial form in terms of its implementation, there are still decisions from yearly meetings of Conference of Parties (COP)/ Meeting of Parties (MOP) under the Kyoto Protocol and other institutions in the climate change regime, which, though not laws, form part of climate change instruments.

Similarly, the choice for 'policy' as a general description of the instruments appears plausible, considering that there is a plethora of decisions emanating from the COP/MOP and other organs which seek to generally set out a course of action or strategy to 'influence or determine decisions, actions or other matters'.[100] Seen from the angle that the decisions are meant to influence and guide actions on climate change, there is a basis for referring to these instruments as policies, and not as laws, which embody judicial enforcement as their primary and core element.[101] Yet, solely referring to climate change as a policy issue flies in the face of instruments such as the Kyoto Protocol and the future treaty, which is expected to have the binding effect of law. What is fair, as an appropriate approach, is that the choice and use of the term 'law' or 'policy' are not mutually exclusive, both validly can be accommodated as belonging to the emerging framework of instruments set to govern global efforts at finding a solution.

Therefore, it is in the light of the foregoing that the words 'regulatory framework' are preferred in this study to refer to decisions, laws, policies, guidelines, agreements and process related documents that are the outcome of climate change negotiations at different levels in response to the adverse impacts of climate change. The reason for the preference of 'regulatory framework' derives from the meaning of the word 'regulation' which, arguably, accommodates 'laws' and 'policies'. According to the Black Law Dictionary, a regulation is 'the act or process of controlling by rule or restricton', or 'a rule or order, having legal force'.[102] It further defines a 'rule' as a 'stardard or principle, a general norm mandating or guiding conduct or action in a given type of situation'[103], and an 'order' as 'a common direction or instruction' or 'a written

[99] G Ulfstein & J Werksman 'The Kyoto compliance system: Towards hard enforcement' in OS Stooke, J Hovi & G Ulfstein *Implementing the climate regime: International compliance* (2005) 39-62
[100] On the definition of policy, see http://www.thefreedictionary.com/policy (accessed 14 April 2014)
[101] n 98 above
[102] Black's Law Dictionary Seventh edition (1999) 1289
[103] Black's Law Dictionary Seventh edition (1999) 1330

direction or command delivered by a court or judge'.[104] Since an important feature of 'policies' lies in its non-binding nature, the definition of a 'regulation' accommodates instruments such as, 'policies', 'guidelines' and other documents which, though proceed from a legally established body, may necessarily not have binding force of a law. Equally, since a 'regulation' connotes a sense of 'legal' or 'judicial' force, through its link with a 'rule' and 'order', which aims to 'control' and 'restrict' conducts, the argument can be made that the word 'regulation' embodies instruments with binding effect in diferrent tiers of climate change decision-making.

The development of climate change regulatory framework occurs in different tiers of governance. Dunnof identifies different levels, namely, local, national, regional and international policy responsibility over environmental challenges.[105] In the author's view, the magnitude of the environmental challenge presents the basis for moving its governance from 'a sub-national to national or from a national to a regional or from a regional to an international level'.[106] The approach in the climate change negotiation adopts environmental governance structure in that the UNFCCC views climate change as a global challenge and encourages state parties to initiate efforts aimed at addressing it at international, regional, sub-regional and national levels.[107] This suggests that the term 'international' as used in climate change rule-making process mainly refers to the activities at the United Nations level in relation to climate change, as distinguishable from activities at the regional and sub-regional levels. In what seems as an acceptance by literature that these tiers are distinct and can be used as a basis for an investigation of climate change governance, writers have examined domestic climate change regulations against the backdrop of the development at the supra-national levels.[108]

It is noteworthy that the foregoing approach, particularly, in distinguishing between international, regional, sub-regional and national levels of governance, differs from the preferred classification in literature on the evolvement of international human rights law. For instance, Viljoen argues that while international human rights law has evolved at the global, regional and

[104] Black's Law Dictionary Seventh edition (1999) 1123
[105] JL Dunnof 'Levels of environmental governance' in D Bodansky *et al* (eds) *The Oxford handbook of international environmental law* (2007) 87
[106] As above
[107] UNFCCC, preamble, arts 4(1), 6(a) & (b)
[108] S Pasternack'Local climate change law and multi-level governance in North America' in BJ Richardson (ed) *Local climate change law: Environmental regulation in cities and other localities* (2012) 69-104; HM Osofsky 'Suburban climate change efforts in Minnesota: Implications for multi-level mitigation strategies' in BJ Richardson (ed) *Local climate change law: Environmental regulation in cities and other localities* (2012) 105-133

subregional, regional, and national levels, viewed from the perspective of nation states, the global, regional and subregional tiers comprise international level.[109] This assumes that whatever governance is beyond national is international, meaning that, in reality, these are the only two levels of evolvement. Validly, the reasoning can be used in concluding that climate change regulatory framework outside the domestic level is 'international' since it involves interaction among nation states. However, in terms of the development in climate change negotiation, classifying global, regional and subregional tiers as belonging to 'international level' is problematic as it may obscure the distint development at different levels. For instance, while regional human rights instruments and some national constitutions guarantee the right to a healthy environment, such right does not exist in any United Nations treaty, a development that shows the peculiar nature of each level of governance. Also, the argument that classifies any development outside the State as 'international' does not dismiss the self-evident reality that even if 'international', the regional and sub-regional tiers are separate and autonomous on their own as creations of distinct laws with distinct institutions.

This study engages with the climate change governance framework at the international, regional and national levels in examining human rights implications of climate change regulatory framework on indigenous peoples' lands in Africa.[110] Adopting this classification is preferred in that, as mentioned earlier, it is recognised under climate change pillar instruments, particularly the UNFCCC. More importantly, it serves as a convenient platform to analyse as far as possible, the extent of protection available to indigenous peoples' relationship with their lands under different levels of governance.

1.2 Study thesis

The thesis demonstrates that the climate change regulatory framework does not adequately address the adverse impacts of climate change and response measures on indigenous peoples' lands. It then argues how a human rights concept can be employed in Africa as a regional response to address this lack.

[109] Viljoen (n 34 above) 9
[110] Sub-regional is left out of the discussion because events here are still fluid and nothing concrete has emerged so far in form of regulatory framework

1.3 Problem statement

Climate change has negative consequences for indigenous peoples' lands and resources. While not peculiar to indigenous peoples', a lifestyle intricately linked to the land makes their case a priority.[111] In the light of the adverse impacts of climate change, indigenous peoples in Africa are unable to support the unique land use and tenure system peculiar to their lifestyle, a trend which portrays the historical subordination of their land tenure and use which remains largely formalised in the legislation of states.[112] Despite this situation, the regulatory framework at the international, national and regional levels in response to the adverse impacts of climate change does not adequately safeguard indigenous peoples' land tenure and use in Africa.[113] This situation raises concern about the realisation of their lands and related rights, but, as yet, it has not been examined or explored how human rights can be engaged to address the challenge.

1.4 Objective of the study

In the light of the foregoing, the objective of the study is to investigate whether, in view of adverse climate change impacts, the climate change regulatory framework adequately safeguards indigenous peoples' lands, and if not, to explore how a human rights concept can be employed in Africa as a regional response.

1.5 Research questions

Toward realising the above objective, the study addresses the following specific questions:

1. What is the link between human rights and climate change?

2. What is the notion of the land rights of indigenous peoples and how are these rights adversely affected by climate change in Africa?

3. To what extent does the international climate change regulatory framework protect indigenous peoples' land tenure and use?

[111] Abate & Kronk (n 14 above)
[112] For a detailed discussion of this, see chapter 3
[113] For a detailed discussion of the gap at the international and national levels in relation to protection of indigenous peoples' lands, see chapters 5 and 6

4. Do national climate change regulatory frameworks address indigenous peoples' land tenure and use in Africa?

5. How can human rights concept be explored as a regional response in Africa to address the gap in the climate change regulatory framework in relation to indigenous peoples' land rights?

1.6 Assumptions

This study proceeds on the following assumptions:

1. Indigenous peoples' land rights are recognised under international human rights law.

2. With regard to indigenous peoples and their land rights, climate change response measures can be beneficial if effectively implemented.

3. African regional human rights system recognises the protection of indigenous peoples and their land rights.

1.7 Research methods

The study employs a desk research analysis which reviews scholars' writings, statutes, treaties, guidelines, decisions, case-law and constitutions. The outcome of analysis is validated by interactions in stakeholders' fora relating to climate change held in Cape Town, South Africa, the United States, Namibia and Geneva, Switzerland.[114]

The websites of UN-REDD programme and the UNFCCC were consulted for the selection of states used as case studies. All states in Africa have adaptation challenges, however, the fact that climate response projects, particularly the mitigation measure of REDD+ under the UN-REDD programme are taking place in only few but are steadily increasing in African states, excludes from this study other states in Africa which are not under the programme. Nigeria, Tanzania and

[114] 'Consultation on climate change and human rights' Convened by the United Nations Independent Expert on Human Rights and the Environment, the Friedrich-Ebert Stiftung (FES) and the Office of the High Commissioner for Human Rights (OHCHR), Chamonix, Geneva and France 15-17 July 2014; 'Technical Workshop on Gender and REDD+ learning exchange', 13-15 May 2014, Washington, DC; UNFCCC 'Africa Regional Workshop for Designated National Authorities' 30 June-4 July 2014, Windhoek, Namibia; Natural Justice 'Rights-based REDD+ dialogue II: Realizing REDD+ safeguards', 18-19 October 2013, Cape Town, South Africa

Zambia are selected as case studies to demonstrate a trend in the national regulatory framework on adaptation and REDD+ processes, a mitigation initiative, in relation to the protection of indigenous peoples' land tenure and use in Africa. The selection is based on criteria, namely, language expediency, geography and interest.

In Africa, states with national programmes under the UN-REDD programme for REDD+ are Côte d'Ivoire, the Republic of Congo, the Democratic Republic of Congo (DRC), Nigeria, the United Republic of Tanzania and Zambia.[115] Due to the scanty understanding of the investigator of the French language, the regulatory framework of the DRC, Côte d'Ivoire, and the Republic of Congo are not included as case studies. While the study may benefit from the development in these countries, the fact that its focus is on the analysis of regulatory framework suggests that findings of the study can also be useful in guiding the approach in these states and other states in Africa.

The selected states reflect different geopolitical zones, at least in sub-Saharan Africa: Nigeria (West Africa), Tanzania (East Africa), and Zambia (Southern Africa). Finally, the selection of case studies is based on personal interest and familiarity with Nigeria as the country of my origin, Zambia, as a country of origin of my supervisor and Tanzania, because of the considerable presence of indigenous peoples.[116]

1.8 Literature review

The subject of climate change, like a beautiful damsel, has been courted by different disciplines. Its theoretical basis varies from pure science to other fields of study including politics, security, international relations, environmental law and economics as well as the field of human rights.

[115] However, technical supports are given to programmes in Benin, Cameroon, the Central African Republic, Côte d'Ivoire, Ethiopia, Ghana, Kenya, Madagascar, Morocco, South Sudan, the Sudan, Tunisia and Uganda, see UN-REDD 'Partner countries' http://www.un-redd.org/AfricaRegionalActivities/tabid/131890/Default.aspx (accessed 14 April 2013)

[116] See, 'Combined initial, 2nd and 3rd periodic reports of the United Republic of Tanzania submitted to the International Covenant on Economic, Social and Cultural Rights (UN doc E/C.12/TZA/1-3, 28 March 2011) at the occasion of the 48th session of the Committee on Economic Social and Cultural Rights' http://www.tanzaniapastoralist.org/uploads/1/0/2/7/10277102/shadow_report_iphg_tanzania49.pdf. (accessed 13 December 2013) affirming that Tanzania is home to more than 70,000 Maasai and other indigenous groups including the Barbaig, Akie, Taturu and Hadzabe 9, 19

The Working Group 1 contributions to the Assessment Reports of the IPCC put the scientific and factual basis of climate change beyond doubt.[117] The interplay of population growth and need for political responsibility over environmental issues is the thrust of the contribution of Erlich,[118] Hardin,[119] and Catton.[120] Several scholars have examined climate change as a human security issue.[121] There is increasing literature devoted to understanding states' behaviour through the application of several theories of international relations to climate change.[122] There is general literature dealing with climate change in the context of Africa.[123] Also, there are writings on the direct and indirect impacts of climate change as they affect indigenous peoples.[124]

Generally, existing literature on environmental law sheds light on principles which are considered relevant to addressing the adverse impacts of climate change. For instance, it explains the 'polluters pay principle'[125] which underlies emission trading introduced under the climate change regime to deal with climate change concerns.[126] Other environmental law principles

[117] IPCC Summary for policymakers (n 2 above); RT Watson *et al* 'Greenhouse gases and aerosols' in JT Houghton, GJ Jenkins & JJ Ephraums (eds) *Scientific assessment of climate change* (1990) 1-34; KE Trenberth, JT Houghton & LG Meira Filho 'The climate system: An overview' in JT Houghton *et al* (eds) *Climate change;1995:The science of climate change: Contribution of WGI to the Second Assessment Report* (1995) 55-63; APM Baede, E Ahlonsou, Y Ding & D Schimel 'The climate system: An overview' in JT Houghton *et al Climate change 2001: The scientific basis contribution of Working Group I to the 3rd Assessment Report of the Intergovernmental Panel on Climate Change* (2001) 87-98; Le Treut *et al* (n 4 above) 95-121
[118] PR Ehrlich & AH Ehrlich 'The population bomb revisited' (2009) 1 *Electronic Journal of Sustainable Development* 63
[119] G Hardin 'The tragedy of the commons' (1968) 162 *Science* 1243
[120] W Catton *Overshoot: The ecological basis of revolutionary change* (1982)
[121] J Barnett 'Security and climate change' (2003) 13 *Global Environmental Change* 7; D Kuwali 'From the west to the rest: Climate change as a challenge to human security in Africa'(2008) 17 *African Security Review* 20
[122] F Weiler 'Global climate change and leadership: The role of major players in finding solutions to common problems' (2010) 13 *Journal of International Affairs*; RO Keohane & DG Victor *The regime complex for climate change* (2010); D Bodansky 'The Copenhagen climate change conference: A post-mortem' (April, 2010) 104 *The American Journal of International Law* 230
[123] C Toulmin *Climate change in Africa* (2009); Collier (n 1 above)
[124] The distinction along direct and indirect categorisation in relation to adverse impacts of climate change is employed in Resolution 10/4 (n 66 above) and Resolution 26 (n 66 above); on the discussion relating to impact of climate change particularly its mitigation measures on indigenous peoples, see 'Climate change, human rights and indigenous peoples' submission to the United Nations High Commissioner on Human Rights by the International Indian Treaty Council (IITC Submission); 'Climate change, forest conservation and indigenous peoples rights' submission by Global Forest People, (GFP submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Global_Forest_Coalition_Indigenous_Peoples_ClimateChange.pdf (accessed 26 October 2012) ; 'Report on the impacts of climate change mitigation measures on indigenous peoples on their territories and lands' E/C 19/2008/10 (Unedited version) (Indigenous peoples climate change mitigation report); Greenpeace Briefing 'Human rights and the climate crisis: Acting today to prevent tragedy tomorrow (Greenpeace report) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Greenpeace_HR_ClimateCrisis.pdf (accessed 27 October 2012)
[125] JB Wiener 'Global environmental regulation: Instrument choice in legal context' (1999) 108 *Yale Law Journal* 677; see also Rio Declaration, principle 16
[126] Kyoto Protocol, art 17; D Tladi *Sustainable development in International law: An analysis of key enviro-economic instruments* (2007)15

which scholars have engaged with include the 'precautionary principle',[127] 'common but differentiated responsibilities principle',[128] and sustainable development.[129]

Similarly, there are arguments supporting the need to promote the interaction of biodiversity law and climate change as the human rights-based approach to climate change.[130] Other scholars see no need for such synergy as they argue that the human rights field is connected to the climate change field on the assumption that the underlying 'human source' of climate change is a strong point supporting the resort to human rights.[131] Drawing a factual link between human rights and the environment, Alfreðsson and Ovsiouk argue that the victims and actors of a human made environmental crisis are similar to those present in the human rights field.[132] Hence, it is not surprising that Amizadeh argues that as human rights is the best legal response to issues such as slavery and apartheid, it may well be the strongest argument of law in addressing climate change.[133] This position appears defensible. There are human rights instruments,[134] reports,[135] and scholarly writings which can be considered in addressing climate change and its negative impacts.[136] This position is buttressed further by the fact that key environmental instruments

[127] M Haritz 'Liability with and liability from the precautionary principle in climate change cases' in M Faure & M Peeters (eds) *Climate change liability* (2011) 15-32; D Freestone & E Hey 'Origins and development of the precautionary principle' in D Freestone & E Hey (eds) *The precautionary principle and international law: The challenges of implementation* (1996) 3; see also Rio Declaration, principle 15
[128] Rajamani (n 5 above)
[129] S Imran, K Alam & N Beaumont 'Reinterpreting the definition of sustainable development for a more ecocentric reorientation sustainable development' (2011) 22 *Sustainable Development* 1; JA Vucetich & MP Nelson 'Sustainability: Virtuous or vulgar?' (2010) 60 *BioScience* 539; K Bosselmann 'Losing the forest for the trees: environmental reductionism in the Law' (2010) 2 *Sustainability* 2424, 2426; L Seghezzo 'The five dimensions of sustainability' (2009) 18 *Environmental Politics* 539
[130] E Morgera 'No need to reinvent the wheel for a human rights-based approach to tackling climate change: The contribution of international biodiversity law' (2012) University of Edinburgh School of Law Research Paper Series, no 2012/15
[131] M Robison 'Foreword' in S Humphreys (ed) *Human rights and climate change* (2010) xvii; W Sachs 'Human rights and climate change'(2006) 106 *Pontificate Academiae Scientiarvm* 349
[132] G Alfreðsson & A Ovsiouk 'Human rights and the environment' (1991) 60 *Nordic Journal International Law* 19, 20
[133] SC Aminzadeh 'A moral imperative: The human rights implications of climate change' (2007) 39 *Hastings International & Comparative Law Review* 231, 234
[134] Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in Paris on 10 December 1948, General Assembly resolution 217 A (III); International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI); International Covenant on Civil and Political Rights (ICCPR), adopted by General Assembly resolution 2200A (XXI) of 16 December 1966; International Convention on the Elimination of All Forms of Racial Discrimination, adopted by General Assembly resolution 2106 (XX) of 21 December 1965; UNHRC Resolutions on the right to adequate housing, UNHRC Res. 6/27, U.N. Doc. A/HRC/6/22 (14 April 2008); also see resolutions passed by Human Rights Council namely Resolution 7/23 (n 66 above), Resolution 10/4 (n 66 above), Resolution 18/22 (n 66 above) and Resolution 26 (n 66 above)
[135] S McInerney-Lankford, M Darrow & L Rajamani 'Human rights and climate change: A review of the international legal dimensions' (2011); 'Report of the Office of the UN High Commissioner for Human Rights on the relationship between human rights and climate change', U.N. Doc. A/HRC/10/61 (15 January 2009)
[136] JH Knox 'Linking human rights and climate change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 478; D Bodansky 'Introduction: Climate change and human rights: Unpacking the issues' (2010) 38 *Georgia Journal of International & Comparative Law* 511, 516; S Kravchenko 'Right to carbon or right to life: Human rights approaches to climate change' (2008) 9 *Vermont Journal of Environmental law* 514

make reference to human rights.[137] In further justifying the conceptualisation of climate change through human rights, writers have based their arguments on the limitations of environmental law in areas such as a lack of language of obligations, a weak compliance and accountability mechanism,[138] the unsettled status of environmental law principles such as 'precautionary' principle,[139] and the 'do no harm' principle.[140] More importantly, it has been argued that the declarations and principles of environmental law are not binding and, therefore, cannot be elevated or become a substitute for an international human rights to the environment.[141]

By contrast, there are authors who reveal the weaknesses in applying a human rights concept to environmental protection: some particularly highlight its limitation in terms of its anthropocentric (human interest) focus,[142] and challenge its use in litigating climate change, regarding notions such as 'causation', 'extra-territoriality' and 'sovereignty' as problematic.[143] Also, according to Adelman, climate change issues cut wide across a range of rights and 'do not fit neatly into any single category of human rights'.[144] In addition to the scanty literature on the conceptualisation of climate change using human rights in Africa,[145] there is a conceptual detachment from environmental principles in the existing literature applying human rights to climate change. Generally, scholarship does not consider the intersection of human rights with environmental law principles as a justification for employing human rights in assessing the

[137] Stockholm Declaration, principle 1; Rio Declaration, principle 1; Forest Principles, preambles; see M Pallemaerts 'International environmental law: From Stockholm to Rio- Back to the future?' in P Sands (ed) *Greening international law* (1993) 8-12
[138] Kravchenko (n 136 above) 514-45
[139] In *Nuclear Tests* (*New Zealand v France*) 1995 ICJ 288, 342 (September 22), ICJ dismissed New Zealand's claims without ruling on this issue. Dissenting, Justice Weeramantry argued that the precautionary principle is 'gaining increasing support as part of the international law of the environment' 307-42; UNFCCC, art 3
[140] Stockholm Declaration, principle 21; Rio Declaration, principle 2
[141] EA Posner 'Climate change and international human rights litigation: A critical appraisal' (2007) 155 *University of Pennsylvania Law Review* (2007) 1925-45 ; S Atapattu 'The right to a heathy life or the right to die polluted?: The emergence of a human right to a healthy environment under international law (2002) 16 *Tulane Environmental Law Journal* 65, 74-78
[142] D Bodansky 'Customary (And not so customary) International Environmental Law' (1995) 3 *Indiana Journal of Legal Studies* 116; Imran *et al* (n 129 above); Vucetich (n 129 above); Seghezzo (n 129 above); Bosselmann (n 129 above); A Boyle 'Human rights or environmental rights? A reassessment' (2007) 18 *Fordham Environmental Law Review* 471
[143] A Gouritin 'Potential liability of European states under the ECHR for failure to take appropriate measures with a view to adaptation to climate change' in M Faure & M Peeters (eds) *Climate change liability* (2011) 134-152; Shi-Ling Hsu 'A realistic evaluation of climate change litigation through the lens of a hypothetical lawsuit' (2008) 79 *University of Colorado Law Review* 101; EA Posner 'Climate change and international human rights litigation: A critical appraisal' (2007) 155 *University of Pennsylvania Law Review* (2007) 1925; J Gupta 'Legal steps outside the Climate Convention: Litigation as a tool to address climate change' (2007) 16 *RECIEL* 76; M Allen 'Liability for climate change: Will it ever be possible to sue anyone for damaging the climate?' (2003) 421*Commentary in Nature* 891
[144] S Adelman 'Rethinking human rights: The impact of climate change on the dominant discourse' in S Humphreys (ed) *Human rights and climate change* (2010) 169
[145] The exception to this is R Mwebaza 'Climate change and the international human rights framework in Africa' in R Mwebaza & LJ Kotze (eds) *Environmental governance and climate change in Africa: Legal perspectives* (2009) 240

climate change regulatory framework in relation to its protection of indigenous peoples' land rights. Rather, existing literature reinforces Wood's concern about the 'substantial exclusion of environmental issues from most human rights theory'.[146] Hence, a preliminary focus of this thesis is to examine the conceptual basis or framework for applying human rights to the subject of climate change.

There is ample literature on indigenous peoples' land rights and the need for their protection, particularly in Africa.[147] The essentials with respect to the land rights of indigenous peoples have been highlighted as being collective and informal in nature.[148] Literature has shown that international law has played a critical role in subordinating indigenous peoples' land rights everywhere, including Africa, and has demonstrated the extent to which human rights have remedied this historical injustice. This situation is evident from the negotiations of the UNDRIP and the general application of human rights instruments embodying provisions and jurisprudence on compensation, benefit-sharing, participation and the protection of land rights at the core of the claim of indigenous peoples to environmental justice.[149] However, in the literature the link between the notion of indigenous peoples' land rights in Africa and the adverse effects of climate change is less clear.

In response to the adverse effects of climate change, writers agree that considering its nature as a global challenge, the regulatory framework to address the adverse effects of climate change has been top-down, focusing on adaptation and mitigation at the international level for application at the domestic level.[150] There has been a general examination by scholars of the interaction between the national regulatory framework and supra national regulatory governance of climate change.[151] There have been specific writings on the governance of international adaptation

[146] K Woods *Human rights and environmental sustainability* (2010) 3
[147] AK Barume *Land rights of indigenous peoples in Africa: With special focus on central, eastern, and southern Africa* (2010) 66-70; Daes (n 13 above); R Hitchcock R & D Vinding 'Indigenous peoples' rights in Southern Africa: An introduction' in R Hitchcock R & D Vinding (ed) *Indigenous peoples rights in Southern Africa* (2004); M Hansungunle 'Dual land tenure in Zambia & implications' (on file with the author)
[148] As above
[149] J Gilbert & G Couillard 'International law and land rights in Africa: The shift from states' territorial possessions to indigenous peoples' ownership rights' in R Home (ed) *Essays in African Land Law* (2011) 48; Anaya (n 19 above); L Westra *Environmenal justice and the rights of unborn and future generations* (2006) 161-183; FJ Seymour 'Conservation, displacement, and compensation' in MM Cernea & HM Mathur *Can compensation prevent impoverishment*? (2008) 286-306
[150] Wold *et al* (n 1 above); Dunnof (n 105 above); Deere-Birkbeck (n 89 above)
[151] For a good collection of contributions on this, see BJ Richardson (ed) *Local climate change law: Environmental regulation in cities and other localities* (2012)

funds,[152] and the REDD+ as a climate mitigation initiative[153] as they relate to indigenous peoples' land rights and related issues, including carbon rights and benefit-sharing, participation and a redress mechanism.[154] In particular, as a mitigation measure, the REDD+ governance has been described as embodying all institutions, policies and processes that a country has in place at national and subnational levels to implement the REDD+.[155] In relation to climate change, institutions and initiatives are an emerging subject of discourse at the regional level: the African Union Committee of African Heads of State and Government on Climate Change (CAHOSCC),[156] the African Ministerial Conference on the Environment (AMCEN),[157] and the ClimDev-Africa Programme which operates through the three channels of African Climate Policy Centre (ACPC), Climate Change and Desertification Unit (CCDU) and the ClimDev Special Fund (CDSF).[158] Other institutions and initiatives with a climate change agenda are the African Union Commission (AUS),[159] New Partnership for African Development (NEPAD),[160] the Pan-African Parliament,[161] and the Peace and Security Council (PSC).[162]

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[152] L Schalatek *et al* 'Climate finance thematic briefing: Adaptation finance' November 2012; R Muyungi `Climate change adaptation fund: A unique and key financing mechanism for adaptation needs in developing countries http://unfccc.int/press/news_room/newsletter/guest_column/items/4477.php (accessed 13 November 2013)

[153] Willem den Besten *et al* (n 43 above) 40-48; Thompson *et al* (n 90 above) 100-110

[154] T Sikor *et al* 'REDD-plus, forest people's rights and nested climate governance' (2010) 20 *Global Environmental Change* 423-425; B Blom, T Sunderland & D Murdiyarso 'Getting REDD to work locally: Lessons learned from integrated conservation and development projects' (2010) 13 *Environmental Science Policy* 164; C Robledo, J Blaser & S Byrne 'Climate change: What are its implications for forest governance' in LA German, A Karsenty & A Tiani (eds) *Governing Africa's forest in a globalised world* (2010) 354-76; T Griffiths *Seeing "RED"? "Avoided deforestation" and the rights of indigenous peoples and local communities* (2007) 8; D Takacs *Forest carbon law + property rights* (November 2009) 5-57

[155] UN-REDD Programme and Chatham House *Guidance for the Provision of Information on REDD+ Governance (Draft)* (June 2011) 4

[156] Decision on the Coordination of the Committee of African Heads of State and Government on Climate Change (CAHOSCC) and Africa's Preparation for COP 19/CMP 9 Doc. Assembly/AU/6(XX) , see generally para 6 (CAHOSCC Decision) and chapter six for the discussion of its role; W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 1

[157] P Acquah, S Torheim & E Njenga *History of the African Ministerial Conference on the Environment 1985-2005* (2006); on the discussion of the role of AMCEN, see generally chapter 6 of this study

[158] 'Decision on Climate Change and Development in Africa' Doc.Assembly/AU/12(VIII); EAC, AUC and ADB *Revised ClimDev-Africa Framework Programme Document* (2012); United Nations Economic and Social Council 'Report on Climate for Development (ClimDev-Africa) in Africa Programme' E/ECA/CFSSD/8/8 19-21 November 2012; Economic Commission for Africa 8th session of the Committee on Food Security and Sustainable Development and the regional implementation meeting for the 20th session of the Commission on Sustainable Development 'Report on Climate for Development (ClimDev-Africa) in Africa Programme' E/ECA/CFSSD/8/8 13 November 2012; ECA and AUC *ClimDev Special Fund Operational Procedures Manual* (December 2011) 12-13 (*ClimDev Special Fund Operational Procedures*); on the discussion of the operation of the ACPC, see generally chapter 6 of this study

[159] 'The African Union Commission' http://www.au.int/en/commission (accessed 13 February 2014);'The EC-ACP Capacity Building Programme on Multilateral Environmental Agreements-The Africa Hub-African Union Commission Training of AfricanNegotiators'file:///C:/Users/User/Downloads/MEAs%20Write%20up%20for%20MEAs%20and%20DREA%20Websites%20%2014-9-11.pdf (accessed 10 February 2014); on the discussion of the role of African Union Commission, see generally chapter six of this study; and Viljoen (n 34 above)

[160] The New Partnership for Africa's Development' (NEPAD) http://www.nepad.org (accessed 13 February 2014)(NEPAD Framework Document); on the evolution of NEPAD, see I Taylor *NEPAD: Toward Africa's development or another false start?* (2005); M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30

Nonetheless, rarely is there attention to the extent to which the climate change regulatory framework at different levels of application, namely, international, national and regional, safeguard indigenous peoples facing the adverse effects of climate change in relation to their lands. Authors such as Pasternack[163] and Osofsky,[164] who have analysed climate change related regulations at the national level of governance, did so in the context of North America and clearly indigenous peoples' lands is not the focus of their investigations. The rarity of academic attention to this subject, particularly at the national level, seems to confirm the position of Gregersen *et al* that although normative and institutional issues are important aspects of climate governance, 'most of the available literature does not get into the subject of governance improvement in depth, and particularly not at the country level'.[165] Consequently, another important aspect of this study is to examine the extent to which the climate change regulatory frameworks at different levels of application, international, national and regional, safeguard indigenous peoples' land use and tenure in Africa.

At the regional level in Africa, the human rights system has taken a considerable lead in the protection of indigenous peoples and their land rights.[166] It is also beginning to engage with climate change through the human rights lens. In 2009, the African Commission on Human and Peoples' Rights (the Commission) adopted Resolution 153, titled 'Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa'.[167] Subsequently in 2014, it urged

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Human Rights Quarterly 41; R Herbert & S Gruzd (2008)*The African Peer Review Mechanism:Lessons from the Pioneers* ; Guidelines for the NEPAD Climate Change Fund' http://www.nepad.org/sites/default/files/Guidelines%20for%20Applicants%20%28NEPAD%20Climate%20Change%20Fund%29.pdf (accessed 13 February 2014)

[161] 'Treaty Establishing the African Economic Community', adopted in Abuja , Nigeria, 1991 and entered into force in 1994 (AEC Treaty); BR Dinokopila 'The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration' (2013) 13 *African Human Rights Law Journal* 302-323; Pan African Parliament Rules of Procedures; T Chagutah 'PAP is fully behind the common African position on climate change' interview conducted' http://www.za.boell.org/web/cop17-785.html (accessed 10 January 2014)

[162] Protocol on the Establishment of Peace and Security Council (PSC Protocol), adopted on 10 July 2002, and entered into force on 26 December 2003; LM Fisher *et al* 'African peace and security architecture' A report commissioned by the African Union's Peace and Security Department and subsequently adopted by the 3rd meeting of the Chief Executives and Senior Officials of the AU, RECs and RMs on the Implementation of the MoU on Co-operation in the Area of Peace and Security, held from 4-10 November, Zanzibar, Tanzania; AO Jegede 'The African Union peace and security architecture: Can the Panel of the Wise make a difference? '(2009) 9 *African Human Rights Law Journal* 419; Modalities of the Panel of the Wise, adopted by the Peace and Security Council at its 100th meeting held on 12 November 2007 para IV(8) (Modalities of the POW)

[163] Pasternack (n 108 above)

[164] Osofsky (n 108 above)

[165] H Gregersen *et al* 'Does the opportunity cost approach indicate the real cost of REDD+?' Rights and realities of paying for REDD+ rights and resources initiative (2010) 15; also see E Corbera & H Schroeder 'Governing and implementing REDD+' (2011) 14 *Environmental Law & Policy* 89- 99

[166] *Endorois* case (n 28 above)

[167] African Commission of Human and Peoples' Rights, ACHPR/Res153(XLVI)09: Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, November 25, 2009 (Resolution 153)

the African Working Group Extractive Industries, Environment and Human Rights to carry out the assignment.[168] Similarly, the Commission and its Working Group on Indigenous Populations have covered climate change in their functions.[169] Contrary to what largely obtains at the national level in terms of the recognition of the identity of indigenous peoples, the jurisprudence developed by the Commission in the *Endorois* case offers some optimism that regional mechanisms can protect indigenous peoples rights in Africa.[170] Thus far, it is yet to explore how human rights can be engaged as a regional response in addressing the inadequacy of the climate change regulatory framework in relation to the protection of indigenous peoples' land rights.

1.9 Limitations of study

This study has qualified scope and is constrained by resources.

1.9.1 Limited scope

This study focuses on climate change, a phenomenon of global reality with varying adverse impacts on populations. The development in respect of this subject has a range of normative and institutional implications. Apart from the pillar instruments on climate change considered in this study, there are numerous instruments which are relevant to climate change and can be analysed.[171] In relation to the climate change regulatory framework on response measures of adaptation and mitigation, every year a range of decisions emerge from the conferences of COP and MOP under the Kyoto Protocol. In addition, there are reports by the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI), as well as the Ad-hoc working groups.[172] The regulatory framework also includes numerous guidelines established to support the implementation of an international climate response on adaptation and mitigation.

[168] African Commission on Human and Peoples' Rights '271: Resolution on climate change in Africa', adopted at the 55th ordinary session of the African Commission on Human and Peoples' Rights held in Luanda, Angola, from 28 April-12 May 2014
[169] See for instance its visits and resulting reports: 'Report of the Country visit of the Working Group on Indigenous Populations/Communities to the Republic of Congo', 37, 15-24 March, 2010 (DRC visit report); 'Report of the Working Group on Indigenous Populations/Communities Mission to the Republic of Rwanda', 1-5 December 2008, adopted by the African Commission on Human and Peoples' Rights at its 47th ordinary session, 30, 12-26 May 2010 (Rwanda Mission Report); 'Report of the Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya' 37, 1-19 March 2010 , adopted by the African Commission on Human and Peoples' Rights at its 50th ordinary session, 24 October - 5 November 2011 (Kenya's research and information visit)
[170] *Endorois* case (n 28 above)
[171] Examples include the CBD (n 39 above)
[172] These institutions are examined and discussed in chapter 4 dealing with international climate change regulatory framework in relation to indigenous peoples' lands

However, in order to prevent endless research, it is important to note that the study is limited in certain respects. The first limitation is that while every part of the world will experience different measure of adverse effects of climate change, the focus of the study is on Africa where, according to scientific findings, there is evidence of serious vulnerability to climate change.[173] Even then, Africa is a vast continent with diverse people which will not record similar variation of climate change and its impacts.[174] Also, climate change will affect everyone, especially, those experiencing different shades of vulnerability owing to 'gender, age, indigenous or minority status, or disability'.[175] The focus of the study is, however, on indigenous peoples who, owing to reliance on lands for survival and extreme marginalisation, will suffer seriously the adverse impacts of climate change.[176] The concept of indigenous peoples' lands should deservedly refer to dispossessed lands as well as that within their possession. The thesis, however, addresses the climate change regulatory framework in relation only to the lands still within the possession of the indigenous peoples.

Second, the thesis focuses majorly on the normative aspects of the climate change regulatory framework which is developing at different levels of governance, including, international, regional, sub-regional, and national tiers. In discussing the climate change regulatory framework, the attention of the study excludes the sub-regional level as a result of an absence of concerete development at that level capable of academic enquiry.[177] Also, while looking at the national climate change regulatory framework, it is impossible for a study of this nature to look at all states in Africa. Hence, only three states are selected in Africa for assessment based on the reasons earlier given under the section dealing with research methods.

There are other disciplines important in assessing climate change regulatory framework which are not the focus of the study. For instance, understanding the political behaviour of states is a vital aspect of the rule-making process, but, it is the subject matter of international relations.[178]

[173] Collier *et al* (n 1 above); Boko *et al* (n 11 above)
[174] Collier et *al* (n 1 above)
[175] Decision 1/CP.16 (n 37 above) preamble; also see Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' A/HRC/10/61 15 January 2009 (OHCHR Report) para 44
[176] UNDG Guidelines on Indigenous People (n 12 above); Stern (n 12 above) 281
[177] What is clearly emerging from these levels are projects planned under regional framework for implementation at some of the sub-regions. Examples of such projects are metioned in the chapter 6 of the thesis in the section dealing with the African Union Commission
[178] Weiler (n 122 above); Keohane & Victor (n 122 above)

Efforts to address climate change embodies trade in carbon which falls within the realm of economists.[179] Similarly, several of the climate mitigation and adaptation initiatives such as the REDD+ and alternative energy projects are within the remit of agriculturists, forestry experts, and engineers.[180] The focus of this study is on regulatory framework which are important because it is the basis within which other disciplines function in the context of climate change. In discussing the climate change regulatory framework, institutional components are only examined in so far as they are relevant to indigenous peoples' land tenure and use: the focus is mainly on laws, policies, guidelines, rules, and other rule-based initiatives pertaining to the application of adaptation funds as well as the mitigation initiative of the REDD+ at different levels of governance of climate change.

The third limitation is that both adaptation and mitigation, as international responses to climate change, have numerous initiatives which implicate indigenous peoples. For instance, as well as the issue of funding in adaptation, other options for adaptation include technology transfer,[181] which, although important, are not the focus of this study. In discussing adaptation funds, the focus of the study is on its regulatory framework. There are various measures, particularly on climate change mitigation which, although important, are outside the scope of this study. Examples of these are projects under the Clean Development Mechanism (CDM) mechanism which seek to promote sustainable development, such as reforestation and alternative sources of energies in developing countries, including Africa.[182] The REDD+ intiative in Africa, which is selected as a climate change mitigation option for study, also has a market dimension which remains under negotiation.[183] While these aspects have their own implications for the human rights of indigenous peoples particularly in relation to their land tenure and use, they are not the focus of this study. Also, the REDD+ is being developed and supported by the UN-REDD National Programme, but there are other multilateral initiatives supporting the REDD+ such as

[179] Wold *et al* (n 1 above); Stern (n 12 above) 23
[180] As above
[181] See UNFCCC, arts 4(3), (7) and (8)
[182] Kyoto Protocol, art 12; CDM allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits, each equivalent to one tonne of CO2. These CERs can be traded and sold, and used by industrialised countries to meet a part of their emission reduction targets under the Kyoto Protocol, see http://cdm.unfccc.int/about/index.html (accessed 27 October 2011)
[183] On the submissions of parties on various policy approaches that can be adopted in relation to financing REDD+, see UNFCCC 'Policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries', Ad Hoc Working Group on Long-term Cooperative Action under the Convention 15th session Bonn, 15-24 May 2012

Forest Carbon Partnership Facility (FCPF) and the Forest Investment Programme (FIP), hosted by the World Bank.[184] There are overlaps. However, this study focuses mainly on the regulatory framework of the REDD+ initiative under the UN-REDD National Programme in the three case studies.

Finally, there is limitation in terms of the period covered by this study. Given that the field of climate change is rapidly evolving, as mentioned earlier, new meetings are held every year by institutions such as the COP/MOP and SBSTA. Considering this evolving development, the research is generally limited to developments up to and including December 2013.

1.9.2 Resource constraints

The research is not funded and the investigator has a maximum period of three years to investigate thoroughly a difficult concept. Language difficulties are real since the focus is on indigenous peoples who are not familiar with the use of English language. These resources constraints inform the methodology of the study in focusing largely on the analysis of existing literature on the subject.

1.10 Synopsis

This study is presented in seven chapters:

Chapter One: Introduction

In introducing the study, this chapter highlights the background, reveals the controversies around the concept of 'indigenous peoples', the intersection between indigenous peoples' lands, environment, forests and climate change as well as the meaning of the climate change regulatory framework in the study. It also identifies issues addressed by the study, namely, the conceptual basis for applying human rights to the subject of climate change, the notion of the land rights of indigenous peoples and the adverse effects of climate change, the extent to which the climate change regulatory framework addresses indigenous peoples' land tenure and use, and how human rights can be explored as a regional response in Africa to the inadequacy in the climate change regulatory framework in the protection of indigenous peoples' land rights.

[184] UN-REDD Programme 'FAQ' http://www.un-redd.org/FAQs/tabid/586/Default.aspx (accessed 12 May 2014)

Chapter Two: Human rights and climate change: Conceptual framework

In the main, the chapter examines the divergence and convergence between the environmental field and human rights as a conceptual framework for climate change. It argues that human rights principles intersect with environmental law principles and, therefore, are useful in assessing the adequacy [or otherwise] of the climate change regulatory framework in relation to the protection of indigenous peoples' land rights.

Chapter Three: The notion of indigenous peoples' land rights and the adverse effects of climate change in Africa

This chapter examines indigenous peoples' land rights, highlighting their perception of land use and tenure as key features of land rights. It then demonstrates how certain principles of international law relating to land use and tenure have subordinated this notion of indigenous peoples' land rights, as well as the link to the adverse impacts of climate change in Africa.

Chapter Four: The international climate change regulatory framework in relation to indigenous peoples' lands

A general overview of the international climate change regulatory framework is presented in this chapter. Particularly, the chapter focuses on the adaptation and mitigation regulatory framework. In doing so, it argues that athough there is emerging evidence that the international climate regulatory framework considers indigenous peoples' land tenure and use, there are certain principles emphasised at this level which potentially may legitimise at the national level the subordination of indigenous peoples' land tenure and use.

Chapter Five: National climate change regulatory frameworks in relation to indigenous peoples' lands

Following the overview provided in the preceding chapter, an attempt is made in this chapter to examine the extent to which the climate change regulatory framework at the national level offers protection to indigenous peoples' land tenure and use. In doing so, the focus is on selected states to draw a general pattern in Africa. In the main, the chapter assesses the regulatory framework on adaptation and mitigation processes in Tanzania, Nigeria and Zambia to show that the national

climate change regulatory framework does not adequately safeguard indigenous peoples' land tenure and use and related rights.

Chapter Six: The inadequacy of the national climate change regulatory framework in relation to indigenous peoples' lands: Human rights as regional response

Responding to the gap in the climate change regulatory framework in relation to indigenous peoples' lands, the chapter contends that resort can be made to regional human rights instruments and institutions for the purpose of addressing the inadequate protection of indigenous peoples' land tenure and use in the climate change regulatory framework. It bases this position on three arguments. The first argument is the incompatibility of the inadequate climate regulatory framework at the domestic level with the regional human rights obligations of state and the rights guaranteed under regional human rights instruments. The second reason is the potential in the emerging regional climate change related institutions and initiatives for being linked to human rights. Finally, there is the argument that potential exists within the regional human rights mechanisms to address the inadequacy of the climate regulatory framework at the national level in relation to the protection of indigenous peoples' lands in Africa.

Chapter Seven: Conclusion and recommendations

The chapter summarises the preceding chapters. It concludes that there is link between human rights and climate change justifying its engagement as a conceptual basis. The notion of indigenous peoples' land rights exists in the form of subsistence use of land as well as informal and collective tenure system which are adversely impacted by climate change. While there is emerging evidence that the international climate regulatory framework considers indigenous peoples' land tenure and use, principles of 'sovereignty', 'country-driven' and 'national legislation' emphasised at the level can potentially legitimise at the national level the subordination of indigenous peoples' land tenure and use. This is illustrated through examples on national climate change regulatory frameworks from Tanzania, Zambia and Nigeria where the inadequate protection of land use and tenure has negative implications for indigenous peoples' participation, carbon rights and benefit-sharing, as well their access to grievance mechanism and remedies.

The potential in the regional climate change regulatory framework for human rights, and the promotional, protective, interpretive and Assembly entrusted functions of the African Commission on Human and Peoples' Rights (the Commission) can serve as specific channels by which the regional application of human rights can protect the land rights of indigenous peoples in the context of climate change in Africa. Notwithstanding the potential in resorting to regional human rights, reforms are necessary at the international, national and regional levels for effective protection of indigenous peoples' land rights in the context of climate change. At the international level, these reforms include the reconceptualisation of principles of 'sovereignty', 'country-driven' and 'national legislation'. At the national level, it can either entail the creation of a new stand-alone regulatory framework on climate change that is consistent with the decisions under the international climate change regulatory framework and UNDRIP or the harmonisation of each of the existing law on climate change to recognise the subsistence use of land and tenure system of the indigenous peoples as guaranteed under decisions at the international climate change regulatory framework and UNDRIP. At the regional level, interaction between climate change related instituions and initiatives with human rights mechanisms and official policy statement on the protection of indigenous peoples in the light of climate change impact are required in Africa.

Chapter 2

Human rights and climate change: Conceptual framework

2.1 Introduction

The overarching goal of the thesis is to investigate whether in the light of adverse impacts of climate change the climate change regulatory framework adequately safeguards indigenous peoples' land rights and if not, to explore how the human rights concept can be employed as a regional response in Africa. The reference to 'human rights' suggests that beyond debate is its relevance for assessing the climate change regulatory framework in relation to the protection of indigenous peoples' land rights under the threat of the adverse effects of climate change. Indigenous peoples' land rights regime is widely discussed in literature as human rights,[1] however, the application of human rights to the subject of climate change is novel and contested. The novelty case exists notwithstanding the official recognition which emerged at the United Nations on the link between climate change and human rights by the adoption of Resolution 10/4 by the United Nations Human Rights Council (UNHRC).[2] Initially, climate change was discussed in meteorology being rooted in the physical sciences and, only recently, has been linked to the social sciences.[3] Despite the emerging events at the United Nations level, it remains controversial whether the human rights and, not an environmental law framework is the appropriate conceptual basis for climate change.[4]

This chapter argues that this tension is needless. Human rights is useful in assessing the adequacy or otherwise of the climate change regulatory framework in protecting indigenous peoples' land rights facing the negative consequences of climate change. Its value in assessment is achieved by the intersection of human rights with key environmental law issues and principles. The chapter is presented in four parts. Following the introduction, part two addresses the

[1] The notion of indigenous peoples' land rights in Africa is extensively discussed in chapter 3
[2] 'Human rights and climate change', Human Rights Council Resolution 10/4, adopted at the 41st meeting, 25 March 2009 (Resolution 10/4)
[3] S Humphreys 'Introduction: Human rights and climate change' in S Humphreys (ed) (2010) *Human rights and climate change* (2010) 1; International Council on Human Rights *Climate change and human rights: A rough guide* (ICHR Guide) (2008) 3-6
[4] D Hart 'Is climate change a human rights issue?' (2012) 24 *Environmental Law & Management* 76; D Bodansky 'Introduction: Climate change and human rights: Unpacking the issues' (2010) 38 *Journal of International & Comparative Law* 511, 516

theoretical dilemma posed by applying human rights as a conceptual basis. Part three unpacks human rights as a theoretical basis. Part four is the conclusion.

2.2 Human rights in climate change discourse: Conceptual dilemma

The consideration of human rights as a basis for conceptualising climate change is recent and contested.[5] The first official recognition of a relationship between climate change and human rights at the UNHRC emerged with the adoption of Resolution 10/4 in 2009.[6] Additionally, on 17 October 2011, the Human Rights Council adopted another resolution on human rights and climate change' (Resolution 18/22) as well as in 2014, Resolution 26 L/23.[7] Resolution 10/4 was adopted following the report of the Office of the High Commissioner on Human Rights (OHCHR).[8] The report was subsequent to the adoption of Resolution 7/23 of the UNHRC in 2008,[9] which requested the Office of the OHCHR to carry out 'a detailed analytical study of the relationship between climate change and human right.'[10]

A number of states,[11] United Nations Organisations,[12] regional intergovernmental organisations,[13] non-governmental organisations,[14] and national human rights institutions,[15]

[5] M Limon 'Human rights and climate change: Constructing a case for political action'(2009) 33 *Harvard Environmental Law Review* 439; JH Knox 'Linking human rights and climate change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 483
[6] Resolution 10/4 (n 2 above)
[7] UNHRC Res 26 L/33 'Human rights and climate change'23 June 2014, A/HRC/26/L.33;UNHRC Res 18/22 'Human rights and climate change' (2011) (Resolution 18/22) A/HRC/RES/18/22
[8] Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' A/HRC/10/61 15 January 2009 (OHCHR Report)
[9] Human Rights Council 'Human rights and climate change' Res. 7/23, U.N. Doc. A/HRC/7/78 (Resolution 7/23)
[10] Resolution 7/23 (n 9 above) para 1
[11] These states are Albania, Argentina, Australia, Bolivia, Bulgaria, Canada, Colombia, Costa Rica, Ecuador, Finland, France, Guatemala, Japan, Maldives, Marshall Islands, Mauritius, New Zealand, Oman, Romania, Russian Federation, Serbia, Spain, Sudan, Switzerland, Togo, Ukraine, United Kingdom, United States of America and Zimbabwe, see United Nations Human Rights Council 'OHCHR study on the relationship between climate change and human rights: Submissions and reference documents received' http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Submissions.aspx (accessed 10 December 2013)
[12] Food and Agriculture Organisation of the United Nations (FAO), International Labour Organisation (ILO), International Maritime Organisation (IMO), International Civil Aviation Organisation (ICAO), Secretariat of the United Nations Convention on Combating Desertification (UNCCD), United Nations Development Fund for Women (UNIFEM), United Nations Institute for Training and Research (UNITAR), World Food Programme (WFP), World Health Organisation (WHO), World Meteorological Organisation (WMO)
[13] European Commission, Organisation of American States
[14] Earthjustice, Environmental Defender's Office - New South Wales, Australia, Foundation for International Environmental Law and Development (FIELD), Friends of the Earth - Australia, Climate Action Network Australia (CANA), Australian Climate Justice Programme (ACJP), Friends of the Earth - England, Wales and Northern Ireland, Global Forest Coalition, Greenpeace, International Commission of Jurists (ICJ) – Dutch Section, International Council on Human Rights Policy (ICHRP), International Disability and Development Consortium (IDDC), International Indian Treaty Council (IITC), Minority Rights Group International (MRGI), Movimiento de la Juventud Kuna (MJK)- Panama, New South Wales Young Lawyers - Australia, Oxfam

responded to the invitation. Also crucial are the submissions made by international organisations such as the Global Forest Coalition,[16] the International Indian Treaty Council,[17] and the Friends of the Earth.[18] Notable in the discussions as to whether climate change is an environmental or a human rights concern are the submissions made by developed states such as United States,[19] Canada,[20] the United Kingdom,[21] Australia,[22] Finland[23] and African nations such as Mali,[24] Mauritius,[25] and Zimbabwe.[26] The analysis of these submissions, as shall be seen in the subsections, generally indicates that opinion is divided on whether climate change is an environmental or a human rights concern. Some particpants take the view that it is an environmental issue which should be addressed by mechanisms different and distinct from human rights, other participants view the issue differently.

International, Sydney Centre for International Law, the University of Sydney, the Climate Justice Programme, and International Union for Conservation of Nature (IUCN)

[15] Human Rights and Equal Opportunities Commission 'Australia background paper: Human rights and climate change' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Australia_HR_Equal_Opportunity_Commission_HR_ClimateChange_4.pdf (accessed 8 April 2014); The Asia Pacific Forum of National Human Rights Institutions 'Human rights and the environment' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Asia_Pacific_Forum_of_NHRIs_1_HR_and_Environment_ACJ_Report_Recommendations.pdf (accessed 8 April 2012)

[16] 'Climate change, forest conservation and indigenous peoples rights' submission by Global Forest People, (GFP submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Global_Forest_Coalition_Indigenous_Peoples_ClimateChange.pdf (accessed 26 October) 2012 1-8

[17] 'Climate change, human rights and indigenous peoples' submission to the United Nations High Commissioner on Human Rights by the International Indian Treaty Council (IITC Submission) 20, 21, 49, 50, 51

[18] 'Submission to the OHCHR regarding human rights and climate change by Friends of the Earth Australia, the Australian Climate Justice Programme and Climate Action Network Australia' (Friends of the Earth Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Friends_of_the_Earth_Australia_CANA_ACJP.pdf (accessed 15 October 2012) 4

[19] 'Observations by the United States of America on the relationship between climate change and human rights' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/USA.pdf (accessed 8 April 2012) (USA Submission)

[20] 'Government of Canada Response to request for information by the Office of the High Commissioner for Human Rights concerning a request in Human Rights Council resolution 7/23 for a detailed analytical study of the relationship between climate change and human rights' (Canada Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Canada.pdf (accessed 18 October 2012)

[21] 'Human Rights Council Resolution 7/23 (Human rights and climate change)' (UK Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/UK.pdf (accessed 18 October 2012)

[22] 'Australian Government submission to the Office of the High Commissioner for the Human Rights on the Relationship between climate change and human rights' (Australia Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Australia.pdf (accessed 18 October 2012).

[23] 'The Government of Finland Replies to the Questionnaire to Member States prepared by the Office of the High Commissioner for Human Rights, pursuant to Human Rights Council resolution 7/23 on human rights and climate change' (Finland Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Finland.pdf (accessed 18 October 2012)

[24] 'Submission of Mali to OHCHR Study 'Human Rights and Climate Change' (Mali Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Mali.pdf (accessed 18 October 2012); also see Limon (n 5 above) 475 on the author's reading and analysis of an instrument originally in French language

[25] 'Human Rights Council Resolution 7/23 (Human rights and climate change)' (Mauritius Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Mauritius.pdf (accessed 18 October 2012).

[26] 'Expected impacts of climate change vulnerability and adaptation assessments in Zimbabwe' (Zimbabwe Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Zimbabwe.pdf (accessed 18 October 2012)

2.2.1 Two perspectives: An environmental or human rights concern?

2.2.1.1 Climate change as an environmental concern

In its submission to the Office of High Commissioner for Human Rights (OHCHR),[27] the United States argues that a human rights approach is unlikely to be effective in addressing climate change. In its view climate change is a 'complex global environmental problem' which is not amenable to human rights-based solutions.'[28] Further defending the sentiment that climate change is strictly an environmental issue, the United States submitted that international co-operation and not contestation, as connoted by human rights, is necessary to fix the climate change crisis. In its view:

> The process of pursuing human rights claims would be adversarial and require affixing blame to particular entities; this contrasts with the efforts to achieve international co-operation that have thus far been pursued through the international climate change negotiations. [29]

In the main, it argues that:

> [G] reenhouse emissions that contribute to climate change are linked to a broad array of human rights activities. This includes activities related to electricity, transportation, industry, heating, waste disposal, agriculture, and forestry...[30]

According to the United States, climate change can be more effectively handled through 'traditional systems of international co-operation and international mechanisms for addressing this problem, including through the United Nations Framework Convention on Climate Change (UNFCCC) process.'[31] Sharing this view point, Canada submits that UNFCCC is the 'most appropriate' venue and not the Human Rights Council for climate change discussion.[32] In support, Finland took the view that it is difficult to define responsibility of states in a climate change context based on international human rights treaties.[33]

[27] USA Submission (n 19 above) paras 11-26
[28] USA Submission (n 19 above) para 23
[29] USA Submission (n 19 above) para 26
[30] USA Submission (n 19 above) para 22.
[31] USA Submission (n 19 above) 4
[32] Canada Submission (n 20 above)
[33] Finland Submission (n 23 above) para d

A close reflection on these submissions supporting climate change as an environmental concern rests on two bases, namely, the global nature of the problem and its link with activities which ensure the realisation of human rights. These bases merit scrutiny.

a. Complex global environmental problem

The negotiation and outcome of international climate change instruments are patterned upon the conception of climate change as a global environmental challenge which is best addressed through consensus and co-operation. The process began with the adoption of a framework convention establishing basic issues and was followed by a more regulatory instrument in the form of a protocol.[34] To that end, rather than a binding instrument, what was established in 1992 was a framework, that is, the UNFCCC which merely sets out the basic structure for addressing climate change.[35] This was followed by a regulatory and binding instrument of the Kyoto Protocol in 1995,[36] in between and afterward, there have been a number of Conference of Parties (COP) decisions which have emerged from international climate change negotiations.[37] This approach follows a rulemaking tradition familiar to the international environmental law making process.[38]

Strong evidence of the conception of climate change as an environmental concern is discernible in the language used in the two pillar instruments. The UNFCCC and Kyoto Protocol, which emanated from climate change discussions, have environmental protection as their aim. By suggesting that climate change is an environmental concern, article 2 of the UNFCCC demonstrates a strong inclination toward environmental protection when it provides that the ultimate objective of the UNFCCC is the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'. Furthermore, for the benefit of present and future generations, article 3(1) of the UNFCCC enjoins parties to protect the climate system. The environmental dimension of climate

[34] D Bodansky & L Rajamani 'The evolution and governance architecture of the climate change regime' in D Sprinz &U Luterbacher (eds) *International relations and global climate change* (2013) 2
[35] The United Nations Framework on Climate Change Convention (UNFCCC) is one of the key instruments in relation to climate change adopted at World Conference on Environment and Development at Rio de Janeiro, 3-14 June 1992
[36] United Nations Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998) entered into force 16 February, 2005, arts 6, 12 &17; the 1st commitment under the Protocol ended in 2012 and was extended in Doha from 1 January 2013- 31 December 2020, see http://unfccc.int/kyoto_protocol/items/2830.php (accessed 23 May 2013)
[37] Bodansky & Rajamani (n 34 above) 4
[38] As above

change is similarly expressed in the commitment of the global community toward the mitigation of climate change under the UNFCCC. Article 4(1)(b) enjoins all parties, considering their common but differentiated responsibilities as well as specific national and regional circumstances, to put in place measures to mitigate climate change.[39]

Along similar lines, the Kyoto Protocol requires developed states, listed under Annex 1 of the UNFCCC each to 'implement and/or further elaborate policies and measures in accordance with its national circumstances.'[40] These policies include promotion of energy efficiency, protection and enhancement of sinks and reservoirs of greenhouse gases not under the Montreal Protocol, promotion of sustainable forest management practices, afforestation and reforestation,[41] all of which point towards the environmental dimension of climate change.

Similarly, scholarship strongly stresses the environmental or ecological dimension of the impacts of climate change, that is, its effects on the physical environment. For instance, Rajamani posits that climate change is 'the most significant environmental problem of our time.'[42] To Suckling, the 'polar bears are the icon for climate change'.[43] According to Cloutier, the Arctic is the 'world's barometer of climate change',[44] while McKibben notes that in increasing the amount of carbon dioxide in the atmosphere, human beings may well be 'ending nature'.[45]

The position strictly viewing climate change as an environmental concern is not without its weaknesses. First, notions under the UNFCCC, such as common but differentiated responsibilities,[46] participation[47] and vulnerability,[48] as shall be made manifest later in this

[39] UNFCCC, art 4(1)(b)
[40] The states listed as having commitment obligations under Annex 1 are developed countries, namely, Austria, Belgium, Canada, Denmark, European Economic Community, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland and United States of America. Other countries involved are those undergoing process of economic transition. These are Belarus, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Russian Federation, Ukraine
[41] Kyoto Protocol, art 2(1)(a) generally
[42] L Rajamani 'The principle of common but differentiated responsibility and the balance of commitments under the climate regime' (2000) 9 *Review of European Community & International Environmental Law* 120
[43] K Suckling 'An icon for climate change: The polar bear' (2007) http://indiancountrytodaymedianetwork.com/ictarchives/2007/01/04/suckling-an-icon-for-climate-change-the-polar-bear-90193 (accessed 20 June 2013)
[44] S Watt Cloutier 'Remarks upon receiving the Canadian Environment Awards Citation of a Lifetime Achievement' (June 5, 2006)
[45] B Mckibben *The end of nature: Humanity, climate change and the natural world* (2003) 48
[46] UNFCCC, preamble
[47] UNFCCC, art 4(1)(i)
[48] UNFCCC, preamble and art 3(2)

discussion, raise the issue of environmental justice which is linked to human rights. Second, even if its construction as an environmental challenge is valid, individuals whose environment is adversely affected by climate change or wish to speak solely for its protection are incapable of accessing direct remedies considering the non-adversarial nature of the dispute resolution under the pillar instruments of climate change. For instance, provided the necessary conditions are complied with, parties may have recourse to the International Court of Justice for settlement of a dispute arising under the UNFCCC.[49] This remedy is available only to the state and operates in the shadow of article 14(1) which stipulates negotiation and the peaceful settlement of disputes as the preferred and first option. This conception differs largely from a human rights' notion of dispute resolution which is generally adversarial and accessible to individuals. Following a similar pattern as under the UNFCCC, is the consensual nature of the compliance mechanism that exists under the Kyoto Protocol.[50] The compliance arrangement involves a Compliance Committee of 20 members functioning in two main branches: a Facilitative Branch and an Enforcement Branch.[51] The Committee does not address individual cases of non-compliance, and only report on its activities to the Conference of Parties (COP).[52] In all, the argument and scholarship portraying climate change strictly from the environmental angle may deflect attention from the human victims of the global environmental challenge.

b. Link of human rights with climate change induced activities

In advocating the construction of climate change as an environmental challenge, the United States noted as follows that:

> Many activities that contribute to the buildup of greenhouse gases in the atmosphere are themselves critically important to advancing human wellbeing and higher standards of living. Similarly, many of these activities contribute to the advancement of human rights, and indeed the individual actors contributing to these emissions are themselves rights holders

Even though it can be faulted, the above position is not unconsidered in view of a context in which human rights is linked with economic globalisation in the theoretical foundation of

[49] UNFCCC, art 14(2)
[50] 'Procedures and mechanisms relating to compliance under the KyotoProtocol' adopted as Decision 24/CP.7 of the Marrakesh Accords (Decision 24/CP.7)
[51] Decision 24/CP.7 (n 50 above) Annex, Sec II, paras 1, 2 and 3
[52] Decision 24/CP.7 (n 50 above) sec III; see generally, G Ulfstein & J Werksman 'The Kyoto compliance system: Towards hard enforcement' in OS Stooke, J Hovi & G Ulfstein *Implementing the climate regime: International compliance* (2005) 39-62

'liberalism'. As a political theory advanced by Hobbes and Locke to challenge the medieval thinking and established the tradition in which Man is freed from all restraints and possesses a natural right to all the objects of his desire, [53] liberalism, in the account of Mutua, is the origin of of the international human rights was birthed in liberal theory and philosophy.[54] Through colonialism and globalisation, the concept of rights has found a place in the normative framework of non-Western parts of the world.[55] A development which, in the words of Donelly, has made human rights a 'standard of civilisation'.[56]

Similarly, economic globalisation has become popular in the context of neo-liberal paradigm,[57] considered in some literature as the return of classical liberalism which advanced minimal role for states and that economy should be left to the free dealings of citizens, and the organisations they freely choose to establish and take part in.[58] The neo-liberal economic model is supported by institutions, in particular, the World Bank, International Monetary Funds (IMF) and the World Trade Organisation (WTO).[59] These institutions are largely controlled by developed nations, including the United States, through their voting shares.[60] The neo-liberal economic agenda has thrived in the context of the human rights to self-determination and natural resources which are often engaged as a ground to dispose of environmental resources within a given territory.[61]

Woods offers a succinct description of the process of economic globalisation which is thriving on neo-liberal notion and relevant to the realisation of human rights. According to the author:

> Technological change and government deregulation have permitted the establishment of transnational networks in production , trade and finance. The new 'production' network describes firms and multinational enterprises (MNEs) who use advanced means of communication , and new, flexible techniques of production so as to spread their activities across

[53] LP Hinchman 'The origin of human rights: A Hegelian perspective'(1984) 37 *Western Political Quarterly* 8
[54] M Mutua 'Standard setting in human rights: Critique and prognosis' (2007) 29 *Human Rights Quarterly* 547, 551
[55] J Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 314, 315
[56] J Donelly 'Human rights: A new standard of civilisation' (1988) 74 *International Affairs* 1
[57] K Woods *Human rights and environmental sustainability* (2010) 3; G Rist *The history of development: From western origins to global faith* (2008) 21-24; this position is generally true except for autocratic nations such as China which is achieving economic development certainly not within the neo-liberal paradigm, see C Tisdell 'Economic reform and openness in China: China's development policies in the last 30 years'(2009) 39 *Economic Analysis & Policy* 271
[58] DE Thorsen & A Lie 'What is neoliberalism?' http://folk.uio.no/daget/neoliberalism.pdf (accessed 14 August 2014) 2, 5; Woods (n 57 above) 4
[59] Woods (n 57 above) 13
[60] In relation to IMF, for instance, the United States top the voting shares with 421,961, see International Monetary Fund 'IMF Executive Directors and Voting Power' http://www.imf.org/external/np/sec/memdir/eds.aspx (accessed 21 May 2014)
[61] Woods (n 57 above) 7

> the globe. In trade, globalisation refers to the fact that the quantity and speed of goods and services traded across the globe has increased , and so too has the geographical spread of participants, the strength and depth of institutions which facilitate trade, and the impact of trade on domestic economic arrangements. Finally, in finance, globalisation has been facilitated by new financial instruments which permit a wider range of services to be brought and sold across the world economy.[62]

That the foregoing developments enhance realisation of human rights may be self-evident. Nevertheless, a range of policies which feature along the path of economic globalisation have come with adverse impacts on the environment, moving Pollis to declare that globalisation stems from `the ideology of neoliberalism,[63] which is devoid of any normative principle of justice and humanity' and is responsible for the ills of the world.[64] While Woods, on the other hand, holds that 'it is misleading to suggest that neoliberalism has no normative principles of justice',[65] Pollis' viewpoint has some measure of merit when one considers the negative impact of economic globalisation on the environment, and arguably, its contribution to climate change.

In occasioning adverse effects such as environmental spoilage and pollution, the integration of neoliberal economic policies with national economic programmes contributes to climate change. For instance, the implementation of structural adjustment programmes (SAP) which were propagated through the World Bank by the IMF in the 1980s as a way to stimulate economic growth and address the payment of foreign debt, has had environmental consequences. These programmes cut down on public spending and regulation, so as to stimulate agriculture and industry in order to integrate a given country into world market and attract foreign direct investment.[66] According to Woods, environmentalists object to SAP on three grounds.[67]

First, by involving the lowering of environmental standard to enable multinationals to perform their operations, SAP encourages environmental spoilage.[68] Second, in encouraging the cutting down of public spendings, it necessitates a drastic reduction of the budget for environmental protection. Finally, in relation to agriculture, in the interest of pursuing comparative advantage in

[62] N Woods 'The political economy of globalisation ' in N Woods (ed) *The political economy of globalisation* (2000) 3
[63] A Pollis 'Human Rights and globalisation' (2004) 3 *Journal of Human Rights* 343
[64] As above
[65] Woods (n 57 above) 4
[66] RL Bryant & S Bailey *Third world political ecology* (1997) 114
[67] Woods (n 57 above)14
[68] As above

the market place, subsistence cropping for which the poor are known is neglected in favour of cash crops.[69] In all, as Bryant and Bailey note:

> [S]tructural adjustment programmes often simultaneously reduce the ability of states to respond to environmental problems and increase the seriousness and intensity of those problems.[70]

Also, significant to the contribution of globalisation to climate change is environmental pollution. Sari lists three ways through which foreign direct investment may negatively impact on the level of environmental pollution in a given country. In the author's view:

> [1]If trade and investment liberalization cause an expansion of economic activity, and the nature of that activity remains unchanged, then the total amount of pollution must increase.
>
> [2][the] composition effect, the effect derived from different comparative advantages [where] some sectors in different economy will expand, while others will contract....If the comparative advantage is derived from lower environmental standards, then the composition effect will be damaging to the environment.
>
> [3] the efficiency effect, resulting from different technologies utilised in the production system. Some technologies may reduce both input requirements of environmental resources and the pollution produced, but others may not have this effect.[71]

Sari's explanation of the 'composition effect' relates to climate change. The author refers to the example of steel industry, arguing that high pollution cost of production in developed countries often underlies the relocation of business to developing countries where there are low environmental standards which encourages further pollution of the environment.[72] Barkin, in a study released in 2003 titled 'The counter-intuitive relationship between globalisation and climate change' found that the consequence of globalised trade on the environment in relation to carbon emission and other greenhouse gases is dependent upon the mode of transportation.[73]

Hence, it not strange that the United States of America and others argue that considering its link with the realisation of human rights, consensual and cooperative approaches offered through the

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[69] As above
[70] Bryant & Bailey (n 66 above) 61
[71] AP Saris 'Environmental and human rights impacts of trade liberalization : A case study in Batam Island, Indonesia' in L Zarsky (ed) *Human rights and the environment: Conflicts and norms in a globalising world* (2002)123-146
[72] As above
[73] JS Barkin 'The counter-intuitive relationship between globalisation and climate change' (2003) 3 *Global Environmental Politics* 8

platform of the UNFCCC are appropriate and effective for addressing climate change. This point of view has equally being advanced in some writings on the subject.[74] Posner demonstrates leading arguments for the preference for a consensual political environment such as allowed under the UNFCCC and not human rights as a conceptual basis for addressing climate change. According to the author, engaging human rights 'would not lead to desirable outcome'.[75] Human rights is problematic because of the causation of climate change, which involves everyone, however minimally.[76] Even if some nations are more responsible, the author contends that penalising such nations with the aid of human rights will have a minimal effect on the climate if other nations or businesses can continue in pursuing unfriendly climate activities.[77] Human rights apply across board and do not differentiate between poor or rich states, therefore, its usage as a conceptual basis will affect economic development which is a critical concern of developing nations.[78] Finally, as matters of complaints will end up before the courts, contrary to the role of court as interpreter of the law, it may lead to the court taking decisions about complex matters of policy which are best handled and balanced through politics.[79]

It is necessary to respond to the foregoing arguments linking human rights with activities that may induce climate change, inclusive of inclusive of Posner's position. First, economic activities have environmental effects material to climate change, but is illogical to ignore the relevance of human rights as a conceptual platform for addressing climate change, because environmental degradation can be explained outside the neo-liberal paradigm. For instance, nations such as China which is unsympathetic to the human rights paradigm has vigorously pursued economic development,[80] with little regard for the environment.[81] This trend at least questions the basis of linking environmental despoilation to the liberal source of human rights and, arguably, economic globalisation. Rather, human rights concept generally allows for the protection of the

[74] EA Posner 'Climate change and international human rights litigation: A critical appraisal' (2007) 155 *University of Pennsylvania Law Review* 1925; Posner's argument is further reiterated in its subsequent paper, see EA Posner & CR Sunstein 'Climate change justice' (2008) 96 *Georgetown Law Journal* 1565; also see J Gupta 'Legal steps outside the Climate Convention: Litigation as a tool to address climate change' (2007) 16 *RECIEL* 76; M Allen 'Liability for climate change: Will it ever be possible to sue anyone for damaging the climate?' (2003) 421*Commentary in Nature* 891
[75] Posner (n 74 above) 1925
[76] Posner (n 74 above) 1929
[77] Posner (n 74 above) 1927
[78] Posner (n 74 above) 1939
[79] As above
[80] Tisdell (n 57 above)
[81] B Xu 'China's environmental crisis' http://www.cfr.org/china/chinas-environmental-crisis/p12608 (accessed 20 April 2014); M Nako 'Chad fines China's CNPC unit $1.2 billion for environmental damage' http://www.reuters.com/article/2014/03/21/us-chad-cnpc-fine-idUSBREA2K1NB20140321 (accessed 21 March 2014)

environment. For instance, most national constitutions that guarantee individual socio-economic rights assure the protection of the environment through a provision of the human rights to a healthy environment.[82] Consequently, human rights as a concept cannot be seen as a barrier to addressing climate change.

More particularly on the issue of global causation of climate change as a disqualifier of human rights framework, Posner's argument does not address the factor of disproportionality of contribution in the causation of climate change and underates the relevance of human rights as a basis for redressing disproportionality.[83] If the argument of Posner is maintained, it will require the neglecting the circumstances of developing states and, indeed, indigenous peoples, who disproportionately bear the burden of climate change.[84] Accepting Posner's argument will amount to treating unequals equally.

To the argument that the developed states alone cannot halt a changing climate, there is no better response than human rights. It is an essential aspect of the human rights concept that in the matter of the realisation of rights, a state cannot refuse to discharge its obligations by resort to the actions or inactions of other states.[85] Hence, in relation to addressing the cause and impact of climate change, the omission or inaction of one state should not be an excuse for other states not to act. By extension, the inaction of one region is not a justification for other regions not to act. Similarly, the position that employing human rights to penalise climate unfriendly approaches may affect the economic development of developing states is misconceived. It suggests that the realisation of economic development cannot be attained without the violation of the human right to healthy environment. It is incorrect to suggest that a human rights platform is incapable of being engaged to drive sustainable development or that sustainable development is not a human

[82] For example, the right to clean and healthy environment is guaranteed respectively under art 42 of the Constitution of Kenya, 2010 and art 24 of the Constitution of the Republic of South Africa, 1996
[83] This disproportionate contribution underlies the principle of common but differentiated responsibility as underscored in a number of climate-related instruments such as principle 7 Rio Declaration, arts 3(1) and 4 (1) of the UNFCCC and art 10 of the Kyoto Protocol
[84] As above; 'United Nations Development Group Guidelines on Indigenous Peoples Issues', February 2008 <www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf> (accessed 20 May 2013) 8; also see N Stern *The economics of climate change* (2006) 95
[85] O De Schutter *et al* 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084, 1096

rights. This reasoning again defeats the whole notion of respecting human rights to healthy environment which is central to the notion of sustainable development.[86]

Posner's position that litigation in courts may generate bad policy decisions[87] is difficult to understand. The author admits that human rights litigation can 'generate press attention, mobilise public interest groups, galvanize ordinary citizens, and ultimately gain compensation for victims' and particularly generates 'wiser policy'.[88] If as Posner argues, human rights litigation is incapable of achieving both ends, then, the problem is no longer about the potential utility of the notion of human rights, rather, it is about the context and substance of court decisions. It amounts to rejecting the essential along with the insignificant to reject human rights as a conceptual basis for addressing climate change simply because it is capable of producing conflicting policy ends.

In what is in contrast to the foregoing, there are arguments demonstrating that the human source of climate change and vulnerability are valid reasons for involving a human rights framework in a climate change discourse.

2.2.1.2 Climate change as a human rights concern

The evidence that climate change is linked to human activities and vulnerability is the very reason for engaging a human rights framework as a conceptual basis for addressing the issue.

a. Human source of climate change

There are submissions, especially by developing nations including states in Africa, to the UNHRC that the human source of climate change is linked to the developed nations. For instance, Mauritius notes that being a small island state, it's greenhouse gas emissions are insignificant.[89] Mali indicates in its submission that 'it is almost impossible for populations in poor countries to identify and pursue channels of justice, to have their cases heard, or to prove

[86] Sustainable development is defined as 'development that meets the needs of the present generation without compromising the ability of the future generation to meet their own needs', see World Commission on Environment and Development (WCED) *Our common future* (1987); on the evolution and analysis of enviro-economic instruments relating to its application see, D Tladi *Sustainable development in International law: An analysis of key enviro-economic instruments* (2007) 68, where the author indicates that human rights to environment is one of the intersects with the notion of sustainable development
[87] Posner (n 74 above) 1931
[88] As above
[89] Mauritius Submission (n 25 above)

responsibility'.[90] These submissions claim that the activities of the populations in developed countries are to blame for a changing climate and a human rights concept can be used as a tool to address the adverse consequencies resulting from such activities. It has been shown, compared to the situation in developing nations, the consumption of products in developed states disproportionately harms the environment. Mckibben argues climate change is a consequence of the 'way of life' chosen by one part of the world.[91]

These views can be further reinforced by key provisions of instruments in the climate change regulatory framework. Article 3 of the UNFCCC on the objective of the Convention reiterates that it aims at addressing the human cause (anthropogenic) of climate change. That the populations in developed nations of the world contribute more to climate crisis is evident from the two instruments on climate change, that is, the UNFCCC and Kyoto Protocol. The preamble to the UNFCCC, for instance, notes that emission of greenhouse gases has largely and historically originated from developed countries. This is the basis for the principle of common but differentiated responsibility which is entrenched under articles 3(1) and 4 (1) of the UNFCCC and article 10 of the Kyoto Protocol. Robinson is correct in observing that the 'human source' of climate change is a strong force for involving a human rights framework in the climate change discourse.[92] In reinforcing this viewpoint, De Schutter argues that issues such as unsustainable deforestation, mining and ocean degradation should be considered in terms of their impacts on human life and as a threat to human rights.[93]

b. Human vulnerability to climate change

The notion of vulnerability has been widely defined in different contexts. According to F¨ussel, its roots can be traced to research in geography and natural hazards. Now, it is used in different research communities dealing with 'disaster management, public health, development, secure

[90] Mali Submission (n 24 above)
[91] L Fagbohun 'Mournful remedies, endless conflicts and inconsistencies in Nigeria's quest for environmental governance: Rethinking the legal possibilities for Sustainability' (2012) 7; B Mckibben *The end of nature: Humanity, climate change and the natural world* (2003) 46
[92] M Robinson 'Foreword' in S Humphreys (ed) *Human rights and climate change;* also see Oxfam International 'Climate wrongs and human rights: Putting people at the heart of climate-change policy' (2008) Executive Summary http://www.oxfam.org/sites/www.oxfam.org/files/bp117-climate-wrongs-human-rights-summary-0809.pdf. (accessed 14 October 2012) which emphasises the need to view climate change as human wrong
[93] O De Schutter 'Climate change is a human rights issue and that's how we can solve it' (2012) Tuesday 24 April. *The Guardian* http://www.guardian.co.uk/environment/2012/apr/24/climate-change-human-rights-issue (accessed 15 June 2013)

livelihoods, and climate impact and adaptation'.[94] According to Liverman, vulnerability 'has been related or equated to concepts such as resilience, marginality, susceptibility, adaptability, fragility, and risk'.[95] In the context of climate change, vulnerability has been defined as 'the degree to which geophysical, biological and socio-economic systems are susceptible to, and unable to cope with the adverse impacts of climate change'.[96]

The concept of vulnerability has found expression in human rights discourse and is relevant in conceptualising climate change as a human rights challenge. This is well reflected in the submissions made pursuant to Resolution 28/3 of 2008[97] and the resultant OHCHR Report of 2009.[98] The submission by the Global Forest Coalition offers extensive insight into the plight of vulnerable groups particularly, indigenous peoples, in the face of climate change response measures such as REDD+ and renewable energy projects and concludes that climate change has implications for the rights of indigenous peoples.[99] The International Indian Treaty Council discusses different scenarios of the impacts of climate change on indigenous peoples,[100] a viewpoint highlighted by the Friends of the Earth in their conclusion on the need to integrate human rights into the climate policy debate.[101]

Stressing the centrality of human vulnerability to the dicussion which led to the adoption of Resolution 10/4, Limon notes that this position is visible in the series of mutually reinforcing efforts by vulnerable states, indigenous peoples' groups and non-governmental organisations (NGOs) to highlight and leverage the linkage between human rights and climate change.[102] The motivation for their efforts, Limon explains, was three-fold. First, it was a result of common frustration felt by these groups due to the slow progress in addressing climate change using the conventional politico-scientific approach.[103] Second, there was a general belief that since the scientific uncertainty of the existence and impact of climate change had been settled, there is

[94] Hans-Martin F¨ussel 'Vulnerability in climate change research: A comprehensive conceptual framework'(2005) University of California International and Area Studies Breslauer Symposium (University of California) paper 6, 1-29
[95] DM Liverman 'Vulnerability to global environmental change' in RE Kasperson *et al* (eds) *Understanding global environmental change: The contributions of risk analysis and management* (1990) 27- 44
[96] 'Climate Change 2007: Working Group II: Impacts, adaptation and vulnerability' para 19.1.2.1
[97] Resolution 18/22 (n 7 above)
[98] OHCHR Report (n 8 above)
[99] GFP Submission (n 16 above)
[100] IITC Submission (n 17 above) 20, 21, 49, 50, 51
[101] Friends of the Earth Submission (n 18 above) 4
[102] Limon (n 5 above) 440-444
[103] As above

need to shift focus onto the 'victims of the problem'.[104] Finally, people and communities most at risk were uncomfortable with the lack of an accountability mechanism to deal with the phenomenon, its human cause and consequences.[105]

Subsequent to the foregoing development, there has been scholarship showing that human vulnerability in the face of climate change adverse impacts is real. For instance, in drawing attention to this fact, Aminzadeh urges that 'human beings are the icon of climate change'.[106] In terms of the human impact of climate change, particularly on indigenous peoples, Cloutier describes indigenous peoples as 'the mercury in the barometer' of climate change in the Arctic.[107] This signifies that the plight of vulnerable groups is an appropriate indication of global climate impact and the failing efforts to address a global crisis. Further buttressing this position is the report of the OHCHR which explains that the impact of climate change will be seriously felt by populations living in acutely vulnerable situations 'due to factors such as poverty, gender, age, minority status, and disability'.[108] Examples of such populations as cited in the OHCHR report are women, children and indigenous peoples.[109] Indigenous peoples, according to the OHCHR report will be disproportionately impacted negatively in view of the fact that they often live in 'marginal lands and fragile ecosystems which are particularly sensitive to alterations in the physical environment'.[110]

It is in light of the above that the sentiments for resorting to human rights is expressed in the submissions of developing states and some international organisations. Mauritius, on the relationship between obligations existing under UNFCCC and international human rights treaties, acknowledges, although there is no international human right to healthy environment, that this cannot be said of the African Charter which applies at the regional level.[111] This position on human vulnerability is becoming mainstream in the functioning of initiatives and institutions including the International Council on Human Rights Policy (ICHRP),[112] the Organisation of

[104] As above
[105] As above
[106] As above
[107] SC Aminzadeh 'A moral imperative: The human rights implications of climate change' (2007) 39 *Hastings International & Comparative Law Review* 234
[108] OHCHR Report (n 8 above)
[109] OHCHR Report (n 8 above) para 44
[110] OHCHR Report (n 8 above) para 51
[111] Mauritius Submission (n 25 above) para d
[112] International Council on Human Rights Policy *Climate change and human rights: A rough guide.* (2008) (ICHRP Guide)

American States,[113] Oxfam International,[114] and Mary Robinson's Realizing Rights.[115] These sentiments reflect the position reached in 2007 when a Small Island States Conference held in the Maldives considered and concluded that climate change will negatively impact on human rights in their states.[116]

It is not surprising that Mali takes the view in its submission to the OHCHR that 'laws and institutions for the defence of human rights must evolve to adapt to the new reality of climate change'.[117] Similarly, the Report of the OHCHR describes the effect of climate change on a range of rights, including right to life,[118] the right to adequate food,[119] the right to adequate water,[120] the right to health,[121] the right to adequate housing,[122] and the right to self-determination.[123] It documents that climate response measures, such as REDD+, and agro-fuel plantations may have implications for human rights.[124] The subsequently passed Resolution 18/22 of 2011 indicates the necessity for including human rights in conceptualising climate change:

> Human rights obligations, standards, and principles have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy, and sustainable outcomes.[125]

It remains to describe the features in human rights that distinguish it as a conceptual basis for climate change.

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[113] 'Human rights and climate change in the Americas' AG/RES. 2429 (XXXVIII-O/08), adopted at the 4th plenary session, held on June 3, 2008, (OAS Resolution), where the General Assembly of the OAS admits that 'the adverse effects of climate change might have a negative impact on the enjoyment of human rights'
[114] Oxfam International 'Climate wrongs and human rights: Putting people at the heart of climate-change policy' (2008) Executive Summary http://www.oxfam.org/sites/www.oxfam.org/files/bp117-climate-wrongs-human-rights-summary-0809.pdf. (accessed 14 October 2012) which emphasises the need to view climate change as human wrong
[115] M Robinson 'Climate change and justice' (11 December 2006) delivered at Barbara Ward Lecture at Chatham House http://ebookbrowse.com/barbara-ward-lecture-12-11-06-final-pdf-d22367010 (accessed 17 October 2012) where the author argues that the world should no longer be contented with a perspective which views climate change as an issue where 'the rich gives charity to the poor', rather, it is an issue of global injustice which requires human rights to resolve
[116] Limon (n 5 above)
[117] Mali Submission (n 24 above)
[118] OHCHR Report (n 8 above) paras 21-24
[119] OHCHR Report (n 8 above) paras 25-27
[120] OHCHR Report (n 8 above) paras 28-30
[121] OHCHR Report (n 8 above) pars 31-34
[122] OHCHR Report (n 8 above) paras 35-38
[123] OHCHR Report (n 8 above) paras 39-41
[124] OHCHR Report (n 8 above) paras 65-68
[125] Resolution 18/22 (n 7 above) preamble

2.3 Human rights as a conceptual approach: Which approach, what features?

As manifest in this section, while there are different schools of thought underpinning the notion of human rights, arguably, the discourse school of human rights is most suitable as a conceptual basis for assessing the adequacy or otherwise of the climate change regulatory framework in relation to the impact of climate change.

2.3.1 Human rights and schools of thought

After an analysis of human rights literature, Dembour identifies four schools of thought which have shaped the meaning of human rights as it is understood today: the natural, deliberative, protest and discourse schools.[126] To the natural school, human rights are rights held by virtue of being human, even though they are enjoyed 'as a result of contingent political and legal practices'.[127] In Dembour's words, the scholars in this category generally regard human rights as 'given', either by God, the universe, reason, or another transcendental source.[128] The deliberative school, a term coined by Dembour, rejects the natural feature on which 'natural' scholars hinge their theory and advances a positivist approach to the meaning of human rights. According to this school, human rights are products of social agreement, created by external forces such as legislative acts and/or judicial decisions and then attached to legal persons.[129] The deliberative approach allows space for participation, democratic decisions and fairness.[130] It accommodates the development of rights and their attachment to bearers.[131] As Ife notes, the deliberative school embraces 'state obligations tradition' where human rights only exist with mechanisms that offer protection.[132]

The protest school views human rights as a response to issues of injustice.[133] Hence, human rights must challenge the status quo in favour of the oppressed, the poor and the unprivileged.[134] Since rights must evolve to address suffering, they cannot be achieved without a fight for their

[126] Marie-Benedecte Dembour 'What are human rights? Four schools of thought' (2010) 32 *Human Rights Quarterly* 1, 2
[127] J Donelly 'International human rights law: Universal , relative, or relatively universal' in MA Baderin & M Ssenyonjo (eds) *International human rights law: Six decades after the UDHR and beyond* (2010) 42
[128] Dembour (n 126 above) 2-3
[129] Dembour (n 126 above) 3
[130] Dembour (n 126 above) 5-6
[131] A Woodiwiss 'The law cannot be enough: Human rights and limits of legalism' in Meckled-Garcia & Cali (eds) *The legalisation of human rights: Multidisciplinary perspectives on human rights and human rights law* (2006) 32-38, 36
[132] J Ife *Human rights from below* (2009) 74-75
[133] Dembour (n 126 above) 7
[134] Dembour (n 126 above) 3

realisation.[135] As Zeleza notes, it is neither a court nor a book that ended apartheid, colonialism and slavery; meaning that human rights are not the products of concepts but of conflicts.[136] The 'protest' theorists maintain, in the words of Baxi, that 'suffering and repressed people remain the primary authors of human rights values and visions'.[137] In the author's view, human rights' norms and standards involve 'participation' by national, regional, and global actors who engage human rights as a means to improve practices, processes and institution of governance.[138]

The fourth school is the discourse school which contests the notion of rights universality and advocates that rights should be dynamic embodying cultural features.[139] Dembour argues that this group believes that human rights lack answers to the ills of the world and that human rights exist only because people talk about them.[140] Dembour identifies Makau Mutua as a representative of scholars in this school and generally condemns the group as human rights 'nihilists'.[141] Dembour's view of this school is perhaps mistaken, at least with regard to Mutua.[142] Mutua does not consider human rights as needless but only emphasises that human rights, should not be treated as a 'final inflexible truth' but rather as an 'experimental paradigm, a work in progress'. Mutua questions human rights movement in that it seeks to foster diversity and difference but only as long as this is achieved within a 'liberal paradigm'.[143] Accordingly, in his view, there is need to review human rights so that its ideal of diversity and difference can have its true meaning.[144] Mutua's viewpoint is apt, if understood as a call for dynamic human rights and not necessarily its total rejection. As Ife argues, the discourse school views human rights as dynamic and evolving with universal elements at its core.[145]

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[135] Dembour (n 126 above) 8
[136] PT Zeleza 'Introduction: The struggle for human rights in Africa' in PT Zeleza & PJ McConnaughay (eds) *Human rights, the rule of law and development in Africa* (2004) 1-19, 7; N Stammers *Human rights and social movements* (2009) 2, where the author argues that human rights evolve as part of social movement struggles
[137] U Baxi 'Politics of reading human rights: Inclusion and exclusion of human rights' in Meckled-Garcia & Cali (eds) *The legalisation of human rights: Multidisciplinary perspectives on human rights and human rights law* (2006) 182-200, 184
[138] Baxi (n 137 above) 191
[139] JK Cowan, Marie-Benedicte Dembour & RA Wilson 'Introduction' in JK Cowan, Marie-Benedicte Dembour &RA Wilson (eds) *Culture and rights: An anthropological perspectives* (2001) 1-26, 11
[140] Dembour (n 126 above) 4
[141] Dembour (n 126 above) 6, 10
[142] See also A Sarelin *Exploring the role and transformative potential of human rights in development practice and food security: A case study of Malawi* (2012) 54, who although in a different context and focus, also argues that Mutua is misunderstood on this point
[143] M Mutua *Human rights: A political and cultural critique* (2002) 4
[144] Mutua (n 143 above) 3-4
[145] Ife (n 132 above) 200

On four grounds the discourse school of thought best accommodates the different dimensions involved in constructing a human rights approach as a conceptual basis for assessing the adequacy or otherwise of the climate change regulatory framework in the light of the adverse impacts of climate change. First, in recognising that human rights are not static and are constantly amenable to negotiation and improvement,[146] the discourse school arguably explains the development or increase in human rights instruments since the 1948 when the Universal Declaration on Human Rights (UDHR) was made. It particularly accommodates the emergence of the claim of indigenous peoples' movement to 'group' or 'collective' rights, including their land rights, a reconstruction of a 'stable' individual notion of rights which for long has been the universal norm.[147] The understanding of indigenous peoples' rights is reflected in the evolvement of instruments aimed at protecting indigenous peoples, which culminated in the adoption of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[148]

There are notions which are becoming relevant in the light of climate change which is best explored in the discourse lens of human rights and are discernible in what has been described as the pervasive nature of the climate change phenomenon which includes different role players in its cause and effect.[149] For instance, non-state actors not only are involved in the combustion of fossil fuel,[150] they are also involved in climate change mitigation measures on indigenous peoples' lands.[151] These developments challenge the traditional horizontal understanding of human rights as a contract between a state and its citizens and more importantly, calls for a dynamic approach toward the accountability for human rights. Responding to these developments, arguably, is impossible to address except by a regulatory framework which engages human rights in a discourse lens.

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[146] Mutua (n 143 above) 3-4
[147] Boaventua de Sousa Santos & CA Rodriguez-Garavito 'Law, politics, and the Subaltern in counter-hegemonic globalisation' in Boaventua de Sousa Santos & CA Rodriguez-Garavito (eds) *Law, and globalization from below: Towards a cosmopolitan legality* (2005) 1-26
[148] United Nations Declaration of Rights of the Indigenous Peoples, adopted by United Nations Resolution 61/295, at 107th plenary meetings, 13 September 2007
[149] S McInerney-Lankford 'Climate change and human rights: An introduction to legal issues' (2009) 33 *Harvard Environmental Law Review* 431; Limon (n 5 above) 457
[150] R Bratspies 'The intersection of international human rights and domestic environmental regulation' (2010) 38 *Georgia Journal of International & Comparative Law* 649, 652
[151] JE Green 'Delegation and accountability in the Clean Development Mechanism: The new authority of non-state actors' (2008) 4 *Journal of International Law & International Relations* 21

Second, the discourse school, according to Ife, recognises the dynamic role of people in human rights protection and their realisation.[152] In explaining the role of peoples as drivers of rights, Klotz and Lynch note that the change which challenges conventional, normative, cultural economic, social and political orders is set in motion by the agency of people.[153] In the context of the adverse impacts of climate change, this describes the reality of indigenous peoples' activities in relation to concerns over their land rights. In climate discussions, despite their lack of formal participation, indigenous peoples have conceived a platform to emphasise their concerns and draw attention to the adverse impacts of climate change on their land rights, as well as the need for an effective regulatory approach in addressing the trend.[154]

Third, even if per Dembour, the discourse school views human rights as relevant only in so far as peoples 'talk about it',[155] it holds some significance for addressing the challenge posed by the climate change regulatory framework to indigenous peoples. As Amy Sinden argues, human rights 'at least at rhetorical level' remains the best response of law for addressing the adverse impacts of climate change.[156] There are viewpoints which regard the significance of human rights to climate change not only in terms of a remedial function but as a value to drive the climate change agenda.[157] Human rights can be conceived as a value to shape discussions at all levels of climate change regulations affecting indigenous peoples' land rights. It can also serve as a benchmark in assessing the application of the climate change regulatory framework in relation to climate change response measures involving the lands belonging to indigenous peoples. Beside adaptation funds, an example of such measures is the United Nations Reduced Emissions from Deforestation and forest Degradation (UN-REDD) programme.[158]A discourse

[152] Ife (n 132 above) 76-77
[153] A Klotz & CM Lynch *Strategies for research in constructivist international relations* (2007)1; Sarelin (n 142 above)
[154] 'Tiohtiá:ke Declaration' at International Indigenous Peoples Forum on Climate Change, Statement to the State Parties of the COP 11/MOP 1 of the United Nations Framework Convention on Climate Change (Tiohtiá:ke Declaration); Declaration of the African Indigenous Peoples' Summit on Climate Change', Nakuru, Kenya (2009) (Nakuru Declaration); Petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by acts and omissions of the United States on behalf of all Inuit of the Arctic Regions of the United States and Canada http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf (Inuit Petition) (accessed 10 February 2012), where the Inuit attempted litigation to hold United States responsible for the transboundary effect of its climate change policy.
[155] Dembour (n 126 above) 7
[156] A Sinden 'Climate change and human rights' (2008) 27 *Journal of Land Resources & Environmental Law* 257
[157] S McInerney-Lankford, Mac Darrow &L Rajamani *Human rights and climate change: A review of the international legal dimensions* (2011) 55-63*;* Limon (n 5 above) 458
[158] Centre for International Environmental Law *Know your rights related to REDD+: A guide for indigenous and local community leaders* (2014) 5; J Willem den Besten, B Arts & P Verkooijen 'The evolution of REDD+: An analysis of discursive-institutional dynamics' (2014) 35 *Environmental Science and Policy* 40; see generally chapters 4 and 5 of this study where the initiative is examined in detail

understanding of human rights can help in bringing out the adequacy or otherwise of the regulatory framework asociated with these initiatives in relation to indigenous peoples' rights.

Finally, as proof of its dynamic utility, human rights in its discourse lens has been applied in relation to food security,[159] international trade,[160] and climate change.[161] In relation to these areas, the literature has constructed and applied a human rights approach based on core principles of human rights, namely, universality and inalienability, indivisibility, interdependence and inter-relatedness non-discrimination and equality, participation and inclusion, and accountability.[162] Against this backdrop, it is important to explore how these principles distinguish human rights as a conceptual basis for tackling the adverse impacts of climate change, illustrating different aspects or concerns in relation to the adequacy or otherwise of the climate change regulatory framework. The discussion in the section below, for the purpose of convenience, is carried out under the following heads, namely, core human rights principles and the intersection with environmental law principles.

2.3.2 Core human rights principles

Human rights entails principles, namely, universality and indivisibility, interdependency and inter-relatedness, non-discrimination and equality, participation, and accountability which are essential tools for examining the regulatory framework which aims at tackling the adverse impacts of climate change in relation to indigenous peoples' lands. As subjects and right holders under international human rights law, indigenous peoples' issues about lands can benefit from

[159] Sarelin (n 142 above)
[160] S Joseph *Blame it on the WTO? A human rights critique* (2011) 13-55; SM Walker 'The future of human rights impact assessments of trade agreements' (2009) 35 School of Human Rights Research Series 1-39
[161] Moritz von Normann 'Does a human rights-based approach to climate change lead to ecological justice?' (2012) delivered at Lund Conference on Earth System Governance 'Towards a just and legitimate earth system governance: Addressing inequalities ' April 18-20, 2012; J Schade *Human rights, climate change, and climate policies in Kenya: How climate variability and agrofuel expansion impact on the enjoyment of human in the Tana Delta* (2011) Research Mission Report of a joint effort by COMCAD (Bielefeld University), FIAN Germany, KYF, and CEMIRIDE 1-69; CIEL 'Analysis of human rights language in the Cancun Agreements (UNFCCC 16th session of the Conference of the Parties)' (2011); McInerney-Lankford *et al* (n 157 above); MA Orellana, M Kothari & S Chaudhry 'Climate change in the work of the Committee on Economic, Social and Cultural Rights' (2010) 1-34; S Kravchenko 'Procedural rights as a crucial tool to combat climate change' (2010) 38 *Georgia Journal of International & Comparative Law* 613; CIEL *Human rights and climate change: Practical steps for implementation* (2009); Aminzadeh (n 107 above)
[162] These principles are generally described in United Nations *The human rights based approach to development co-operation:Towards a common understanding among UN Agencies* United Nations Development Group, 2003 http://hrbaportal.org/the-human-rights-based-approach-to-development-co-operation-towards-a-common-understanding-among-un-agencies (accessed 18 November 2012) (*Human rights based approach principles*); the principles are also well described in J Hausermann *A human rights approach to development* (1998) 23-38, and applied in scholarships including, Sarelin (n 142 above) 109-134 on the realisation of right to food; Walker (n 160 above) 34-5 in relation to international trade; and in relation to climate change, Moritz von Normann (n 161 above) and Schade (n 161 above) 9-10

the application of core human rights principles in assessing the climate change regulatory framework. With respect to indigenous peoples, these principles are particularly guaranteed in separate and general international human rights instruments and their monitoring bodies.[163]

2.3.2.1 Universality and inalienability

The principle of universality and inalienability connotes that human rights apply to everyone everywhere in the world and that negotiations or 'trade-offs' should not result in human rights violations.[164] The notion of universality and inalienability, a core feature of the human rights approach, is helpful in advancing the understanding that where a regulatory framework proves inadequate in safeguarding indigenous peoples' lands in the light of the adverse impacts of climate change, this questions the general scope of the universality and inalienability of human rights. Importantly, the analysis of the climate change regulatory framework with reference to indigenous peoples' lands can benefit from the universal and inalienable nature of human rights. Hardly a single has not ratified at least one instrument which is relevant to indigenous peoples, particularly their land rights.

For instance, just about every state has ratified at least one of the nine core international human rights treaties.[165] The pillar covenant of human rights, namely the International Covenant on Civil and Political Rights (ICCPR),[166]and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[167] have 164 and 160 parties respectively.[168] The Convention on the Elimination of Racial Discrimination (CERD) has no less than 175 parties and is of significance to indigenous peoples.[169] Signatories to these instruments include states in Africa and, with exception of China and United States in the case of the ICESCR, it includes most developed

[163] G Alfreðsson 'Human rights and indigenous rights' in N Loukacheva (ed) *Polar law textbook* (2010)147
[164] Ife (n 132 above) 84; Vienna Declaration and Programme of Action, adopted at World Conference on Human Rights in Vienna 1993 UN doc.A/CONF.157/23 paras 1 and 5; the idea of universality of human rights is however challenged by relativists who view that human rights vary from culture to culture, see SE Merry *Human rights and gender violence: Translating international law into local justice* (2006) 40; however human rights is at least universal in the sense that it has become a subject of attention all over the world, see Donelly (n 127 above) 31, who argues, in my view, rightly that universality remains the core feature of human rights
[165] http://www2.ohchr.org/english/law/ (accessed 2 January 2013); see also McInerney-Lankford (n 157 above) 4
[166] International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 9 U.N.T.S. 171
[167] International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966
[168] McInerney-Lankford (n 157 above) 4
[169] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en accessed (2 January 2013); F Mackay 'Indigenous peoples' rights and the UN Committee on the Elimination of Racial Discrimination' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 155-202

nations of the world which have or are pressured for commitments under the climate change regulatory framework.[170] Thus, for any given state, there is at least one human right instrument upon which a claim relating to indigenous peoples' land rights in the face of adverse effects of climate change can be based. It also involves UNDRIP even if it is a declaration which some states in Africa are reluctant to adopt.[171] As Alfreðsson has argued the provisions of a declaration such as UNDRIP may operate either in whole or in part as international customary law, particularly with regard to equality, non-discrimination and the prohibition of torture.[172]

The monitoring bodies of the United Nations' institutions, such as the Human Rights Committee (HRC) have on a number of occasions in their concluding remarks pronounced on issues relating to indigenous peoples.[173] A similar practice is evident in the activities of the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Rights of the Child (CRC),[174] and the African Commission on Human and Peoples' Rights (the Commission).[175] Issues in relation to indigenous peoples have featured in the General Comments of the CESCR,[176] and the HRC, at least in engaging states such as Rwanda.[177] The CERD has indeed noted that encroachment on the lands of indigenous peoples or forced displacement can trigger the use of its early warning procedure.[178] It has equally featured the plight of indigenous peoples

[170] McInerney-Lankford (n 157 above) 4
[171] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on 13 September 2007, with 143 votes in support and four in opposition . 11 states abstained from voting while thirty four states were absent from the vote; see AK Barume 'Responding to the concerns of the African States' in C Charters & R Stavenhagen (eds) *Making the Declaration work: The United Nations Declaration on the Rights of Indigenous Peoples* (2009) IWGIA 170-182, 180, explaining that 15 African nations were not available during the voting exercise for the adoption of UNDRIP while Burundi, Kenya and Nigeria abstained from voting ; also see AG Newman 'Africa and the United Nations Declaration on the Rights of the Indigenous Peoples' in Charters & Stavenhagen (above) 141-154
[172] Alfreðsson (n 163 above) 149
[173] Among others, see the Concluding Observations of the Human Rights Committee, Canada, 20 April 2006, UN Doc CCPR/C/CAN/CO/5; Brazil, 1 December 2005, UN Doc CCPR/C/BRA/CO/2
[174] 'Concluding observations: Committee on the Rights of the Child, Nigeria', 44th session, RC/C/NGA/CO/3-4, 25 May-11 June 2010 para 77; also see Concluding Observations on Cameroon, Committee on the Rights of the Child ,53rd session, CRC/C/CMR/CO/2 ,11-29 January 2010
[175] 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation', 12 December 2003 UN Doc E/C.12/1/Add.94, paras 11 and 39; Mackay (n 169 above) 161
[176] United Nations General Comment No. 15, the right to water, arts 11 and 12
[177] 'Concluding observations on Rwanda', Human Rights Committee 95th session CCPR/C/RWA/CO/3 7 May 2009 New York, 15 March-3 April 2009 para 22
[178] Guidelines for the Use of the Early Warning and Urgent Action Procedure, advanced unedited version, adopted by the Committee on the Elimination of Racial Discrimination, August 2007, 3

in its concluding remarks in relation to states such as Rwanda,[179] Canada,[180] Sweden,[181]and Suriname[182] in relation to land rights.[183]

Other institutions include the HRC which in its past activities has featured the issues of indigenous peoples in its concluding remarks and observations on states, including Cameroon,[184] Nigeria,[185] and Botswana.[186] Similarly, the agenda of mechanisms such as the Working Group of Indigenous Populations,[187] Permanent Forum on Indigenous Issues,[188] and Special Rapporteur for Indigenous Peoples,[189] are known for issues relating to indigenous peoples. Arguably, the notion of the universality and inalienability of human rights is reflected in the functionings of the foregoing mechanisms and may be useful in examining the climate change regulatory framework in relation to indigenous peoples' lands in Africa.

At the African regional level there is a human rights framework with the potential to address the adequacy or otherwise of the climate change regulatory framework on the adverse impacts of climate change on indigenous peoples' lands. The Commission offers an important institutional platform specifically related to indigenous peoples' affairs with the creation in 2000 of the Working Group on Indigenous Populations or Communities in Africa (Working Group).[190] Indigenous peoples' rights have featured in the main procedures of the Commission, namely, state reporting and communication and resolutions/guidelines.[191] In its concluding remarks on

[179] 'Concluding observations on Rwanda', Committee on the Elimination of Racial Discrimination 78th session CERD/C/RWA/CO/13-17, 14 February–11 March 2011, Consideration of reports submitted by state parties under article 9 of the Convention, para 11
[180] 'Concluding observations on Canada', Committee on the Elimination of Racial Discrimination 25 May 2007, CERD/C/CAN/CO/18, para 22
[181] 'Concluding observations on Sweden', Committee on the Elimination of Racial Discrimination 10 May 2004, CERD/C/64/CO/8, para 16
[182] 'Concluding observations on Surimane', Committee on the Elimination of Racial Discrimination 12 March 2004, CERD/C/64/CO/9, para 14
[183] See generally on the activities of the CERD, Mackay (n 169 above)
[184] Human Rights Council 11th session Agenda item 6 Universal periodic review Report of the Working Group on the Universal Periodic Review, 12 October 2009, A/HRC/11/21, para 46
[185] Human Rights Council 11th session Universal Periodic Review Report of the Working Group on the Universal Periodic Review Nigeria, 5 October 2009, A/HRC/11/26, paras 40, 58 and 65
[186] Human Rights Council, 10th session, Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, Botswana A/HRC/10/69,13 January 2009, para 35
[187] Established pursuant to Economic and Social Council Resolution 1982/34 as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human rights, see F Viljoen 'Reflections on the legal protection of indigenous peoples rights in Africa' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010)75-94, 80
[188] Established as an advisory body to ECOSOC, see, Viljoen (n 187 above) 80
[189] This was established in 2001 with the mandate to study issues impacting on the human rights of the indigenous peoples
[190] Resolution on the Adoption of the 'Report of the African Commission's Working Group on Indigenous Populations/ Communities, 20 November 2003, 17th Annual Activity Report of the Commission
[191] Viljoen (n 187 above) 87

states such as Namibia,[192] South Africa,[193] Uganda,[194] Cameroon,[195] and the communication on Kenya,[196] the Commission focuses attention on different aspects of the impact of state activities on indigenous peoples' human rights.[197] Arguably, the widespread presence or availability of international norms and institutions which focus on indigenous peoples is a justification for employing a human rights approach as a conceptual basis for examining the adequacy or otherwise of the climate change regulatory framework in addressing the adverse impacts of climate change in relation to indigenous peoples' lands.[198]

2.3.2.2 Interdependency and inter-relatedness

Human rights are interdependent, inter-related and indivisible in the sense that the realisation of a given right depends on the realisation of other rights. By this is meant that civil, cultural, economic, political and social rights are equal in status and cannot be ranked or placed in a hierarchy of importance, even though the nature of obligations due by duty-bearers may differ.[199]

The notion of interdependency or interrelatedness of human rights is a feature with an added value in analysing the adequacy or otherwise of the climate change regulatory framework in relation to the protection of indigenous peoples in the light of adverse climate change challenges. There is a valid basis for this viewpoint. Not least in the case of indigenous peoples is that the notion of land rights implicates a range of interdependent and interrelated rights, as can be gleaned from instruments relating to indigenous peoples' land rights. ILO Convention 169 contains interrelated provisions on the rights to land of indigenous peoples which extend over a range of human rights, including economic, as well as civil and political rights. For instance, article 13(1) of the Convention requires governments to recognise and respect the special

[192] 'Concluding observations for the report of Namibia', issued after examination at the 29th session
[193] 'Conclusions and Recommendations on the 1st Periodic Report of the Republic of South Africa', 38th session of the Commission, 21 November-5 December 2005
[194] Supplementary Report on the 1st Periodic Report of Uganda to the African Commission on Human and Peoples' Rights, submitted by the United Organisation for Batwa Development in Uganda, the Forest Peoples Programme and International Working Group for Indigenous Affairs
[195] 'Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Cameroon', 47th ordinary session 12-26 May 2010, in Banjul, The Gambia Consideration of Reports submitted by state parties under the Terms of Article 62 of the African Charter on Human and Peoples' Rights, paras 36 and 37
[196] Communication 276/03, *Centre for Minority Rights Development* (Kenya) *and Minority Rights Group (on behalf of Endorois Welfare Council)* (*Endorois* case) 27th Activity Report: June- November 2009
[197] Viljoen (n 187 above) 88
[198] See generally on the activities of the CERD, Mackay (n 169 above)
[199] DJ Whelan *Indivisible human rights: A history* (2010) 4; M Scheinin 'Characteristics of human rights norms' in C Krause & M Scheinin (eds) *International protection of human rights: A textbook* (2009) 24

spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories. Indigenous peoples' lands include the notion of environment, based on article 13(2) of ILO Convention 169 which defines the term 'lands' to include 'the concept of territories, which covers the total environment of the areas inhabited by indigenous peoples'. According to article 7(1), the notion of indigenous peoples' land rights is linked to the right to self- determined development and article 15(1) provides that indigenous peoples have the right to enjoy natural resources particularly through their participation in 'the use, management and conservation of these resources'. In relation to projects on their lands, ILO Convention 169 stipulates that relocation must be done only when it is inevitable, and with the consent of indigenous peoples.[200]

Similar evidence on the interrelatedness and interdependency of rights to land is visible in the UNDRIP. Article 25 of UNDRIP affirms that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with 'their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources'. Article 26(1) of UNDRIP affirms that indigenous peoples have the rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or occupied, while article 26(2) provides that states' duty to guarantee the right to land must be realised in respect of tradition and the land tenure systems of indigenous peoples. The UNDRIP also contains related rights, such as conservation,[201] benefit-sharing,[202] participation,[203] access to justice,[204] and co-operation,[205] which are connected with the enjoyment of the land rights of indigenous peoples in the context of climate change.

At the regional level, there is evidence of the interrelated and interdependent conception of rights to land that may be useful in assessing the climate change regulatory framework in relation to the protection of indigenous peoples' lands in the light of the adverse impacts of climate change. This can be gleaned from the approach in the report of the Working Group which describes the interdependency of indigenous peoples' lands with other rights as follows:

[200] Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), entered into force 5 September 1991 (ILO Convention 169) art 16(2)
[201] UNDRIP, arts 24 and 29
[202] UNDRIP, arts 10, 28 which provides for compensation; also arts 11(2) and 28(1) on restitution
[203] UNDRIP, arts 5, 18, 27 and 41
[204] UNDRIP, art 40
[205] UNDRIP, arts 38 and 39

> The protection of rights to land and natural resources is fundamental to the survival of indigenous communities in Africa and such protection relates to ...Articles 20, 21, 22 and 24 of the African Charter

Article 20 of the African Charter provides for the right to existence and self-determination, article 21 stipulates the right to freely dispose of wealth and resources and, in the case of dispossession, the right to recover their property and be compensated. Article 22 of the African Charter safeguards the right to development and equal enjoyment of a common heritage, and article 24 guarantees the right to environment. These interrelated normative constructions of the rights to land are relevant in assessing the climate change regulatory framework in relation to the adverse impacts of climate change on indigenous peoples' lands.

For instance, the adequacy of a normative framework is crucial in implementing UN-REDD+ on the land of indigenous peoples in that there is foreseeable set of overlapping and interconnected negative impacts touching areas including their welfare, livelihoods, social order, identity, and culture.[206] These interconnected impacts potentially implicate a notion of interrelated or interdependent human rights. While not directly related to climate change context, there is evidence that this is possible considering that the jurisprudence of regional human rights mechanisms has also connected the rights to land of indigenous peoples to such rights as the rights to property,[207] life, liberty and personal security,[208] subsistence,[209] food security,[210]

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[206] Milan Declaration of the 6th International Indigenous Peoples Forum on Climate Change , COP 9, UNFCCC, Milan, Italy, 29-30 November 2003, (Milan Declaration) para 5; E Boyd, M Gutierrez & M Chang 'Small-scale forest carbon projects: Adapting CDM to low income communities' (2007) 17 *Global Environmental Change* 250-259; 'Report on the impacts of climate change mitigation measures on indigenous peoples on their territories and lands' E/C 19/2008/10 (Unedited version) (Indigenous peoples climate change mitigation report) paras 4 and 5; GFP Submission (n 16 above) 3-5; P Anderson *'Prior, and informed consent in REDD+'* (2011) 8; Greenpeace Briefing 'Human rights and the climate crisis: Acting today to prevent tragedy tomorrow (Greenpeace report) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Greenpeace_HR_ClimateCrisis.pdf (accessed 27 October 2012) para 31; B Blom, T Sunderland & D Murdiyarso 'Getting REDD to work locally: Lessons learned from integrated conservation and development projects' (2010) 13 *Environmental Science Policy* 164-172, 169; K Sena 'REDD and indigenous peoples' rights in Africa' IWGIA *REDD and indigenous peoples* (2009) Indigenous Affairs 10-20

[207] In a number of cases from regional human rights system, particularly the Inter American and African system, the issues relating to indigenous peoples' right to land have been made while alleging a violation of right to property, see *See Saramaka People v Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, para 95 (28 November 2007) (*Suriname* case); *Indigenous Community Yakye Axa v Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 146, para 143 (17 June 2005); *Maya Indigenous Community of the Toledo District v Belize*, Case 12.053, Inter-Am.C.H.R., Report No. 40/04, EA/Ser.L/V/II.122 doc. 5 rev., para 113 (2004); *Indigenous Community of Awas Tingni v Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79, para 148 (31August 2001) (*Awas Tingni* case)

[208] *Inter-American Court Communidad Yanomami v Brazil*, decision of 5 March 1985, Case 7615, (*Yanomami* case), reprinted in Inter-American Commission on Human Rights and Inter-American Court of Human Rights *Inter American Yearbook of Human Rights* (1985)

[209] Communication 167/1984 *HRC Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, decision of 10 May 1990, UN Doc CCPR/C/38/D/167/1984 para 33 (*Lubicon Lake Band* case)

health,[211] and spirituality,[212] and a safe and healthy environment.[213] The main focus of this study is on land rights, but the principle of interdependency or interrelatedness of human rights allows for a consideration of other aspects of the rights of indigenous peoples in so far as they relate to the adequacy or otherwise of the climate change regulatory framework.

2.3.2.3 Equity and non-discrimination

According to Swepston and Alfreðsson, the prohibition of discrimination is a crucial aspect of human rights law.[214] The principle of non-discrimination and equality holds that human rights should be enjoyed by all human beings without discrimination of any kind, such as race, property, birth or any other status.[215] The land rights of indigenous peoples in the light of the adequacy or otherwise of the climate change regulatory framework raise issues which can benefit from the human rights principle of non-discrimination and equity. First, climate change mitigation projects such as the REDD+ on indigenous peoples' lands raise issues around equal and non-discriminatory treatment in matters such as the ownership, use and management of land, as well as access to information and benefit-sharing.[216] As the climate situation worsens, there is evidence that poorer nations, and the poor populations within these nations, will be worst affected.[217] Due to discrimination, indigenous peoples are marginalised and are often regarded as belonging to the 'poorest of the poor'.[218] A major manifestation and catalyst of discrimination

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[210] 'The right to food' A/60/350, 12 September 2005, 8-21 where the Special Rapporteur on the right to food highlighted the centrality of land to the right to food of indigenous peoples http://www.un.org/en/ecosoc/docs/pdfs/summary%2020land%20and%20vulnerable%20people%202%20june.pdf (accessed 25 January 2012)

[211] *Yanomami* case (n 208 above)

[212] *Sesana and others v Attorney General*, High Court Judgment, ILDC 665 (BW 2006) where the Court held that there is 'a deeply spiritual relationship between indigenous peoples and their land'

[213] 'Indigenous peoples' right to adequate housing' United Nations Housing Rights Programme Report No. 7 OHCHR (2005) 9

[214] L Swepston & G Alfreðsson 'The rights of indigenous peoples and the contribution by Erica Daes' in GS Alfreðsson &M Stavropoulou (eds) *Justice pending: Indigenous peoples and other good causes: Essays in honour of Erica-Irene Daes* (2000) 74

[215] Sarelin (n 142 above) 112; The World Bank *World Development Report 2006: Equity and development* (2006) 27

[216] See Anderson (n 206 above) 8-10; LA German *et al* 'Forest governance and decentralisation in Africa: Linking local, regional and global dialogues' in LA German, A Karsenty & A Tiani (eds) *Governing Africa's forest in a globalised world* (2010) 1-20, 12 and 13

[217] Intergovernmental Panel on Climate Change, *Climate Change 2007: Fourth Assessment Report (*Summary for policy maker) (2007) 8; McInerney-Lankford *et al* (n 157 above) 1

[218] GM Wachira 'Indigenous peoples' rights to land and natural resources' (2010) in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 298-299; Independent Commission on International Humanitarian Issues Indigenous peoples: A global quest for justice (1987) 16-17

and inequality 'has been the failure of state authorities to recognise customary indigenous forms of land possession and use'.[219]

In international human rights law there exists the normative basis for addressing the equity and non-discrimination issues around the adequacy or otherwise of the climate change regulatory framework to address the impacts of climate change on indigenous peoples' land rights. Under the UNDRIP, the relevant norms of human rights which can be useful to indigenous peoples' land rights include rights to conservation,[220] benefit-sharing,[221] and the right of states to natural resources.[222] There are other instruments in international human rights law which offer a strong basis for the principle of equity and non-discrimination. These include the Universal Declaration of Human Rights,[223] ICCPR,[224] ICESCR,[225] Declaration of Principles on Equality,[226] and the Convention on the Elimination of all Forms of Racial Discrimination (CERD). The treaty monitoring bodies for these institutions, notably the ICCPR, ICESCR and CERD have also pointed out that states have obligations in addressing discrimination. Particularly, a review of the conclusions of UN Human Rights treaty bodies issued between 2002 and 2006 has shown a finding of discrimination resulting from violations of indigenous peoples' rights to own and control land.[227]

Similarly, non-recognition of the land rights of indigenous peoples and the potential in this to establish a case for discrimination has been the focus of the United Nations Committee on the Elimination of Racial Discrimination (UNCERD). In its General Recommendations XX111 of 1997, the UNCERD requires:

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[219] *Surimane* case (n 207 above) para 235; and the concurring opinion of Judge Sergio Garcia Ramirez in the judgment on the merits and reparations in *Awas Tingni* case (n 207 above) paras 12-44, 13 (holding that lack of recognition of the property right of the indigenous peoples according to customary law 'would create an inequality that is utterly antithetical to the principles and to the purposes that inspire the hemispheric system for the protection of human rights'

[220] UNDRIP, arts 24 and 29

[221] UNDRIP, arts 10 and 28 which provide for compensation; also arts 11(2) and 28(1) on restitution

[222] S Adelman 'Rethinking human rights: The impact of climate change on the dominant discourse' in S Humphreys (ed) *Human rights and climate change* (2010) 169

[223] Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in Paris on 10 December 1948, General Assembly resolution 217 A (III)

[224] ICCPR, arts 2(1), 3, 4(1) and 26

[225] ICESCR, arts 2(2) and (3)

[226] Declaration of Principles on Equality (2008) http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf (accessed 10 November 2013) principle 5

[227] Mackay (n 169 above) 156; also see F Mackay (ed) *Indigenous peoples and United Nations treaty bodies: A compilation of United Nations treaty body jurisprudence 1993-2004*

> State parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be subsisted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[228]

At the regional level, in addition to guaranteeing the rights to non-discrimination and equality, the Working Group has in its report drawn attention to the trend on the discrimination against indigenous peoples in relation to their land rights.[229] In fact, according to the Working Group, 'the rampant discrimination towards indigenous peoples is a violation of the African Charter'.[230]

Equity and non-discrimination as a human rights principle is useful in the context of access to information on climate change and climate-related projects. Particularly, indigenous peoples should be entitled to appropriate information and participation concerning the REDD+ projects which involve their land. Also, indigenous peoples should be able to access information regarding the adverse effects of projects on their land. These may include information in relation to the nature of project, adaptation and mitigation funds, and benefit-sharing.

In relation to the foregoing there are relevant provisions regarding access to information without discrimination. Article 19 of the UDHR recognises the right to freedom of opinion which includes seeking, receiving and the impartation of information and ideas.[231] In almost similar language this is provided under the ICCPR.[232] In 2011, the HRC issued a new General Comment further detailing the rights under article 19 of the ICCPR. According to the General Comment, with regards to right of access to information, 'state parties should proactively put in the public domain Government information of public interest'.[233] At the regional level, the right to information is safeguarded under the European Convention for the Protection of Human Rights and Fundamental Freedoms,[234] the American Convention on Human Rights,[235] and the African

[228] UN Committee on the Elimination of Racial Discrimination General Recommendations XXIII (51) concerning indigenous peoples, adopted at the 1235th meeting, 18 August 1997 UN Doc CERD/C/51/Misc.13/Rev.4.para 3
[229] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005) (Working Group Report), adopted by the African Commission at its 28th ordinary session 35-36
[230] Working Group Report (n 229 above) 34
[231] UDHR, art 19
[232] ICCPR, art 19(2)
[233] General Comment No. 34, CCPR/C/G/34 (2011) para 18
[234] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 art 10

Charter.[236] According to the African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa, freedom of expression entails access to information without discrimination.[237] To further strengthen the provision on the right to information, the Commission approves that a process be put in place by the Special Rapporteur to expand article 4 of the Declaration of Principles on Freedom of Expression in Africa to include access to information.[238]

Accordingly, the Commission has crafted a model law on access to information.[239] Although a non-binding document, the model law explains article 9 of the African Charter which deals with access to information. Hence, while there is no express right to information under the UNDRIP, this gap can be filled by a combined reading of these provisions along with the express guarantees on information in other applicable instruments of international human rights law. Arguably, such a construction would allow indigenous peoples access to a whole range of information regarding climate change, its adverse impacts, and climate change response measures on their land.

While the claimants involved are not indigenous peoples, the decision in *Claude Reyes v Chile*,[240] is relevant to accessing information on climate change and climate change response projects such as the REDD+. In that case petitioners alleged that Chile violated their right to freedom of expression and free access to state-held information when the Chilean Committee on Foreign Investment failed to release information about a deforestation project that the petitioners wanted to evaluate in terms of its environmental impact.[241] The Inter-American Commission was of the view that Chile has a positive obligation to provide information to the public in such circumstances. When the case was eventually forwarded to the Inter-American Court on Human

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[235] American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, art 13
[236] African Charter, art 9(1) provides that every individual shall have the right to receive information while art 9(2) stipulates that every individual shall have the right to express and disseminate his opinions within the law
[237] Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Sess. (23 October 2002) http://www.achpr.org/sessions/32nd/resolutions/62/ (accessed 15 October 2012) sec I(2)
[238] 'Resolution to modify the Declaration of Principles on Freedom of Expression to include Access to Information and Request for a Commemorative Day on Freedom of Information', adopted at the African Commission on Human and Peoples' Rights meeting at its 50th ordinary session held in Banjul, The Gambia, from 18 April- 2 May 2012 http://www.achpr.org/sessions/51st/resolutions/222/ (accessed 16 October 2012)
[239] Model law on access to information for Africa, prepared by the African Commission on Human and Peoples' Rights', April 2013
[240] *Marcel Claude Reyes et al v Chile*, Case 12.108, Report No. 60/03, Inter-Am.Comm. H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 (2003) (*Reyes* case) para 2
[241] As above

Rights in 2006, it was held, absent legitimate restriction, that every individual is entitled to receive information and the positive obligation to provide it.[242]

In all, the human rights principles of equity and discrimination require that a regulatory framework put in place to address the impacts of climate change should not be discriminatory or inequitable.

2.3.2.4 Participation

The principle of participation holds that every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights can be realised.[243] There are relevant norms on participation which the emerging climate change regulatory framework should embody. The absence of such principles will make it difficult to ground certain of the claims of indigenous peoples including their need to be involved in climate change negotiation. Through the principle of participation there is basis for expecting the climate change regulatory framework to enable the involvement of indigenous peoples in the discussions pertaining to activities on their land.

The principle of participation and inclusion is entrenched in human rights instruments including the UNDRIP. Article 18 of UNDRIP provides:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.[244]

Article 21 of the UDHR provides that everyone has the right to take part in the governance of his or her country.[245] This is also guaranteed under article 25 of ICCPR which provides that citizens shall have the right, without unreasonable restrictions, 'to take part in the conduct of public affairs, directly or through freely chosen representatives'.[246] It also provides for participation in

[242] *Reyes* case (n 240 above)
[243] *Human rights based approach principles* (n 162 above); Hausermann (n 162 above); L VeneKlasen, V Miller *et al Rights-based approaches and beyond: Challenges of linking rights and participation* (2004) 5
[244] Also see UNDRIP arts 5, 27 and 41
[245] UDHR, art 21
[246] ICCPR, art 25

terms of taking part in the conduct of public affairs and access to public service in a given country.[247] The HRC has interpreted 'conduct of public affairs' broadly to include 'exercise of political power and in particular the exercise of legislative, executive and administrative powers' extending to the formulation and implementation of policy at international, regional and national levels.[248] In its General Recommendation XXIII on the Rights of Indigenous Peoples, the CERD calls upon state parties:

> to ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.

There are provisions in the regional human rights instruments, namely the American Declaration,[249] Inter-American Convention,[250] and the African Charter,[251] on the right to participate in decision-making. Thus the inference that can be drawn from the above discussion is that the principles of participation and inclusion are core themes in human rights instruments and jurisprudence, and can be useful in assessing the adequacy or otherwise of the climate change regulatory framework in relation to the protection of indigenous peoples in the light of climate change challenge.

2.3.2.5 Accountability

The notion of accountability assumes actors, including states, as the duty bearers of human rights with obligations to respect, protect and fulfil internationally recognised human rights. Furthermore, citizens as rights holders, should have a right to a remedy in the case of a proven violation of rights.[252]Accountability is a core element that distinguishes human rights as a conceptual basis for assessing the climate change regulatory framework. Under international human rights law, citizens or persons are the right holders, whereas, the state is the major bearer of obligations.[253] Unlike international environmental law, in which duties or commitments are

[247] As above
[248] Human Rights Committee, General Comment No. 25 (1996) , UN doc. CCPR/C/21/Rev.1/Add.7, para 5
[249] American Declaration, art 20
[250] Inter-American Convention, art 23
[251] African Charter, art 13
[252] Human rights based approach principles (n 162 above); Hausermann (n 162 above); N Peter 'Taking accountability into account: The debate so far' in P Newell & J Wheeler (eds) *Rights, resources and the politics of accountability* (2006) 40
[253] O O'Neili 'The dark side of human rights' (2005) 81 *International Affairs* 427

held horizontally, between state and state,[254] duties of states generally exist with regard to their citizens under international human rights law.[255] There are three levels of obligations, namely, to *respect*, to *protect*, and to *fulfil* human rights.[256] These obligations can be useful in the absence or weakness of effective safeguards under the climate change regulatory framework to tackle the adverse effects of climate change on indigenous peoples' lands.

In the context of indigenous peoples' land rights, the obligation to 'respect' signifies that states must refrain from measures which infringe on the rights of indigenous peoples' in relation to their land.[257] It is less clear whether the 'obligation to respect' supports an interpretation that requires states to refrain from such acts which might affect human rights, in this case, the human rights of indigenous peoples in another state. A similar dilemma is posed by the obligation to 'protect' which requires states to prevent private actors from infringing the rights of indigenous peoples. It is debatable whether human rights is able to respond to wrongs committed by non-state actors.[258] Yet, the depredations of climate change primarily result from private economic activity, that is, operations mostly by non-state actors, which make the need for human rights application compelling.[259]

A similar challenge is noticeable in respect of the obligation to 'fulfil' which requires the state to cultivate policies and programmes that inspire the progressive realisation of human rights, and to refrain from actions that weaken the realisation of rights.[260] The issue arises as to whether a state has the duty not to formulate a regulatory framework which justifies activities that can negatively impact on the realisation of rights, in this case indigenous peoples' land rights, in another nation. The Inuit petition tried to establish that such an extraterritorial duty or obligation exists, but unsuccessfully.[261] However, there is emerging a reconstruction of the accountability regime to make extraterritorial application of human rights possible. In this regard, the Maastricht

[254] UNFCCC, art 3(1); Limon (n 5 above) 458; P Cullet 'Definition of an environmental right in a human rights context'(1995) 13 *Netherlands Quarterly of Human Rights* 25
[255] McInerney-Lankford (n 157 above)
[256] IE Koch 'Dichotomies, trichotomies or waves of duties?'(2005) 5 *Human Rights Law Review* 81
[257] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on state parties to the Covenant: 26.05.2004. CCPR/C/21/Rev.1/Add.13 HRC (United Nations General Comment 31) paras 5-6
[258] RM Bratspies 'The intersection of international human rights and domestic environmental regulation' (2010) 38 *Georgia Journal of International & Comparative Law* 649
[259] Bratspies (n 258 above) 652
[260] United Nations General Comment No. 31 para 7; S Skogly *Beyond national borders: States' human rights obligations in international co-operation* (2006) 60-61
[261] Inuit Petition (n 154 above)

Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights can be helpful in providing for extraterritorial obligations (ETOs).[262] These extra-territorial obligations are also acknowledged in the OHCHR Study Report on the relationship between climate change and human rights. According to the OHCHR Study Report, states are required to:

> refrain from interfering with the enjoyment of human rights in other countries; take measures to prevent third parties (e.g. private companies) over which they hold influence from interfering with the enjoyment of human rights in other countries; take steps though international assistance and co-operation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries, including disaster relief, emergency assistance, and assistance to refugees and displaced persons; ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.[263]

The application of human rights supports international co-operation to address the negative impacts of climate change on vulnerable populations.[264] It does not foreclose international co-operation, which, in itself, is extraterritorial in reach. As shall be argued later in the study, even if this extraterritorial reach is contested, states do have obligations to formulate an appropriate climate change regulatory framework for the protection of indigenous peoples in the face of the adverse impacts of climate change and response measures.[265] Hence, the accountability element of a human rights approach is a further justification for engaging human rights as a conceptual basis. In this regard, the imaginative application of human rights provisions may draw from article 56 of the United Nations Charter which enjoins the international community to cooperate to realise the fulfilment of human rights.[266] Also, under the principle of state responsibility, it is not impossible to hold a State responsible for a violation of its obligation under a treaty or customary international law such as obligations to cooperate or not to harm the environment.[267]

The element of accountability in human rights offers an added value to indigenous peoples' concerns in relation to their land by providing grievance mechanisms where issues in relation to

[262] ICJ (2011) Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights http://oppenheimer.mcgill.ca/IMG/pdf/Maastricht_20ETO_20Principleiples_20-_20FINAL.pdf (accessed 15 October 2012)
[263] OHCHR Report (n 8 above) para 86
[264] Knox (n 5 above) 494-5
[265] See chapter 6 of this study
[266] United Nations Charter, a combined reading of arts 56 and 55 is arguably a basis for international co-operation in relation to human right.
[267] C Wold, D Hunter & M Powers *Climate change and the law* (2009) 133

climate change impacts can be addressed. The grievance mechanisms set up for accountability purposes under the climate change response measures are not helpful. First, neither the UNFCCC nor the Kyoto Protocol offers express provisions on access to remedial measures for individuals or communities challenged by climate change.[268] For instance, the UN-REDD Programme being implemented at the domestic level lacks a defined international mechanism to address concerns emerging from the operation of projects, should local remedies fail.[269] However, human rights affords marginalised and vulnerable groups the grievance mechanisms to address their grievances. As Newell and Wheeler observe, groups can raise claims and thereby promote accountability of state, private and civil society actors.[270]

Also, the approach of the Compliance Committee established under the Kyoto Protocol to resolution of disputes is a further reflection of weakness of the climate change regulatory framework which makes recourse to human rights necessary. This approach is consensual merely aiming at facilitating, promoting and enforcing compliance between states.[271] It does not allow for individual recourse to adversarial measures, even when it does not provide remedies for injured parties.[272] Rather, it follows the consensual nature of the compliance system under international environmental law which mainly leaves the ultimate decision-making to the political body, that is, the COP or MOP, as the case may be.[273] This approach is not new. It is evidenced in such instruments as the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*,[274] the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[275] and the 1989

[268] McInerney-Lankford *et al* (n 157 above) 3
[269] 'A complaint mechanism for REDD+', a report from the Center for International Environmental Law and Rainforest Foundation Norway (May 2011) which makes a case for REDD+ complaint mechanism http://www.ciel.org/Publications/REDD+_ComplaintMech_May11.pdf (accessed 13 May 2012)
[270] P Newell & J Wheeler 'Rights, resources and politics of accountability: An introduction' in P Newell & J Wheeler (eds) *Rights, resources and the politics of accountability* (2006) 5-6; Sarelin (n 142 above)125
[271] Kyoto Protocol, arts 18 and 20; M Fitzmaurice 'The Kyoto Protocol compliance regime and treaty law' (2004) 8 *Singapore Year Book of International Law* (2004) 23-40; G Ulfstein & J Werksman 'The Kyoto compliance system: Towards hard enforcement' http://folk.uio.no/geiru/TheKyotoComplianceSystem.pdf (accessed 24 October 2011)
[272] Aminzadeh (n 107 above) 259-60
[273] J Brunnée 'The Kyoto Protocol: Testing ground for compliance theories?' (2003) 63 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 255-280
[274] Adopted in 1992 by the Copenhagen Amendment, see Report of the 4th meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.4/15 25 November 1992; see also 'Review of the Non-Compliance Procedure of the Montreal Protocol Pursuant to Decision IX/35 of the 9th meeting of the Parties, Ad Hoc Group of Legal and Technical Experts of Non-Compliance with the Montreal Protocol, 1st session', Geneva, 3-4 July 1998
[275] *Aarhus Convention* done at Aarhus, Denmark, 25 June 1998

Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal[276] (the Basel Convention). This approach reflects or explains the viewpoint argued by Bodansky, that international environmental law is more of trade off involving different requirement for different countries.[277] Rather than focusing on punitive sanctions, the objective of the compliance procedure is to return erring state parties to compliance without the necessary accusation of wrong doing.[278]

Yet such a preference for non-adversarial means of addressing climate change flies in the face of reality. As Aminzadeh points out, the path so far followed by international community has been largely ineffective in addressing the mitigation of, and adaptation to climate change.[279] Perhaps, nothing better reflects the unacceptability of this approach than the submission of Mali to the OHCHR Study:

> Laws and institutions for the defence of human rights must evolve to adapt to the new reality of climate change. When vulnerable communities try to use human rights laws to defend their rights and seek climate justice, important weaknesses are revealed.[280]

Grievance mechanisms under the human rights regime consider obligations as justiciable and offer a forum for remedy to victims of climate change who have little influence over negotiations.[281] Arguably, it holds promise for vulnerable peoples, such as indigenous peoples, who, in any case, do not participate or contribute in any formal way at the climate change discussions.[282] Hence, an added value of a human rights approach is the norm-based remedial potential which may be useful in addressing the inadequacy of the climate change regulatory framework for the protection of indigenous peoples facing the adverse impacts of climate change on their land. A number of human rights instruments, including the UNDRIP, contain provisions on the right to remedy. Article 8 of the UDHR provides for the right of everyone to effective

[276] *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 22 March 1989, entered into force 5 May 1992, 28 I.L.M. 657 (1989); also see Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, UNEP/CHW.6/40, 6th meeting, Geneva, 9-13 December 2002; Fitzmaurice (n 271 above)
[277] Bodansky (n 4 above) 516
[278] Fitzmaurice (n 271 above)
[279] Aminzadeh (n 107 above)
[280] Mali Submission (n 24 above)
[281] As above
[282] Indigenous peoples climate change mitigation report (n 206 above)

remedy before national tribunals regarding every alleged violation of human rights.[283] Article 2, paragraph 3(a), of the ICPPR, guarantees victims of human rights violations an effective remedy. This involves access to effective judicial or other appropriate remedies including compensation at both the national and international levels.[284] According to article 7 of the African Charter, 'every individual shall have the right to have his cause heard'.[285]

The UNDRIP has numerous provisions in relation to access to a remedy. Article 40, for instance, provides:

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.[286]

The redress to which indigenous peoples are entitled may include restitution or where impossible, 'just, fair, and equitable compensation' where their lands have been 'confiscated taken, occupied, used or damaged without their free, prior and informed consent'.[287] Also, according to article 10 of the UNDRIP, indigenous peoples are not to be forcibly removed from their land, without free, prior and informed consent 'on just and fair compensation and, where possible, with the option of return.'[288]

Generally, there are several accountability mechanisms under human rights law, such as quasi and judicial bodies, rapporteurs, which can be engaged by indigenous peoples as individuals and groups when they fall victim to measures adopted in response to climate change. At the international level, potential accountability avenues include the Universal Periodic Review (UPR), the HRC established by the ICCPR and the CESR which is established to monitor the implementation of the ICESCR.[289] Regional tribunals include the Inter-American Commission and Court of Human Rights and the European Court of Human Rights (ECHR),[290] and the

[283] UDHR, art 8
[284] CESCR General Comment 3, para 5
[285] African Charter, art 7
[286] UDHR, art 40
[287] UDHR, art 28
[288] UNDRIP, art 10
[289] The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985
[290] Bodansky (n 4 above) 517; Knox (n 5 above) 497; CIEL (n 161 above) 22-3; Limon (n 5 above) 472

Commission as well as the African Court on Human and Peoples' Rights, provided the applicable condition is fulfilled.[291] Thus, in the event of a gap within the climate change regulatory framework relating to the protection of indigenous peoples facing the adverse impacts of climate change on their land, a human rights approach offers the guarantees and mechanisms which can be engaged in addressing such a deficiency. At any rate, the arguments around the conceptualisation of climate change either strictly from the point of view of environmental law or human rights is needless. This is because of the intersection or the complementary nature of the two fields.

2.3.3 Intersection with environmental law

In *Case Concerning the Gabcikovo-Nagymaros Project*,[292] Judge Weeremantry of the International Court of Justice (ICJ) recognised that the enjoyment of internationally recognised human rights depends upon environmental protection. According to the observation made in a separate opinion:

> The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[293]

The intersection of human rights with the principles of environmental law on the protection of the environment is, thus, another distinguishing feature of human rights as a conceptual tool for examining the adequacy or otherwise of the climate change regulatory framework. Generally, scholarly writings emphasise three approaches through which human rights can fulfil the protection of the environment and vice-versa.[294] The first approach is through the application of procedural rights found in international human rights law. The second model is achieved through the invocation and reinterpretation of existing human rights to achieve environmental ends. The

[291] MS Chapman 'Climate change and the regional human rights systems' (2010) 10 *Sustainable Development Law & Policy* 37
[292] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, [1997] I.C.J. Rep. 7 (*Gabcikovo-Nagymaros Project* case)
[293] *Gabcikovo-Nagymaros Project* case (n 292 above) 9-92 per Judge Weeremantry
[294] DK Anton & DL Shelton *Environmental protection and human rights* (2011); MR Anderson 'Human rights approaches to environmental protection: An Overview' in A Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1998) 4; D Shelton 'Human rights, environmental rights and the right to environment' (1992) 28 *Stanford Journal of Internatonal Law* 103, 105; A Kiss 'An introductory note on a human right to environment' in EB Weiss (ed) *Environmental change and international law: New challenges and dimensions* (1992) 199; J Symonides 'The right to a clean, balanced and protected environment' (1992) 20 *International Journal Legal Information* 24

creation of a distinct right to environment is the third approach.[295] These approaches have been discussed as applicable in relation to climate change.[296]

2.3.3.1 Procedural rights

Procedural rights exist within international human rights law which can promote environmental protection and realise human rights where the climate change regulatory framework is inadequate. Of these rights, freedom of information, the right to participate in decision-making and the right to seek a remedy have been prominently discussed.[297] These approaches intersect with procedural safeguards under environmental law. With respect to information, principle 10 of the Rio Declaration provides:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities.[298]

Under the UNFCCC, state parties are required to promote at the national, sub-regional and regional levels public access to information on climate change and its effects.[299] The African Convention on the Conservation of Nature and Natural Resources, as revised (Conservation Convention),[300] enjoins states to put in place legislation to ensure access to information on environmental matters.[301] There exist copious instruments under international environmental law on public participation, particularly as a key element of environmental impact assessment (EIA).[302] Agenda 21 makes copious reference to EIA. Especially paragraph 23(2) emphasises the

[295] Anderson (n 294 above) 8; G Alfreðsson & A Ovsiouk 'Human rights and the environment' (1991) 60 *Nordic Journal International Law* 19, 22
[296] Moritz von Normann (n 161 above); Kravchenko (n 161 above); Aminzadeh (n 107 above)
[297] S Atapattu 'The public health impact of global environmental problems and the role of international law' (2004) 30 *American Journal of Law & Medicine*; Moritz von Normann (n 161 above) 6
[298] Rio Declaration, principle 10; also see generally, Agenda 21, chapter 3
[299] UNFCCC, art 12(9) and (10)
[300] So far, 42 states in Africa have signed the Convention while 11 states have ratified. It shall enter into force thirty (30) days after the deposit of the fifteenth (15th) instrument of ratification, see http://www.au.int/en/sites/default/files/Revised%20-%20Nature%20and%20Natural%20Resources_0.pdf (accessed 10 March 2014)
[301] African Convention on Conservation of Nature and Natural Resources, 2003 (Conservation Convention) art 16(1)(a); on the examples of other instruments dealing with information, see Convention for the Protection of World Cultural and Natural Heritage November 23 1972 art 27; World Charter for Nature, art 16
[302] For a discussion of the origin of EIA see, A Boyle 'Developments in the international law of environmental impact assessments and their relation to the Espoo Convention' (2011) 20 *Review of European Community & International Environmental Law* 227; JA Lemmer 'Cleaning up development: EIA in two of the world's largest and most rapidly developing countries' (2007) 19 *Georgia International Environmental Law Review* 275; NA Robinson 'International trends in environmental

need for public participation in EIA procedures.[303] The UNFCCC directs all state parties to employ methods, such as impact assessments, to help minimise 'adverse effects on the economy, on public health and on the quality of the environment'.[304] Article 14(1)(c) of the Conservation Convention enjoins states to ensure that legislative measures allow participation of the public in decision-making with a potentially significant environmental impact.[305]

In relation to access to justice, principle 10 of the Rio Declaration stresses the need for 'effective access to judicial and administrative proceedings, including redress and remedy'.[306] For the purpose of protecting the environment and natural resources, the Conservation Convention requires parties to 'adopt legislative and regulatory measures necessary to ensure timely and appropriate access to justice'.[307] The Conservation Convention also provides for peaceful resolution of disputes, and where this fails, recourse to the Court of Justice of the African Union.[308] Similarly, article 14 of the UNFCCC offers the option of negotiation in relation to disputes around its provisions and where this fails, resort to the ICJ as an option for settlement of disputes.[309]

Through elaborate provisions peculiar to different instruments, international environmental law makes a unique contribution which might help in the protection of indigenous peoples in the light of the adverse impacts of climate change. The safeguard in relation to access to information is helpful as information will always be necessary on several aspects of the impact of climate change and response measures on their land. Similarly, the participation of indigenous peoples in

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impact assessment' (1992) 19 *Boston College Environmental Affairs Law Review* 591; on legal status of EIA see *Pulp Mills on the River Uruguay* ICJ 20 April 2010 http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=135 (accessed 29 October 2012)

[303] Agenda 21, para 23(2)

[304] UNFCCC, art 4(1)(f)

[305] On examples of other instruments with EIA provision, see Protocol on Environmental Protection to the Antarctic Treaty' (Madrid Protocol) http://sedac.ciesin.columbia.edu/entri/texts/antarctic.treaty.protocol.1991.htmlart (accessed 15 October 2012) principles 3(1) and 8(1); Convention on Environmental Impact Assessment in a Transboundary Context' done at Espoo (Finland), on 25 February 1991 (Espoo Convention); Convention on Biological Diversity (CBD) opened for signature June 5, 1992, 1760 U.N.T.S. 143, 151 (entered into force 29 December 1993) art 14(1)(a); United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, opened for signature 14 October 1994, 1954 U.N.T.S. 108, 117 (entered into force 26 December 1996) art10(4); Aarhus Convention, art 6 generally

[306] Rio Declaration, principle 10

[307] Conservation Convention, art 16(1)(d)

[308] Conservation Convention, art 30; pursuant to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004), the Court of Justice has now been merged with the African Court of Human and Peoples' Rights under a new mechanism referred to as the African Court of Justice and Human Rights, see 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004)'

[309] UNFCCC, art 14(2)

climate change mitigation measures is difficult to imagine without an EIA. Indeed, when climate-related information is supplied to indigenous peoples upon or without request, and EIA is carried out with their full participation and consent, there is a limited basis to allege, let alone found, a violation of a right. Access to justice is particularly key as judicial or quasi-judicial proceedings under human rights law are not the first option, where issues can be addressed administratively or through recourse to alternative conflict resolution procedures as advanced by environmental law instruments.[310]

However, a major challenge facing procedural principles under international environmental law in relation to climate change is that the mechanisms which are often available under the instruments for redressing wrongs are state-centric.[311]This gap makes procedural guarantees under international environmental law less likely to be useful as a stand-alone in addressing the concerns of indigenous peoples facing the adverse impacts of climate change. However, these provisions can be animated by the human rights principles and mechanisms as earlier explained. The path dependent of these provisions make human rights an inevitable approach and complementary to procedural rights guaranteed under environmental instruments and vice versa.

2.3.3.2 Interpretation of existing human rights

The ends of environmental protection and the realisation of human rights can be attained through the interpretation of existing human rights which are not connected with the environment.[312] There is interesting jurisprudence that human rights, such as the rights to life, privacy, property, health and culture, have been protected in the context of a finding of environmental harm. For instance, in Europe, most of the victims bringing cases to the European Court on Human Rights and the former European Commission on Human Rights have invoked the right to privacy and family life. Article 8(1) of the European Convention on Human Rights and Fundamental Freedoms provides that everyone has the right to respect for his private and family life, his home

[310] UNDRIP, art 40
[311] P Cullet 'Definition of an environmental right in a human rights context' (1995) 13 *Netherlands Quarterly of Human Rights* 25
[312] Shelton (n 294 above) 105; Anderson (n 294 above) 7; N Peart 'Human rights-based climate change litigation: A radical solution?' (2012) 24 *Environmental Law & Management* 77; Alfreðsson & Ovsiouk (n 295 above) 19, 22

and his correspondence'.[313] This has been mostly successful when the environmental harm consists of pollution.[314]

In *Lopez-Ostra v Spain,* the applicant and her daughter alleged violation of rights to their private and family life due to serious health hazards posed by the fumes of a tannery waste treatment plant which operated alongside the apartment building where they lived. While noting that the state had discretion to strike an appropriate balance between economic development and the applicants' rights, the Court ruled that the discretion had been exceeded. Hence, it found a violation of the applicants' rights.[315] In *Öneryıldız v Turkey*, the Court recognised that the State has an obligation to provide deterrence against threats to life, including environmental harms.[316] In *Tatar v Romania*, the Court concluded that the Romanian authorities had failed in their duty to assess and address environmental risks, and in taking suitable measures to protect the applicants' rights under article 8 and, more generally, their right to a healthy environment. On this basis, the Court awarded the complainants damages while noting the need for government to address issues identified in the EIA.[317]

The Inter-American human rights system has followed a similar approach in the protection of the environment and the realisation of human rights of indigenous peoples` land rights. In *Yanomami v Brazil*, the Yanomani Indians of Brazil alleged that the grant of license allowing the exploitation of resources had led to influx of non-indigenous peoples into their territories and brought about the spread of contagious diseases. Among others, the Commission found that the government had violated the Yanomani's rights to life, liberty and personal security guaranteed by article 1 of the American Declaration.[318] The case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, decided by the Inter-American Court of Human Rights, involved the protection of Nicaraguan forests in lands traditionally owned by the *Awas Tingni*.[319] In returning a finding of violations of their rights, including the right to property, the Court unanimously

[313] European Convention on Human Rights as amended by Protocols Nos. 11 and 14 http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf ; on the permissible grounds for limiting the exercise of the right, see the second paragraph of the art 8(1)
[314] Shelton (n 294 above)
[315] *Lopez-Ostra v Spain* ECHR (1994), Series A, No. 303C, but see *Powell and Rayner v United Kingdom* (1990) Series A, No. 172, where the ECHR found that aircraft noise from Heathrow Airport constituted a violation of art 8, but justified under art 8(2) as necessary in a democratic society' for the economic well-being of the country
[316] *Öneryıldız v Turkey*, ETS No. 150-Lugano, 21 June 1993
[317] *Tatar v Romania* Application No. 67021/01, Judgment of 27 January (2009) paras 120-137
[318] *Yanomami case* (n 208 above)
[319] *Awas Tingni case* (n 207 above) para 140; also see *Yanomami case* (n 208 above)

declared that the state must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating and title mechanisms for the properties of indigenous communities, in accordance with customary law and indigenous values, uses and customs.[320]

The foregoing cases are neither initiated nor examined with climate change or its regulatory framework as focus, the petition lodged by the Inuit before the Inter-American Commission on Human Rights in December 2005 is different and novel. Faced with the tragic consequences of climate change, the Inuit alleged that the United States' climate change policy is destroying the Arctic environment and, thereby, violating a number of their rights, including the right to health, life and property.[321] In response, the Inter-American Commission stated that the information supplied in the communication is not enough to 'characterise a violation of the rights protected by the American Declaration'.[322] Osofsky's several articles on this case argue, although refused, that the petition questions the traditional approach toward environmental protection by extending human rights beyond the confines of United States law.[323]

The Nigerian case, *Gbemre v Shell Petroleum Development Company Nigeria Limited and others* (*Gbemre* case)[324] arose from gas flaring activities in the Niger Delta area. Communities in this area filed the case against Shell, ExxonMobil, ChevronTexaco, the Nigerian National Petroleum Corporation, and the Nigerian government to stop gas flaring.[325] It was the case of the communities that the practice of gas flaring and the failure by the corporations to undergo EIA are in violation, among other things, of the Nigerian gas-flaring regulations, and thus contribute to climate change.[326] Hence, the community alleged the violation of their fundamental rights to life and dignity of the human person as provided by sections 33(1) and 34(1) of the Constitution

[320] *Awas Tingni case* (n 207 above) paras 167-169
[321] Inuit Petition (n 154 above)
[322] Letter from Ariel E Dulitzky, Assistant Executive Sectary, Organisation of American States, to Paul Crowley, Legal Rep. (Nov. 16, 2006) http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf. (accessed 27 October 2012)
[323] For some of the author's articles on this subject, see HM Osofsky 'Is climate change "international"? Litigation's diagonal regulatory role' (2009) 49 *Virginia Journal of International Law* (Osofsky's climate change international) 585; HM Osofsky 'The Inuit petition as a bridge? Beyond dialectics of climate change and indigenous peoples' rights' (2007) 31 *American Indian Law Review* (Osofsky Inuit petition as a bridge) 675; HM Osofsky 'The geography of climate change litigation: Implications for transnational regulatory governance' (2005) 83 *Washington University Law Quarterly* 1789; HM Osofsky 'Learning from environmental justice: A new model for international environmental rights'24 *Stanford Environmental Law Journal* (2005) 72
[324] *Gbemre v Shell Petroleum Development Company Nigeria Limited and Others* (2005) AHRLR 151 (NgHC 2005) (*Gbemre* case)
[325] *Gbemre* case (n 324 above) para 4(7)
[326] *Gbemre* case (n 324 above) para 4(7)(c)

of the Federal Republic of Nigeria, and relevant provisions under the African Charter. Relying on the arguments of the communities that gas flaring contributes to climate change, the Court ordered the defendants to stop gas flaring in the Niger Delta community.[327]

The foregoing cases, particularly the Inuit case, show that existing human rights can be invoked, at least rhetorically, to address the failure of the climate change regulatory framework to tackle adequately the adverse impacts of climate change. More importantly, it demonstrates that using existing human rights, legal action in climate change can be constructed diagonally between the citizens of one state against the government of another state in relation to the adverse impacts of climate change.[328]

2.3.3.3 Right to environment

Hodkova traces the history of the right to environment to the Stockholm Declaration of 1972, which provides the progressive basis for its approval at the domestic levels by states.[329] The right was conceived with the aim of fostering the protection and conservation of the environment.[330] The source of this conception is found in principle 1 of the declaration which asserts that 'man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being'.[331] However, there has been much controversy over whether principle 1 indeed formulates a right to environment aimed at the conservation and protection of the environment. Some writers argue it can achieve that end,[332] others are of a contrary view arguing that principle 1 cannot, by itself, attain such an end.[333]

At any rate, after the Rio Conference, a Special Rapporteur was appointed to carry out a study on human rights and environment.[334] The report prepared pursuant to this mandate enumerates in its

[327] *Gbemre* case (n 324 above) para 5-7
[328] Osofsky's Inuit petition as a bridge (n 323 above); Osofsky's climate change international (n 323 above) 643
[329] I Hodkova 'Is there a right to a healthy environment in the International legal order?' (1992) 7 *Connecticut Journal of International Law* 65
[330] Anderson (n 294 above) 3
[331] Declaration on the Human Environment, Report of the United Nations Conference on the Human Environment (New York, 1973), UN Doc. A/CONF.48/14/REV.1., adopted in UNGA Res. 2997 (XXVII) of 1972, principle 1
[332] Hodkova (n 329 above) 66; Symonides (n 294 above); Kiss (n 294 above) 199
[333] Atapattu (n 297 above) 298; see also R Desgagné 'Integrating environmental values into the European Convention On Human Rights' (1995) 89 *American Journal of International Law* 263 on the view that principle 1 merely clarifies that a certain environmental quality is a precondition for men to enjoy rights
[334] Atapattu (n 297 above) 299

appendix the 'Draft Principles on Human Rights and the Environment'.[335] According to principle 2, 'all persons have the right to a secure, healthy and ecologically sound environment'.[336] Also, to all persons, principle 4 of the instrument guarantees 'an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.'[337]

The right to environment is guaranteed under the regional human rights instruments. The trend setter on this is African Charter since 1981.[338] Other instruments are the Protocol of San Salvador to the American Convention on Human Rights,[339] and the 2004 Revised Arab Charter on Human Rights (Arab Charter).[340] In March 2011, the Human Rights Council adopted resolution 16/11 on 'human rights and the environment',[341] and requested OHCHR to conduct a detailed analytical study on the relationship between human rights and the environment.[342] On 22 March 2012, the HRC adopted by consensus another resolution, in which it decided to appoint for a period of three years, an independent expert on the issue of human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment. One of the tasks of the independent expert is to study, in consultation with stakeholders, including representatives of indigenous peoples, the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[343]

The right to environment offers an important platform, particularly for assessing the climate change regulatory framework in relation to the protection of indigenous peoples' land rights in the face of climate change. It is because much of climate change and its response measures have implications either negatively or positively on indigenous peoples' lands. Potentially, it can help in motivating the formulation of an appropriate regulatory framework for the implementation of projects to take place in an environmental-friendly manner. Jurisprudence which may emerge

[335] 'Draft Principles On Human Rights And The Environment' E/CN.4/Sub.2/1994/9, Annex I (1994) (Draft Principles on human rights and environment) http://www1.umn.edu/humanrts/instree/1994-dec.htm
[336] Draft Principles on human rights and environment, principle 2
[337] Draft Principles on human rights and environment, principle 4
[338] African Charter, art 24
[339] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 14 November 1988, art 11
[340] African Charter, art 38
[341] 'Human rights and the environment' Resolution adopted by the Human Rights Council on 12 April 2011, A/HRC/RES/16/11 (Resolution 16/11)
[342] 'Analytical study on the relationship between human rights and the environment' A/HRC/19/34, 16 Dec. 2011
[343] 'Human rights and the environment', Resolution adopted by the Human Rights Council on 15 March 2012 A/HRC/19/L.J.

from its interpretation can help in elaborating the obligations required of states to make this happen. In the *Ogoniland* case, the complainant alleged that the oil production operations of the military government of Nigeria, through non-state actors, have been carried out without regard to the health of people or environment of the local communities. These activities, it was alleged, have resulted in environmental degradation and the health problems of the peoples. In the context of considering the violations of the rights, particularly the right to safe and healthy environment guaranteed under article 24 of the African Charter, the Commission imposed obligations upon government to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[344]

Thus, the application of human rights as a conceptual framework is necessary considering its intersection with the application of procedural rights, existing rights and the notion of a right to environment in the protection of the environment and realisation of rights. However, in addition to the foregoing, human rights is also relevant in its link with other principles of international environmental law. Arguably, these principles of international environmental law are useful when animated by human rights instruments and jurisprudence. These principles are discussed below.

2.3.3.4 International environmental law principles

a. Intergenerational equity

Intergenerational equity brings to the fore the responsibility of the human entity to protect the environment and not to destroy it.[345] This relationship, posits Weiss, imposes upon each generation certain planetary obligations to conserve the natural and cultural resource base for future generation.[346] For their fulfilment, these obligations, as Weiss explains, require three principles. First, it requires that conservation should be demanded of one generation in such a

[344] Communication 155/96, *Social and Economic Rights Action Center* (SERAC) *and Center for Economic and Social Rights (CESR) / Nigeria* (*Ogoniland* case) para 52
[345] EB Weiss 'Our rights and obligations to future generations for the environment' (1990) 84 *American Journal of International Law* 198; Tladi (n 86 above) 47
[346] EB Weiss 'The planetary trust: Conservation and intergenerational equity' (1984) 11 *Ecology Law Quarterly* 494; this idea is also developed in the author's work, E Brown Weiss *In fairness to future generations: International law, common patrimony and intergenerational equity* (1989)

way that it does not restrict the options of future generations.[347] Second, one generation should pass the planet over to the other in no worse condition than it was given.[348] The third principle requires of each generation to provide the other with 'access to the legacy of past generations and should conserve this access for future generations'.[349]

The principle of intergenerational equity is a recurring trend in international environmental law. This is reflected in its key instruments. Principle 2 of the Stockholm Declaration provides that mankind has a responsibility to protect and improve the environment for the present and future generations.[350] Although situated in the construct of development, the Rio Declaration enjoins states to engage in development in such a way that meets the 'environmental needs of the present and future generations'.[351] The UNFCCC provides that 'parties should protect the climate system for the benefit of the present and future generations of human kind'.[352] One can agree with Tladi and the views of others on this trend that international environmental agreements are generally based 'even when they do not invoke intergenerational equity expressly in the operative parts of the treaty, on the principle of intergenerational equity'.[353]

By recognising the principle of intergenerational equity, environmental law converges with the underlying thinking and claim of indigenous peoples on the sustainable use of their land. Generally, indigenous peoples hold their land not only for themselves but on behalf of future generations.[354] Hence, if their land becomes forfeited due to climate change or the adverse impacts of climate response measures, it is not just their rights that are compromised but those of the future generation. The position of indigenous peoples in relation to this possibility has been made known in a number of their declarations. For instance, in the Tiohtiá:ke Declaration, indigenous peoples reiterate their special relationship with mother earth and the importance of an

[347] EB Weiss 'Intergenerational equity and the rights of future generations' 609
[348] As above
[349] As above
[350] Stockholm Declaration , principle 2; also see International Convention for the Regulation of Whaling, 1946 http://www.iwcoffice.org/cache/downloads/1r2jdhu5xtusws0ocw04wgcw/convention.pdf (accessed 28 October 2012) preamble; Conservation Convention, preamble; Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference at its 17th session Paris, 16 November 1972 (1972 World Heritage Convention) http://unesdoc.unesco.org/images/0013/001398/139839e.pdf (accessed 28 October 2012) art 4
[351] Rio Declaration, principle 3
[352] UNFCCC, preamble & art 3(1); CBD, art 3
[353] Tladi (n 86 above) 43; A Boyle & D Freestone 'Introduction' in A Boyle & D Freestone (eds) *International law and sustainable development: Past achievements and future challenges'* (1999) 12; and P Sands *Principles of international environmental law* 2nd ed (2003) 200
[354] UNDRIP, art 25

indigenous knowledge system to the survival of their communities and the entire world.[355] This significance is not limited only to the present world, as the Declaration further emphasises, accommodating indigenous peoples' worldview is critical in securing the future of humanity and achieving environmental justice for all.[356] Also, in the Nakuru Declaration, indigenous peoples restate their belief in the principle of intergenerational equity and recognise the interdependence and intimacy between the environment and their livelihoods.[357]

Whereas intergenerational equity is a concept widely recognised in environmental law instruments and reflects the environmental value of indigenous peoples, it has been generally questioned on three grounds. These grounds arguably justify the need for a conceptualisation of intergenerational equity as a human rights principle. First, it has been questioned whether rights can be attributed to a group that does not yet exist.[358] Second, Supanich is unconvinced about the extension of traditional human rights across time and the embracing of a generic human right to a decent environment.[359] In Supanich's view, the human rights model is unsuitable in discussing intergenerational responsibility as it is uncertain that 'environmental rights' exist at all.[360] The third objection against Weiss's notion is that its conceptualizing as 'group rights' negates the Western liberal political ideology and legal traditions of individual rights.[361]

Contrary to these criticisms, one can argue that inter-generational equity is not strange to the human rights regime of indigenous peoples. If anything, human rights is the best defence of the inter-generational concerns of indigenous peoples in the light of the climate change challenge.

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[355] Nakuru Declaration (n 154 above)
[356] International Indigenous Peoples Forum on Climate Change Statement to the State Parties of the COP 11/MOP 1 of the United Nations Framework Convention on Climate Change (UNFCCC) 9 December, 2005
[357] Nakuru Declaration (n 154 above)
[358] JW Tung-Chieh 'Intergenerational and intragenerational equity and transboundary movements of radioactive wastes' (2002), A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Master of Laws, Institute of Comparative Law Faculty of Law, McGill University, Montreal, Canada, 13-14, where the author presents these criticisms in the context of transboundary movements of radioactive wastes
[359] GP Supanich 'The legal basis of intergenerational responsibility: An alternative view-The sense of intergenerational identity' (1992) 3 *Yearbook of International Environmental Law* 94, 96
[360] Supanich (n 359 above) 96-97; also see A Rest 'The Oposa decision: Implementing the principles of intergenerational equity and responsibility' (1994) 24 *Environmental Policy & Law* 314; and X Fuentes 'International law making in the field of sustainable development: The unequal competition between development and the environment' (2002) 2 *International Environmental Agreements, Politics, Law & Economics* 125, who respectively argue that recognising a right to healthy environment is ill-timed and can compromise development
[361] PA Barresi 'Beyond fairness to future generations: An intragenerational alternative to intergenerational equity in the international environmental arena' (1997) 1*Tulane Environmental Law Journal* 59, 79, 87; L Gundling 'What obligation does our generation owe to the next? An approach to global environmental responsibility: Our responsibility to future generations'(1990) 84 *American Journal of International Law* 207, 210 where the author argues that Weiss' notion is inconsistent with the traditional understanding of rights, which ordinarily has reference for the individual

First, the UNDRIP recognises the responsibility of indigenous peoples towards their land as inter-generational.

Article 25 of UNDRIP provides:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.[362]

Although not decided in the context of indigenous peoples' rights, the *Minor Oposa* case, action was brought to prevent misappropriation of rainforests in the context of section 16 of the Constitution of the Philippines which guarantees the human right to a balanced and healthful ecology. The Court allowed the claimants to sue on behalf of themselves and future generations.[363] This demonstrates that human rights can be used in constructing inter-generational claims. Weiss anticipates this possibility by grounding the concept of intergenerational equity in key human rights instruments, such as, the preamble to the UDHR,[364] the United Nations Charter,[365] and the ICCPR.[366] These instruments, according to Weiss, 'express a fundamental belief in the dignity of all members of the human family and an equality of rights, which extends in time as well as space'.[367]

The criticism in respect of 'environmental right' does not reflect developments, at least, in regional human rights law and jurisprudence. The African Charter and other regional institutions, as observed earlier, guarantee the right to a satisfactory environment favourable to human development.[368] The third objection that Weiss's notion of intergenerational equity will confer group rights seems redundant in the face of UNDRIP that generally recognises the rights of indigenous peoples as collective rights. In sum, human rights construct can expand the

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[362] UNDRIP, art 25
[363] *Juan Antonio Oposa et al., v The Honorable Fulgencio S. Factoran, Jr., in his capacity as the Secretary of the Department of Environment and Natural Resources, and the Honorable Eriberto U. Rosario, Presiding Judge of the RTC, Makati, Branch* 66 (*Minor Oposa* case) http://www.elaw.org/node/1343, (accessed 11 September 2012); also see *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* No. 93/14, June 14, 1993 (Separate opinion of Judge Weeramantry 83-84) which discusses equity among generations
[364] UDHR, preamble
[365] United Nations Charter, preamble
[366] ICCPR, preamble
[367] Weiss (n 347 above) 605; BG Norton 'Environmental ethics and the rights of future generations' (1982) 4 *Environmental Ethics* 319, 322 who further buttresses that intergenerational rights are 'hypothetical rights' and since there is strong evidence that future generations will exist, the rights cannot be ignored, even if hypothetical.
[368] African Charter, art 24

understanding of the concept of inter-generational equity and enrich its use in examining the suitability of the climate change regulatory framework for addressing the adverse impacts of climate change.

b. Intra-generational equity

In international environmental law, the principle of intra-generational equity is reflected in the notion of 'common but differentiated responsibility'.[369] This notion requires that in sharing the costs for environmental protection, regard must be given to the unequal contributions of states to global environmental degradation and their capabilities to solve it.[370] The principle of common but differentiated responsibility is an improvement on the polluter-pays principle, which demands that the costs of pollution be borne by the person or persons responsible for the pollution.[371] The principle of common but differentiated responsibility is a recurrent theme in key instruments of international environmental law. Principle 7 of the Rio Declaration provides as follows:

> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[372]

In the context of climate change, the preamble of the UNFCCC acknowledges that:

> the global nature of climate change calls for the widest possible co-operation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.

[369] Tladi (n 86 above) 49; Fuentes (n 360 above) 122
[370] L Rajamani 'The changing fortunes of differential treatment in the evolution of international environmental law' (2012) 88 *International Affairs* 605; L Rajamani & S Maljean-Dubois (eds) *Implementation of international environmental law* (2011) 107-205; SR Chouchery 'Common but differentiated responsibility in international environmental law from Stockholm to Rio' in K Ginther *et al* (eds) *Sustainable development and good governance* (1995) 334
[371] Tladi (n 86 above) 49; P Sands 'International law in the field of sustainable development :Emerging legal principle' in W Lang (ed) *Sustainable development and international law* (1995) 53, 66
[372] Rio Declaration, principle 7; also see Montreal Protocol on Substances that Deplete the Ozone Layer 1987 (amended: London, 27-9 June 1990; Nairobi, 19-21 June 1991, preamble and art 10; Basel Convention, preamble, for instance, enjoins states to take into account the 'limited capabilities of the developing countries to manage hazardous wastes' and 'the need to promote the transfer of technology …particularly to developing countries'. Art 10(3) of the Convention also provides that parties 'employ appropriate means to cooperate in order to assist developing countries'

Subsequently, the call for co-operation under the UNFCCC was more specifically spelt out under the Kyoto Protocol. The Protocol distinguishes between developed and developing countries in relation to central obligations on targets and timetables for greenhouse gas mitigation. Developed countries have obligations under the Kyoto Protocol, but, there is no obligation required of developing countries other than co-operation.[373] The obligation on the part of developing nations to cooperate is made conditional on the implementation of commitments by developed countries.[374]

The ground for an unequal contribution to climate change and the capacity to bear the costs of environmental degradation is a moral claim on the basis of which developing nations are exempt from emission reduction commitments under the Kyoto Protocol. Except this principle in the climate change regulatory framework is construed from a human rights lens, there is nothing in this claim that confers any advantage or benefit upon vulnerable populations facing the adverse impacts of climate change. Yet, rather than contributing to climate change, according to the summation of Tauli-Corpuz and Lynge, it is the successful struggles of indigenous peoples against deforestation and the expansion of monocrop plantations, as well as their effective stewardship over the world's biodiversity, which have ensured 'significant amounts of carbon under the ground and in the trees'.[375] If on the ground of an unequal contribution of states toward environmental degradation, the developing countries are exempt from the burden of cost, no less a measure is required by states in their dealings with indigenous peoples who are disadvantaged intra-generationally in states where they are found. In other words, already marginalised from the mainstream of society, there is a valid reason for an effective regulatory framework that offers indigenous peoples special assistance in their state or region.[376]

The principle of intra-generational equity has attracted scholarly criticism. The claim of developing nations based on their need and special circumstances, according to Stone, fails because 'ordinarily the persons who need something more are expected to pay more'.[377] Additionally, Stone contends, shifting the focus on the wealth and technological superiority of

[373] Kyoto Protocol, art 3
[374] UNFCCC, art 4(7)
[375] Indigenous peoples climate change mitigation report (n 206 above) para 17
[376] As above
[377] CD Stone 'Common but differentiated responsibilities in international law'(2004) 98 *The American Journal of International Law* 276, 290; also see Tladi (n 86 above) who presents and addresses Stone's criticism in the context of sustainable development

the developed nations as a basis for non-uniform obligations is morally unjustifiable as it amounts to holding present generations in developed states accountable for the overuse of global commons by their forbears.[378] However, Stone's arguments are objected to as it seems untenable for a generation to claim a lack of responsibility for the actions of their forbears if it continues to enjoy the blessings of their development path. Also, Stone's argument signifies that the most vulnerable populations, such as indigenous peoples, should pay more since they need a higher level of assistance to cope with adverse impacts of climate change, which is unacceptable.

The concept of intra-generational equity, however, is not strange to international human rights law. Human rights recognises the need not to treat unequal persons equally, a principle underlying the concept of intra-generational equity. The provision for affirmative action programmes requires the adoption of measures especially for the improvement in the wellbeing of generally deprived populations.[379] If a differential treatment, therefore, is included in a climate change regulatory framework, at least, it is in order to enable assistance to be accessible to populations who require such assistance so as not to be in worse condition than the populations in a given state. It would seem, as is the case with inter-generational equity, constructing a case for special assistance is difficult to conceive without recourse to human rights.

Nevertheless, while human rights can animate environmental law principles, the argument here is not suggesting that human rights is self-supporting. At the very least, the argument is that the intersection of human rights with environmental law conveys a symbolic hope that human rights approach is useful in assessing the adequacy or otherwise of the climate change regulatory framework at different levels of rulemaking and can be linked to the climate change regulatory framework, where appropriate, in addressing the adverse impacts of climate change.

[378] Stone (n 377 above) 292
[379] For instance, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), in its art 1(4) provides that 'special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals ... as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination '; MCR Craven *The international covenant of economic, social and cultural rights* (1995) 184 stating that affirmative action programmes 'involve the adoption of special measures to benefit socially, economically, or culturally deprived groups'; see also RB Ginsburg & DJ Merritt 'Affirmative action: An international human rights dialogue'(1999) 21 *Cardozo Law Review* 253, 254-55 where the authors define affirmative action as 'any programme that takes positive steps to enhance opportunities for a disadvantaged group'

2.4 Conclusion

The chapter justifies human rights as a conceptual basis for assessing the climate change regulatory framework in response to the adverse impacts of climate change. This is not merely an effort to debunk the notion that the realisation of rights contributes to climate change but to engage with the meaning and principles which constitutes a human rights concept. More importantly, in a departure from the discourse school of human rights, it has done so in order to explore the features which distinguish human rights as a conceptual basis. A human rights concept is embodied in core principles, namely, interdependence and inter-relatedness, non-discrimination and equality, participation and inclusion, and accountability which can benefit the concerns of vulnerable groups, such as indigenous peoples facing the adverse impacts of climate change. This benefit is particularly necessary if there is a failing in the climate change regulatory framework formulated in response to adverse impacts of climate change.

Another distinguishing feature is the intersection of human rights intersection with key principles of environmental law. Human rights can contribute three approaches through which indigenous peoples can realise rights and safeguard land in an era of climate change if the climate change regulatory framework proves unhelpful. These options are, namely, through procedural rights, existing rights and the right to a safe and healthy environment. Human rights, as a conceptual basis, intersects with principles, namely, inter-generational as well as intra-generational notions of equity. Under human rights, these notions can be translated from equitable principles of environmental law to legal rights which can be recognised and engaged with in animating the adequacy or otherwise of the climate change regulatory framework in addressing the adverse impacts of climate change on the land rights of indigenous peoples.

Having shown that human rights is suitable as a conceptual basis for assessing the climate change regulatory framework in the light of the adverse impacts of climate change on indigenous peoples' land rights, the next chapter turns to the main interest in analysing the climate change regulatory framework, that is, the notion of indigenous peoples' land rights and the link with the adverse impacts of climate change in Africa.

Chapter 3

The notion of indigenous peoples' land rights and the adverse effects of climate change in Africa

3.1 Introduction

The preceding chapter justifies the application of human rights as a conceptual framework for assessing the climate change regulatory framework in response to the adverse effects of climate change. This was achieved through the discussion of its features and convergence with environmental protection. This chapter seeks to establish the notion of indigenous peoples' land rights as referenced in this study and its peculiar link with the adverse effects of climate change. To this end it investigates the nature of indigenous peoples' land rights, highlighting their perception of land use and tenure as essential features of their land rights. Following the discussion of these fundamental features, the chapter demonstrates that there are core principles of international law relating to land use and tenure which conflict with and subordinate this notion of land rights in Africa. Next, the chapter describes the negative consequences of climate change on indigenous peoples' lands and argues that these are a further reflection of historical subordination of their land tenure and use in Africa.

The chapter is presented in five sections. Subsequent to the introductory comment, the second section discusses the notion of indigenous peoples' land rights. This is followed by section three which discusses the principles of international law in relation to the use of land and tenure in conflict with the nature of indigenous peoples' land rights. In the same section it is argued that the subordination of indigenous peoples' land use and tenure in Africa is an outcome of this conflicting perspective. Section four describes the adverse effects of climate change on indigenous peoples' land use and tenure and makes the argument that the notion of indigenous peoples' lands as adversely affected by climate change is a reflection of the historical subordination of the land tenure and use by indigenous peoples in Africa. Section five is the conclusion.

3.2 The nature of indigenous peoples' land rights

The land that indigenous peoples inhabit, occupy and use is variously referred to as 'indigenous lands', 'tribal lands' or 'traditional lands'.[1] Hence, the land rights of indigenous peoples are defined by the variety of use and the land tenure system[2] in accordance with their customs and laws.[3] The land of indigenous peoples is vulnerable to a range of challenges, more so under a rapidly changing climate. Yet, they depend upon it to sustain their identity and for the fulfilment of other rights.

Indigenous peoples use land in several ways for subsistence, including fishing, hunting, shifting cultivation, the gathering of wild forest products and other activities.[4] These are crucial not only for their physical, cultural, and spiritual vitality,[5] but also to their 'knowledge and practices in connection with nature'.[6] Conservation is a feature in their societies,[7] but the notion of indigenous peoples' relationship to the land, as canvassed here, is not merely one of 'conservation'.[8] The relationship of indigenous peoples to the land constitutes an important source of knowledge of cultural significance to their nature or environment survival.[9] The significance of the subsistence use of land by indigenous peoples goes beyond conservation. This subsistence use of land by indigenous peoples is characterised by features in form of holding

[1] PG McHugh *The modern jurisprudence of tribal land rights* (2011) 3; LL Wiersma 'Indigenous lands as cultural property: A new approach to indigenous land claims' (2005) 54 *Duke Law Journal* 1061; K McNeil 'Aboriginal rights in Canada: From title to land to territorial sovereignty' (1998) 5 *Tulsa Journal of Comparative &International Law* 253
[2] Wiersma (n 1 above) 1064
[3] United Nations Permanent Forum on Indigenous Issues (UNPFII) 'Study on shifting cultivation and the socio-cultural integrity of indigenous peoples' (2012) E/C.19/2012/8 para 18 (UNPFII Study)
[4] E Desmet *Indigenous rights entwined in nature conservation* (2011) 86; UNEP 'The relationship between indigenous peoples and forests' http://www.unep.org/vitalforest/Report/VFG-03-The-relationship-between-indigenous-people-and-forests.pdf (accessed 10 March 2013) 14 (UNEP Forest Report)
[5] OAS 'Indigenous and tribal peoples' rights over their ancestral lands and natural resources: Norms and jurisprudence of the Inter-American Human Rights System' (2009) 1; see also *Maya Indigenous Communities of Toledo District v Belize* 12.053, Report No. 40/4 (*Belize* case), Inter-American Commission on Human Rights, OEA/Ser.L/V/II.122 Doc 5 Rev, (2004) para 155
[6] *Yakye Axa Indigenous Community v Paraguay* Series C No.125 Inter-American Court of Human Rights (2005) para 154.
[7] Desmet (n 4 above) 50, the author however generally states that the indigenous peoples are neither 'intrinsic destroyers of nature nor ecologically noble savages'
[8] DA Posey *Interpreting and applying the "reality" of Indigenous concepts: What is necessary to learn from the natives* (1992); A Gomez-Pompa & A Kaus 'Taming the wilderness myth' (April 1992) 42 *Bioscience* 271, 277
[9] Desmet (n 4 above); F Nelson 'Introduction: The politics of natural resource governance in Africa' in F Nelson (ed) *Community conservation and contested land: The politics of national resource governance in Africa* (2010) 3; MO Hinz & OC Ruppel 'Legal protection of biodiversity in Namibia' in MO Hinz & OC Ruppel (eds) *Biodiversity and the ancestors: Challenges to customary and environmental law* (2008) 16

patterns and practices, which, as shall be made evident in the ensuing section, defines their cultural and environmental relationship with the land.[10]

3.2.1 Land use as an emblem of cultural and environmental integrity

The indigenous peoples are diverse and the perception of the states in which they live may differ from region to region.[11] Land is essential to indigenous peoples' cultural identity and survival.[12] However, this is not the end of its significance. Land, through its use by indigenous peoples for subsistence purpose,[13] is also critical to environmental integrity. Hence, disrupting or denying their subsistence use of land is a challenge to their cultural and environmental integrity.[14] Some definitions of key terms are important for this section.

Culture, according to Rodley, is captured 'in the notion of a "way of life"- the cluster of social and economic activities, which gives a community its sense of identity'.[15] Cultural integrity is presented by Wiessner as entailing the liberty afforded indigenous communities 'to continue the life of its culture and have it flourish'.[16] Gilbert views the cultural integrity of indigenous peoples

[10] See generally, JL Banda 'Romancing customary tenure: Challenges and prospects for the neo-liberal suitor' in J Fenrich, P Galizzi & TE Higgins (eds) *The future of customary law* (2011) 313; SJ Anaya 'Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: The more fundamental issue of what rights indigenous peoples have in lands and resources' (2005) 22 *Arizona Journal of International & Comparative Law* 7 (Anaya's participatory rights); J Nelson 'Sub-Saharan Africa' in M Colchester (ed) *A survey of indigenous land tenure* (December 2001), a report for the land tenure service of the Food and Agriculture Organisation, see generally, chapter 5; TO Elias *The nature of African customary law* (1956) chapter ix which generally deals with African concept of ownership and possession

[11] F Viljoen *International human rights law in Africa* (2012) 228-232; M Hansungule 'Minority protection in the African system of human rights' in A Eide, JT Moller & I Ziemele *Making peoples heard* (2011) 409-12; A Eide 'Prevention of discrimination, protection of minorities and the rights of indigenous peoples: Challenges and choices' in Eide, Moller & Ziemele (above) 390; SJ Anaya 'The evolution of the concept of indigenous peoples and its contemporary dimensions' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 23 (Anaya's evolution); GM Wachira 'Vindicating indigenous peoples' land rights in Kenya' (2008), Unpublished Thesis submitted in fulfilment of the requirements of the degree Doctor of Laws (LLD) Faculty of Law, University of Pretoria 10-18; J Gilbert *Indigenous peoples' land rights under international law: From victims to actors* (2007) xiv; J Anaya *Indigenous peoples in international law* (2004) (Anaya's indigenous peoples)

[12] On the uniqueness of land to indigenous peoples' struggle, see generally, Gilbert (n 11 above); GM Wachira 'Indigenous peoples' right to land and natural resources' in Dersso (n 11 above); E Daes 'Principal problems regarding indigenous land rights and recent endeavours to resolve them' in Moller & Ziemele (n 11 above) 467; AK Barume *Land rights of indigenous peoples in Africa* (2010); R Sylvian 'Land, water and truth: San identity and global indeginism' (2002) 104 *American Anthropologist* 1074,1075; Wiersma (n 1 above) 1065; SJ Anaya & RA Williams, Jr. 'The protection of indigenous peoples' rights over lands and natural resources under the Inter-American human rights system' (2001) 14 *Harvard Human Rights Journal* 33, 53; JRM Cobo 'Study of the problem of discrimination against indigenous populations' (1986) E/CN.4/SUB.2/1986/7/ADD.1-5 (Cobo Study); E A Daes 'Study on indigenous peoples and their relationship to land', final working paper by the Special Rapporteur to the Commission on Human Rights, UN Doc.E/CN.4 (Daes Study)

[13] UNEP Forest Report (n 4 above) 14

[14] UNPFII Study (n 3 above) paras 18, 20, 39

[15] N Rodley 'Conceptual problems in the protection of minorities: International legal development' (1995) 17 *Human Rights Quarterly* 48; Barume (n 12 above) 51

[16] S Wiessner 'The cultural rights of indigenous peoples: Achievements and continuing challenges' (2011) 22 *The European Journal of International Law* 140

as including 'subsistence, livelihood, cultural diversity and heritage'.[17] Karr, in explaining integrity in the context of the environment,[18] refers to it as 'the condition at sites with little or no influence from human actions'.[19] The argument is made here that subsistence use of land by indigenous peoples is a reflection of their cultural identity and a driver of environmental integrity and is presented by reference to anthropological findings and other scholarly writings on indigenous peoples' land use, as well as key provisions of international environmental law and human rights.

3.2.1.1 Subsistence land use

The construction of land use in subsistence terms as a reflection of the cultural and environmental worldview of indigenous peoples is necessary for conceptual reasons. From an anthropological perspective, Ingold argues that a 'Western' perception of culture and environment holds the two elements as separate entities. Western culture views the environment as something outside or independent of human existence and in need of control by man,[20] a resource to be used and exploited.[21] The hunters and gatherers, as well pastoralists whose lifestyles define indigenous peoples in Africa,[22] view the environment not in the sense of 'building but of dwelling'.[23] Hence, for these peoples, there is no divide between culture and environment. This is why it has been proposed that the hunters and gatherers' view of the environment should be taken seriously in 'our very understanding of the environment and of our relations and responsibilities towards it'.[24]

[17] J Gilbert 'Custodians of the land: Indigenous peoples, human rights and cultural integrity' in M Langfield *et al* (eds) *Cultural diversity, heritage and human rights Intersections in theory and practice: Key issues in cultural heritage* (2010) 38
[18] The term 'environmental' and 'ecological integrity' has been used interchangeable, see JB Sterba 'A bio-centric defence of environmental integrity' in D Pinentel, L Westra & RF Noss (eds) *Ecological integrity: Integrating environment, conservation and health* (2000) 335
[19] JR Karr 'Ecological integrity: An essential ingredient for human's long term success' in L Westra, K Bosselmann & C Soskolne (eds) *Globalisation and ecological integrity in science and international law* (2011) 17
[20] T Ingold *The perception of the environment: Essays on livelihood, dwelling and skill* (2000) 40-43
[21] K Milton *Loving nature: Towards an ecology of emotion* (2002) 52
[22] IPACC 'The doctrines of discovery, 'terra nullius' and the legal marginalisation of indigenous peoples in contemporary Africa' (May, 2012), statement by the Indigenous Peoples of Africa Coordinating Committee to the 11th session of the UN Permanent Forum on Indigenous Issues (UNPFII)1, (IPACC Statement); Wachira (n 12 above) 302; ACHPR and IWGIA 'Report of the African Commission's Working Group of Experts on Indigenous populations/communities' (2005), submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa', adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary, 15 (Working Group Report)
[23] Ingold (n 20 above) 42
[24] Ingold (n 20 above) 40

The view of hunters and gatherers in relation to environmental integrity goes hand in hand with their cultural use of land for subsistence purpose.[25] Indigenous peoples view themselves as culturally linked with the natural environment, including the land upon which they live.[26] This is because their cultural and environmental survival is linked to the control and use of land resources in a sustainable manner.[27] Scholarly writings have shown that the land use of indigenous peoples is not only a marker of their cultural identity,[28] it is a reflection of their sense of nature.[29] This is why the worldview of indigenous peoples about their land embodies the environment. According to Watters, if damage is done to indigenous peoples' environment, it is almost certain to disrupt their culture and constitute a substantial threat to their identity and survival.[30] Anaya argues, 'to the extent that indigenous cultures can be characterised as harmonious with nature, we see rights to cultural integrity fitting in very closely with environmentalism'.[31] Indigenous peoples view their land as a divine gift or heritage and themselves as its guardian or protectors.[32] This viewpoint is also reflected in the way indigenous peoples use their land and resources.

Among the San peoples of the Kalahari in Southern Africa, according to Nanda and Warms, land is an expression of harmony with nature which they are willing to maintain.[33] The Maasai of eastern Africa, particularly Kenya, conceive of land and relate to it as an important host, not only of themselves as a people, but of the plants, animals, trees and fish which, among other things, all constitute their cultural and environmental universe.[34] Like other indigenous peoples elsewhere, the Ogiek have been reported as living in harmony with their natural habitat and

[25] L Heinämäki 'The right to be a part of nature: Indigenous peoples and the environment' 2010, academic dissertation presented with the permission of the Faculty of Law of the University of Lapland 1
[26] SJ Anaya 'Environmentalism, human rights and indigenous peoples: A tale of converging and diverging interests' (2000) 7 *Buffalo Environmental Law Journal* 7 (Anaya Environmentalism); Anaya participatory rights (n 10 above) ; Cobo Study (n 12 above) vol v, para 197
[27] Anaya & Williams (n 12 above) 33, 53
[28] AP Cohen 'Culture as identity: An anthropologist's view' (1993) 24 *New Literary History* 195
[29] J Woodliffe 'Biodiversity and indigenous peoples' in M Bowman & C Redgwell C (eds) *International law and the conservation of biological diversity (*1996) 256
[30] L Watters 'Indigenous peoples and the environment: Convergence from a Nordic perspective' (2002) 20 *University of California Journal of Environmental Law & Policy* 237, 239-240
[31]Anaya Environmentalism (n 26 above)
[32] P West & D Brockington 'An anthropological perspective on some unexpected consequences of protected areas' (2006) 20 *Conservation Biology* 609
[33] S Nanda & LR Warms (2014) 'Cultural Anthropology' 11th ed, 352, where the author made reference to the findings of Lee about these peoples; see R Lee 'Indigenism and its discontents: Anthropology and the small peoples at the millennium'(March, 2000), paper presented as the keynote address at the annual meeting of the American Ethnological Society, Tampa
[34] JK Asiemat & FDP Situmatt 'Indigenous peoples and the environment: The case of the pastoral Maasai of Kenya' (1994) 5 *Colorado Journal of International Environmental Law & Policy* 149

environment.[35] Francis and Situmatt maintain, given their attachment to land, that any change within the environment of the Maasai is best discussed in the context of changes 'to and in the community's right to land'.[36]

The conception of land by indigenous peoples is reflected in the subsistence manner of its use. Among the forest-dependent Mbendjele (pygmies) of Congo-Brazzaville, the forests fulfil subsistence role including serving as places where pregnant women give birth to children, for finding indigenous foods, sharing stories relating to traditional practices such as 'past hunting, fishing, or gathering trips', and an eternal abode after death.[37] The San people of the Kalahari, as Chennells reports, have a peculiar relationship with their land and 'every plant, beetle, animal'.[38] Suagee explains that there is little or no dividing line between indigenous peoples' environment, land and cultural value. Rather, in the worldview of indigenous peoples, careful use of land and its biological communities tends to be a prerequisite for cultural survival'.[39]

Some commentators, however, argue that indigenous peoples' use of land and resources, particularly the non-human, for subsistence purpose, is far from being harmonious.[40] They contend that nature requires a strict preservation that is incompatible with indigenous peoples' presence or resource use, noting that the recognition of the formal rights of indigenous populations will compromise the state of nature.[41] Scholarship in support of indigenous harmonious use of land is criticised in that it overlooks their wage labour and commerce which negatively impact on nature.[42] In particular, Lüdert, noting that some indigenous peoples benefit from eco-tourism, argues that indigenous peoples are involved in the commodification of

[35] 'Report of the Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya, 1-19 March 2010' , adopted by the African Commission on Human and Peoples' Rights at its 50th ordinary session, 24 October-5 November 2011 (Kenya's Research and Information Visit)
[36] Asiemat & Situmatt (n 34 above) 159
[37] J Lewis 'Forest people or village people: Whose voice will be heard?' delivered at the Annual International African Studies Conference, University of Edinburgh, 24-25 May 2000 https://www.academia.edu/5105643/Forest_People_or_Village_People._May_2000 (accessed 30 May 2014) 7; Barume (n 12 above) 54
[38] R Chennells 'The Khomani San of South Africa' in J Nelson & L Hossack (eds) *From principles to practice: Indigenous peoples and protected areas in Africa* (2003) 278-79
[39] DB Suagee 'Human rights and the cultural heritage of Indian Tribes in the United States' (1999) 8 *International Journal of Cultural Property* 48, 50
[40] See generally Desmet (n 4 above) 48-54
[41] See for example CP Van Schaik, J Terborgh & B Dugelby 'The silent crisis: The state of rain forest nature preserves' in R Kramer, CP van Schalk & J Johnson (eds) *Last stand: Protected areas and the defence of tropical biodiversity* (1997) 78
[42] C Zerner 'Through a green lens: The construction of customary environmental law and community in Indonesia's Maluku Islands'(1994) 28 *Law and Society Review* 1079, 1122

nature.[43] In an attempt to show that the relationship of indigenous peoples with their land is not necessarily harmonious, D'Amato and Chopra note that the activities of the Inuit, that is, the indigenous peoples of arctic Canada, Alaska, Greenland and Siberia, are injurious to whales and should not be exempt if an international norm should emerge granting the whale, a right to life.[44]

These viewpoints are outliers. Other commentators show that a convergence between indigenous peoples' subsistence use of land and environmental protection is not irreconcilable.[45] According to Lynch and Alcorn, 'maintaining biodiversity reserves is one strategy that enables communities to maintain their identity and self-reliance […] to secure survival'.[46] On indigenous peoples who feed on whales for survival, Doubleday argues that whales have been endangered because of commercial whaling, not owing to indigenous peoples' subsistence use. Therefore, any international norm conferring the right to life on whales for the purpose of their conservation and preservation should accommodate indigenous peoples and the subsistence relationship they have with the animals on which they culturally depend.[47]

It is thus understandable that Jaska is of the view that the recognition and enforcement of the land rights of indigenous peoples will promote environmental sustainability. This is in consideration that it will protect indigenous peoples' lands and resources from overconsumption and secure the recognition of their cultural stewardship over the environment.[48] From an environmental viewpoint, Ganz sets out the case for indigenous peoples as the keeper of the environment through their land use. First, indigenous peoples have occupied and lived off their land for long, hence, they hold it in great respect.[49] In addition, if land title is enjoyed by this community, they can receive the financial benefit which can incentivise the preservation and maintenance of the resources. Finally, because of their legendary reliance on these resources, the

[43] J Lüdert 'Nature(s) revisited: Identities and indigenous peoples' available at http://www.anth.ubc.ca/fileadmin/user_upload/anso/anso_student_assoc/Jan_Ludert_2009_10_grad_conference_presentation.pdf (accessed 3 March 2013) 20
[44] A D'Amato & SK Chopra 'Whales: Their emerging right to life' (1991) 85 *American Journal of International Law* 21 ; *The Economist* 'Whales are people, too' February 25, 2012 69
[45] Desmet (n 4 above) 48; OJ Lynch & JB Alcorn *Tenurial rights and community based conservation* (1993)
[46] Lynch & Alcorn (n 45 above) 385
[47] NC Doubleday 'Aboriginal subsistence whaling: The right of Inuit to hunt whales and implications for international environmental law' (1989) 17 *Denver Journal of International Law & Policy* 373, 374
[48] MF Jaska 'Putting the "Sustainable" back in sustainable development: Recognizing and enforcing' indigenous property rights as a pathway to global environmental sustainability'(2006) 21 *Journal of Environmental Law & Litigation* 157, 199
[49] AT Durning 'Guardians of the land: Indigenous peoples and the health of the earth' (1992) World Watcher Paper 112

indigenous peoples possess valuable knowledge on how to sustainably develop the land's resources and preserve it for future generations.[50] On a similar note, Richardson explains:

> Environmental justice for indigenous peoples may be interpreted as requiring, at a minimum: the recognition of ownership of land and other resources traditionally utilised; allowing for their effective participation in resource management decision-making; and securing an equitable share of the benefits arising from the use of environmental resources.[51]

This is to be expected as whatever affects the use of land of indigenous peoples has implications for their culture and environment. The recognition of the need for indigenous peoples to control and use their land for subsistence purposes, therefore, is necessary not only for the preservation of their culture,[52] but for the preservation of their environment. This understanding is endorsed in the existing instruments on international environmental law and human rights.

3.2.1.2 Subsistence use of land under international environmental law

There are key instruments under international environmental law with provisions that recognise the subsistence use of land by indigenous peoples as important to their cultural integrity and to environmental protection. For instance, though there is no reference to indigenous peoples in the Stockholm Declaration, the first instrument in modern international environmental law to 'protect and improve the human environment and to remedy and prevent its impairment',[53] this is not the case in the Rio Declaration which followed twenty years later.[54] Principle 22 of the Rio Declaration affirms the relevance of indigenous peoples' way of life to conservation and the sustainable management of the environment given 'their knowledge and traditional practices'. For this purpose, the principle enjoins the recognition by states of 'their identity, culture and interests' and requires their effective participation in sustainable development agenda. Although there is no specific reference to indigenous peoples' subsistence land use in the Rio Declaration, it can be read into the words, such as 'traditional practices' and 'interests', which states are enjoined to recognise and duly support for the purpose of conservation and the management of

[50] B Ganz 'Indigenous peoples and land tenure: An issue of human rights and environmental protection'(1997) 9 *Georgia International Environmental Law Review* 173; Durning (n 49 above) 150
[51] BJ Richardson 'Indigenous peoples, international law and sustainability' (2001) 10 *RECIEL* 1
[52] Ganz (n 50 above) 173
[53] Declaration of the United Nations Conference on the Human Environment at Stockholm 1972; see also General Assembly resolution 2581 (XXVI which set out the purpose of convening the Stockholm Conference (Stockholm Declaration)
[54] Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, at Rio de Janeiro from 3-14 June 1992 (Rio Declaration)

the environment. Hence, indirectly, the provision endorses the view that the subsistence relationship of indigenous peoples with land is not only essential to their culture but also to environmental integrity.

That such conception of land use is critical to the cultural lifestyle and environmental integrity of indigenous peoples is inherent in the definition of 'lands' by another Rio instrument, Agenda 21.[55] Chapter 26 (1) of Agenda 21 explains the term 'lands' as including the environment of the areas which indigenous peoples occupy. In endorsing the notion that the use of land by external actors may be different from indigenous peoples' perception of land use, Agenda 21 urges governments of the need to protect indigenous peoples' lands from activities that are environmentally unsound and such activities that they may consider to be 'socially and culturally inappropriate'.[56] Agenda 21 further calls on entities including international development and finance organisations, to incorporate the 'values, views and knowledge' of indigenous peoples into resource management and other policies and programmes which may affect them.[57] Arguably, this includes their view of subsistence use of land.

The Convention on Biological Diversity (CBD)[58] is a major binding instrument that underscores the purport of promoting the subsistence land use by indigenous peoples as a means of securing biodiversity conservation and the sustainable use of its components.[59] Article 8(j) of the CBD urges, subject to their domestic legislation, states should 'preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles'. Of importance, too, is article 10(c) of the CBD which tasks the states with the protection and promotion of 'customary use of biological resources in accordance with traditional cultural practices' in so far as they are not incompatible with conservation or sustainable development.[60]

[55] Agenda 21, adopted at the United Nations Conference on Environment and Development, at Rio de Janeiro from 3-14 June 1992 (Agenda 21)
[56] Agenda 21, chapter 26(3)(a)(ii)
[57] Agenda 21, chapter 26(5)
[58] Convention on Biological Diversity, adopted at the United Nations Conference on Environment and Development, Rio de Janeiro from 3-14 June 1992, entered into force on December 29, 1993 (CBD); See P Birnie & A Boyle *International law and the environment* (2002) 580 (pointing at the controversial nature of the notion of indigenous peoples' rights as the reason for the silence of the CBD on its definition and offering a cross-reference with the definitions in other conventions that may explain the concept
[59] See generally the objectives of the CBD
[60] CBD, art 10(c)

Along similar lines, in affirming the perception of indigenous peoples on the use of land, the Charter of the Indigenous and Tribal Peoples of the Tropical Forests of 1996 states:

> Our territories and forests are to us more than an economic resource. For us, they are life itself and have an integral and spiritual value for our communities. They are fundamental to our social, cultural, spiritual, economic and political survival as distinct peoples.[61]

Article 4 of the Charter further provides that '[t]he unity of people and territory is vital and must be recognised'. This peculiar relationship of indigenous peoples to their land is defended by the unanimous position of the indigenous leaders of the Amazon basin and defines indigenous peoples' territory as:

> The mountains, valleys, rivers and lagoons that are identified with the existence of an indigenous people and that have provided it with its means of subsistence; the richness inherited from their ancestors and the legacy they are obliged to transmit to their descendants; a space where every little part, every manifestation of life, every expression of nature is sacred in the memory and in the collective experience of that people and which is shared in intimate interrelation with the rest of living beings respecting its natural evolution as a unique guarantee of mutual development…[62]

The viewpoint that the subsistence use of land by indigenous peoples is critical to their cultural and environmental survival is equally evident in the Addis Ababa Principles and Guidelines on Sustainable Use of Biodiversity of 2004 (Addis Ababa Principles).[63] Principle 2 of the Addis Ababa Principles supports the idea that when government recognises the stewardship of indigenous peoples and local communities over the use of their resources, sustainability of such resources is more certain. In 2004, the Conference of the Parties to the CBD adopted the 'Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and

[61] Charter of the Indigenous and Tribal Peoples of the Tropical Forests Statement of the International Alliance of the Indigenous and Tribal Peoples of the Tropical Forests (Established Penang, Malaysia, 15 February 1992) (Revised Nairobi, Kenya, 22 November 2002) (Charter of the Tropical Forests) art 3

[62] C Tirado, PG Hierro & RC Smith 'El indígena y su territorio sonuno solo: estrategías para la defensa de lospueblos y territorios indígenas en la cuencaamazónica' (1991) 27-28, cited in Desmet (n 4 above) 86

[63] Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity (2004) http://www.cites.org/eng/res/13/addis-gdl-en.pdf (accessed 23 March 2013) (Addis Principles); see also J Gilbert & G Couillard 'International law and land rights in Africa: The shift from states' territorial possessions to indigenous peoples' ownership rights' in R Home (ed) *Essays in African land law* (2011) 61

Local Communities' (The Akwé: Kon Guidelines).[64] Among other things, the Akwé: Kon Guidelines call for the need to take into consideration 'the interrelationships among cultural, environmental and social elements' of the worldview of indigenous peoples in relation to projects on their lands.[65]

There is no particular reference to indigenous peoples in the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD).[66] However, there are provisions which echo the vital link between subsistence land use by indigenous peoples and their culture as well as environment. For instance, states are enjoined to cooperate with a range of stakeholders, including 'communities' and 'landholders', for the purpose of establishing 'a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use'.[67] A sense of the category of 'communities' that is intended by the Convention is discernible from article 10(2)(f) which affirms that states have a commitment in relation to stakeholders, including pastoralists.[68]

As a driver of cultural and environmental integrity, subsistence use of land by indigenous peoples is considered key in the context of sustainable development.[69] This is ascertainable from the Plan of Implementation of the World Summit on Sustainable Development (WSSDPI), hosted ten years after the Rio Conference.[70] The WSSDPI considers the security of land tenure as necessary in protecting and managing 'the natural resource base of economic and social development in the WSSD'.[71] In its introductory section it acknowledges that cultural diversity is a prerequisite for 'achieving sustainable development and ensuring that sustainable development

[64] The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, adopted at COP-7 (Kuala Lumpur, February 9-20 2004) Decision VII/16 (The Akwé: Kon Guidelines)
[65] The Akwé: Kon Guidelines, sec 3(f)
[66] United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa , adopted at its 5th session, on 17 June 1994 , A/AC.241/27 (UNCCD)
[67] UNCCD, art 3c
[68] UNCCD, art 10(2)(f)
[69] On the definition of sustainable development and its controversies in relation to the protection of the environment, see S Imran, K Alam & N Beaumont 'Reinterpreting the definition of sustainable development for a more ecocentric reorientation sustainable development' (2011) 22 *Sustainable Development* 1; JA Vucetich & MP Nelson 'Sustainability: Virtuous or vulgar?' (2010) 60 *BioScience* 539; K Bosselmann 'Losing the forest for the trees: Environmental reductionism in the Law' (2010) 2 *Sustainability* 2424, 2426; L Seghezzo 'The five dimensions of sustainability' (2009) 18 *Environmental Politics* 539
[70] World Summit on Sustainable Development (WSSD) Johannesburg, South Africa A/CONF.199/L.6/Rev.2; World Summit on Sustainable Development Plan of Implementation (WSSDPI) Advance unedited text 4 September 2002
[71] WSSDPI, sec 38(i)

benefits all'.[72] Arguably, the acknowledgment accommodates indigenous peoples' perception of land use. This conclusion is possible from the provision of paragraph 6(e) which, in tracing the link between poverty and sustainable development, urges the need to develop the following:

> [P]olicies and ways and means to improve access by indigenous people and their communities…and recognise that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities.

The WSSDPI's recognition of the paramount role that the perception of land for subsistence purposes plays in forest management and the general conservation and sustainable use of biodiversity, largely endorses indigenous peoples' subsistence use of land.[73]

The words 'indigenous peoples' are not used in the African Convention on Conservation of Nature and Natural Resources adopted in 2003,[74] however, the 'African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources' (OAU Model Law) does reference them.[75] The OAU Model law provides copiously for the rights of communities, including, their biological resources, the right to collectively benefit from the use of their biological resources, the exercise of collective rights as legitimate custodians and users of their biological resources.[76] In respect of these rights, article 17 of the Guidelines provides that states should recognise the practices and customs of local and indigenous communities, even if unwritten.

The conclusion can be drawn, to a reasonable extent that international environmental law recognises indigenous peoples' subsistence land use and its significance, not only for their culture, but also for environmental integrity.

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[72] WSSDPI, para 5
[73] WSSDPI, sec 43
[74] African Convention on Conservation of Nature and Natural Resources, 2003 (Conservation Convention); Gilbert & Couillard argue that unlike its 1968 version, the Conservation Convention looks promising for the realisation of land use of the indigenous peoples, particularly when it is interpreted along with the relevant provision of the African Charter on Human and Peoples' Rights and the work of the African Commission's Working Group on Indigenous populations/communities, see Gilbert & Couillard (n 63 above) 62
[75] *The African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (OAU Model Law), Algeria, 2000
[76] OAU Model Law, art 16(1)(2)(3), (6) respectively

3.2.1.3 Subsistence land-use under international human rights law

There are provisions in key human rights instruments which reveal the cultural and environmental significance of the subsistence use of land by indigenous peoples. A starting point is article 1(2) of the International Covenant on Civil and Political Rights (ICCPR) which provides:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Article 27 of the ICCPR directly relates to persons belonging to ethnic, religious or linguistic minorities.[77] In interpreting this provision, the Human Right Committee (HRC), in its General Comment 23,[78] affirms 'with regard to the exercise of the cultural rights protected under article 27', that culture is discerned in several forms including 'a particular way of life associated with the use of land resources, especially in the case of indigenous peoples'.[79] Article 27 provision may not necessarily exempt external projects on indigenous peoples' lands, it connotes that such projects should have limited impact and prevent 'measures that may deprive them of the use of land necessary to enjoy their culture.'[80]

As an improvement upon Convention 107,[81] ILO Convention 169, is a binding instrument dealing with indigenous peoples. The instrument contains a range of provisions that demonstrate the cultural and environmental purport of indigenous peoples' subsistence relationship with land.[82] 'Lands', according to the Convention, is 'the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use'.[83]

[77] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 (ICCPR)
[78] Human Rights Committee General Comment No. 23 'The rights of minorities' (art 27) (1994) UN Doc CCPR/C/21/Rev.1/Add.5 (General Comment No. 23)
[79] General Comment No. 23, para 7
[80] G Ulfstein 'Indigenous peoples' right to land' (2004) 8 *Max Planck UNYB* 11
[81] The Indigenous and Tribal Populations Conventions: l957 No. 107, adopted by the International Labour Conference at its 40th session at Geneva on 26 June 1957 (ILO Convention 107)
[82] Convention concerning Indigenous and Tribal Peoples in Independent Countries Convention: C169, adopted 27 June 1989 at Geneva (ILO Convention 169)
[83] ILO Convention 169, art 13(2)

The significance of this definition is clarified by article 14(1) which provides:

> The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.[84]

The subsequent adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the United Nations General Assembly enhances its value.[85] UNDRIP's preamble calls for 'control by indigenous peoples over developments affecting them and their lands, territories and resources'.[86] This viewpoint is needful as such developments may offend their belief system in relation to their use of land for cultural and environmental ends. Article 10, which provides that 'indigenous peoples shall not be forcibly removed from their lands or territories' strengthens their position. Article 25 reiterates the rights of indigenous peoples to maintain their unique relationship with traditionally owned lands and to 'uphold their responsibilities to future generations in this regard'. Article 29 acknowledges the right of indigenous peoples to the conservation and protection of their environment and the centrality of their stewardship for that purpose.

The perception which holds that the land use of indigenous peoples is significant on cultural and environmental grounds is further promoted in the seminal work of Martinez Cobo, the first UN Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (later renamed the Sub-Commission on the Promotion and Protection of Human Rights) on the Study of the Discrimination against Indigenous Population. According to this study:

> [A]ll indigenous communities have, and uphold, a complete code of rules of various kinds which are applicable to the tenure and conservation of land as an important factor in the production process, the foundation of family life and the territorial basis for the existence of their people as such. The whole range of

[84] ILO Convention 169, art 14(1)
[85] United Nations Declaration on the Rights of Indigenous Peoples, adopted at 107th plenary meeting 13 September 2007 (UNDRIP)
[86] UNDRIP, preamble

> emotional, cultural, spiritual and religious considerations is present where the relationship with the land is concerned…The land forms part of their existence.[87]

Thus, in concluding the study, the Special Rapporteur recommends the need for an environmental impact assessment (EIA) of project activities on indigenous peoples' lands. For this purpose the study draws a distinction between a community with destroyed 'ecological equilibrium' and one 'whose ecological equilibrium has not been destroyed'. The study then advises, among other things, that 'where ecological equilibrium has been destroyed, the communities should be offered new opportunities for activities compatible with the respect due to their cultural identity'.[88] Arguably, this recommendation endorses indigenous peoples' way of life as critical in restoring communities where ecological equilibrum has been destroyed.

The link between the subsistence land use of indigenous peoples and a sustainable environment is further underscored by the findings of subsequent Special Rapporteurs. Reporting on the relationship between indigenous peoples and their land, Erica- Irene A Daes, former Rapporteur of the United Nations Working Group on Indigenous Populations notes that the well-being of the indigenous peoples' cultures and communities can be safeguarded through 'the full use and enjoyment of their traditional territories'.[89] Indeed, according to the report, the relationship between subsistence use of land by indigenous peoples and all living things is at the core of indigenous societies.'[90] This point is reinforced by Stavenhagen reflecting on the continuing devastating effects of mining operations on the livelihood of indigenous peoples and their environment in the Philippines. According to the Special Rapporteur, it is part of the cultural integrity of indigenous peoples to utilise the knowledge system gained over time in their relationship with their land for environmental management.[91]

In what appears to underscore the value of subsistence use of land, Anaya, on the situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, recommends, particularly to the government of Finland, to 'step up its effort to clarify and legally protect Sami rights to land

[87] Cobo Study (n 12 above) vol 4, para 51
[88] Cobo Study (n 12 above) vol 5, para 555
[89] Daes (n 12 above) 476-477
[90] Daes Study (n 12 above) para 11
[91] R Stavenhagen 'Report of the special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, mission to the Philippines' (2003) U.N.Doc.E/CN.4/2003/90/Add.3, paras 28, 30 (Stavenhagen Report)

and resources.'[92] This recommendation was reasoned as necessary due to Sami reindeer husbandry, and the centrality of this to the 'culture and heritage of the Sami people'.[93] The need for external initiatives to respect this kind of relationship is evident in his subsequent conclusions and recommendations made in respect of a visit to Congo.[94] In that regard, the Special Rapporteur advised that initiatives on indigenous peoples' lands, particularly with the advent of climate change, must be designed culturally with goals that focus on their 'ability to maintain their distinct cultural identities, languages and connections with their traditional lands'.[95] A similar point was raised by the visit to Botswana where indigenous peoples (predominantly Basarwa and Bakgalagadi indigenous communities) alleged that their culture and heritage are often disregarded in the design and implementation of land resource-based projects.[96] The United Nations Permanent Forum on Indigenous Issues (UNPFII) in one of its sessions emphasised the relevance of land use, particularly shifting cultivation as a sustainable practice by indigenous peoples, which not only serves their cultural purpose but also environmental ends.[97] In an earlier session, the UNPFII appointed Victoria Tauli-Corpuz and Aqquluk Lynge as its special rapporteurs to prepare a report on the 'impact of climate change mitigation measures on the territories and lands of indigenous peoples'.[98] It also recommended 'as custodians of the Earth's biodiversity, that indigenous peoples should be major players in the protection of world biodiversity.[99]

At the regional level, the idea that land, and by extension its subsistence use, is central in the agitation of indigenous peoples for human rights, cultural integrity and environmental protection is given special consideration in the activities of the African Commission's Working Group of Experts on Indigenous Populations/Communities (Working Group). According to the Working Group:

> Dispossession of land and natural resources is a major human rights problem for indigenous peoples … .The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-

[92] J Anaya 'The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland' (6 June 2011) A/HRC/18/35/Add.2 para 84
[93] As above
[94] J Anaya 'The situation of indigenous peoples in the Republic of the Congo' (11 July 2011) A/HRC/18/35/Add.5 (Anaya Congo Report)
[95] As above
[96] J Anaya 'Preliminary note on the situation of indigenous peoples in Botswana' (23 September 2009) A/HRC/12/34/Add.4
[97] UNPFII Study (n 3 above) para 18
[98] UNPFII 'Report on the 6th session' (14-25 May 2007) E/2007/43 E/C.19/2007/12 , para 52 (UNPFII Report)
[99] UNPFII Report (n 98 above) para 59

> gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them ….[100]

There are other activities at the regional level in Africa affirming the link between indigenous peoples' subsistence land use and cultural and environmental ends. An example is found in the activities of the newly established Working Group on Extractive Industries, Environment and Human Rights.[101] For instance, while making its oral submission at the 51st ordinary session of the Commission, Nord Sud XXI calls upon the Working Group on Extractive Industries and the Environment to note, rather than promoting sustainable use of land and resources of indigenous peoples, what is widespread in Africa is an unsustainable exploitation of the land resources of indigenous peoples.[102]

In the *Endorois* case, that the subsistence use of land by indigenous peoples is of environmental and cultural significance was part of the focus in the analysis of the Commission.[103] In that case the complainants argue that the creation of a game reserve on their land is in disregard of national law, Kenyan constitutional provisions and, most importantly, certain articles of the African Charter, including the rights to property, free disposition of natural resources, religion and cultural life.[104] The Endorois community emphasised that access to their land is crucial to the securing of their subsistence and livelihood and it is inseparably linked to their cultural integrity and traditional lifestyle.[105] This cultural lifestyle embodies, the community further explains, a close intimacy with 'grazing lands, sacred religious sites and plants used for traditional medicine', all situated around the shores of Lake Bogoria.[106]

[100] Working Group Report (n 22 above) 20
[101] Working Group on Extractive Industries, Environment and Human Rights was established at the 46th ordinary session, held in Banjul, The Gambia, from 11-25 November 2009, through Resolution ACHPR/Res.148(XLVI)09
[102] Oral Statement by Nord Sud XXI to the 51st ordinary session of the African Commission on Human and Peoples' Rights held at Banjul 21 April 2012, the Gambia, Item 7
[103] Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)* (*Endorois* case) 27th Activity Report: June- November 2009, 237
[104] *Endorois* case (n 103 above) para 21
[105] *Endorois* case (n 103 above) para 16
[106] As above

In arriving at its decision, the Commission reviewed its decision in the *Ogoniland* case,[107] and reiterated the approach in the earlier jurisprudence of the Inter-American system in the matter of *Awas Tingni*.[108] Based on these decisions, the Commission took the position:

> For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[109]

There is case-law from national courts in which the cultural and environmental significance of subsistence land use by the indigenous peoples have been highlighted. A significant case, which arose in the face of eviction by the government of Kenya, is that of *Francis Kemei, David Sitienei and others v the Attorney General, the PC Rift Valley Province, Rift Valley Provincial Forest Officer, District Commissioner Nakur.*[110] In that case, the Ogiek Community of the Tinet Forest in the south western Mau forest of Kenya argued, unsuccessfully, that they are food gatherers, hunters, peasant farmers, bee-keepers and that this lifestyle is closely linked with the forest and basically connected with the preservation of nature.[111]

In *Roy Sesana, Keiwa Setlhobogwa and Others v the Attorney-General* (in his capacity as recognised agent of the government of the Republic of Botswana),[112] the respondent argued that rescission of the provision of amenities for the Central Kalahari Game Reserve (CKGR) was justified considering that those services were not meant to be permanent and in any case, the land occupied by the residents was state land in respect of which the applicants neither enjoyed any ownership or tenancy rights. In deciding in favour of the applicants, the High Court of Botswana stressed the implications of the failure of government to make amenities available for a population in their habitat, highlighting, among other things, that this may make the environment less conducive for their lifestyle and result in displacement from the land as well as undermine

[107] Communication 155/96, *Social and Economic Rights Action Center* (SERAC) *and Center for Economic and Social Rights* (CESR) *v Nigeria* 15th Activity Report: 2001-2002 (*Ogoniland* case)
[108] *Mayagna* (Sumo) *Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights 31 August 2001 (*Awas Tingni* case); for an analysis of this case see SJ Anaya & C Grossman 'The case of Awas Tingni v Nicaragua: A new step in the international law of indigenous peoples'(2002) 19 *Arizona Journal of International & Comparative Law* 1
[109] *Awas Tingni* case (n 108 above) paras 148-149
[110] *Francis Kemei, David Sitienei and others v The Attorney General , the PC Rift Valley Province, Rift Valley Provincial Forest Officer, District Commissioner Nakuru* Miscellaneous Civil Application No.128 of 1999 (*Francis Kemei* case)
[111] *Francis Kemei* case (n 110 above)
[112] *Sesana and Others v Attorney-General* (2006) AHRLR 183 (*Sesana* case)

their culture as a people.[113] The decision, indirectly, signifies that government has an obligation to support the continued stay of the Basarwa in the CKGR for the subsistence use of land in furtherance of their culture.

In all, there is well- founded merit in both environmental law and human rights law in support of the proposition that indigenous peoples' subsistence use of land is significant for cultural and environmental integrity. The next subsection identifies and discusses another key component of indigenous peoples' land rights, that is, the salient features of land tenure which regulate their notion of land use.

3.2.2 Indigenous peoples' land tenure: Essential features

Generally, 'land tenure' is not defined in any key instrument relating to indigenous peoples' land regime, hence, its meaning is left to the description of its elements. A Food and Agricultural Organisation (FAO) explains land tenure as 'the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land'.[114] The FAO document goes further to describe land tenure as a set of institutional rules which defines access to the 'use, control, and transfer' of land.[115] Theorists of property rights generally reflect this understanding of land tenure in their four basic typologies of tenure, namely, individual or private, public or state controlled, common or group property and open access in relation to land.[116] Though flexible, the common or group notion of land tenure defines African customary tenure in the sense that land is understood as belonging to collectives and is subject to, and managed in accordance with customary laws to regulate access by groups and individuals.[117] However, scholarship has substantially portrayed this notion of customary land tenure using the word

[113] *Sesana* case (n 112 above) para 210
[114] 'What is land tenure?' http://www.fao.org/docrep/005/Y4307E/y4307e05.htm
[115] As above
[116] MA McKean 'Common property: What is it, what is it good for, and what makes it work?' in C Gibson, MA McKean & E Ostrom (eds) *People and forests: Communities institutions, and governance* (2000) 27-56; Lynch & JB Alcorn (n 45 above) 373-391
[117] J Bruce & and S Migot-Adholla 'Introduction: Are the indigenous African tenure systems insecure' in J Bruce & S Migot-Adholla (eds) *Searching for land tenure security in Africa* (1994) 4; DW Bromley & MM Cernea *The management of common property natural resources: Some conceptual and operational fallacies* (1989) 17-19

customary and indigenous societies/peoples' land tenure almost interchangeably, as though they are one and the same tenure.[118]

This approach features both in the rapidly growing literature on African customary land tenure,[119] as well as writings on indigenous peoples' land tenure.[120] In particular, Okoth-Ogendo's argument that African customary law is the applicable law to indigenous peoples' lands may not be incorrect,[121] however, it stems from a context which considers land in the agrarian sense of 'a creative force in social production and reproduction', available to 'individuals as well as collectives whether exclusively, concurrently or sequentially'.[122] This construction of land tenure cannot be the perception of several indigenous peoples in Africa, who do not engage in agriculture, or conceive of agriculture as an ideal lifestyle.[123]

Interchanging indigenous societies/peoples' land tenure with customary land tenure, as Nelson rightly observes, seems questionable when the substance of the work on African land tenure essentially focuses on an agrarian setting with little or no attention on the land tenure of African hunter-gatherers, in particular, and other self-identified African indigenous peoples.[124] Hence, a discussion of customary land tenure may overlap in some respects with indigenous peoples' land tenure, it is a path that must be trodden cautiously. Suffice it to state at this juncture that it is in the context of the latter group that the ensuing paragraphs explore collective landholdings, the informal or oral nature of land title and parallel usage as the essential features of indigenous peoples' land tenure.

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[118] See WJ du Plessis 'African indigenous land rights in a private ownership paradigm' (2011) 14 *PER / PELJ* 261; HWO Okoth-Ogendo 'Nature of land rights under indigenous law in Africa' in A Claassens & B Cousins (eds) *Land, power and custom: Controversies generated by South Africa's communal land rights* (2008) (Okoth-Ogendo's nature of land rights) 95-108; HWO Okoth-Ogendo 'The tragic African commons: A century of expropriation, suppression and subversion' (2005), a keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1-4 August 2005; 3 (Okoth-Ogendo's tragic African commons) 11-12; Elias (n 10 above) 162

[119] Banda (n 10 above) 332; Okoth-Ogendo's tragic African commons (n 118 above) 3; B Cousins 'Potential and pitfalls of 'communal' land tenure reform: Experience in Africa and implications for South Africa' (March 2009) paper for World Bank conference on *Land governance in support of the MDGs: Responding to new challenge*s 2; Mcneil (n 1 above) 260; Elias (n 10 above) 163

[120] Anaya's participatory rights (n 10 above) 10; Barume (n 12 above) 174-186; Wachira (n 12 above) 306-310 ; C Kidd & J Kenrick 'The forest peoples of Africa: land rights in context' in Forests Peoples Programme Land rights and the forest peoples of Africa (March 2009) 4-25; M Hansungule 'Challenges to the effective legal protection of indigenous peoples in Central Africa' (On file with the author) 1-19; Nelson (n 10 above) 52; A Buchanan 'The role of collective rights in the theory of indigenous peoples' rights'(1993) 3 *Transnational Law & Contemporary Problems* 93

[121] Okoth-Ogendo's tragic African commons (n 118 above) 11-12

[122] Okoth-Ogendo's tragic African commons (n 118 above) 3

[123] Nelson (n 10 above) 52

[124] Nelson (n 10 above) 52

3.2.2.1 Collective land ownership

The notion of collective rights is the most debated and distinct element in the discourse of indigenous peoples' rights. This controversy, Anaya explains, orginated during the Cold War when super powers insisted that a collective notion of rights was in conflict with individual rights.[125] The debate, however valid, has become redundant. Scholarship has shown that the collective nature of indigenous peoples' rights is a justifiable departure from the focus on individualism at the core of the normative liberal assumption of human rights.[126] Indeed, as Ramcharan observes, 'the notion of the rights of the collectivity, or of groups, or of peoples, is not a stranger to the intellectual history of rights.'[127]

In contemporary development of international human rights law, of the rights claimed by indigenous peoples as collective, the most prominent in terms of uniqueness to their lifestyle are land rights.[128] The pillar instruments of indigenous peoples' rights regime recognise the collective nature of indigenous peoples' land rights. In addition to enjoining states to recognise the cultural significance of indigenous peoples' lands, article 13(1) of ILO Convention 169, specifically emphasises the need for states to recognise the 'collective aspects of this relationship'. It provides:

> [I]n applying the provisions of this Part of the Convention, governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

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[125] SJ Anaya 'Superpower attitudes toward indigenous peoples and group rights' (1999) 93 *Proceedings of the Annual Meeting American Society* 251, 257, tracing this concern to possible conflicts of individual rights with collective notion of rights and Cold War opposition to collective claims; but see, on the divergence of view in this regard, DG Newman 'Theorizing collective indigenous rights' (2007) 31 *American Indian Law Review* 273, 279 where the author argues that the notion of collective right does not reflect collective sense in which the indigenous peoples will advance it; see also DG Newman 'Collective interests and collective rights' (2004) 49 *American Journal of Jurisprudence* 127

[126] Buchanan (n 120) 91, 92 arguing the collective nature of indigenous peoples' rights as a justifiable departure from and a fundamental challenge to the focus on individualism which is at the core of the normative assumption of human rights concept

[127] BG Ramcharan 'Individual, collective and group rights: History, theory, practice and contemporary evolution' (1993) 1 *International Law Journal on Group Rights* 27, 28 arguing that collective rights is at the core of the social contract theories and the theories of rights offered by Hobbes, Locke, Rousseau and Mill, which though reserved domain for the individual, also situate the individual in a contractual relationship with the collectivity, thereby implying some rights for the latter; see more recently W van Genugten 'Protection of indigenous peoples on the African continent: Concepts, position seeking, and the interaction of legal system' (January 2010) 104 *The American Journal of International Law* 29, making reference to other key instruments which embody collective rights as a principle. Examples cited by the author include 1945 UN Charter, its art 1(2) dealing with the 'principle of equal rights and self-determination of peoples'

[128] Gilbert (n 11 above) xiv; Buchanan (n 120 above) 91; Barume (n 12 above) 177-78; Daes (n 12 above) 467; Cobo study (n 12 above) vol 5, paras 196-198; Cobo study (n 12 above) vol 4, para 152

Collective land rights are guaranteed under different articles of the UNDRIP. Its preamble affirms that 'indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples'.[129] Article 1 of UNDRIP takes this view further by affirming that indigenous peoples have the collective and individual right to the full enjoyment of all human rights and fundamental freedoms recognised in key instruments such as the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights law. Arguably, it includes the collective right of indigenous peoples to the 'lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.'[130] Article 25 safeguards the right which they have in relation to the maintenance of their special relationship with land. Article 26 generally regulates their right to own, use, develop and control lands and resources. Article 27 underscores the obligation of states. In this regard, it provides that states should:

> establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognise and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

In Africa, according to Cusson, collective lands include 'hunting and gathering areas, grasslands, forests, mixed savannah, wetlands, mountain sides, lakes, rivers, coastal areas , fishing grounds, etc'.[131] These are lands which are traditionally vested in indigenous peoples and are held in the collective sense in accordance with established rules and customs.[132]Collective control comprises mainly extended families as opposed to individually controlled land that is not allowed as custom only permits the privilege to use land and not to alienate or transfer it by sale.[133] The majority of indigenous communities favour 'collective stewardship' over their land and resources.[134]

[129] UNDRIP, preamble
[130] UNDRIP, art 26(1)
[131] B Cousins 'Tenure and common property resources in Africa' in C Toulmin & J Quan (eds) *Evolving land rights, policy and tenure in Africatenure and property* (2000) 151-180, 160; Okoth-Ogendo's tragic African commons (n 118 above) 12
[132] A Mahomed *et al* Understanding land tenure law: Commentary and legislation (2010) section 2-1
[132] A Mahomed *et al* Understanding land tenure law: Commentary and legislation (2010) section 2-1
[133] AJ Njoh 'Indigenous peoples and ancestral lands: Implications of the Bakweri's case in Cameroon' in Home (n 63 above) 71, where the author notes that this is common place in most parts of colonial Africa, although discussion is largely in the context of the Bakweri; Wachira (n 12 above); Barume (n 12 above) Okoth-Ogendo's tragic African commons (n 118 above) 8
[134] Anaya's indigenous peoples (n 11 above) 141

Generally, anthropological as well as legal commentaries exist on the collective aspect of land relations in a tenure system.

Anthropological analysis of practice in pre-colonial Africa points out that an individual notion of ownership is a product of colonial economic influence on a communal relationship with the land.[135] Land relations in pre-colonial Africa emphasised, in the word of Chinock, the notion of 'ours', not 'yours'.[136] The Mbendjele of the Republic of Congo, according to Barume, refer to the forests as 'ndima angosu', meaning 'our forest'.[137] Among these peoples legitimate claim to exclusive individual ownership of land is difficult, if not impossible, as only Kombaa (God) could own land, rivers, and forest.[138] The Hadzabe of Tanzania distinguish between the 'tangoto' (open land) and the chikiko, that is, the lands consisting of the forests. Rights in respect of the latter, according to the Hadzabe's world view, allow anyone to 'live, hunt, and gather anywhere he or she wishes without restriction'.[139] In the worldview of the San people of Botswana homesteads, which include the lands in the Central Kalahari, are referred to as 'nloresi' (traditional territories).[140]

Similarly, a collective relationship with the land is an aspect of the lifestyle of the Maasai people in Kenya and Tanzania. In relation to this, Tarayai notes:

> The rules governing the right of tenure are sacred, crucial to the community's survival, and eliminate possible alienation of individuals. The landholder, according to Maasai custom, is the community itself. The individual member has the limited right to use community land along with other members. However, a member has no right to sell, lease, or charge money for use of any portion of the community's land. The community itself has no such right either. It cannot alienate, lease, or charge for use of its land, because under customary law, land has no monetary value. The land is held in trust by the community for its members, both present and prospective. Such members collectively have a duty to defend communal land against external

[135] Cousins (n 131 above) 3; M Chanock 'Paradigms, policies and property: A review of the customary law of land tenure' in R Roberts & K Mann (eds) *Land in colonial Africa* (1991) 61, 62; Njoh (n 133 above) 71; Cobo's study (n 12 above) vol.v, para 197
[136] Chanock (n 135 above) 71
[137] Barume (n 12 above) 178
[138] Lewis (n 37 above) 64; Barume (n 12 above) 179
[139] Barume (n 12 above) 178-9, citing J Woodburn 'Minimal politics:The political organisation of the Hadza of North Tanzania' in WA Shack & PS Cohen (eds) *Politics in leadership* (1979) 245
[140] Barume (n 12 above) 179

> aggression and encroachment. The community cannot transfer any portion of its land to any of its members or to any outsider.[141]

However, it appears, there is no Africa-wide conception of the collectivity of land ownership. Generally, anthropological literature has shown that individual rights to land are not unknown in customary tenure in some settings in Africa. Schapera, for instance, documents that among the Tswanas, if a person was removed from his land on account of the commission of certain crimes, or left without an intention to return, his land could be allocated to another.[142] Similarly, as Hunter evidences, the land relations in Pondoland largely were held collectively, but the approach in Pondoland in relation to arable land is similar to the European conception of individual rights.[143] Similarly, among the Kikuyus in Kenya, individuals enjoyed a right to own their own pieces of land, although rights to land were generally held in 'commons'.[144] This pattern may be correct in terms of indigenous peoples' dealing with land, howver, it is a departure from the general perception of hunter-gatherers whose lifestyle typifies indigenous peoples in Africa.[145]

The majority of indigenous communities favour collective stewardship over their land and resources.[146] They prefer lands possessed without the option of division into individual plots.[147] This form of land tenure system, as Wachira argues, is compatible with their cultural aspirations and way of life.[148] Hence, individualised ownership of such lands may not be sustainable or consistent with lifestyles, such as pastoralism which largely depend on sharing of resources communally.[149]

At any rate, the argument that individual ownership is not compatible with indigenous peoples' land tenure is futile. For instance, article 1 of the UNDRIP provides that indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and

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[141] N Tarayai 'The legal perspectives of the Maasai culture, customs, and traditions' (2004) 21 *Arizona Journal of International & Comparative Law* 206
[142] I Schapera A *handbook of Tswana law and custom* (1994)
[143] MH Wilson *Reaction to conquest:Effects of contact with Europeans on the Pondo of South Africa* (1961)113
[144] J Kenyatta *Facing mount Kenya: The tribal life of the Gikuyu* (1979) 21
[145] Nelson (n 10 above) 52; Working Group (n 22 above)15
[146] Anaya's indigenous rights (n 11 above) 141; A Xanthaki 'Land rights of indigenous peoples in South-East Asia' (2003) 4 *Melbourne Journal of International Law*
[147] Barume (n 12 above) 177
[148] Wachira, (n 12 above) 308; See also Asiema & Situmatt (n 34 above) 149. On the San in South Africa, see J Suzman *Regional assessment of the status of the San in Southern Africa* (2001) 34
[149] Okoth-Ogendo's tragic African commons (n 118 above) 12; Wachira (n 12 above)

fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. Article 44 of the UNDRIP guarantees to indigenous female and male individuals all the rights under the UNDRIP which, arguably, includes the right to land. It thus appears that collective ownership of land does not necessarily exclude the notion of individual right and its protection. Wiessner argues, in addressing the various threats facing indigenous peoples, both individual and collective rights are required as appropriate legal responses.[150]

Individual ownership is to be understood in the context of the customs and institutions of indigenous peoples which define their collective identity. In *Tsilhqot' in Nation v British Columbia,*[151] the Supreme Court of British Columbia expatiates upon what can be regarded as the enjoyment of individual rights by indigenous peoples' rights in the context of collectivity. In that case, the Court, agreeing with Slaterry's view on the law of aboriginal title to land in relation to its collective feature,[152] notes:

> The doctrine of aboriginal land rights attributes to native groups a collective title with certain general features. The character of this collective title is not governed by traditional notions or practices, and so does not vary from group to group. However, the rights of individuals and other entities within the group are determined *inter se*, not by the doctrine of aboriginal title, but by internal rules founded on custom. These rules dictate the extent to which any individual, family, lineage, or other sub-group has rights to possess and use lands and resources vested in the entire group. The rules have a customary base, but they are not for that reason necessarily static.[153]

There are judicial cases from different jurisdictions that further reinforce the collective notion of indigenous peoples' ownership of land. The Supreme Court of Canada in *Delgamuukw v British Columbia* had cause to distinguish what collective land rights entail from an individual right claim to an aboriginal title. It's view was:

> [a] further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation.

[150] Wiessner (n 16 above) 139
[151] *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700 (*Tsilhqot'in Nation* case)
[152] B Slattery 'Understanding aboriginal rights' (1987) 66 *Canadian Bar Review* 727, 745
[153] *Tsilhqot'in Nation* case (n 151 above) para 471

> Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.[154]

In *Mabo v Queensland*, the Australian Court took the view that the rights to land of indigenous peoples are 'vested not in an individual or a number of identified individuals but in community'.[155] On a similar issue, in *Alexkor Ltd and Another v Richtersveld Community and Others* (*Ritchtersveld Community* case),[156] the Constitutional Court of South Africa affirms the findings of the lower courts about the collective nature of land ownership as recognised under the applicable law to the Ritchtersveld community, that is, the Nama law. Affirming the position of the Supreme Court of Appeal (SCA) on this issue, the Constitutional Court found that land was communally owned since members of the community had a right to occupy and use the land. The Court went further to describe the various elements which led it to a conclusion that land was collectively owned by the community. Agreeing with the finding of the SCA in the matter, the Constitutional Court observed:

> One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources.[157]

Regional human rights systems equally have discussed this essential aspect of indigenous peoples' land rights. For instance, in deciding whether article 21 of the American Convention on Human Rights had been violated,[158] the Inter-American Court of Human Rights (IACHR) emphasised that indigenous and tribal peoples' right to property is collective in nature with the people as the corresponding bearer.[159] This view is justified considering that the right is enjoyed by indigenous peoples in collective way and cannot be effectively safeguarded except if guaranteed to indigenous peoples as a whole,[160] in that sense, according to the long practice of

[154] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 115
[155] *Mabo v Queensland* (No 2), (1992) 175 CLR 1, 107 ALR 1 (*Mabo* case) per Brennan para 52
[156] *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) (*Richtersveld Community* case)
[157] *Richtersveld Community* case (n 156 above) paras 58 and 59
[158] American Convention on Human Rights, signed at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969
[159] The right to territorial property has been identified by the IACHR as one of the rights of indigenous and tribal peoples with a collective aspect, see *Belize* case (n 5 above), para 113; *Awas Tingni* case (n 108 above) para 140(c)
[160] *Belize* case (n 5 above) par 113

the IACHR 'the individuals and families enjoy subsidiary rights of use and occupation.'[161] The rationale for this is further clarified by the IACHR in the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*:

> There is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community.[162]

The collective aspect of indigenous peoples' characteristic tenure of land has been the subject matter for consideration by the Commission where the inattention to this unique feature at the national level has been a strong basis for resorting to the regional human rights system. In *Endorois case*, it was the case of the complainants that the High Court in Kenya, refused to consider the claim to collective right to property made by the complainants. Rather, as was alleged, the High Court proceeded on the erroneous notion that 'there is no proper identity of the people who were affected by the setting aside of the land' in ruling against the complainants.[163] The complainants argued that since time immemorial the *Endorois* have lived on the land where they have 'constructed homes, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land'.[164] In doing so, it was the further argument of the complainants that the *Endorois* have exercised 'an indigenous form of tenure, holding the land through a collective form of ownership'.[165] Responding to this point, the Commission ruled that it is satisfied that the *Endorois* can be regarded as a 'distinct tribal group whose members enjoy and exercise certain rights, such as the right to property, in a distinctly collective manner'. [166]

3.2.2.2 Customary tenure

Generally, tenure in relation to land is grouped according to whether it is 'formal' or 'informal'. The formal tenure is deemed to be written and statutory, while the informal land tenure system is considered as a customary or traditional land tenure system because the proof of title to lands is generally based on oral traditions.[167] The distinction between formal and informal tenure is

[161] *Awas Tingni* case (n 108 above) para 140(a)
[162] *Awas Tingn*i case (n 108 above) para 149
[163] *Endorois* case (n 103 above) para 12
[164] *Endorois* case (n 103 above) para 87
[165] As above
[166] *Endorois* case (n 103 above) para113
[167] IFAD 'Land tenure security and poverty reduction' (2012) 2 http://www.ifad.org/pub/factsheet/land/e.pdf (accessed 5 March 2013)

necessary considering that in most parts of Africa, and this is particularly true of far-flung and rural areas, the allocation of land is effected informally through customary laws allowing individuals or groups the use of lands managed collectively.[168] It is against this background that most indigenous peoples live,[169] where the control over the use of land is regulated through unwritten rules embedded in their customs and traditions.[170] These customs and traditions are established by indigenous peoples from time immemorial, and have not been compromised by laws imposed by colonial authorities.[171]

As earlier mentioned, an important aspect of these customs and traditions relates to its oral nature of proof of title,[172] which is understandable as the vast majority of the laws and customs relating to the land of indigenous peoples are not written but merely passed orally from one generation to the other.[173] Most indigenous peoples lack access to formal legal title.[174] As Bennet notes, this constitutes an aspect of 'living customary law' which is discernible from practices of a given people and mostly exist in oral tradition.[175] Similarly, according to McHugh:

> Indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms.[176]

The essential characteristics of a formal land tenure system include the recognition by registration and title, an informal land tenure system is mainly defined by traditional practices

[168] B Cousins 'Characterising 'communal' tenure: nested systems and flexible boundaries' in Claassens & Cousins (n 118 above) 111-113; J Potter 'Customary land tenure in Sub-Saharan Africa today: Meanings and contexts' http://www.issafrica.org/pubs/Books/GroundUp/2Customary.pdf (accessed 30 March 2013) 56
[169] 'The right to adequate housing' Fact Sheet No. 21/Rev
[170] SD Ngidangb 'Deconstruction and reconstruction of native customary land tenure' (June 2005) 43 *Southeast Asian Studies* 50
[171] Cobo's study (n 12 above) vol iv para 153
[172] USAID 'Tenure and indigenous peoples: The importance of self-determination , territory, and rights to land and other natural resources property rights and resource governance' *Briefing Paper* 13; The Norwegian Forum for Environment and Development 'Beyond formalisation: Land rights agenda for Norwegian development and foreign policy' 15
[173] Wachira (n 12 above) 316-317; C Daniels 'Indigenous rights in Namibia' in R Hitchrock & D Vinding (eds) *Indigenous peoples' rights in Southern Africa* (2004)54
[174] Gilbert & Couillard (n 63 above)
[175] The author distinguishes what he terms 'official customary law' from 'living customary law'. The former refers to rules imposed by external authorities without local support and hence it lacks legitimacy while the latter is not fixed in any written codes and is dynamic, see T Bennet 'official' vs 'living' customary law: Dilemmas of description and recognition' in Claassens & Cousins (n 118 above) 188-9
[176] McHugh (n 1above) 200

and customs, which are often ignored by law.[177] Indigenous peoples are only able to prove title to their land through reference to the graves of their ancestors and oral testimony from different generations of peoples who have inhabited the land.[178]

Although not mentioned expressly in any provision of the key instruments relating to the land rights of indigenous peoples, the informal nature of indigenous peoples' land rights can be inferred. For instance, the right to adequate housing guaranteed under article 11 of the ICESCR has been interpreted as entailing 'a degree of tenure security which guarantees legal protection against forced evictions, harassment and other threats'.[179] The phrase 'a degree of tenure security' reflects a flexibility which may accommodate different types of tenure including such as held by indigenous peoples that is generally informal in nature.

Article 17(3) of ILO Convention 169 reflects informal title to land as a feature of indigenous peoples' lands and cautions on the possibility of 'strangers' taking advantage of it to deny indigenous peoples their land rights. Particularly, it states that non-indigenous peoples are prohibited from taking advantage of the customs 'or lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them'.[180] This viewpoint is strengthened by UNDRIP which requires states to recognise and protect indigenous peoples' lands, based on proper regard for their customs, traditions and land tenure systems.[181]

The viewpoint that informal or customary rules of indigenous peoples' land tenure are valid, arguably, is strengthened by General Recommendation No. 23 of 1997 by the Committee on the Elimination of Racial Discrimination (CERD).[182] In reflecting on the situation of indigenous peoples, the CERD enjoins the recognition, promotion and preservation by states of the peculiar history, culture, way of life and language of indigenous peoples.[183] As an integral aspect of indigenous peoples' relation to land, it is argued that informal customs and traditions of

[177] T Cousins & D Hornby 'Leaping the fissures: Bridging the gap between paper and real practice in setting up common property institutions in land reform in South Africa' (October 2000), prepared for the CASS/PLAAS CBNRM Programme 2nd annual regional meeting *Legal aspects of governance of CBNRM* 8-10
[178] Wachira (n 12 above) 317; Daniels (n 173 above) 54
[179] UNHRC Resolutions on the right to adequate housing, UNHRC Res. 6/27, U.N. Doc. A/HRC/6/22 (14 April 2008)
[180] ILO Convention 169, art 17(3)
[181] UNDRIP, art 26(3)
[182] General Recommendation No. 23: Indigenous Peoples : 1997/08/18 (General Recommendation No. 23)
[183] General Recommendation No. 23 para 4(a)

indigenous peoples on land tenure fall within the Committee's construction of 'the distinct culture, history, lifestyle' of indigenous peoples which states are enjoined to recognise.

There is copious national case-law in which the informal feature of indigenous peoples' claim to land has been recognised. Usually, it is implemented through the acceptance in evidence of the oral narration of the history, custom and tradition of indigenous peoples as a proof of land ownership. In *Delgamuukw v British Columbia*, the Supreme Court of Canada took the view that the use of oral histories as a way of proving aboriginal title to land is procedurally acceptable. In that case, the *Gitksan* or *Wet'suwet'en* hereditary chiefs sued as appellants, both individually and on behalf of their 'Houses', to claim 58,000 square kilometres in British Columbia.[184] In response, British Columbia counterclaimed, urging the Supreme Court of Canada for a declaration that the appellants have no right or interest in the title of the portion of land being claimed, or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.[185]

In proof of their case at trial court, the appellants relied on their sacred oral tradition about their ancestors, histories and territories as evidence of historical use and 'ownership' of the alleged portion of the territories. The Trial Court however rejected this evidence as untenable.[186] In contrast to the approach by the High Court, the Supreme Court of Canada reiterated the need to give proper regard to the oral history of the appellants on their relationship with land. For many aboriginal nations, the Court held, oral histories are the only records of their past.[187] The use of oral testimonies as a reflection of indigenous peoples' land tenure carries significant weight in proving their proprietary rights. This viewpoint is judicially endorsed by the Australia High Court in the case of *Mabo v Queensland*.[188] In that case, the Court took the view that propositions can be validly made in relation to native title to land without reference to documentary evidence.[189]

The reliance on the oral traditions of indigenous peoples as a reflection of land tenure and its proof has been considered under regional human rights system. For instance, in the absence of a

[184] *Delgamuukw* case (n 154 above) para 7
[185] *Delgamuukw* case (n 154 above) para 7
[186] *Delgamuukw* case (n 154 above) para 13
[187] *Delgamuukw* case (n 154 above) para 84
[188] *Mabo* case (n 155 above)
[189] *Mabo* case (n 155 above) para 64 per Brennan J

title deed, the Inter-American Court of Human Rights in the *Mayagna (Sumo) Awas Tingni Community v Nicaragua,*[190] received evidence of oral histories on the migration, communal life style and, land use pattern of the *Awas Tingni Community* in proof of their title to land.[191] Since the evidence of oral histories remained largely unchallenged, the Court held, it is admissible.[192] Similarly, in *Yakye Axa Indigenous Community v Paraguay,*[193] the Court asserted that to guarantee the right of indigenous peoples to communal property, it should be borne in mind that land is closely linked to their oral expressions and traditions.[194]

The case is not being made here that indigenous peoples' land claim is always informal in nature. Treaties are a means of cession of indigenous land and the strategy of guaranteeing remaining land held by the indigenous nation.[195] This is most common with regard to indigenous land in the Western hemisphere, indigenous communities in Africa such as the Maasai are a rare exception.[196] Where such a treaty relationship is proven, it can, therefore, translate an otherwise informal land ownership claim to a documented one**.**

3.2.3 Concept of parallel use

The parallel use to which indigenous peoples put land is another distinct feature of their land tenure. This feature refers to the right of indigenous peoples to a shared access and use of resources on land, including water, grass, trees, fruits, forests, sand, to mention a few.[197] The pattern of land tenure and use is a defining characteristic of the indigenous peoples' land ownership[198] as indigenous peoples migrate from time to time and may, as Anaya and Williams put it, 'have overlapping land use and occupancy areas'.[199] Indigenous peoples, particularly the 'nomadic communities', live in vast arid and semi-arid lands where there are scarce watering points which are best adaptable to such parallel use of resources.[200] In particular, pastoralists

[190] *Awas Tingni* case (n 108 above)
[191] *Awas Tingni* case (n 108 above) para 83
[192] *Awas Tingni* case (n 108 above) para 100
[193] *Yakye Axa* case (n 6 above)
[194] *Yakye Axa* case (n 6 above) para 154
[195] Daes Study (n 12 above) para 49
[196] MA Martinez 'Human rights of indigenous peoples: Study on treaties, agreements and other constructive arrangements between States and indigenous populations' (22 June 1999) E/CN.4/Sub.2/1999/20 22 June 1999 (Martinez Study) para 78
[197] B Cousins 'Embeddedness' versus titling: African land tenure systems and the potential impacts of the communal land rights Act 11 of 2004' (2005) 16 *Stellenbosch Law Review* 492
[198] Anaya & Williams (n 12 above) 45
[199] Anaya & Williams (n 12 above) 33, 45
[200] Okoth-Ogendo's tragic African commons (n 118 above) 12

such as the Maasai of Kenya and Tanzania, the Mbororo of Cameroon, the Tuareg and Fulani of West Africa and the Khoesan of Southern Africa, occupy lands in arid and semi-arid regions that are suitable for livestock keeping.[201] This form of land use by indigenous peoples, it has been argued, 'is the most feasible option of land holding'.[202] Parallel use of land is not only beneficial to indigenous peoples such as those depending on marine and forest resources, it is significant for the management of forest resources.[203]

Though not expressly mentioned, parallel use of land is recognised in key instruments relating to indigenous peoples' land rights. For instance, article 14(1) of the ILO Convention 169, recognises parallel use as an essential feature of indigenous peoples' land rights, in the sense that it requires state parties to take measures in appropriate cases for the protection of lands 'not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities'.[204] Similarly, the recognition of a parallel pattern of use of land as a feature of indigenous peoples' land tenure is discernible in the UNDRIP. Article 26 of UNDRIP provides:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

The above provisions do not expressly employ the phrase 'parallel use' in relation to indigenous peoples' land rights, the words 'otherwise used or acquired' validate the logic that parallel use of land is an additional description to traditional ownership and occupation of land.

Parallel use of land as a feature, it will seem, does not disturb exclusive claim of one indigenous group against the other in relation to land. For instance, it does not mean that since the Endorois

[201] Working Group Report (n 22 above) 17
[202] Wachira (n 12 above) 307
[203] RE Johannes 'Did indigenous conservation ethics exist?' (14 October 2002) SPC Traditional Marine Resource Management and Knowledge Information Bulletin 1-5; TS Connor 'We are part of nature: Indigenous peoples' rights as a basis for environmental protection in the Amazon Basin' (1994) 5 *Colombia Journal of International Environmental Law & Policy* 193, 201-204; Doubleday (n 47 above) 374
[204] ILO Convention 169, art 14(1)

and the Ogiek are indigenous peoples in Kenya,[205] they can make claim to the exclusive ownership and use of land without distinction or differentiation. This point is made clearer in *Delgamuukw v British Columbia*, where Lamer J explained the nature of indigenous peoples' land title in relation to exclusive use and occupation as follows:

> Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to assert the right to exclusive use and occupation over it.[206]

Although parallel use of land is a unique characteristic of indigenous peoples' land tenure, it does not exclude the concept of exclusive ownership which one indigenous peoples may enjoy against others in dealing with land. Notwithstanding the foregoing notion of land use and tenure of indigenous peoples, today, in modern states in Africa, there operates generally a contrasting worldview derived from international law principles which historically have existed as an agency of subordinating indigenous peoples' land use and land tenure.

3.3 Indigenous peoples' land tenure and use *v* contrasting doctrines of international law

Whereas indigenous peoples' nature of land rights, as earlier shown, reflects the notion of land use and tenure with features of the latter defined in terms of its collective sense of ownership, informal or oral nature of claim, and parallel usage, international law had a different influence, as a result of its recognition and application of the doctrines of 'discovery' and *terra nullius*. Historically, these doctrines were engaged as part of the legal justification of the European expansion which expropriated in regions of the world including Asia, the Americas, Pacific Islands, and Africa from the 16th to 20th centuries.[207] These doctrines are of limited application considering the role of conquests and treaties associated with exploration and land

[205] 'Country Report of the Research Project by the International Labour Organisation and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples: Kenya' (2009) http://www1.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf (accessed 30 March 2013), iv, which lists the Ogiek and Endorois as parts of the indigenous peoples in Kenya
[206] *Delgamuukw* case (n 154 above) 258
[207] Daes (n 12 above) 468; Gilbert (n 11 above); Barume (n 12 above) 64-84,184; Gilbert & Couillard (n 63 above) 28-47; Anaya's evolution (n 11 above); LG Robertson *Conquest by law: How the discovery of America dispossessed indigenous peoples of their lands* (2007)

expropriation,[208] but the end result is the same. Essentially, they had the effect of dispossessing indigenous peoples of their land in such manner that has encouraged the subordination of their notion of land use and tenure to even the post-independent land tenure approach of modern states in Africa. This section discusses these two doctrines and demonstrates that they are at the root of the subordination of indigenous peoples' land use and tenure in modern Africa.

3.3.1 Doctrine of 'discovery'

The consensus can be drawn from the official reports of United Nations bodies,[209] various submissions made by indigenous peoples or their representatives,[210] and academic writings,[211] that from the 16th to 20th centuries, the doctrine of discovery is an international law principle employed by the European countries, colonists, and settlers in dispossessing indigenous peoples all over the world of their lands, assets, and human rights. The doctrine emerged from the decrees by the Vatican which empowered Christian monarchs and states in Europe, initially, Spain and Portugal,[212] and later Britain (self-appointed), to a right of conquest, sovereignty and superiority over non-Christian peoples, along with their lands, territories and resources in Africa, Asia, and North as well as South America.[213] Under the doctrine of discovery, Christianity played a significant role both as a determinant to access to land and as a moral justification for civilisation and conquest.[214] The judiciary plays a crucial role in the earlier entrenchment of this

[208] See A Pratt 'Treaties vs Terra Nullius: "Reconciliation," treaty-making and indigenous sovereignty in Australia and Canada' (2004) 3 *Indigenous Law Journal* 43; G Partington 'Thoughts on terra nullius' http://www.samuelgriffith.org.au/papers/html/volume19/v19chap11.html (accessed 8 March 2014)
[209] TG Frichner 'Preliminary study of the impact on indigenous peoples of the international legal construct known as the doctrine of discovery' (2010) E/C.19/2010/13; Martinez Study (n 196 above); Daes Study (n 12 above)
[210] IPACC Statement (n 22 above); Eastern Shawnee Tribe of Oklahoma, Confederated Tribes of the Grand Ronde Community of Oregon and others 'The doctrine of discovery: The international law of colonialism' (2012) Conference Room Paper 11th session of the UN Permanent Forum on Indigenous Issues 7-18 May 2012
[211] RJ Miller & L LeSage 'The international law of discovery, indigenous peoples, and Chile' (2011) 89 *Nebraska Law Review* 819; RJ Miller, J Ruru, L Behrendt & T Lingberg *Discovering indigenous peoples' lands: The doctrine of discovery in the English colonies* (2010); Anaya's evolution (n 11 above); Gilbert & Couillard (n 63 above) 28-47; RJ Miller & J Ruru 'An indigenous lens into comparative law: The doctrine of discovery in the United States and New Zealand'(2008) Legal Research Paper Series Paper No. 2008 (Discovery paper); Robertson (n 207 above); RJ Miller 'Native America, discovered and conquered (2006) 9-24
[212] Miller & Ruru (n 211 above) 1; Miller & LeSage (n 211 above) 829; Miller *et al* (n 211 above) 3-6
[213] Anaya's evolution (n 11 above) 23-42; Frichner (n 209 above) paras 5-7, 48; Miller *et al* (n 211 above) 9-24; Robertson (n 207 above) 1-27
[214] Miller & LeSage (n 211 above) 826; Anaya's evolution (n 11 above) 25-26; Gilbert & Couillard (n 63 above) 29; Hansungule (n 120 above)

doctrine.[215] The consequence of the doctrine is that 'discoverers' emerged as owners of land while indigenous peoples, at best became tenants on their own land.[216]

In Africa, the above elements have a unique aspect. The doctrine of discovery effected the partition which was launched under the banner of 'commerce, christianity and civilisation', between 1880-1914.[217] In this period, the Berlin Conference (1884-1885) is important as it formalised the colonisation of Africa,[218] and embodied the three arms of the banner, particularly 'civilisation' in its General Act which refers to the assigned responsibility by the colonialising states to bring Africa into the mainstream of civilisation.[219]

The prominent casualty of this civilising mission is the land of the indigenous communities and the institutions around it.[220] In addition to being perceived as uncivilised and lacking the juridical persona to own land, according to Ogendo, the collective form of land ownership and the customary institutions regulating their worldview about land were considered unrefined.[221] This understanding that indigenous peoples lack appropriate institutions or rationality to own or manage land is also reflected in the notion of trusteeship which featured prominently in international life at that time. It is evident in article 22 of the Covenant of the League of Nations, which states as follows:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the

[215] Robertson (n 207 above) 40-76 who discusses particularly the role of court in the United States in the judicial evolution of the doctrine of discovery
[216] Anaya's evolution (n 11 above) 25-26; Gilbert & Couillard (n 63 above); Robertson (n 207 above) x; Miller *et al* (n 211 above) 9-24
[217] Gilbert & Couillard (n 63 above) 29; T Pakenham *The scramble for Africa: White man's conquest of the dark continent from 1876 to 1912* (1991) 7, 20, 25
[218] Gilbert & Couillard (n 63 above) 29
[219] General Act of the Conference of Berlin Concerning the Congo, signed at Berlin, February 26, 1885 http://www.internationalcriminallaw.org/International_Crimes/Crimes%20Against%20Humanity/Slavery/GenAct_Berlin_InReCongo1909.pdf (accessed 25 March 2013) which makes reference to the 'development of commerce and civilisation', 'advantages of civilisation' and 'development of civilisation'; see also Gilbert & Couillard (n 63 above)
[220] On literature which generally discuss the negative impact of colonial and post colonial land policy on customary land tenure a see Banda (n 10 above) 312-335; AA Oba 'The future of customary law in Africa' in Fenrich *et al* (n 10 above) 58-82; Hansungule (n 120 above); Okoth-Ogendo's tragic African commons (n 118 above); Okoth-Ogendo's nature of land rights (n 118 above); Roberts & Mann (n 144 above); Elias (n 10 above)
[221] Okoth-Ogendo's nature of land rights (n 118 above) 97

> principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.[222]

A case which is distinctive for its general dismissal of indigenous peoples' notion of land as unrefined and undeveloped is *Re Southern Rhodesia*. The Privy Council in that case stated that:

> some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with institutions or the legal ideas of civilised society.[223]

Despite a strong move to invalidate the doctrine of discovery,[224] it remains a part of modern international law.[225] Judicial recognition of the doctrine against a claim to ownership of land by indigenous peoples in the United States, dates as far back in 1823 in *Johnson v M'Intosh.*[226] As Robertson put it, in the United States and to a great extent in other former British colonies, the legal rule justifying claims to indigenous lands discovered by Europeans is traced back to the 1823 decision of *Johnson v M'Intosh.*[227] In that case, the issue before the Supreme Court of the United States was whether a non-Indian who acquired land from an Indian had obtained a valid title. It was the position of the Court that by virtue of the doctrine of discovery, the United States government had become the owner of the land within the United States.[228] This decision has been confirmed in a more recent times in *City of Sherrill v Oneida Indian Nation of New York*[229] where it was noted in the majority judgment of Supreme Court of the United States:

> Under the 'doctrine of discovery… fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign-first the discovering European nation and later the original States and the United States.[230]

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[222] Covenant of the League of Nations, adopted in Paris on 29 April 1919 http://www.austlii.edu.au/au/other/dfat/treaties/1920/1.html (accessed 24 March 2013) art 22; Gilbert & Couillard (n 63 above) 30
[223] *Re Southern Rhodesia* (1919) AC 211, 233-234
[224] RJ Miller 'Doctrine of discovery' http://unpfip.blogspot.com/2011/07/robert-j-miller-doctrine-of-discovery.html (accessed 28 March 2013)
[225] J Dugard *International law*: *A South African perspective* (2012) 131; I Brownlie *Principles of public International law* (2008) 123
[226] *Johnson v M'Intosh*, 21 U.S. (8 Wheat.) 543 1823 (*Johnson* case); see generally, Robertson (n 207 above) where the author reflects on the contribution of *Johnson v M'Intosh* to the doctrine of discovery; Daes Study (n 12 above) para 29
[227] Robertson (n 207 above) ix
[228] *Johnson* case (n 226 above) 592
[229] *City of Sherrill v Oneida Indian Nation of New York* 544 U. S. (2005) (*Sherrill* case)
[230] *Sherrill* case (n 229 above) 3

The foregoing decisions, particularly *Johnson v M'Intosh* have been regarded by indigenous peoples and their representatives,[231] as influential in justifying the application of the doctrine by the Courts in Australia,[232] Canada,[233] New Zealand,[234] and by the English Privy Council in cases about colonization in Africa.[235]

3.3.2 Doctrine of *terra nullius*

The doctrine of *terra nullius* is another important principle of international law which contrasts with the notions of indigenous peoples' land use and tenure. This doctrine is singular in dehumanising indigenous peoples and their manner of use of land.[236] Originally, the principle meant that lands inhabited by non-Christians were unoccupied and therefore open to a right of possession and occupation.[237] In the context of colonialism, it is understood as an element of the doctrine of discovery which entitles the 'discoverers' to the legal ownership of any area of land that was physically empty of human beings, and 'any region that was populated but was governed by a human society, form of government, or laws that European legal regimes did not recognise'.[238] States such as England, Holland, France and the United States depended on this doctrine in claiming that the lands occupied and used by indigenous nations were legally empty and open to annexation.[239]

The theoretical application of the principle of *terra nullius* is continuing and most significant in its contrast to elements of indigenous peoples'land use and tenure. The philosophical contributions of Adam Smith and John Locke of the contrast.[240] In Smith's scale of economic development, hunting and gathering is 'the lowest and rudest state of society'.[241] Indigenous peoples defined by a lifestyle of hunting and gathering as well as pastoralism were held as belonging in the 'lowest and rudest state of society' in contrast with the advanced lifestyle of the

[231] Discovery paper (n 211 above); IPACC Statement (n 22 above); see Robertson (n 207 above)
[232] *Western Australia v Ward* [2002] 213 CLR 1, 76 ALJR 1098; *Mabo* case (n 155 above)
[233] *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia*, [2011] 55 C.E.L.R. (3d) 165, 15 B.C.L.R. (5th) 322 (British Columbia Supreme Court); *R v Sparrow* [1990] 70 D.L.R. (4th) 385, 1 S.C.R. 1075 (Supreme Court of Canada)
[234] *Attorney-General v Ngati Apa* [2003] 2 NZLR 643
[235] *Amodu Tijani v Secretary, Southern Nigeria*, 2 AC 399 (1921); *In re Southern Rhodesia*, A.C. 211 (191)
[236] Daes study (n 12 above) para 34
[237] Daes study (n 12 above) para 35
[238] Miller (n 224 above)
[239] Miller (n 224 above) 21, 27-28, 49, 56, 63-64, 156, 159-60
[240] J Locke *The Works of John Locke*, vol 4 (Economic Writings and Two Treatises of Goverment) [1691] http://oll.libertyfund.org/titles/763M (accessed 10 May 2013), see generally, chapter v where the author argues property right arises only where land is altered from its natural state
[241] A Smith *The wealth of nations* Book v chapter 1 part 1

colonialising states.[242] In his theory of property, Locke posited that the application of labour to land is the means through which ownership of it can be safeguarded.[243] The failure to apply one's labour denies an individual or a group the legitimacy of calling the piece of land their own.[244] Justifying this postulation, Buchan and Heath argue that the use of land other than through settled agriculture is incapable of property rights.[245] In commenting in his land report on Kenya, Sir Charles Eliot expressed this view. In his words:

> I cannot admit that wandering tribes have a right to keep other and superior race out of large tracts merely because they have acquired the habit of straggling over far more land than they can utilise.[246]

The worldview that lands not productively engaged were legally empty was challenged at the International Court of Justice (ICJ) in *Western Sahara Advisory Opinion*.[247] In that matter, a main issue for consideration by the ICJ was whether Western Sahara was *terra nullius* at the time of colonialisation. After reviewing the issue, the ICJ was of the view that at the material time, the nomadic peoples of the Shinguitti country possessed rights to the lands through which they migrated from time to time. However, while in the further view of the Court, this evidence was sufficient to constitute legal ties between Western Sahara and the Mauritanian entity,[248] the Court was reluctant to fully endorse the recognition of the full rights of these peoples when it noted:

> The migration routes of almost all the nomadic tribes of Western Sahara ... crossed what were to become the colonial frontiers and traversed, *inter alia*, substantial areas of what is today the territory of the Islamic Republic of Mauritania. The tribes, in their migrations, had grazing pastures, cultivated lands, and wells or water-holes in both territories and their burial grounds in one or other territory. These basic elements of the nomads' way of life ... were in some measure the subject of tribal rights, and their use was in general regulated by customs.[249]

Accordingly, it was the opinion of the ICJ that the nomadic lifestyle of the tribes in Western Sahara only entitled them to 'some' recognition which can be extinguished and hence, did not constitute enough proof the title of the land.[250] This position attracted the criticism that the ICJ

[242] IPACC Statement (n 22 above)
[243] Locke (n 240 above)
[244] Locke (n 240 above) 121
[245] B Buchan & M Heath 'Savagery and civilization: From terra nullius to the "Tide of History" '(2006) 6 *Ethnicities* 8
[246] Kenya Land Commission Report (1933) Government printer Nairobi 642 , cited by Gilbert & Couilliard (n 63 above) 32
[247] *Western Sahara Advisory* Opinion 1CJ Reports 1975 (*Western Sahara Advisory* Opinion)
[248] *Western Sahara Advisory* Opinion (n 247 above) para 152
[249] *Western Sahara Advisory* Opinion (n 247 above) para 64
[250] As above

allowed a Western conception of acquisition of title to trump a nomadic lifestyle as proof of title.[251]

The reluctance of the Court totally to abrogate the principle has been supported by subsequent decisions in some domestic jurisdictions. In *Mabo v Queensland*, the High Court of Australia condemned the doctrine and established that it is not acceptable. However, it held that the title of aborigines may be extinguished by the power of the state.[252] A similar approach was adopted in the Canadian case of *Delgamuukw v the Quee*n. In that case, the Supreme Court of Canada, after a rigorous analysis of the doctrine of *terra nullius*, took the view that while aboriginal title is compatible with the Constitution Act of 1982, it confers an inferior right when compared to ordinary fee simple title.[253] From these cases, it is evident that though the Court is reluctant to consider the land of the aborigines as legally empty, the recognition of their title is a decision of the State.

This is particularly the case with pastoralists and hunters and gatherers who self-identify as indigenous peoples in Africa, live a mobile life and portray the use of land which is different from the cultivating lifestyle of agriculturalists.[254] For instance, forest peoples in the Central African Republic are regarded as incapable of enjoying land or tenure rights because 'they do not comply with the permanent residence and domestication of the land that is deemed necessary in order to hold property rights'.[255] The above doctrines, namely, discovery and *terra nullius*, in their application, arguably continue to have implications for indigenous peoples' lands in post-independence states in Africa.

3.4 Subordination of indigenous peoples' lands in colonial and post-independent Africa

The twin doctrines of discovery and *terra nullius* have had negative impact on customary land tenure, and by extension, indigenous peoples' land use and tenure in colonial and post-independent Africa. This is discernible in the legislative approaches toward indigenous peoples'

[251] M Resiman 'Protecting indigenous rights in international adjudication' (1995) 89 *American Journal of International Law* 354-355
[252] *Mabo* case (n 155 above) para 129
[253] *Delgamuukw* case (n 154 above) para 190
[254] IPAAC Statement (n 22 above); Kidd & Kenrick (n 120 above) 8-9; Wachira (n 12 above) 313
[255] Kidd & Kenrick (n 120 above) 7; also see Hansungule (n 120 above) 5

land use and tenure in colonial and post-independent states in Africa which generally reflect the non-recognition of the land use and tenure of indigenous peoples.

3.4.1 Colonial legislation

Associated with the implementation of the doctrines of discovery and *terra nullius* is the reconstruction of land use and tenure by colonial authorities and subsequently, post-colonial states in a manner which differs from the worldview of indigenous peoples.[256] Through out Africa, living customary law replaced by a European construct of a legal system brought by the colonising states.[257] This change was achieved through the common law, doctrines of equity and the statutes of general application which were introduced by the British in the 'British West, East, and Central Africa north of the Zambezi, and including Liberia and the Sudan[258] and, similarly, through the civil law model introduced by France, Belgium, Italy, Spain and Portugal in their colonies.[259] As is the case with Roman-Dutch law exported to South Africa, the former Southern Rhodesia and the former High Commission Territories.[260]

The effect of these models of a legal system is the introduction of a number of legal mechanisms which undermined and subordinated the notion of indigenous peoples' land use and tenure. As Ogendo documents, in British colonial Africa, this was achieved through the Foreign Jurisdiction Act.[261] Whatever notion of land tenure that communities in Africa may have had at that time, by this Act, the British government affirmed their power and control over overseas territories.[262] Second, almost immediately the application of English law became the fundamental law for

[256] Banda (n 10 above) 315; Oba (n 220 above) 61; Hansungunle (n 120 above) 5; Okoth-Ogendo tragic African commons (n 118 above) 5-8; Chanock (n 135 above) 62; Nelson (n 10 above); C Besteman 'Individualisation and the assault on customary tenure in Africa:Title registration programmes and the case of Somalia' (1994) 64 *Africa* 484; E Colson 'The impact of the colonial period on the definition of land rights' in V Turner (ed) *Colonialism in Africa, 1870–1960* (1971) 193–215
[257] Oba (n 220 above) 58; Hansungule (n 120 above) 5; Okoth-Ogendo tragic African commons (n 118 above) 5; Nelson (n 10 above) 53; Chanock (n 135 above) 64; J Potter 'Customary land tenure' in Sub-Saharan Africa today: Meanings and contexts' 55-75
[258] Oba (n 220) 58; Nelson (n 10 above) 53; T Verhelst 'Safeguarding African customary law: Judicial and legislative processes for its adaptation and integration' (1968) 8; AN Allot & E Cotran 'A background paper on restatement of laws in Africa: The need, value and methods of such restatement' in University of Ife Institute of African Studies (ed) *Integration of customary and modern legal systems in Africa* (1971) 21-24; Elias (n 10 above) 162
[259] Nelson (n 10 above) 53; Allot & Contra (n 258 above) 23
[260] Nelson (n 10 above) 53; AN Allot 'Towards the unification of laws in Africa' (1965) 14 *International Law & Comparative Law Quarterly* 366, 371-372
[261] Okoth-Ogendo's tragic African commons (n 118 above) 5
[262] As above

administering the colonised states in nearly all contexts, including land.[263] The third legal mechanism that undermines the native nature of land, Ogendo argues, is an Advisory Opinion which emanated from the Law Officers of the Crown on 13 December 1899.[264] The effect of this Advisory Opinion is to confer on the 'sovereign' the power of control and disposition of land considered as vacant or unoccupied in the colonised states.[265] In the conception of African customary land law ownership, there is nothing like 'unused', 'vacant', 'ineffectively occupied', or 'land without title holders'.[266]

Contrary to an African customary concept of ownership and possession, the sovereign could declare lands as Crowns lands or grant them to individual in fee simple or for any term. In line with this Advisory Opinion, the British Government immediately declared colonies they considered as lacking a settled form of government as having no power to own land, thereby, making lands available for settlers in terms of English proprietary principles.[267] This legal framework indirectly accelerated the legal expropriation of indigenous peoples' lands.[268] The situation was not any different in the French, German or Belgian colonial Africa.[269] A different legal framework was put in place in the colonies belonging to these states which made undocumented lands, 'at the stroke of a pen', *terra nullius*.[270] A German imperial decree of 15 June 1896 requires that private or concessionary title in Cameroon had to be established with the colonial state authorities, otherwise such lands will be regarded as vacant and empty without a master. [271]

One reason for this practice is that indigenous customary law was considered incapable of vesting title in relation to land in any group or individual.[272] Another reason is that it was strongly held by colonial anthropologists and administrators that the customary law of

[263] Okoth-Ogendo's tragic African commons (n 118 above) 5; J MacAuslan 'Only the name of the country changes: The diaspora of European land law in Commonwealth Africa' in C Toulmin & J Quan (eds) *Evolving land rights, policy and tenure in Africa* (2000)
[264] Okoth-Ogendo's tragic African commons (n 118 above) 5
[265] As above
[266] J Fairhead 'Food security in North and South Kivu (Zaire)' (1989) *Final consultancy report for Oxfam,* part 1, section 2, 99; D Biebuyck 'Systemes de tenure fonciere et problemes fonciers au Congo' in D Biebuyck (ed) *African agrarian systems* (1963) 83-100; Elias (n 10 above) 163
[267] Okoth-Ogendo's tragic African commons (n 118 above) 6
[268] Okoth-Ogendo's tragic African commons (n 118 above) 5
[269] Okoth-Ogendo's tragic African commons (n 118 above) 6; IPACC Statement (n 22 above)
[270] Okoth-Ogendo's tragic African commons (n 118 above) 6
[271] Cited in IPACC Statement (n 22 above)
[272] Okoth-Ogendo's nature of land rights (n 118 above) 97

indigenous communities was merely a stage in the development of the African state and would disappear as Western civilisation became increasingly dominant in Africa.[273] Arising from this development is a misconceived version of customary law which, viewed customary land tenure through a number of stereotypes. As Colson observes:

> [C]ommon official stereotypes about African customary land law thus came to be used by colonial officials in assessing the legality of current decisions, and so came to be incorporated in 'customary'systems of tenure.[274]

An example of such a stereotype is that customary land tenure is inalienable and communal in nature.[275] In a number of instances properties held collectively by indigenous peoples were declared 'repugnant' to a colonial understanding of property.[276] The consequence was that the European concept of private or individualised legal tenure became prominent in every colony and infiltrated into customary land rights. Colson, again, describes how this was achieved in colonial Africa:

> If no private person appeared to hold such rights over a given area, then they assumed that the rights must vest in the political unit whose members used the region. Failing this, they belonged to the newly created [colonial] government which could then alienate the land on its own terms to commercial corporations or to European settlers.[277]

Another illustration of a stereotype about customary land tenure is the misconception that the institution of chiefs play a prominent role in customary land tenure, and its configuration.[278] In describing this misconception and configuration, Channock declares:

> There is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure. The development of the concept of a leading customary role for the chiefs with regard to ownership and allocation of land was fundamental to the evolution of the paradigm of customary tenure...In the broad approach to the institutions of primitive

[273] Oba (n 220 above) 61; Okoth-Ogendo's tragic African commons (n 118 above) 8; Verhelst (n 258 above) 83
[274] Colson (n 256 above) 196
[275] Banda (n 10 above) 316-322; Elias (n 10 above) 163, 164
[276] Okoth-Ogendo's tragic African commons (n 118 above) 8; K Mann & R Roberts (eds) *Law in colonial Africa* (1990) 13
[277] As above; also see Banda (n 10 above)
[278] Banda (n 10 above) 320, 321; Chanock (n 135 above) 64

> government, the chiefs were seen as the holders of land with rights of administration and allocation. Rights in land were seen as flowing downward.[279]

While the above is generally carried out in the context of customary law, it came with a negative impact on indigenous peoples' land use and tenure. First, colonial policy, ensured that lands, such as those of pastoralists and hunter-gatherers which are collectively owned were used for the profit of the colony.[280] These included making them available to those members of the population, that is the farmers who used the land for commercial purposes, including agriculture and neglect of populations such as hunter-gatherers who made no such investments on land.[281] Second, and more fundamentally, it relocated the radical title to land in the sovereign state, that is the colonial states,[282]or the chiefs, as the case may be.[283] This idea is inconsistent with indigenous peoples' conception of leadership which has little space for chieftaincy institution. For instance, the Maasai in east Africa have been documented as having no chiefs but representatives,[284] hence, 'chiefs', as the legal institution to control, manage, and transfer land title, appears strange and unknown to this group.

3.4.2 Post-independent Africa

The foregoing trend has not changed in post-colonial African states: the misconception about customary law as influenced by the twin doctrines of 'discovery' and 'terra nullius' and the institutions that propagated it were passed on to post-colonial states in Africa.[285] Akin to the radical title which resided in the colonial state, states in Africa retain the radical title to land which enables them to 'regulate the use of indigenous lands without much regard for constitutional limits on governmental power that would otherwise be applicable'.[286] The constitutions of several states in Africa and, indeed, land specific statutes generally vest the

[279] Chanock (n 135 above) 64
[280] Colson (n 256 above) 207
[281] Nelson (n 10 above) 54; IPACC Statement (n 22 above)
[282] Elias (n 10 above) 163
[283] Chanock (n 135 above) 64
[284] See http://www.africaguide.com/culture/tribes/maasai. htm(accessed 30 March 2013); also see *Inter-American Court Communidad Yanomami v Brazil*, decision of 5 March 1985, Case 7615 (*Yanomami* case), reprinted in Inter- American Commission on Human Rights and Inter -American Court of Human Rights *Inter American Yearbook of Human Rights* (1985) who are also regarded as having no chiefs but leaders http://www.rainforestinfo.org.au/background/people.htm (accessed 30 March 2013)
[285] Banda (n 10 above) 316, 317; Oba (n 220 above) 65; Hansungule (n 120 above) 5; Okoth-Ogendo's tragic African commons (n 118 above) 9; S Berry 'Hegemony on a shoestring: Indirect rule and access to agricultural land' (1992) 62 *Africa* 327; P Shipton & M Goheen 'Understanding African land-holding: Power, wealth, and meaning (1992) 62 *Africa* 307
[286] Daes Study (n 12 above) para 82; Wachira (n 12 above) 316

ownership of land in the state or at least provide that land can be acquired by states on the ground of public policy.[287]

The general situation of indigenous peoples in relation to the foregoing in post-colonial Africa moved Hansungule to observe:

> The native State-successor of the colonial State-continued the racist and genocidal practices against indigenous peoples such as driving them from their lands which are declared 'property of the State' in which the State had the sole right to administer, manage and see to their exploitation.[288]

Arguably, this historical trend of the subordination of the land of indigenous peoples is furthered through the adverse effects of climate change on indigenous peoples' land tenure and use in modern states in Africa.

3.5 Cause and effect of climate change as threat to land-tenure and use

Generally, in discussing the adverse impacts of climate change, literature identifies two layers of impact, namely, direct and indirect.[289] The direct impacts refer to documented effects of a changing climate on the physical environment, whereas indirect impacts refer to measures in response to the adverse impacts of climate change.[290] In relation to the subordination of indigenous peoples' lands in the context of climate change in Africa, this categorisation is limited. It fails appropriately to capture, as it is attempted here, the varying dimensions of the threat experienced by indigenous peoples in relation to their land tenure and use in the cause and effect of climate change in Africa.

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[287] See chapter 5 for a detailed discusion of this in the context of national climate change regulatory framework in relation to indigenous peoples' lands

[288] Hansungule (n 120 above) 5

[289] The direct and indirect impact description is made in 'Declaration of Indigenous Peoples of Africa on Sustainable Development and Rio +20' http://www.uncsd2012.org/index.php?page=view&nr=1151&type=230&menu=38#sthash.T8Py7xbC.dpuf (accessed 14 May 2014); Resolution 10/4, UNHRC Res 10/4, UN Doc. A/HRC/10/29 (20 March 2009) (Resolution 10/4); on discussion relating to impact of climate change particularly its mitigation measures on indigenous peoples, see 'Climate change, human rights and indigenous peoples' submission to the United Nations High Commissioner on Human Rights by the International Indian Treaty Council (IITC Submission); 'Climate change, forest conservation and indigenous peoples rights' submission by Global Forest People (GFP submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Global_Forest_Coalition_Indigenous_Peoples_ClimateChange.pdf accessed 26 October 2012; 'Report on the impacts of climate change mitigation measures on indigenous peoples on their territories and lands' E/C 19/2008/10 (Unedited version) (Indigenous peoples climate change mitigation report); Greenpeace Briefing 'Human rights and the climate crisis: Acting today to prevent tragedy tomorrow (Greenpeace report) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Greenpeace_HR_ClimateCrisis.pdf (accessed 27 October 2012)

[290] Resolution 10/4 (n 289 above); IITC Submssion (n 289 above)

3.5.1 Cause of climate change as a threat

Activities which cause climate change have a link to the expropriation of indigenous peoples' lands in Africa and further the distruption of their land use and tenure. In the main, contemporary land use and tenure policies in modern African states are informed by the economic utility of land and individual ownership in a manner which differs from the perception of indigenous peoples' land tenure and use.[291] This approach reflects the definition of 'land use' as understood in a climate change context as 'economic purposes for which land is managed'.[292] In line with the trend in the historic expropriation of indigenous peoples' lands, contemporary states in Africa exercise the power of eminent domain to take over land, in order to privatise title for realising the 'global faith' of economic development.[293] This conception of land use and tenure follows a market-oriented development model propagated by a number of international lending and development policies, such as those of the World Bank,[294] United Nations Development Programme (UNDP),[295] FAO,[296] the United States Agency for International Development (USAID),[297] and the European Union (EU).[298]

This development model is driven by powerful states, transnational corporations, and multi-national companies and is inspired by a worldview which has no regard for indigenous peoples' concepture of land tenure and use. In the words of Doyle and Gilbert, this model has reduced indigenous peoples to the 'sacrificial lambs' of development,[299] because of 'development aggression',[300] which runs through most states in Africa at the expense of the recognition of indigenous peoples' notion of land-use and tenure, in favour of a use and tenure system that

[291] Banda (n 10 above) 325
[292] IPCC 'Summary for policymakers land use, land-use change, and forestry' (2000) 21
[293] G Rist *The history of development: From western origins to global faith* (2009) 21-24
[294] World Bank *Land policy for growth and poverty reduction* (2003) 9-17
[295] United Nations Development Programme *Attacking poverty while improving the environment initiative* (1999) 13
[296] FAO *Voluntary guidelines on the responsible governance of tenure of land , fisheries and forests in the context of national food security* (2012) 17-20
[297] United States Agency for International Development *Nature,wealth and power:emerging practice for revitalizing rural Africa* (2002) 15
[298] European Union *Land policy guidelines* (2004) 4
[299] As above
[300] *Report of the UN Special Rapporteur, Rodolfo Stavenhagen, Mission to the Philippines*, UN Doc. E/CN.4/2003/90, Add. 3, para 30

supports large scale agriculture, mining and logging, road building, as well as conservation programmes for economic purposes.[301]

The modern approach constitutes a development path that contributes to global climate change.[302] In relation to agricultural activities, according to Amin, a massive agrarian drive signifies that the control and access to natural resources has become the overriding objective of most states.[303] Evidence of policies, laws and practices in relation to the agricultural use of land belonging to indigenous peoples, as Barume documents, can be found in different regions of Africa since independence,[304] in nations such as Kenya,[305] Tanzania,[306] and Rwanda.[307] Evidence of large scale plantations can be found in Cameroon, Kenya, Tanzania, Mozambique, Namibia, South Africa, and Ethiopia, which, in addition to disrupting the land use of indigenous peoples, also, through displacement, compromises their tenure rights.[308] There is evidence that such widespread agricultural projects, including those associated with indigenous peoples' lands, in contributing to large scale clearing of forests, are a driver of climate change.[309]

Indigenous peoples' lands are often conceded to private or public business, including logging companies,[310] operating in African states, including the Democratic Republic of Congo (DRC), Nigeria, Cameroon, Tanzania, Zambia and Uganda.[311] For instance, in the DRC, an area of forest about 532 000 hectares in size, is the estimated loss per year due to degradation and activities including uncontrolled logging.[312] Some indigenous peoples' lands is especially rich in minerals.

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[301] Barume (n 12 above) 64-71; TMW Koita, 'Land allocation and the protection of biodiversity: A case study of Mbunza' in Hinz & Ruppel (n 9 above) 65-87
[302] World Development Report *Development and climate change* (2010) 1-35; C Toulmin *Climate change in Africa* (2009) 77
[303] S Amin 'The challenge of globalisation: Delinking'in *South Centre* (*Independent Commission of the South on Development Issues*) (1993) 133; see also Toulmin (n 302 above)75-76
[304] Barume (n 12 above) 69; also see Toulmin (n 302 above) 77
[305] Barume (n 12 above) 65
[306] R Yeager & NN Miller *Wildlife, wild death: Land use and survival in Eastern Africa* (1986) 24; OPK Olengurumwa *1990's Tanzania laws reforms and its impact on the pastoral land tenure* (A paper prepared for Pastoral Week at Arusha from 14-16 February 2010) 9
[307] Olengurumwa (n 306 above) 22
[308] S Vermeulen & L Cotula 'Over the heads of local people: Consultation, consent, and recompense in large-scale land deals for biofuels projects in Africa' (2010) 37 *Journal of Peasant Studies* (2010) 899
[309] RW Gorte & PA Sheikh 'Deforestation and climate change' (March 2010) 13; J Helmut & EF Lambin '*What drives tropical deforestation A meta-analysis of proximate and underlying causes of deforestation based on subnational case study evidence'* (2001) Land-Use and Land-Cover Change (LUCC) Project IV 24; Gorte & Sheikh (n 309 above) 13; Helmut & Lambin (n 309 above) 24
[310] Barume (n 12 above) 70
[311] See generally 'forest country information' <www.fao.org/forestry/country/en/ > (accessed 21 June 2013)
[312] < www.fao.org/forestry/country/57478/en/cod/ > (accessed 21 May 2013)

This is the case with the Niger Delta region in Nigeria, which is rich in crude oil,[313] and the Central Kalahari Game Reserve (CKGR) in Botswana, rich in diamonds.[314] The mineral known as coltan, widely sought after by the mobile phone industry is reportedly found on Batwa ancestral lands in the DRC.[315] The implementation of the foregoing projects not only represents the disruption of land use as understood by indigenous peoples, it results in dispossession and displacement which compromise their tenure system.[316] As has been shown, activities, including logging and mining, have implications for global climate change. They are a significant source of carbon emissions, amounting to about one-fifth of global man-made emissions, thereby accelerating global rate of climate change.[317]

Oil exploration, particularly in sub Saharan Africa, is typified by environmental degradation resulting from activities including gas flaring, deforestation and other negative practices that have implications for climate change.[318] The sites for these activities often include the land of indigenous peoples who traditionally live a hunting and gathering lifestyle which barely has an impact on the environment. However, this situation is rapidly changing as the use to which these lands are put is a radical departure from the traditional conception of land use and tenure, and has become a major source of environmental degradation as well as global warming. For instance, oil exploration, which is reported as a major threat to mangrove forest in the Niger Delta, Nigeria,[319] involves territories which indigenous groups, such as the Ogoni, Efik and Ijaw, inhabit.[320] Besides its associated consequences,[321] energy-related burning, that is, oil, gas and coal

[313] TC Nzeadibe *et al Farmers' perception of climate change governance and adaptation constraints in Niger Delta region of Nigeria* (2011) 11
[314] L Odysseos 'Governing dissent in the Central Kalahari Game Reserve: 'Development', governmentality, and subjectification amongst Botswana's bushmen'(2011) 8 *Globalizations* 439
[315] Barume (n 12 above) 69
[316] Kidd & Kenrick (n 120 above) 22
[317] Greenpeace *Deforestation and Climate Change* <www.greenpeace.org.uk/forests/climate-change> (accessed 22 March 2013); Gorte & Sheikh (n 309 above) 15; Helmut & Lambin (n 309 above) 28
[318] ED Oruonye 'Multinational oil corporations in Sub- Sahara Africa: An assessment of the impacts of globalisation' (2012) 2 *International Journal of Humanities & Social Science* 152
[319] World Rainforest Movement 'Mangrove Destruction by Oil in Niger Delta' (2011) <www.wrm.org.uy/articles-from-the-wrm-bulletin/section1/mangrove-destruction-by-oil-in-niger-delta/>(accessed 27 July 2013)
[320] 'The rights of indigenous peoples: Nigeria' <www1.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Nigeria.pdf> (accessed 28 May 2013)
[321] SI Oni & MA Oyewo 'Gas flaring, transportation and sustainable energy development in the Niger-Delta'(2011) 33 *Journal of Human Ecology* 21; World Rainforest Movement, *Nigeria: Gas flaring-Major contributor to climate change and human rights abuses* <www.wrm.org.uy/bulletin/136/Nigeria.html> (accessed 28 May 2013)

contributes 85 per cent of human generated emissions which have led to the warming of the world, according to the Intergovernmental Panel on Climate Change (IPCC).[322]

Road and dam construction is considered crucial to the development of several sectors of the economy, but all have played a part in the destruction of forests,[323] on which some indigenous peoples in Africa depend. This contributes to climate change as carbon stored in the trees is released into the atmosphere as soon as the trees are cut down by loggers, for mining companies and other actors.[324] Dam construction which results in displacement and the dispossession of land belonging to indigenous populations, feature in Kenya-the Sondu Miriu River,[325] Namibia-the Epupa dam,[326] and Uganda-Bujagali dam.[327] The implementation of these projects comes with a considerable disruption of subsistence lifestyle and urban migration,[328] which has implications for climate change as it has been shown that populations in their migratory route may be constrained to adopt a way of life which contributes to deforestation, a major driver of climate change.[329]

In relation to conservation, the notion that nature must be preserved from human interference has long been the underlying basis for global conservation efforts,[330] often at the expense of the indigenous peoples' land use[331] as well as traditional tenure associated with it.[332] Conservation efforts in Central Africa, for instance, have led to the dispossession of indigenous peoples in that part of Africa through a legal regime which vests title in forests in the states. According to Cernea and Schmidt-Soltau, the trend in this regard has been on-going for a long time, and is

[322] REH Sims *et al* '2007: Energy supply'in B Metz *et al* (eds) *Climate change 200: Mitigation. contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 261-262
[323] 'Rain Forest Deforestation' <www.factsanddetails.com/world.php?itemid=1299&catid=52&subcatid=329> (accessed 28 March 2013); Gorte & Sheikh (n 309 above) 15; Helmut & Lambin (n 309 above) 27
[324] World Rainforest Movement 'What are underlying causes of deforestation?' <www.wrm.org.uy/deforestation/indirect.html> (accessed 18 June 2013)
[325] World Rainforest Movement 'Dams Struggles against the modern dinosaurs' <www.wrm.org.uy/deforestation/dams/texten.pdf> (accessed 27 May 2013) (Dam Struggles)16-17
[326] Dam Struggles (n 325 above) 28
[327] Dam Struggles (n 325 above) 29
[328] Dam struggles (n 325 above) 28-29
[329] 'Migration and climate change' <www.iom.int/cms/envmig> (accessed 18 March 2013)
[330] M Colchester *Salvaging nature: Indigenous peoples, protected areas and biodiversity conservation* (2003) 2-3; W Adams, 'Nature and the colonial mind' in W Adams & M Mulligan (eds) *Decolonizing nature: Strategies for conservation in a post-colonial era* (2003) 25
[331] Barume (n 12 above) 68-70; MM Cernea & K Schmidt-Soltau 'Poverty risks and national parks: Policy issues in conservation and resettlement' (2006) 34*World Development* 1808–30
[332] Colchester (n 330 above) 5

characterised by forced removal without compensation.[333] A similar occurrence is found in projects involving forest-based Batwa in the DRC,[334] and in Uganda.[335] Conservation projects generally present opportunities to indigenous peoples who are forest-dependent by the use of their conservation knowledge and skills in promoting sustainable management of the projects as a means of reducing emission of greenhouse gases which result in a changing climate.[336]

However, in occasioning dispossession, taking over control and use of land of indigenous peoples, conservation has implications for climate change as it is associated with slippage in the global effort to mitigate climate change in that it constrains indigenous peoples into a lifestyle which may further environmental degradation elsewhere. As Meyfroidt and Lambin have demonstrated, leakages in conservation projects may be counterproductive as what is viewed as a gain in one conservation effort may generate activities which promote deforestation elsewhere, and be a source of climate change.[337]

To sum up, generally, in all activities which serve as triggers of climate change there is clear loss of land and associated tenure of indigenous peoples akin to the trend in international law. However, this is not the only threat to indigenous peoples' land tenure and use that reflects the historical trend of subordination of their notion of land tenure and use. In achieving the similar end of displacement, this trend is noticeable in the emerging narratives of the adverse effects of climate change on the physical environment of the remaining land occupied by indigenous peoples in Africa.

3.5.2 Climate change as a threat

In Africa, climate change contributes to lack of viability of the land of indigenous peoples, leads to migration, and thus make their land vacant for state occupation for use to serve national

[333] Cernea & Schmidt-Soltau (n 331 above) 1808–30; Kidd & Kenrick (n 120 above) 10-11
[334] AK Barume *Heading towards extinction? Indigenous rights in Africa: The case of the Twa of the Kahuzi–Biega National Park, Democratic Republic of Congo* (2000) 72-77; L Mulvagh 'The impact of commercial logging and forest policy on indigenous peoples in the Democratic Republic of Congo' <www.iwgia.org/iwgia_files_publications_files/IA_4-06_Dem_Rep_Congo.pdf > (accessed 28 May 2013) 2
[335] C Kidd & P Zaninka 'Securing indigenous peoples' rights in conservation: A review of South-West Uganda (2008) 16
[336] C Robledo, J Blaser & S Byrne 'Climate change: What are its implications for forest governance' in LA German, A Karsenty & A Tiani (eds) *Governing Africa's forest in a globalised world* (2010) 355, 356; Desmet (n 4 above) 652-653
[337] P Meyfroidt & EF Lambin 'Forest transition in Vietnam and displacement of deforestation abroad' (2009) 106 *Proceedings of the National Academy of Sciences of the United States* 16139; see also R Sedjo 'Local logging: Global effects' (1995) 93 *Journal of Forestry* 25, the author finds that all the conservation efforts made in United States west were offset by increases in timber extraction in the south of the United States and in Eastern Canada

economic ends.[338] In West Africa, climatic impact on the land of indigenous peoples such as the Bororo, and Tuareg,[339] include the destruction of grazing lands, drought, loss of access to safe water, the destruction of plants and animals, the loss of traditional fishing activities and displacement.[340] In east Africa, there is evidence of the effects of climate change in relation to several indigenous peoples' groups, among whom are the Maasai, Ogiek, Endorois, and Yaaku in Kenya.[341] These peoples continue to experience conditions, including drought, flood, famine, displacement, and loss of life, which are due to climate change.[342] In an article referring to research commissioned by the Christian Aid in Northern Kenya, Beaumont depicts pastoralists in that region as 'climate canaries', who are fated to become the first victims of world climate change as a result of its impacts on their land.[343] This example signifies the peculiar impacts being faced by these peoples in the light of climate change.

Similar evidence has been reported in central Africa and the great lakes region, in the remaining land occupied by the Batwa in Rwanda, Burundi, Uganda and the DRC. They are known as Baka in Central African Republic (CAR) and Gabon, Baka and Bagyeli in Cameroon.[344] Adverse experiences, including a lengthy dry season are affecting the agricultural calendar and bringing about a scarcity of forest products, such as fruits and tubers, thereby disturbing their cultural lifestyle.[345] More frequently, for the Mboboro and other pastoralists in the same region, transhumance calendars are being altered from January to late October due to a shift in the start of the dry season. This shift does not avert the problem but rather increases the number of conflicts they have with farmers, as they now go on transhumance when the crops have not yet been harvested in the valleys.[346] In the Horn of Africa, the Doko, Ezo, Zozo and Daro Malo in

[338] 'Agrofuels and the myth of the marginal lands' A briefing by the Gaia Foundation, Biofuelwatch, the African Biodiversity Network, Salva La Selva, Watch Indonesia and EcoNexus (September 2008) www.cbd.int/doc/biofuel/Econexus%20Briefing%20AgrofuelsMarginalMyth.pdf (accessed 24 May 2013)
[339] Working Group Report (n 22 above) 18
[340] Indigenous Peoples of Africa Coordinating Committee (IPACC) 'West Africa' http://www.ipacc.org.za/eng/regional_westafrica.asp (accessed 15 September 2011)
[341] Tebtebba Foundation 'Indigenous peoples, forests & REDD Plus: State of forests, policy environment & ways forward' (2010) 440 (Tebtebba Foundation); Centre for Human Rights (CHR) 'Kenya' http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf (accessed 15 March 2013)
[342] IWGIA *The World Indigenous Report* (2011) 410; Tebtebba Foundation (n 341 above).
[343] P Beaumont 'Kenya's herdsmen are facing extinction as global warming destroys their lands' (November 12, 2006) *The Observer*
[344] Working Group Report (n 22 above) 16
[345] Tebtebba Foundation (n 341 above) 481
[346] As above

the Gamo Highlands, experience increasing pressures on local resources and great hardship through the rise in temperature, the scarcity of water, dying animals and less grazing land.[347]

The Amazigh (or Imazighn), also known as the Berbers, in North Africa[348] face an extreme scarcity of water, the degradation of palm trees, a deterioration of a unique tree species in south-western Morocco and salinisation in a changing climate.[349] In the southern part of Africa, the San and Basarwa of the Kalahari basin,[350] contend with increasing dune expansion and increased wind speeds which have resulted in a loss of vegetation and have negatively impacted on traditional cattle and goat farming practices.[351] Indeed, the concern has been expressed that as the Kalahari dunes spread, this will affect attract huge tracts of land in Botswana, Angola, Zimbabwe and western Zambia where these indigenous peoples live.[352]

The foregoing scenarios on the lands of indigenous peoples often lead to their displacement. For instance, in the report following a 2012 commissioned research by the United Nations High Commissioner for Refugees (UNHCR Report) which sought to explore the extent to which climatic change and environmental impacts have played a role in decisions of populations to move away from their homelands in the East and Horn of Africa, there are findings indicating that the climatic threat to land use was a reason for movement.[353] According to the UNHCR Report, drought, flooding and disrupted rainfall, perceived as arising from changes in climatic condition have led to the displacement of pastoralists who are majorly from such African States as Uganda, Eritrea, Ethiopia, Somalia and Eastern Sudan.[354] It was noted that pastoralists from

[347] 'Ethiopia: the changing climate in Gamo highlands' - Video Report http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=11105:ethiopia-the-changing-climate-in-gamo-highlands-video-report&catid=68:videos-and-movies&Itemid=96 (accessed 20 September 2011).
[348] Working Group Report (n 22 above) 18-19
[349] International Institute for Sustainable Development (IISD) 'Climate change in three Maghreb countries Special Report on Selected Side Events at UNFCCC COP-7' (2001) IISD http://www.iisd.ca/climate/cop7/enbots/pdf/enbots0204e.pdf (accessed 15 December 2013)
[350] Working Group Report (n 22 above) 17
[351] UNPFII 'The effects of climate change on indigenous peoples' http://www.un.org/esa/socdev/unpfii/en/climate_change.html (accessed 15 December 2013); Shifting sands: climate change in the Kalahari' http://journals.worldnomads.com/shrummer16/story/52708/South-Africa/Shifting-Sands-Climate-Change-in-the-Kalahari(Accessed 15 December 2012)
[352] R Mwebaza *Is climate change creating more environmental refugees than war in Africa?* (3 August 2010) http://www.issafrica.org/iss-today/is-climate-change-creating-more-environmental-refugees-than-war-in-africa (accessed on 1 November 2013)
[353] T Afifi *et al Climate change, vulnerability and human mobility: Perspectives of refugees from the East and Horn of Africa* (United Nations University Institute for Environment and Human Security, Report No. 1, June 2012) < www.reliefweb.int/sites/reliefweb.int/files/resources/East%20and%20Horn%20of%20Africa_final_web.pdf> (accessed 15 October 2013)
[354] Afifi *et al* (n 353 above) 24

the south-west of Uganda, have permanently moved across the border into Northern Tanzania.[355] Similarly, pastoralists from Ethiopia, as reported, have crossed the border into Kenya and other regions in Ethiopia due to the prolonged drought.[356]

In an earlier study of 2009, it was concluded that drought has so affected the traditional pasture land of pastoralists in North Somalia that some of these peoples have lost livestock due to a lack of pasture and water. Consequently, they have given up their traditional livelihood to settle permanently in the cities, where they usually join the urban poor and Internally Displaced Persons (IDPs), or in the countryside, where they create enclosures.[357] Although it can be traced to other factors, severe climatic variations are the triggers for displacement in Northern Kenya.[358] Estimates in 2011 put the figure of those displaced in northern Kenya as a result of a range of factors including drought at around 4000.[359] The ecological changes including drought, the Fulbe or Mbororo herders in the western part of Africa have altered their transhumance patterns.[360] In Nigeria, for instance, the general trend in the migratory drifts of the Mbororo has been from northwest to southeast.[361]

3.5.3 Effects of climate response as a threat

Global climate change response initiatives have a potential negative impacts on indigenous peoples' land tenure and use. Climate change response measures are categorised into adaptation and mitigation. Adaptation is the adjustment or response that moderates harm or exploits beneficial opportunities in climate change, whereas mitigation connotes human intervention to

[355] Afifi *et al* (n 353 above) 41, reporting the viewpoint of an official from Ministry of Agriculture in Uganda
[356] Afifi *et al* (n 353 above) 41, reporting the viewpoint of International Organisation for Migration, Ethiopia
[357] V Kolmannskog *Climate change, disaster, displacement and migration*: *Initial evidence from Africa* (New Issues in Refugee Research, Research Paper No. 180, December 2009) 6; S Cechvala *Rainfall & migration: Somali-Kenyan Conflict* (December 2011-ICE Case Number 256) <www1.american.edu/ted/ICE/somalia-rainfall.html> (accessed 9 November 2013)
[358] NM Sheekh *et al Kenya's neglected IDPs*: *Internal displacement and vulnerability of pastoralist communities in Northern Kenya* (8 October 2012) <www.issafrica.org/uploads/SitRep2012_8Oct.pdf>, (accessed 8 November 2013), where the authors argue that factors including conflict, legacy of colonialism and violence were also part of the major causes of displacement 2; but see TL Weiss & JD Reyes 'Breaking the cycle of violence: Understanding the links between environment, migration and conflict in the greater horn of Africa' in UJ Dahre (ed) *Horn of Africa and peace*: *The role of the environment* (A report of the 8th Annual Conference on the Horn of Africa, Lund, Sweden, 7-9 August, 2009) 97-108
< www.sirclund.se/Conf2009.pdf> (accessed 8 November 2013) where the authors contend that both gradual environmental change and extreme environmental events influence population movements in the region.
[359] Sheekh *et al* (n 358 above) 5
[360] 'Nigeria'
<www1.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/Report/The%20History%20And%20Social%20Organisation%20Of%20The%20Pastoral%20Fulbe%20Society.doc.> (accessed 28 October 2013)
[361] As above

reduce the sources or enhance the sinks of greenhouse gases.[362] In relation to adaptation, Least Developing Countries (LDC), most of which are in Africa, are required to identify their most exigent adaptation needs through the preparation of National Adaptation Plan of Action (NAPA).[363] Several states in Africa have prepared this action plan but, none indicates the special situation of indigenous peoples' lands in the context of climate change.[364] The implication is that critical issues relating to indigenous peoples are not considered as important by states, a further reflection of the historical neglect of indigenous peoples.

With respect to mitigation, of particular application in Africa are forest-related initiatives under the United Nations Reduced Emissions from Deforestation and forest Degradation (UN-REDD) programme which supports nationally-led REDD+.[365] Many of the forests envisaged for these projects are in the territories historically belonging to indigenous peoples.[366] In Africa, states that are fully under the UN-REDD National programme for REDD+ include DRC, Nigeria, the United Republic of Tanzania, Zambia, and targeted efforts are also supported in Benin, Cameroon, the Central African Republic, Côte d'Ivoire, Ethiopia, Ghana, Kenya, Madagascar, Morocco, South Sudan, the Sudan, Tunisia and Uganda.[367]

In the states listed above, particularly those fully involved and supported under the UN-REDD National programme, the REDD+ initiative has potential benefits for governments as they will receive payment for controlling deforestation.[368] Indigenous peoples can be empowered and their

[362] On the definition of adaptation and mitigation as well as relationship, see RJT Klein *et al* 'Inter-relationships between adaptation and mitigation' in ML Parry *et al* (eds) *Impacts, adaptation and vulnerability*: *Contribution of Working Group II to IPCC (AR4)* 745-747; Intergovernmental Panel on Climate Change (IPCC) *Impacts, adaptations and mitigation of climate change*: *Scientific-Technical Analyses (1995) Contribution of Working Group II to IPCC SAR* (1995) 5

[363] Conference of the Parties (COP) at its 7th session in 2001 through decision 5/CP.7, see Toulmin (n 302 above) 28; see art 4(9) of the UNFCCC which recognises the special needs of LDCs

[364] This is examined in detail in chapter 5 of the thesis which is devoted to the national climate regulatory framework in relation to indigenous peoples' lands

[365] In climate mitigation discourse, REDD+ stands not only for Reducing Emissions from Deforestation and Forest Degradation, but also incentivising conservation, sustainable management of forests and enhancement of forests as stock of carbons in developing countries. For a good discussion on the meaning and evolution of REDD+, see J Willem den Besten, B Arts & P Verkooijen 'The evolution of REDD+: An analysis of discursive-institutional dynamics' (2014) 35 *Environmental Science and Policy* 40; Other initiatives which support REDD+ are World Bank hosted Forest Carbon Partnership Facility (FCPF), and voluntary initiative driven by non-governmental organisation notably, Climate, Community and Biodiversity Alliance (CCBA), see UN-REDD Programme and REDD+, Frequently Asked Questions and Answers (UN-REDD Programme, November 2010); UN-REDD Programme, 'The UN-REDD Programme Strategy 2011-2015' 25

[366] RS Abate & EA Kronk 'Commonality among unique indigenous communities: An introduction to climate change and its impacts on indigenous peoples' in RS Abate & EA Kronk (eds) *Climate change and indigenous peoples: The search for legal remedies* (2013) 10; LA Crippa 'REDD+: Its potential to melt glacial resistance to recognise human rights and indigenous peoples' rights at the World Bank' in Abate and Kronk (above) 123

[367] UN-REDD 'Partner countries'<www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx> (accessed14 June 2013)

[368] Toulmin (n 302 above) 130

socio-economic status can improve if REDD+ respects their tenure system and land-use knowledge in its activities, including monitoring and measurement, reporting, verification, as well as sustainable management of the environment.[369] However, while the REDD+ initiative remains in its early stage of implementation, the extent to which it will benefit indigenous peoples depends on their security of land tenure under the national legal framework, which remains largely absent in Africa.[370] Regarding the REDD+, there are emerging concerns that projects will erode the rights of indigenous peoples who are forest- dependent,[371] due to the insecurity of land tenure of indigenous peoples which potentially constitutes a barrier to claim to any reward from the implementation of REDD+ as a climate mitigation measure.

The foregoing measures often come at a cost not only to indigenous peoples' notion of land use and tenure but their associated cultural way of life. It is not surprising that indigenous peoples have had to change from a pastoral to agricultural way of life due to severe climatic conditions. According to Warner's finding, there are pastoralists who 'borrow money from others to buy seed' for farming due to the declining pasture and loss of livestock which are important aspects of their cultural way of life.[372] Similarly, in describing the situation of indigenous peoples in the Kalahari region, Salick and Byg noted that '[i]ndigenous groups which have been forced to become sedentary, huddle around government drilled boreholes for water, and many are dependent on government hand-outs for survival'.[373] These are disappointing developments considering the cultural significance of indigenous peoples' relationship with land use and tenure. Effectively, the cause and effect of climate change detach indigenous peoples from their traditional use of land and its cultural significance and ultimately bring about an outcome similar to the historic subordination of indigenous peoples' land tenure and use.

[369] This is noted under the Cancun Agreements which require parties to respect the knowledge and rights of indigenous peoples and members of local communities, *see Appendix I to the Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (Decision 1/CP/16 FCCC/CP/2010/7/Add.1) paras 2(c) and (d); also see ND Burgess *et al* 'Getting ready for REDD+ in Tanzania: A case study of progress and challenges'(2010) 44 *Fauna & Flora International* 339

[370] 'Report on the impacts of climate change mitigation measures on indigenous peoples on their territories and lands' (E/C19/2008/10) paras 42-56

[371] T Griffiths & F Martone *Seeing 'REDD'? Forests, climate change mitigation and the rights of indigenous peoples and local communities* (Forest Peoples Programme, May 2009) 26; Toulmin (n 302 above) 130

[372] WK Warner *Climate change induced displacement*: *Adaptation policy in the context of the UNFCCC climate negotiations* (2011) 27

[373] S Jan & A Byg (eds) *Indigenous peoples and climate change* (2007) 9

3.6 Conclusion

The foregoing analysis explores the notion of indigenous peoples' land rights, highlighting that indigenous peoples are known by a variety of land use and tenure which has suffered historic subordination through international law principles. Indigenous peoples view and use land as a means of achieving cultural survival and environmental integrity. This perception is supported by a unique tenure system distinctive in terms of its features, namely, a collective sense of ownership, the informal nature of claim and parallel use, all of which is defensible under key instruments of international human rights and environmental law.

Notwithstanding the foregoing, there has been a historical subordination of the notion of indigenous peoples' land tenure and use which dates back to the colonial era when the development and implementation of two doctrines of international law, that is, the doctrines of 'discovery' and *terra nullius* ensured the legitimisation of non-recognition of the unique features of indigenous peoples' land rights. These doctrines, used by colonial states in different parts of the world including Africa, are remarkable for their conflict with indigenous peoples' perception of land use and tenure. In terms of these doctrines, the use of land and tenure of indigenous peoples such as the pastoralists as well as hunter-gatherers, were considered unrefined, and unprofitable for commercial purposes.To support this worldview, a new or European legal system, as well as customary law, was created which became the applicable law in several colonies effectively subordinating the land tenure and use of indigenous peoples.

The historical subordination continues to be reflected in the reality of the adverse impacts of climate change. In the cause of climate change, the expropriation and unsustainable utilisation of indigenous peoples' lands for developmental purposes undermine and subordinate indigenous peoples' notion of land tenure and use. Also, in occasioning drought, the destruction of plants and animals, displacement, the loss of land and culture, emerging narratives of climatic impact on the physical environment of indigenous peoples make their land vacant and available for state occupation for purposes which undermine their notion of land tenure and use. The next chapter explores the extent to which international climate change regulatory framework addresses this trend.

Chapter 4

The international climate change regulatory framework in relation to indigenous peoples' lands

4. 1 Introduction

The previous chapter unpacks the notion of indigenous peoples' land rights in terms of land use and tenure as well as discusses its link with adverse effects of climate change. Given the global nature of climate change, the response has been top-down: decisions are taken by institutions established at the international level, that is under the aegis of United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to address the adverse impacts of climate change at the national level. This chapter presents an overview of the international climate regulatory framework in relation to indigenous peoples' lands. In the main, the chapter contends that while there is an emerging focus on the protection of indigenous peoples' land tenure and use in the international climate regulatory framework, this is potentially limited by the notions of 'sovereignty', 'country driven' and 'national legislation' which are embraced under the framework. As is the case with the historical trend in international law, these notions potentially legitimise the formulation at the national level of a climate change regulatory framework that subordinates or hinders the protection of indigenous peoples' land use and tenure.

4.2 The international climate change regulatory framework

The climate change regulatory framework at the international level represents a top-down approach by the institutions under the aegis of United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol in addressing the challenge posed by climate change. In itself this is not problematic considering that climate change is a global challenge.[1] Action is necessary at other levels, however, issues such as the differentiation of reponsibilities between developed and developing states and allocation and transfer of resources

[1] JL Dunnof 'Levels of environmental governance'in D Bodansky *et al* (eds) *The Oxford handbook of international environmental law* (2007) 87

makes international negotiation and response inevitable and distinct from other levels of climate governance. In the words of the UNFCCC:

> The global nature of climate change calls for the widest possible co-operation by all countries and their participation in an effective and appropriate international reponse, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.[2]

At the international level, climate change has elicited rule-making and decisions in relation to adaptation and mitigation which are considered as global responses to climate change.[3] It is also characterised by a range of institutions involved and overlapping in the rule and decision-making processes. This section examines these institutions and set of key instruments existing under the international climate change regulatory framework level in relation to indigenous peoples' lands.

4.2.1 Regulatory institutions and indigenous peoples

Key institutions under the aegis of the international climate change regulatory framework are the Conference of Parties (COP), Meeting of the Parties (MOP), the Intergovernmental Panel of Climate Change (IPCC), Subsidiary Body for Scientific and Technological Advice (SBSTA), Subsidiary Body for Implementation (SBI), Ad-hoc Working Group on Long Term Cooperative Action Under the Convention (AWG-LA), Ad-hoc Working Group on Further Commitment for Annex 1 Parties Under the Kyoto Protocol (AWG-KP).[4] Arguably, there is an opportunity in these institutions for engaging with the concerns around the land use and tenure of indigenous peoples in the light of climate change.

4.2.1.1 Conference of Parties / Meeting of the Parties

The Conference of the Parties (COP) is made up of state parties and acts as the main forum elaborating the climate change regime by the negotiation of amendments and protocols.[5] Established pursuant to article 7 of the UNFCCC, the COP is the highest decision-making body

[2] UNFCCC, preamble
[3] E Kriegler *et al* 'Is atmospheric carbon dioxide removal a game changer for climate change mitigation?' (2013) 118 *Climatic Change* 45; R Maguire 'Foundations of international climate law: Objectives, principles and methods in climate change and the law' (2013) 21 *Ius Gentium: Comparative Perspectives on Law & Justice* 83, 84
[4] F Gale 'A cooling climate for negotiations: Intergovernmentalism and its limits' in T Cadman (ed) *Climate change and global policy regime: Towards institutional legitimacy* (2013) 32; D Bodansky 'International law and the design of a climate change regime' in U Luterbacher & DF Sprinz (eds) *International relations and global climate change* (2001) 201
[5] Bodansky (n 4 above) 213

under the UNFCCC,[6] and functions as the MOP or the CMP (Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol) by virtue of article 13 of that protocol. The COP exercises wide functions. For instance, it discussed and reached agreement on the need to negotiate a protocol to the Convention at the COP-1,[7] which led to the adoption of the Kyoto Protocol at COP-3[8]and its subsequent amendment at COP-17 in Doha.[9] According to the Convention, each of the parties has one vote, a rule that applies to all parties except a 'regional economic integration organisation' such as the European Union (EU), whose number of votes equals the number of the member states that are parties to the Convention.[10] Generally, decisions are taken by consensus and recourse to voting is made only in relation to treaty amendments where consensus is difficult to attain. In that case, a decision is reached by a three-fourths majority.[11]

The participation of NGOs in the discussion at this level, even if it is one of observation, is an opportunity to bring indigenous peoples' issues up for discussion. This is not new. In demonstrating that non-state actors play a critical role in shaping environmental governance at all levels, Edmondson notes that it is difficult to imagine that the IPCC (International Panel on Climate Change) would have been formed 'without the initiatives of experts and scientists'.[12] In showing that agenda-setting within the meetings of the COP and arguably the MOP is shaped by NGOs, Conca argues that 'there has been a palpable loss of agenda setting power' by the states involved in environmental regimes.[13] In support, Roberts *et al* show that there is significant empirical correlation between the participation of NGOs and the willingness of governments to sign and ratify treaties.[14]

[6] As above
[7] BL de Chazournes *United Nations Framework Convention on Climate Change*, United Nations Audiovisual Library of International Law
[8] As above
[9] Decision 1/CMP.8 Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9 (Doha Amendment) para 30 FCCC/KP/CMP/2012/13/Add.1
[10] UNFCCC art 18; see Gale (n 4 above) 36
[11] UNFCCC art 15(3); Gale (n 4 above) 36
[12] E Edmondson 'The Intergovernmental Panel on Climate Change: Beyond monitoring' in B Gleeson & N Low (eds) *Governing for the environment: Global patterns, ethics and democracy* (2001) 47
[13] K Conca 'Old states in new bottles? The hybridization of authority in global environmental governance' in J Barry & R Eckersley (eds) *The state and the global ecological crisis* 181-206, 202
[14] J Roberts *et al* 'Who ratifies environmental treaties and why? Institutionalism, structuralism and participation by 192 nations in 22 treaties' (2004) 4 *Global Environmental Politics* 22

The participation of NGOs is not unexpected. As the highest political decision-making bodies under the UNFCCC and Kyoto Protocol, the COP and MOP respectively involve heads of states and representatives who are parties to the agreements. However, non-member states have the right to attend as observers.[15] Importantly, observer status is extended to other bodies, 'whether national or international, governmental or non-governmental', that are qualified in matters within the scope of the UNFCCC.[16] This is the legal basis for the participation of indigenous peoples organisations. The only qualification to this concession is that 'at least one third of the parties present' should not oppose the entity seeking observer status.[17] Cabre has investigated the pattern of attendance of NGOs, parties and UN organisations from COP-1 to 15.[18] The author finds an increase in attendance of observers from less than 1,000 at COP-1 to an average of 3,000 at subsequent meetings.[19] Similarly, the number of intergovernmental organisations in attendance at COP has increased from 23 at COP-1 to an average of 150 at COP-15.[20] In examining the potential for Business International NGOs (BINGO) to shape climate issues, Vormodal concludes that the activities of BINGO seem to have exerted significant influence on the process of negotiating a regulatory design for the Clean Development Mechanism (CDM) created under the Kyoto Protocol.[21]

There is evidence that indigenous peoples-based NGOs have observer status which qualifies them to attend debates at the forum. At the global level, organisations such as Forest Peoples Programme,[22] and the International Alliance of Indigenous and Tribal Peoples of the Tropical Forests enjoy observer status and contribute to climate discussions through their submissions. Of importance to Africa is the Indigenous Peoples of Africa Co-ordinating Committee (IPACC) which has made substantial submissions at COP on a range of issues affecting indigenous peoples in Africa. At the COP 17 for instance, IPACC recommended to the African Group of

[15] UNFCCC, art 7(6)
[16] As above
[17] As above
[18] M Cabre 'Issue linkages to climate change measured through NGO participation in UNFCCC'(2011) 11 *Global Environmental Politics* 10-22
[19] As above
[20] 'IPACC Recommendations to UNFCCC COP 17, Durban, South Africa' 28 November-1 December 2011 http://www.ipacc.org.za/uploads/docs/IPACCFlyer2011.pdf (accessed 24 January 2014)
[21] I Vormedal 'The influence of business and industry NGOs in the negotiation of the Kyoto mechanisms: The case of carbon capture and storage in the CDM' (2008) 8 *Global Environmental Politics* 36
[22] http://maindb.unfccc.int/public/ngo.pl?search=F (accessed 24 January 2014)

Negotiators the need to integrate land tenure systems particularly of the nomadic tribe in Africa into climate discussions.[23]

4.2.1.2 International Panel on Climate Change

The Intergovernmental Panel on Climate Change (IPCC) was jointly established by the United Nations Environment Programme (UNEP) and the World Meteorological Organisation (WMO and subsequently endorsed by the United Nations General Assembly (UNGA) in 1988.[24] The primary mandate of the IPCC is to offer 'a clear scientific view on the current state of knowledge with regard to climate change and its potential environmental and socio-economic impacts.'[25] Its membership is open to all member countries of the United Nations (UN) and WMO.[26]

Though minimal, through its reports over the years, the IPCC has paid some attention to the issues of indigenous peoples. The IPCC Working Group II 1st Assessment Report (FAR) mentions indigenous peoples once in connection with the value to be placed on forest produce.[27] The IPCC Working Group III FAR on response strategies to climate change mentions indigenous peoples in the context of those in the Boreal region.[28] The IPCC Working Group II 2nd Assessment Report (SAR) refers to the impact of climate change on the ecosystem of indigenous peoples.[29] In the Working Group III SAR on the economic and social dimension of climate change does not refer to indigenous peoples at all,[30] but the IPCC Working Group II 3rd Assessment Report (TAR) on vulnerability, though not discussing Africa, makes copious reference to indigenous peoples in the Arctic and Americas.[31]

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[23] n 20 above
[24] IPCC 'Organisation' http://www.ipcc.ch/organisation/organisation.shtml (accessed 12 May 2014)
[25] As above
[26] Presently, 195 countries are members of the IPCC, see IPCC'Organisation' http://www.ipcc.ch/organisation/organisation.shtml(accessed 12 May 2014)
[27] RS de Groot *et al* 'Natural terrestial ecosystems' in WJ McG. Tegart, GW Sheldon & DC Griffiths (eds) *Climate change: The IPCC impact assessment* (1990) Report prepared for IPCC by Working Group II FAR, Camberra, Australia 3-23; 1992 Supplementary Report to IPCC Impact Assessment Report I
[28] D Kupfer & R Karimanzira 'Agriculture, forestry and other human activities' in Working Group III *The IPCC response strategies* (1990) IPCC FAR, World Meteorological Organisations/ United Nations Environment Programme 90, 113
[29] RT Watson, MC Zinyowera & RH Moss *Impacts, adaptations and mitigation of climate change: Scientific-Technical Analyses* (1996) Contribution of Working Group II to IPCC SAR 7, 30, 99, 257
[30] JP Bruce, H Lee & EF Haites (eds) *Economic and social dimensions of climate change* (1995) Contribution of Working Group III to IPCC SAR
[31] A Allali *et al* 'Africa' in JJ McCarthy *et al* (eds) *Impacts , adaptation and vulnerability Contribution of Working Group II to IPCC TAR* (2001) chapter 10

Indigenous peoples' knowledge,[32] health,[33] and related risks,[34] are described in the IPCC Working Group II Fourth Assessment Report (AR4) on impact and vulnerability, although it was largely in the context of the Americas and Arctic. A brief reference to property rights,[35] and pastoralist coping strategy,[36] is discernible at least in relation to indigenous peoples' land rights largely within the Americas and Arctic. Reference is made to indigenous peoples' land rights, in the IPCC Working Group III AR4, as a structural challenge which must be addressed in forest management.[37] In its report, the IPCC Working Group II AR5 devotes a section to indigenous peoples, acknowledging that vulnerability to climate change impact is high among these peoples and that considerable challenges will be witnessed in terms of their culture, livelihoods and food security as a result of the adverse impacts of climate change.[38]

4.2.2 Subsidiary Body for Scientific and Technological Advice

The Subsidiary Body for Scientific and Technological Advice (SBSTA) is established pursuant to article 9 of the UNFCCC. It is largely composed of government experts who provide assessments of scientific knowledge and evaluations of scientific/technical aspects of national reports and the effects of implementation measures.[39] In the main, the SBSTA serves a 'multi-disciplinary' purpose in that it provides expeditious information and advises on scientific and technological matters relating to the UNFCCC.[40] The SBSTA has contributed significantly to the discussion of a range of issues, such as the impact of climate change as well as the vulnerability of different regions and potential response measures.[41]

In its deliberations, the SBSTA operates as an important platform for showcasing the pertinent questions relating to land tenure and use by indigenous peoples. For instance, in response to its invitation for submissions by parties to the SBSTA made at the 11th session of the COP in 2006

[32] A Fischlin *et al* 'Ecosystems, their properties, goods, and services' in ML Parry *et al* (eds) *Impacts, adaptation and vulnerability* (2007) Contribution of Working Group II to IPCC AR4, 211
[33] U Confalonieri *et al* 'Human health' in ML Parry *et al* (eds) *Impacts, adaptation and vulnerability* (2007) Contribution of Working Group II to IPCC AR4, 391, 395
[34] SH Schneider *et al* 'Assessing key vulnerabilities and the risk from climate change' in ML Parry *et al* (eds) *Impacts, adaptation and vulnerability* (2007) Contribution of Working Group II to IPCC AR4, 779
[35] Schneider *et al* (n 34 above) 815
[36] Fischlin *et al* (n 32 above) 293
[37] As above
[38] J Barnett *et al* 'Human security' IPCC WGII AR5 (28 October 2013) http://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-Chap12_FGDall.pdf (accessed 14 May 2014) para 12.3.2
[39] Bodansky (n 4 above) 214
[40] Gale (n 4 above) 36
[41] As above

regarding the policy and incentive approaches to Reducing Emission from Deforestation and Forest Degradation (REDD) activities, Bolivia emphasised the need for the protection of indigenous peoples.[42] In particular, it stressed that REDD should 'dignify the living conditions'[43] and promote the participation of relevant stakeholders, including indigenous peoples in the forest.[44] Similarly, in its presentation on behalf of the African countries of the Congo Basin, submitting on the relevance of REDD as a response to diverse causes of greenhouse emission from deforestation, Gabon argued that sustainable management of the forests cannot be achieved without the participation of indigenous peoples.[45]

At its 27th session in 2007, when the SBSTA received further views on approaches to stimulate action on REDD, the necessity for creating a carbon market to incentivise the protection of the environment was discussed by parties.[46] Tuvalu submitted that creating a carbon market for REDD may infringe on the rights of access of indigenous peoples to forests even though this may be potential source of generating income for indigenous peoples and local communities and in incentivising them to protect their forests.[47] Markets and non-market approaches, as Tuvalu further submitted, must consider the rights of indigenous peoples. It also advised that the development of a national model legislature may be useful in ensuring that the transfer of emissions and the right of ownership of carbon on land does not infringe upon the rights of indigenous peoples.[48]

On the status of indigenous peoples and local communities in the formulation of an appropriate approach to forest emission reduction, the contribution of parties was specifically invited by the SBSTA. These contributions were considered at the 13th session of the SBSTA.[49] No African state responded to the call for submissions, but the contribution of the Czech Republic on behalf of the European Community and its members is quite instructive. In its submission, the Czech

[42] United Nations Framework Convention on Climate Change Subsidiary Body for Scientific and Technological Advice 'Paper No. 3: Bolivia Agenda Item 6: Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action', 24th session Bonn, 18-26 May 2006 Item 6 of the provisional agenda' FCCC/SBSTA/2006/MISC.5 (*Bolivia* paper)
[43] *Bolivia* paper (n 42 above) 10
[44] *Bolivia* paper (n 42 above) 11
[45] UNFCCC SBSTA 'Paper No. 8: Gabon on behalf of Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equitorial Guinea and Gabon' FCCC/SBSTA/2006/MISC.5 75
[46] UNFCCC SBSTA 'Reducing emissions from deforestation in developing countries: Approaches to stimulate action, views on issues related to further steps under the Convention related to reducing emissions from deforestation in developing countries: approaches to stimulate action' FCCC/SBSTA/2007/MISC.14/Add.3 (SBSTA REDD approaches)
[47] SBSTA REDD approaches (n 46 above) 14
[48] As above
[49] As above

Republic contends that for any REDD to be effective, there is a need to allow for a multi-stakeholders process involving local communities and indigenous peoples and respect for their rights as guaranteed under international instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which, arguably, include their rights to land.[50] It also advised that local communities and indigenous peoples should be involved in the monitoring activities of the status of forest carbon stocks.[51] Similarly, Ecuador submitted that the development and implementation of methodologies for REDD should safeguard the rights of indigenous peoples, incorporate a prior consultation clause and assure benefit-sharing which accommodates incentives for indigenous peoples and local communities.[52] The shortcoming with regard to the implementation of these submissions is that the activities of the SBSTA in relation to indigenous peoples, so far, have not been reflected in the decisions of the COP in any significant manner.

4.2.3 Subsidiary Body for Implementation

Article 10 of the UNFCCC establishes the Subsidiary Body for Implementation (SBI) which is composed of government experts that review policy aspects of national reports and help the COP in evaluating summative effects of implementation measures.[53] Compared with the SBSTA, the mandate of the SBI is narrower in nature as it is restricted to matters of implementation, including the determination of timetables and ensuring that targets are being achieved.[54] In performing its role, the SBI scrutinizes the information submitted by state parties in documentation, such as the national communications and emission inventories.[55]

Indigenous peoples' rights, arguably including their land tenure and use, have gained considerable space in the SBI role. For instance, at its eighth session held in Doha, 2012, the invitation was extended to parties and admitted observer organisations to submit to the secretariat (by 25 March 2013), their positions on possible changes to the modalities and

[50] UNFCCC SBSTA 'Paper No. 1: Czech Republic on behalf of the European Community and its member states' 13th session Bonn, 1.10 June 2009 3-4 FCCC/SBSTA/2009/MISC.1 (*Czech Republic* presentation)
[51] *Czech Republic* presentation (n 50 above) 4
[52] *Czech Republic* presentation (n 50 above) 5
[53] Bodansky (n 4 above) 214
[54] Gale (n 4 above) 37
[55] As above

procedures for the CDM.[56] To this end, the session requested the secretariat to organise a workshop and compile submissions for consideration by the SBI at its thirty-eighth session,[57] which can then make recommendations on possible changes to the modalities and procedures for the CDM.[58] This process is required to be carried out in preparation for a review by the COP serving as the MOP to the Kyoto Protocol at its 9th session in 2013.[59]

At its 38th session and workshop held by the SBI, a range of submissions were made by parties,[60] non-governmental organisations,[61] and other related entities.[62] Suggestions in these submissions include proposals for the consolidation of all the decisions, annexes and appendices for the CDM modalities and procedures into one document and to ensure that the implementation of project activities under the CDM, [63] respect substantive and procedural human rights.[64] After reviewing the submissions of participants, the SBI prepared a report which documents some of the recommendations highlighted by participants for key sections of CDM modalities.[65] Notably, recommendations of significance to indigenous peoples include the necessity to ensure in the

[56] UNFCCC 'Guidance relating to the clean development mechanism' Decision 5/CMP.8, FCCC/KP/CMP/2012/13/Add.2 , para 10 (Decision 5/CMP.8)
[57] Decision 5/CMP.8 (n 56 above) para 11
[58] Decision 5/CMP.8 (n 56 above) para 14
[59] Decision 5/CMP.8 (n 56 above) para 10
[60] UNFCCC SBI 'Views on possible changes to the modalities and procedures of the clean development mechanism' 38th session Bonn, 3–14 June 2013'(SBI 38th session) , which documented contributions of parties to the session as including Chad on behalf of Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Rwanda, and Sao Tome and Principe (Submission received 24 March 2013); Ireland and the European Commission on behalf of the European Union and its member States (Submission received 19 March 2013) I (Ireland Submission); New Zealand (Submission received 8 April 2013); Norway (Submission received 11 April 2013); Switzerland (Submission received 4 April 2013); Uzbekistan (Submission received 25 March 2013)
[61] 'Submission by: Institute for Agriculture and Trade Policy (IATP)-Institute for Policy Studies (IPS)-Third World Network (TWN)-Tebtebba (Indigenous Peoples' International Centre for Policy Research and Education; 'Submission by Project Developer Forum Ltd.to Subsidiary Body for Implementation Possible changes to the modalities and procedures for the Clean Development Mechanism (PDF Submission); DIA-Submission to SBI' in SBI 38th session (n 60 above); 'Submission on views regarding the revision of the CDM Modalities and Procedures on behalf of the Human Rights & Climate Change Working Group, Abibimman Foundation, Alianza para la Conservación y el Desarrollo, Asociación Interamericana para la Defensa del Ambiente, Carbon Market Watch, Center for International Environmental Law, Centro de Estudios Ecológicos de la República Argentina, Climate Concept Foundation, Colectivo Revuelta Verde, Earthjustice, Foundation for GAIA, Gujarat Forum on CDM, International Rivers, International-Lawyers.Org, Klima ohne Grenzen gemeinnützige, La Mesa Nacional de Cambio Climático de Guatemala, Movimiento Ciudadano frente al Cambio Climático, Public Interest Network, Participatory Research & Action Network, Paryavaran Mitra, Planetary Association for Clean Energy, Regional Centre for Development Co-operation, A Trust for Nature, and Uttarakhand Save the Rivers Campaign' (Submission on behalf of Human Rights & Climate Change Working Group) in SBI 38th session (n 60 above)
[62] See for instance 'Recommendations of the Executive Board of the clean development mechanism on possible changes to the modalities and procedures of the clean development mechanism' FCCC/SBI/2013/INF.1, 22 April 2013 (Recommendations by Executive Boards)
[63] Ireland Submission (n 60 above) paras 11-12
[64] 'Submission on behalf of Human Rights and Climate Change Working Groups' (n 61 above) 6
[65] UNFCCC SBI 'Report on the workshop on the review of the modalities and procedures of the clean development mechanism' FCCC/SBI/2013/INF.6 (SBI Report)

modalities procedures to make process more transparent,[66] compensation for deficiencies in validation, verification and certification reports,[67] and respect for human rights.[68]

4.2.4 Ad-hoc Working Group on Long Term Cooperative Action Under the Convention

The Ad-hoc Working Group on Long Term Cooperative Action Under the Convention (AWG-LCA) was established as a subsidiary body under the UNFCCC at COP13 as part of the Bali Action Plan[69] to conduct a wide-ranging process to enable the full, effective and sustained implementation of the instrument through long-term cooperative action, up to and beyond 2012.[70] One of the main purposes of the AWG-LCA is to negotiate the issue of non-Annex 1 contributions to reducing greenhouse gas emissions over time.[71] Noteworthy achievements of the AWG-LCA include the Cancun Agreements,[72] and the resultant implementing decisions, including the Cancun Adaptation Framework.[73]

In relation to the consideration of indigenous peoples' issues, in February 2008 a contribution over the need to promote additional information, views and a proposal in relation to paragraph 1 of Bali Action Plan was jointly made by Kenya, Tanzania and Uganda at the fourth session of the AWGLCA.[74] In that submission, it was highlighted that the rights and roles of local communities and indigenous peoples as well as their social, environmental and economic development should not be undermined by REDD.[75]

On a similar matter, at a later session in the same year, intergovernmental organisations enjoying accredited status of the UNFCCC made submissions which highlight the importance of

[66] SBI Report (n 65 above) paras 20-22
[67] SBI Report (n 65 above) para 23
[68] As above
[69] UNFCCC CP 'Bali Action Plan'. Decision 1/CP.13, FCCC/CP/2007/6/Add.1
[70] 'Ad hoc Working Group on Long-term Cooperative Action under the Convention' (AWG-LCA) http://unfccc.int/bodies/body/6431.php (accessed 13 April 2014)
[71] Gale (n 4 above) 38
[72] UNFCCC CP 'The Cancun Agreements: Outcome of the work of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention' Decision 1/CP.16, FCCC/CP/2010/7/Add.1 (Decision 1/CP.16) (Cancun Agreements)
[73] http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=4 (accessed 17 November 2013)
[74] UNFCCC 'Bali Action Plan' Decision 1/CP.13, FCCC/CP/2007/6/Add.1, para 1 of which launches 'a comprehensive process to enable the full, effective and sustained implementation' of the UNFCCC 'through long-term cooperative action, now, up to and beyond 2012'; see also UNFCCC AWGLCA 'Paper No. 1: Belize, Central African, Costa Rica, Dominician Republic, Democratic Republic of the Congo, Ecuador, Equatorial Guinea, Honduras, Ghana, Guyana, Kenya, Madagascar, Nepal, Nicaragua, Panama, Papua New Guinea, Singapore, Solomon Islands , Thailand, Uganda, United Republic of Tanzania, Vanuatu and Vietnam' Ad-hoc Working Group on Long Term Cooperative Action 4th session February 2008, FCCC/AWGLCA/2009/MISC.1/Add.4 11 (*Belize* paper)
[75] *Belize* paper (n 74 above) 11

safeguarding the rights of indigenous peoples particularly in relation to their land.[76] The International Labour Organisation (ILO) advised that the success of REDD will depend on availing the forest dwellers and communities of access to sustainable forest and land-use within the mechanism and providing them with sufficient employment and income opportunities. Any policy for REDD, in its view, should channel incentives to and respect the rights of indigenous and tribal peoples in the conservation of forests as carbon sinks, in line with the provisions of ILO Convention 169.[77] It also notes that local communities and indigenous peoples should participate and be included in the measurement, reporting and verification of the impact of REDD activities 'with respect to income, employment, migration and cultural identity'.[78] Other intergovernmental organisations, including IPACC, in their joint submission reiterate that climate change directly threatens the services for which the ecosystem is known, such as the provision of food, clean water, coastal protection and the people who depend on these activities. Hence, as the natural areas are of cultural and religious significance to these people, protecting and restoring these areas are critical for an effective implementation of REDD.[79] However, just as is the case with the SBSTA and SBI, these activities have not translated into concrete statements in the political decisions of the COP, that is, the highest organ under the UNFCCC.

4.2.5 Ad-hoc Working Group on Further Commitment for Annex 1 Parties Under the Kyoto Protocol

The Ad-hoc Working Group on Further Commitment for Annex 1 Parties Under the Kyoto Protocol (AWG-KP) was established in 2005 to assist the CMP with its work. The AWG-KP is mandated to report to each CMP on the status of its work. It aimed to complete its work and have its results adopted by the Conference of the Parties at the earliest possible time to ensure that there was no gap between the first and second commitment period of the Kyoto Protocol. In 2012, the CMP, at its 8th session, adopted the Doha Amendment which effectively decided that

[76] UNFCCC AWGLCA 'Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan Submissions from intergovernmental organisations' 4th session, Poznan, 1-10 December 2008, FCCC/AWGLCA/2008/MISC.6/Add.2
[77] UNFCCC AWGLCA 'Paper No. 2: International Labour Organisation Submission to be considered in the update of the Assembly Document (Bali Action Plan) to the AWG-LCA' Poznan, 6 December 2008, FCCC/AWGLCA/2008/MISC.6/Add.2, 32-33 (International Labour Organisation Submission)
[78] International Labour Organisation Submission (n 77 above) 33
[79] UNFCCC AWGLCA 'Paper No. 4: International Union for the Conservation of Nature on behalf of the International Union for the Conservation of Nature, The Nature Conservancy, WWF, Conservation International, Birdlife International, Indigenous People of Africa Co-ordinating Committee, Practical Action, Wild Foundation, Wildlife Conservation Society, Fauna and Flora International and Wetlands International Ecosystem-based adaptation: An approach for building resilience and reducing risk for local communities and ecosystems' FCCC/AWGLCA/2008/MISC.6/Add.2, 65

the AWG-KP had fulfilled the mandate set out in decision 1/CMP.1,[80] and that its work was finished.[81]

Particularly during the winding up of its activities at the COP 17, non-governmental organisations engaged the AWG-KP on a range of issues including the land use and tenure of indigenous peoples. In its submission, the International Indigenous Peoples Forum on Climate Change (IIPFCC) cautioned that parties must ensure that the second commitment under Kyoto protocol recognises the rights of indigenous peoples.[82] In its subsequent presentation to the AWG-KP, noting that indigenous peoples, especially in Africa, are already suffering from the impact of climate change, the IIPFCC urged that it should embody measures that accommodate the recognition of indigenous peoples' rights to lands, territories and resources, full and effective participation, as well as the right to free, prior and informed consent in line with applicable universal human rights instruments, including the UNDRIP.[83]

Having examined the rule making institutions and the extent of their inclusion of indigenous peoples issues relating to land, the next discussion examines the extent to which the instruments under the international climate regulatory framework in response to climate change consider indigenous peoples' land tenure and use.

4.3 Regulatory frameworks on the responses to climate change

In its preamble, UNFCCC recognises the vulnerability of certain populations to the negative impact of climate change. Hence, the UNFCCC requires all parties to formulate regional and national programmes to mitigate and adapt to the effects of climate change:[84] international climate change response measures are identified as adaptation and mitigation. From the outset, however, it is noteworthy that mitigation and adaptation are not mutually exclusive in responding

[80] Doha Ammendment (n 9 above)
[81] Doha Ammendment (n 9 above) para 30
[82] Forest Peoples 'International Indigenous Peoples' Forum on Climate Change (IIPFCC) intervention for the AWG-KP' Bonn, Wednesday, 24 May 2012 http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/ad-hoc-working-group-kyoto-protocol-awg-kp-intervention.pdf (accessed 17 December 2013)
[83] Forest Peoples 'International Indigenous Peoples' Forum on Climate Change AWG-KP Opening Intervention' Tuesday, 29 November 2011, Durban/COP17 http://www.forestpeoples.org/topics/un-framework-convention-climate-change-unfccc/publication/2011/international-indigenous-peoples (accessed 17 December 2013)
[84] UNFCCC, art 4(1) (b)

to the global challenge of climate change.[85] For instance, the sustainable use of the forest can serve both adaptation and mitigation ends.[86] It can serve the adaptive purpose of reducing the movement of population to cities and preserve the water and soil which are vital for rural life. It can also deliver mitigation benefits by reducing deforestation.[87] Hence, it has been argued that for a climate change response to be deemed comprehensive it must include adaptation and mitigation.[88]

In the implementation of adaptation and mitigation measures, at least as far as the UNFCCC and the Kyoto Protocol are concerned, developed states do not have the same obligations as developing states. In this regard the obligation of the developing states is no more than what is required of all parties to the two instruments, that is, the obligation to cooperate in the implementation of measures.[89] However, the developed countries, included as Annex I parties of the UNFCCC, have the obligation to 'implement policies and measures' which minimise the adverse effects of climate change,[90] and finance funds for the implementation of adaptation and mitigation measures.[91]This differentiation is rooted in the principle of common but differentiated responsibility which acknowledges that the developed countries historically have been responsible for the present situation of the climate and therefore must take the lead in addressing its consequences.[92]

[85] RJT Klein 'Inter-relationships between adaptation and mitigation' in ML Parry *et al* (eds) *Climate Change 2007: Impacts, adaptation and vulnerability. Contribution of Working Group II to the 4th Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 745-777
[86] O Masera, AD Ceron & A Ordonez 'Forestry mitigation options for Mexico: finding synergies between national sustainable development priorities and global concerns' (2001) 6 *Mitigation &Adaptation Strategies for Global Change* 291
[87] K Halsnæs Æ P Shukla 'Sustainable development as a framework for developing country participation in international climate change policies' (2008) 13 *Mitigation & Adaptation Strategy for Global Change* 105, 115
[88] S Caney 'Climate change and the duties of the advantaged' (2009) 13 *Critical Review of International Social &Political Philosophy* 203; NW Adger 'Vulnerability' (2006) 16 *Global Environmental Change* 268
[89] See UNFCCC, arts 3(5) & 4(1) (c), Kyoto Protocol art 10(c)
[90] Kyoto Protocol, art 3(3)
[91] Kyoto protocol, art 11 (2)(a)(b)
[92] UNFCCC arts 3(1), 4(1), Kyoto Protocol art 10; particularly see UNFCCC 'The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up' Decision 1/CP.1 FCCC/CP/1995/7/Add.1 which was convened to negotiate the Kyoto Protocol'. Among other things, the decision provides particularly in its paragraph 1 (d) that parties shall be guided by 'the fact that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that the per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs'; however see L Rajamani 'The changing fortunes of differential treatment in the evolution of international environmental law' (2012) 88 *International Affairs* 605 who warns on the imminent danger to this principle

As shall be shown, indigenous peoples' land use and tenure feature in the emerging international climate change instruments relating to these response mechanisms, that is, adaptation and mitigation.

4.3.1 The international adaptation regulatory framework

In climate change literature, adaptation refers to measures which can be to cope with the 'ill-effects of climate change'[93] or activities geared toward the prevention of the adverse impacts of climate change.[94] In a similar, but more technical sense, the IPCC defines adaptation as an alteration in the natural or human systems in response to actual or expected impacts of climate change with the aim of moderating the harm in climate change or exploiting its beneficial opportunities.[95] Adaptation connotes adjustments to reduce vulnerability or improve flexibility to the observed or expected changes in climate, involving a range of options such as processes, perceptions, practices and functions.[96] Adaptation, explains Goklany, can take advantage of positive impacts and reduce the negative impact of climate change.[97]

Initially, it was thought of as a 'taboo' to discuss adaptation in climate change negotiation as advocates for climate mitigation feared that politicians are likely to lose interest in mitigation if adaptation options become the focus of discussion.[98] However, for developing states, it has been argued that it will amount to pretence to imagine that adaptation is not urgent.[99] Consequently, the potential and options for adapting to climate change at the local and regional levels have been given considerable attention in climate change literature. According to Solomon *et al*, some impacts of climate change such as sea level rise, can be addressed by constructing sea walls.[100] In some regions, climate change may negatively impact crop production, hence, an appropriate adaptive strategy might entail swapping from negatively impacted products to less impacted

[93] S Caney 'Cosmopolitan justice, responsibility and global climate change' (2005) 18 *Leiden Journal of International Law* 747, 752
[94] J Paavola & WN Adger 'Fair adaptation to climate change' (2006) 56 *Ecological Economics* 594
[95] RT Watson *et al* (eds) '*Climate change 2001: Synthesis report: A contribution of Working Groups I, II, III to the Third Assessment Report of the Intergovernmental Panel on Climate Change'* (2001) 398
[96] ML Parry *et al* (eds) *Climate change 2007: Impacts, adaptation and vulnerability, Contribution of Working Group II to the 4th Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 745-777
[97] IM Goklany 'A climate policy for the short and medium term: Stabilization or adaptation? (2005) 16 *Energy &Environment* 667, 675
[98] R Pielke, G Prins & S Rayner 'Climate change 2007: Lifting the taboo on adaptation' (2007) 445 *Nature* 597
[99] 'Getting serious about the new realities of global climate change' (2013) 69 *Bulletin of the Atomic Scientists* 52
[100] S Solomon *et al* 'Irreversible climate change due to carbon dioxide emissions' (2009) 106 *Proceedings of the National Academy of Sciences of the United States of America* 1704, 1708

crops,[101] or the use of new crop varieties and livestock species well suited to drier conditions, irrigation, crop diversification, adoption of mixed crop and livestock farming systems, and alternating planting dates.[102]Although they vary across regions, countries and communities, some adaptation options have been suggested for Africa. These options include change in the means of gaining a livelihood, such as moving away from farming, modifications in norms, rules and institutions of governance, alterations in agricultural practices, the development of new opportunities for income generation and migration.[103]

McCarthy *et al* identify six types of adaptation, namely, anticipatory, autonomous, planned, private, public and reactive. Anticipatory adaptation refers to adjustment before the impact of climate change occurs, 'autonomous' adaptation means a spontaneous response to climatic change. [104] Private adaptation refers to choices made by individuals or households at a personal level and reactive adaptation occurs after impact of climate change is observed. Public adaptation is initiated and implemented by governments at all level.[105] Planned adaptation is a consequence of policy decisions based on an awareness that conditions have changed or are about to change and that action is required to return, to maintain, or to achieve a desired state.[106] Arguably, in so far as climate change is a policy challenge, international negotiations in relation to climate change adaptation reflect 'planned adaptation' as an overarching policy response and option.

Accordingly, the international community has regarded the sourcing and distribution of adaptation funds to the developing countries as the defining feature of adaptation policy negotiation.[107] It is not surprising as funds are required for the implementation of projects or initiatives which will help developing nations adjust to the adverse impacts of climate change.[108] Its importance is reflected in the main instruments regulating climate change: article 4 provisions

[101] DB Lobell *et al* 'Prioritizing climate change adaptation needs for food security in 2030' (1 February 2008) 319 *Science* 607
[102] K Mendelsohn 'A Ricardian analysis of the impact of climate change on African cropland' (2008) 2 *African Journal of Agricultural & Resource Economics* 1; C Nhemachena & R Hassan 'Micro-level analysis of farmers' adaptation to climate change in Southern Africa' (2007) IFPRI Discussion Paper No. 00714
[103] O Brown, A Hammill & R Mcleman 'Climate change as the 'new' security threat: Implications for Africa' (2007) 83 *International Affairs* 1141-1154, 1149; TT Deressa *et al* 'Determinants of farmers' choice of adaptation methods to climate change in the Nile Basin of Ethiopia' (2009) 19 *Global Environmental Change* 248–255
[104] McCarthy *et al* (n 31 above); also see J Romero 'Adaptation to climate change: Findings from the IPCC TAR' in C Robledo, M Kanninen & L Pedroni (eds) *Tropical forests and adaptation to climate change: In search of synergies* (2005) 5-14
[105] As above
[106] As above
[107] L Schalatek *et al* 'Climate finance thematic briefing: Adaptation finance' (November 2013)
[108] R Muyungi 'Climate change adaptation fund: A unique and key financing mechanism for adaptation needs in developing countries http://unfccc.int/press/news_room/newsletter/guest_column/items/4477.php (accessed 15 November 2013)

dealing with the commitment of parties to the UNFCCC are singular. According to article 4(4), developed parties under the Convention are required to assist developing country parties, particularly, vulnerable states in meeting the costs of adaptation. Similarly, article 4(5) of the UNFCCC elaborates on the centrality of the required funding from developed countries to the promotion and facilitation of the required financial assistance.

According to article 4(7), the extent of fulfillment of the obligations required of the developing countries under the UNFCCC, and arguably toward adaptation, is conditional upon 'the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology'.[109] The obligation of developed countries to provide financial assistance is buttressed by article 10(c) of the Kyoto Protocol which enjoins parties to take 'all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change' to developing countries.

4.3.1.1 International funds for adaptation

There are different categories of funds in relation to adaptation which have emerged under the pillar instruments of climate change. These are mainly the Adaptation Fund (AF) established pursuant to article 12(8) of the Kyoto Protocol,[110] the Least Developed Countries Fund (LDCF) and the Special Climate Change Fund (SCCF) pursuant to article 4(9) of the UNFCCC.[111] A Green Climate Fund (GCF) was established pursuant to article 11 of the UNFCCC.[112] The funds under the LDCF and SCCF are voluntary contributions from developed country parties to the UNFCCC,[113] whereas the LDCF and SCCF, under the management of the Global Environment Facility (GEF);[114] GCF, managed by the GCF Board;[115] and the Adaptation Fund (AF), under the

[109] However this does not exempt the developing countries of the primary obligation of meeting the adaptation needs of their populations. This understanding can be gleaned from the provision of the same article which urges the parties to take into full account the fact that 'economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties'
[110] UNFCCC 'Adaptation Fund' in *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 3rd session*, held in Bali, Decision 1/CMP.3 FCCC/KP/CMP/2007/9/Add.1 14 March 2008 from 3 to 15 December 2007 (Decision 1/CMP.3) preamble
[111] UNFCCC 'Guidance to an entity entrusted with the operation of the financial mechanism of the Convention, for the operation of the least developed countries fund' Decision 27/CP.7 , FCCC/CP/2001/13/Add.4 21 January 2002, preamble
[112] Decision 1/CP.16 (n 72 above)
[113] Muyungi (n 108 above); R O'Sullivan *Creation and evolution of adaptation funds* (2011) 15
[114] Decision 7/CP.7 'Funding under the Convention' , para 6; 'The Special Climate Change Fund (SCCF)' http://unfccc.int/co-operation_and_support/financial_mechanism/special_climate_change_fund/items/3657.php (accessed 16 November 2013)

Adaptation Fund Board (AFB),[116] derive their legal basis from the UNFCCC and Kyoto Protocol respectively. The following sub-section discusses these funds in terms of their institutional and normative framework, highlighting the extent to which measures exist within the funds to safeguard indigenous peoples' land tenure and use.

1. Global Environment Facility

As a financial mechanism established pursuant to article 11(1) of the UNFCCC,[117] the GEF administers three trust funds, namely, the Global Environment Facility Trust Fund (GEFTF), Least Developed Countries Trust Fund (LDCF), and Special Climate Change Trust Fund (SCCF). The funds in the GEF Trust are available for activities within the GEF Focal Areas.[118] The SCCF is a voluntary trust fund which finances activities, programmes, and measures relating to climate change complementary to those funded by the resources allocated to the climate change focal areas of the GEF; the LDCF is a voluntary trust fund established under the UNFCCC to address the special needs of the 48 Least Developed Countries (LDCs) that are especially vulnerable to the adverse impacts of climate change. [119]

a. GEF institution and indigenous peoples

The Assembly is the governing body of the GEF in which representatives of all member countries participate. It meets every three to four years and is responsible for reviewing and evaluating the GEF's general policies, the operation of the GEF, and its membership.[120] The Assembly is also responsible for considering and approving any proposed amendments to the GEF Instrument, a document that established the GEF and set the rules by which it operates. Ministers and high-level government delegations of all GEF member countries take part in the

[115] UNFCCC 'Green Climate Fund' http://unfccc.int/co-operation_and_support/financial_mechanism/green_climate_fund/items/5869.php (accessed 10 January 2014); Y Serengil & H Erden 'Report: Durban climate deal and LULUCF' (2012) 69 *International Journal of Environmental Studies* 169, 170
[116] Decision 1/CMP.3 (n 110 above)
[117] UNFCCC, art 11(1) provides that 'A mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology, is hereby defined. It shall function under the guidance of and be accountable to the Conference of the Parties, which shall decide on its policies, programme priorities and eligibility criteria related to this Convention'
[118] The GEF 'GEF Administered Trust Fund' http://www.thegef.org/gef/trust_funds (accessed 16 November 2013)
[119] As above
[120] The GEF 'GEF assembly meetings and documents' http://www.thegef.org/gef/council_meetings/assembly (accessed 13 November 2013

meetings.[121] The Assembly engages in a combination of activities including plenary meetings and high-level panels, exhibits, side events and GEF project site visits.[122] At the forum, prominent environmentalists, parliamentarians, business leaders, scientists, and NGO leaders discuss global environmental challenges within the context of sustainable development and other international development goals.[123] The GEF Council is the main governing body of the GEF. It functions as an independent board of directors, with primary responsibility for developing, adopting, and evaluating GEF programmes.[124] The Council membership is composed of representatives from 32 constituencies, including developing countries. It meets twice each year for three days and also conducts business by mail. The Council reaches its decision by consensus.[125]

The GEF is serviced by a Secretariat which reports directly to the GEF Council and Assembly, and ensures that decisions taken on GEF activities are translated into effective actions. In addition, the Secretariat coordinates the formulation and implementation of projects in accordance with work programmes.[126] An important aspect of the GEF operation is the Scientific and Technical Advisory Panel (STAP) which is supported by the Secretariat. Consisting of a panel of six members who are international experts in their field and assisted by a network of experts in GEF's key areas of work, by virtue of the terms of reference adopted by the GEF Council in June 2007 the STAP provides strategic scientific and technical advice to the GEF.[127] The STAP reports to each regular meeting of the GEF Council and, where requested, to the GEF Assembly on the status of its activities.[128]

A unique component featuring in the operation of the GEF structure that is relevant to indigenous peoples is its policy allowing for the participation of NGOs and representatives of civil society.[129] Founded in 1995, the GEF NGO network has been the main mechanism for involving CSOs. For instance, the GEF NGO network participates at Council meetings. It is

[121] As above
[122] As above
[123] As above
[124] As above
[125] As above
[126] The GEF 'GEF Secretariat' http://www.thegef.org/gef/Secretariat (accessed 13 November 2013)
[127] As above
[128] The GEF 'The Scientific and Technical Advisory Panel (STAP)' http://www.thegef.org/gef/STAP (accessed 13 November 2013)
[129] As above

valuable because regional focal points in the GEF NGO network include Indigenous Peoples Focal Points (IPFPs) which are selected through consultation among members of key indigenous peoples' networks in regions, including Africa.[130] In addition to promoting participation, the platform enables groups, such as the indigenous peoples who are often sidelined in decision-making, to engage on topical issues in relation to adaptation process involving them. Hence, it affords indigenous peoples the opportunity to contribute in shaping decisions on a number of issues which may affect their land through the process allowing for input by the way of the presentation of papers on a number of issues before the Council. For instance, at the 41st and 42nd Council meetings, the network provided specific input into the GEF Policies on Environmental and Social Safeguards and Gender Mainstreaming as well as the GEF Principles and Guidelines on the Engagement with Indigenous Peoples.[131] The participation of NGOs has been strengthened since the GEF Council approved a strategy for enhancing engagement by extending the involvement of CSOs at local and regional levels.[132]

b. GEF instruments and indigenous peoples

In meeting its responsibilities in relation to the funding of adaptive activities under the LDCF and SCCF, the GEF activities are required to conform with the 'policies, programme priorities and eligibility criteria' set out by the COP.[133] Accordingly, the COP has laid out guidance for the operation of the GEF adaptation activities when it emphasises that adaptation will require 'short, medium and long term strategies'.[134] In the short term, activities that are envisaged include investigation into the impact of climate change, identifying the particular 'vulnerable countries or regions' as well as adaptation policy options. In the medium term, capacity building that is necessary to prepare for adaptation is envisaged; measures to enable adequate adaptation are anticipated as long term measures.[135] Presently, for the implementation of adaptation activities, the COP is at the short term level and has entrusted to the GEF, the task of meeting the full costs

[130] 'GEF NGO network report to GEF Council' (1 July 2011- 30 June 2012) para 5, GEF Council meeting November 13-15, 2012 , GEF/C.43/Inf.10 (GEF Council meeting)
[131] GEF Council meeting (n 130 above) para 13
[132] The GEF 'Civil Society' http://www.thegef.org/gef/csos (accessed 15 October 2013)
[133] On GEF, see generally, Appendix L. Overview of the Global Environment Facility and the World Bank's Roles; UNFCCC, art 11(3)(a)
[134] UNFCCC 'Initial guidance on policies, programme priorities and eligibility criteria to the operating entity or entities of the financial mechanism' Decision 11/CP.1, 10th plenary meeting, 7 April 1995, FCCC/CP/1995/7/Add.1, para 1(d)(i), (Initial Guidance)
[135] Initial Guidance (n 134 above) para 1(d)(ii); also see UNFCCC, arts 4(1)(e), 4(1)(b) and 4(4)

of short term activities.[136] These activities include the formulation of national communications, studies of the possible impacts of climate change, identification of adaptation options and capacity building.[137] These arrangements are endorsed in the GEF Operational Strategy for the UNFCCC.[138]

Realising the centrality of the traditional lands and territories of indigenous peoples to their activities, to GEF has put in place certain policies to enhance the participation of indigenous peoples in GEF financed projects. These include the GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards (GEF SESS),[139] the GEF Policy on Public Involvement in GEF Projects (GEF Minimum Standard Policy).[140] As a further measure to reiterate the provisions in these documents, the GEF has formulated a document on Principles and Guidelines for Engagement with Indigenous Peoples (GEF Principles and Guidelines).[141] The GEF SESS sets out as its component a minimum standard relating to indigenous peoples for compliance by partner agencies seeking to implement projects under GEF auspices. Among other things, it recommends the use of Free Prior Informed Consent (FPIC), as well as criteria such as resettlement, physical cultural resources as well as accountability and grievance.[142] It also requires, specifically, the involvement of indigenous peoples and local communities in the implementation, monitoring and evaluation of GEF-financed projects, underscoring the necessity for information dissemination, consultation and stakeholder participation through all the phases of projects.[143]

GEF Principles and Guidelines emerged from a consultative process commenced with the establishment of an Indigenous Peoples' Task Force (IPTF) in July 2011 to advise on options to enhance the participation of indigenous peoples in GEF Activities.[144] After regional consultations, the IPTF highlighted and recommended that the GEF should establish a rights-

[136] Initial Guidance (n 134 above) para 1(d)(iii) and (iv)
[137] Initial Guidance (n 134 above) para 1(d)(iv)
[138] Initial Guidance (n 134 above) paras 3(8) to (11)
[139] Council document, GEF/C.41.10/Rev.01
[140] Council document, GEF/C.7/6
[141] The GEF 'GEF Principles and Guidelines for Engagement with Indigenous Peoples' http://www.thegef.org/gef/sites/thegef.org/files/publication/GEF%20IP%20Part%201%20Guidelines_r7.pdf (accessed 13 July 2013) (GEF Guidelines)
[142] 'GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards' Council Document GEF/C.41/Rev.1, 17, 22-29
[143] 'Public Involvement in GEF projects and C.6/Inf.5, Draft Outline of Policy Paper on Public Involvement in GEF-Financed Projects' Council Documents GEF/C.7/6
[144] GEF Guidelines (n 141 above) 8

based policy recognising and promoting respect for the rights of indigenous peoples and contributing to the realisation of the UNDRIP, the African Charter and the ILO Convention 169.[145] In line with these recommendations, GEF Principles and Guidelines endorse the realisation of the provisions under UNDRIP which affirm the commitment to the 'full and effective participation' of indigenous peoples, the application of FPIC, the protection of indigenous peoples' ownership and access to land and its sustainable management without compromising the benefits of these peoples from GEF-financed projects.[146]

The GEF Principles also undertake to facilitate access of indigenous peoples to 'local or country level grievance and dispute resolution systems' by requiring GEF partner agencies to put in place accountability grievance systems capable of responding to the complaints of indigenous peoples.[147] It has reiterated its commitments to these ideals, subsequently, in its pronouncement at the RIO+20 United Nations Conference on Sustainable Development,[148] and has followed-up with the establishment of GEF Indigenous Peoples Advisory Group to offer advice on the operationalisation of the GEF Guidelines and Principles.[149]

2. Green Climate Fund

Established pursuant to article 11 of the UNFCCC, the Green Climate Fund (GCF) is equally a financial mechanism which supports projects, programmes, policies and other activities in developing country Parties.[150] At the COP 16, at which it was established, it was decided that the GCF is an avenue through which a substantial share of new funding for adaptation should

[145] 'Indigenous Peoples Task Force' Issues Paper: Final, 30 November 2011, 2-3
[146] GEF Guidelines (n 141 above)18 and 19
[147] 'GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards' Council Document GEF/C.41/Rev.1; GEF Guidelines (n 141 above) 21
[148] 'Statement of Commitments of the Global Environment Facility (GEF) for the United Nations Conference on Sustainable Development (Rio+20)' para 8; this document indicates the commitment of the GEF to 'enhance the participation of Indigenous Peoples in GEF policies, processes, programmes, and projects through timely implementation of the recently approved 'Principles and Guidelines for Engagement with Indigenous Peoples'
[149] The GEF Indigenous Peoples Advisory Group held its 1st meeting at Washington DC, USA at the GEF Secretariat on 2-3 July 2013; Members of the group are: Ms. Lucy Mulenkei, Executive Director of the Indigenous Information Center, Ms. Mrinalini Rai, Chiang Mai University, Mr. Marcial Arias Garcia, Policy Advisor, International Alliance of Indigenous and Tribal Peoples of the Tropical Forests, Mr. Legborsi Saro Pyagbara, President, Movement for the Survival of the Ogoni People (Representative of the GEF NGO Network), Mr. Gonzalo Oviedo, Senior Advisor, Social Policy Programme, IUCN (Expert), Mr. Terence Hay-Edie, Programme Advisor, United Nations Development Programme (GEF Agency Principal Representative), Mr. Carlos Perez-Brito, Social Specialist, Inter-American Development Bank (GEF Agency Alternate Representative) and Ms Yoko Watanabe, Indigenous Peoples Focal Point and Senior Biodiversity Specialist, GEF Secretariat
[150] Decision 1/CP.16 (n 72 above)

flow.[151] Also, the COP decided that the GCF was to be designed by the Transitional Committee (TC).[152] While the GCF structure is still a work in process, at COP 17 held in Durban, the COP approved the instrument for the operationalization of the GCF.[153]

a. GCF structure and indigenous peoples

The GCF Fund will be governed by the GCF Board and operated in a timely manner.[154] Among other responsibilities the GCF Board is requested to balance the allocation of the GCF between adaptation and mitigation activities.[155] At COP 18, these responsibilities are reaffirmed and parties were invited to make submissions 'no later than 10 weeks prior to the subsequent session of the Conference of the Parties' on suggestions for developing guidance for the operation of GCF.[156]

The governing instrument of the GCF has set out the nature and purpose of the funding offered under the GCF. It will offer direct and indirect access to funds and involve relevant stakeholders, including vulnerable groups.[157] The fund will also assist the preparation of documentation, including NAPAs.[158] In allocating funding for adaptation purposes, the Board will aim for a regional balance, but will take into consideration the immediate needs of developing countries, including Africa, which are peculiarly vulnerable to the adverse impacts of climate change.[159] The nature and purpose of this fund have been emphasised lately at the meetings of the GCF Board at which the decision was taken that the interim Secretariat should prepare a document by 2014 which describes the accreditation options for different types of implementation entities.[160]

[151] Decision 1/CP.16 (n 72 above) paras 101 & 102
[152] As above
[153] UNFCCC 'Launching the Green Climate Fund' Decision 3/CP.17, FCCC/CP/2011/9/Add.1 para 2 (Decision 3/CP.17); Serengil & Erden (n 115 above)
[154] Decision 3/CP.17 (n 153 above) para 6
[155] Decision 3/CP.17 (n 153 above) 'Annex' Governing instrument for the Green Climate Fund' (Decision 3/CP.17 Annex) para I(3); for a list of other functions see Decision 3/CP.17 (n 153 above)
[156] UNFCCC 'Report of the Green Climate Fund to the Conference of the Parties and guidance to the Green Climate Fund' Decision 6/CP.18, FCCC/CP/2012/8/Add.1, 9th plenary meeting, 8 December 2012 (Decision 6/CP.18)
in particular, para 7 provides for the reinstatement of these responsibilities while para 16 requests for suggestions from parties FCCC/CP/2012/8/Add.1, 9th plenary meeting 8 December 2012, Decision 6/CP.18
[157] Decision 3/CP.17 Annex (n 153 above)
[158] Decision 3/CP.17 Annex (n 153 above) para 40
[159] Decision 3/CP.17 Annex (n 153 above) para 52
[160] 'Green Climate Fund Business Model Framework: Access Modalities' Annex I: Draft decision of the Board (d) GCF/B.04/05 11 June 2013

Although there is no direct expression that indigenous peoples are or will be involved in the structure of the GCF, the possibility of involvement can be inferred. The intention to involve vulnerable groups in the structure can only mean that groups, such as indigenous peoples, noted for their marginalisation and vulnerability fall within the coverage of the GCF institution. Participation at the GCF decision-making body will, no doubt, afford indigenous peoples the opportunity to contribute to shaping decisions which may emanate from the GCF structure.

b. GCF instruments and indigenous peoples

Concerns in relation to land use and tenure are being raised by indigenous peoples as the discussion evolves concerning the design and operation of the GCF. This is evident in the various submissions made to the TC in its engagement with civil society. In some of these submissions it has been made clear that there is a need to ensure that the GCF is directly accessible to indigenous peoples. On this point, it has been argued by NGOs dealing with indigenous peoples' issues, for instance, that there is the need to create a specific facility under the GCF to enable direct access to funds. Direct access to such funds it is argued will enhance and strengthen the contributions of indigenous peoples' knowledge on adaptation in response to the adverse impacts of climate change.[161] Options which the GCF may follow in the design of its direct access modalities as advised, include models under the International Fund for Agricultural Development (IFAD), the Indigenous Peoples Assistance Facility (IPAF), a former World Bank Facility for indigenous peoples,[162] and the Forest Carbon Partnership,[163] all of which are dedicated indigenous funds.[164]

In a joint submission made to the TC, it is evident that participation of indigenous peoples from 'the local to the national to the Board level' is deemed critical to the application of the fund considering that their communities are directly affected by climate change and the

[161] F Martone & J Rubis 'Indigenous peoples and the Green Climate Fund' (August 2012) A technical briefing for Indigenous Peoples, policymakers and support groups
[162] International Fund for Agricultural Development 'Indigenous grants' http:// ww.ifad.org/english/indigenous/grants/index.htm (accessed 25 October 2013)
[163] Forest Carbon Partnership Facility 'Capacity Building Programme for Forest-Dependent People on REDD+' www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/Program_Description_English_11-15-09_updated.pdf (accessed 25 October 2013)
[164] Martone & Rubis (n 161 above) ; see UNDP and Overseas Development Institute (ODI) 'Direct Access to Climate Finance: Experiences and lessons learned' (2011) Discussion Paper, UNDP

implementation of these funds.[165] The joint submission calls upon the TC to specifically list in the 'operational modalities' the groups constituting affected communities to include indigenous peoples'.[166] The submission pushes for a more intrusive accountability mechanism, contending that such a mechanism should be independent with the power to review 'a wider set of concerns, including violations of customary, national and international law; and it should have the power to halt funding/implementation in case of violations'.[167]

The governing instrument that emerged after consultation does not reflect these suggestions in their totality,[168] but, at least, there are traces that the engagement of the TC with civil society is not merely academic. Some of these suggestions are reflected in the draft governing instrument, for instance, the phrase 'indigenous peoples' has worked itself into the lexicon of the GCF as it is mentioned and they are considered a vulnerable group whose voice and input are necessary in the 'design, development and implementation of the strategies and activities to be financed by the Fund'.[169] Although there is no specific reference regarding the possibility of allowing the accountability set up under the GCF to look into allegations of funding related violations, it is agreed that the mechanism should be 'independent' and will 'receive complaints related to the operation of the Fund and will evaluate and make recommendations'.[170] Similarly, funding can be terminated on the recommendation of the Board to the COP.[171]

3. Adaptation Fund

The legal basis for the existence of the Adaptation Fund (AF) is traceable to the Kyoto Protocol. Article 12(8) of the Protocol enjoins the COP/MOP to utilise the proceeds from projects implemented under the instruments to cover such costs including the rendering of assistance to 'developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation'.[172] Pursuant to this provision, at the 7th session of the COP the parties agreed to the establishment of the AF with the aim to finance adaptation projects

[165] Friends of the Earth US, Global Alliance for Incinerator Alternatives (GAIA), Heinrich Boell Foundation North America, Institute for Agriculture and Trade Policy, Jubilee South-Asia/Pacific Movement on Debt and Development, Sustainable Energy and Economy Network of the Institute for Policy Studies, World Development Movement (Friends of the Earth Submission)
[166] Friends of the Earth Submission (n 165 above) 3
[167] As above
[168] Decision 3/CP.17 Annex (n 153 above)
[169] Decision 3/CP.17 Annex (n 153 above) para 71
[170] Decision 3/CP.17 Annex (n 153 above) para 69
[171] Decision 3/CP.17 Annex (n 153 above) para 72
[172] Kyoto Protocol, arts 10 and 11

and programmes in developing countries which are parties to the protocol.[173] The AP is designed to finance 'concrete adaptation projects and programmes',[174] which aim at 'addressing the adverse impacts of and risks posed by climate change'.[175] It provides funding for the 'full costs' related to the implementation of adaptive activities that address the adverse consequences of climate change.[176]

a. AF structure and indigenous peoples

The operation entity for the AF is the Adaptation Fund Board (AFB),[177] which meets twice annually.[178] Subject to the discretion of the AFB, meetings are open to observers, namely the UNFCCC Parties and its accredited observers.[179] The functions of the AFB include the development of strategic priorities, policies and guidelines, and offering recommendations about such plans to the CMP.[180] Since the notable NGOs which focus on indigenous peoples' issues, including land tenure and use, are accredited UNFCCC observers, it is logical to expect that indigenous peoples will play critical role in the activities of the AFB.

There appears to be an opportunity for the participating organisations to emphasise the concerns of indigenous peoples' marginal lifestyle in fragile parts of the world, including Africa. An issue of particular importance, to which the NGOs may devote attention, is the commitment of the Adaptation Fund to the implementation of adaptation activities in the areas of land management and fragile ecosystems, and supporting capacity-building aimed at prevention, which may include planning, preparation and management of disasters relating to droughts and floods.[181]

[173] UNFCCC 'Funding under the Kyoto Protocol 'Decision 10/CP.7, FCCC/CP/2001/13/Add.1 8th plenary meeting 10 November 2001 para 1
[174] Adaptation Fund 'Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund' para 9 (Adaptation Fund Guidelines)
[175] Adaptation Fund Guidelines (n 174 above) para 10
[176] Adaptation Fund Guidelines (n 174 above) para 14
[177] Decision 1/CMP.3 (n 110 above) para 3
[178] Decision 1/CMP.3 (n 110 above) paras 15
[179] Decision 1/CMP.3 (n 110 above) para 16
[180] Decision 1/CMP.3 (n 110 above) para 5 (a)
[181] UNFCCC CP 'Implementation of Article 4, paragraphs 8 and 9, of the Convention (decision 3/CP.3 and Article 2, paragraph 3, and Article 3, paragraph 14, of the Kyoto Protocol)' Decision 5/CP.7 FCCC/CP/2001/13/Add.1, see generally its para 8(a) to (d) which embody the general activities for which Adaptation Fund along with the Special Climate Change Fund are to be applied

b. AF instruments and indigenous peoples

In addition to recognising the need to operate the AF expeditiously, further guidance is provided in the decisions made at the CMP meeting in Montreal, Canada in 2005,[182] which include that the AF shall function under and be accountable to the CMP and that its operation shall be country-driven, separate from other sources of funding and utilise 'a learning-by-doing approach'.[183] More specific guidance was decided in Nairobi, Kenya in December 2006 as including, transparency and openness of governance and accessibility to adaptation activities at the 'national, regional and community level activities'.[184] In particular, it was decided that priority will be given to projects, taking into account needs as expressed in national communications and national adaptation programmes of action.[185]

The AFB is tasked with the functions of developing specific operational policies and guidelines,[186] and rules of procedures.[187] In the 4th session of the CMP held in Poznan, the developed Strategic Priorities, Policies and Guidelines of the Adaptation Fund (Strategic Guidelines), Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund (Operational Guidelines) and the Rules of Procedures of the Adapatation Fund (Rules of Procedures) were adopted.[188] The adopting decision requests the AFB to start the processing of proposal for funding,[189] and to inform parties of the Strategic Guidelines and Rules of Procedures.[190] According to the Strategic Guidelines, the submission of project proposals can be done directly by parties including the implementing entity elected by governments to

[182] As above
[183] UNFCCC KP/CMP 'Initial guidance to an entity entrusted with the operation of the financial system of the Convention, for the operation of the Adaptation Fund' 9th plenary meeting, 9-10 December 2005 in *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 1st session*, held at Montreal from 28 November-10 December 2005, Decision 28/CMP.1, FCCC/KP/CMP/2005/8/Add.4, paras 2 and 3
[184] UNFCCC KP/CMP 'Adaptation Fund' Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 2nd session, held at Nairobi from 6-17 November 2006 Annex I to this document, Decision 5/CMP.2, FCCC/KP/CMP/2006/10/Add.1. paras1 (c) and 2(a), see generally paras 1 and 2 on the guidance and modalities (Decision 5/CMP.2)
[185] Decision 5/CMP.2 (n 184 above) para 2(c)
[186] Decision 5/CMP.2 (n 184 above) para 5(b)
[187] Decision 5/CMP.2 (n 184 above) para 5(e)
[188] UNFCCC KP/CMP 'Adaptation Fund' Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 4th session, held in Poznan from 1-12 December 2008, Addendum Decision 1/CMP.4 FCCC/KP/CMP/2008/11/Add.2, (Decision 1/CMP.4) paras 1 and 6 respectively; for the full provisions of these instruments, see 'Annex I- Rules of procedure of the Adaptation Fund Board' and 'Annex IV-Strategic Priorities, Policies and Guidelines of the Adaptation Fund' 9th plenary meeting 12 December 2008 (Annex IV Guidelines)
[189] Decision 1/CMP.4 (n 188 above) para 10
[190] Decision 1/CMP.4 (n 188 above) para 14

implement projects.[191] This decision indicates that observers at AFB meetings may be representative of national or international, governmental or non-governmental and qualified in a field related to the work of the Fund.[192] The Operational Guidelines enunciate various aspects of the AF including project or programme requirement, endorsement by country, financing windows dealing with direct and indirect access, eligibility criteria, accreditation of implementing entities, fiduciary Standards, project cycle, and dispute settlement.[193] More recently, the AFB has been requested to continue the encouragement of access to funding through its direct access modality.[194]

Being an emerging funding mechanism, the participation of indigenous peoples in the AF is just unfolding. Their participation featured substantially at the 21st meeting of the AFB which focused on the codification of environmental and social safeguards for funds[195] and stemmed from the realisation that the AFB lacks a policy document on environmental and social safeguards in the application of the fund.[196] In preparation for the meeting, it was directed that the secretariat should take into consideration existing safeguards in comparable programmes and provide an overview of safeguards that should apply to the AF.[197] It was highlighted at the meeting that entities receiving the AF funding must identify and manage the environmental and social risks associated with their activities.[198] This can be achieved by assessing potential environmental and social harms against vulnerable groups including indigenous peoples and the implementation of steps to avoid, minimise or mitigate those harms.[199]

Examples of existing safeguards of signifance to indigenous peoples which were highlighted at the 21st meeting can be found in the review criteria of Operational Guidelines.[200] The review criteria largely aims to ensure that adaptation projects and programmes yield concrete benefits

[191] Annex IV Guidelines (n 188 above) para 11
[192] Annex IV Guidelines (n 188 above) para 32
[193] Annex IV Guidelines (n 188 above) paras 2-13
[194] UNFCCC KP/CMP 'Initial review of the Adaptation Fund' 9th plenary meeting 7 December 2012 (Decision 4/CMP.8) para 7, Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 8th session, held in Doha from 26 November - 8 December 2012, FCCC/KP/CMP/2012/13/Add.2 6
[195] Adaptation Fund Board 'Report of the 21st of the Adaptation Fund Board' 21st Meeting, Bonn, Germany, 3-4 July 2013 AFB/B.21/8/Rev.1 paras 84-96 (Adaptation Fund Board July Report)
[196] Adaptation Fund Board 'Report of the 2oth meeting of the Adaptation Fund Board' Bonn, Germany, 4-5 April 2013, AFB/B.20/7, para 126 (Adaptation Fund Board April Report)
[197] Adaptation Fund Board April Report (n 196 above) para 131
[198] Adaptation Fund Board April Report (n 196 above) para 125
[199] Adaptation Fund Board July Report (n 195 above) para 89
[200] Adaptation Fund Board July Report (n 195 above) paras 84-96

for vulnerable groups. For instance, a critical question which guides the AFB in reviewing projects for approval is whether the project or programme will deliver economic, social and environmental benefits to vulnerable communities which, arguably, include indigenous peoples.[201] Also, although the Strategic Guidelines do not expressly mention the word 'indigenous peoples', there are provisions which contemplate that the concerns of indigenous peoples may not be ignored in AF projects, including provisions which urge the AFB, in assessing projects and programmes, to give particular attention to national communications and NAPA,[202] the 'Economic, social and environmental benefits from the projects',[203] arrangements for monitoring and evaluation and impact assessment,[204] the level of vulnerability,[205] access to the fund in a balanced and equitable manner,[206] as well as the capacity to adapt to the adverse effects of climate change.[207]

More particularly, specific review criteria that include provisions for environmental and social safeguards, are described in the document titled 'Instructions for Preparing a Request for Project or Programme Funding from The Adaptation Fund' (Request Instructions).[208] There are questions which, if appropriately and genuinely responded to by the implementing party, can address the plight of indigenous peoples. These questions reinforce the aims of the Strategic Guidelines, as can be said of the questions calling for a description of the 'economic, social and environmental benefits, with particular reference to the most vulnerable communities, and vulnerable groups within communities' a well as a description of how the project is consistent with national communications and NAPA. There are other questions in the Request Instructions which urge project applicants to describe the process of consultation, supply the list of stakeholders involved in the consultation process, and the vulnerable groups, including gender considerations.

[201] Annex IV Guidelines (n 188 above) para 23
[202] Annex IV Guidelines (n 188 above) para 15(a)
[203] Annex IV Guidelines (n 188 above) para 15(b)
[204] Annex IV Guidelines (n 188 above) para 15(f)
[205] Annex IV Guidelines (n 188 above) para 16(a)
[206] Annex IV Guidelines (n 188 above) para 16(c)
[207] Annex IV Guidelines (n 188 above) para 16(g)
[208] 'Instructions for preparing a request for project or programme funding from adaptation fund', annex in Adaptation Fund Board *Guidance Document for Project and Programme Proponents to Better Prepare A Request For Funding,* approved in the 17th meeting of the Board, Decision B.17/7, 17th meeting, Bonn, 15-16 March 2012, AFB/PPRC.8/4; this document is approved in 2012, see 'Adaptation Fund Board Report of the 17th meeting of the Adaptation Fund Board' AFB/B.17/6, paras 38 &39

In all, through the structure as well as the normative content of its various funds, it can be asserted that the regulatory framework dealing with adaptation funds and the institutions under its aegis can feature and engage with indigenous peoples' land use and tenure in relation to adaptation. It remains to be seen whether similar conclusion can be reached concerning the regulatory framework relating to mitigation.

4.3.2 The International regulatory framework and mitigation

Mitigation refers to human intervention to reduce the sources or enhance the sinks of greenhouse gases.[209] Mitigation is crucial in that it is more beneficial for the global environment to promote mitigation, particularly prevention of deforestation.[210] Under the UNFCCC and the Kyoto Protocol, the pillar instruments of climate change, developed countries have obligations to implement mitigation activities, particularly in developing and least developing countries. This obligation is legally founded in the UNFCCC preamble which requires developed countries to:

> [t]ake immediate action in a flexible manner on the basis of clear priorities, as a first step towards comprehensive response strategies at the global, national and, where agreed, regional levels that take into account all greenhouse gases, with due consideration of their relative contributions to the enhancement of the greenhouse effect.[211]

According to the Kyoto Protocol, developed countries included as Annex I Parties of the UNFCCC have the obligation to 'implement policies and measures'. To that end, all parties to the UNFCCC, subject to the principle of common but differentiated responsibility,[212] are enjoined to do the following:

> [f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change.[213]

[209] Y Farham & J Depledge *The international climate change regime: A guide to Rules, institutions and procedures* (2004) 76 Intergovernmental Panel on Climate Change (IPCC) *Impacts, adaptations and mitigation of climate change: Scientific-Technical analyses*'(1995) Contribution of Working Group II to IPCC Second Assessment Report (SAR) 5
[210] N Stern *The economics of climate change* (2006) 217
[211] UNFCCC, preamble
[212] UNFCCC, art 3(1)
[213] UNFCCC, art 4(1)(b)

The references to 'emissions by sources' and 'removal by sinks' set out the basic context for the negotiation of forests as a crucial mitigation strategy but it is important to note until recently, that the forest sector has been negotiated within the context of forest benefits, conservation as well as the welfare of the forest-dependent communities.[214] These considerations have informed the explosion of forest-related instruments with no binding commitment to parties under international environmental law.[215]

4.3.2.1 Forests in international environmental law

In analysing the polarization that featured in the negotiation of forest issues, particularly on the need for a binding instrument to regulate forest activities, Humphreys identifies two patterns in states' negotiation.[216] The first is traceable to the negotiations at the United Nations Conference on Environment and Development which was highly conflictual between the North and the South. Having a history of forest conservation, the North was in favour of a binding convention to regulate the forest sector.[217] In opposing this view, the South, particularly supported by China, argued that establishing a convention will infringe upon their sovereignty over the use of natural resources.[218] A significant outcome of this phase of the negotiation was the agreement on the Forest Principles which recognise this entrenched position.[219] Principle 1(a) emphasises the sovereign right of states to utilise their natural resources according to their own environmental policies. Forestry also received significant mention in the chapter 11 of Agenda 21 dealing with 'combating deforestation'.

This positional approach evident in the discussion, however, has shifted to one of co-operation as shown in the subsequent accommodation of forest issues in major instruments dealing with the environment. For instance, forest preservation has been an active component of, and a strong asset in biodiversity conservation addressed by the Convention on Biological Diversity

[214] D Humphreys *Logjam: Deforestation and the crisis of global governance* (2006)
[215] CL McDermott, K Levin & B Cashore 'Building the forest-climate bandwagon: REDD and the logic of problem amelioration' (2011) 11 *Global Environmental Politics* 85
[216] D Humphreys 'Forest negotiations at the United Nations: Explaining co-operation and discord' (2001) 3 *Forest Policy & Economics* 125, 135
[217] This position has however been questioned by authors arguing that the North has favoured a convention because it will promote the international trade of their timber industry, see for instance, A Agarwal 'What's new at CSE, India' (2001) cited in Humphreys (n 216 above)
[218] Humphreys (n 216 above) 127
[219] Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992); Annex III Non-Legally Binding Authoritative Statement of Principles for a global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests

(CBD).[220] Other instruments that illustrate the new thinking include the Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development which emphasise the need for the sustainable management of forests products.[221] The sustainable use of natural forests has been addressed by the Millennium Ecosystem Assessment as a practical and prudent way to support the livelihoods of the world's poorest communities in developing countries.[222] Similarly, in the Outcome of the United Nations Conference on Sustainable Development (Rio+20), parties reiterate that forests have social, economic and environmental benefits which contribute to sustainable development.[223]

Prior to the discussion of forests as a mitigation measure under international climate negotiation, the Intergovernmental Panel on Forests (IPF), from 1995-1997, and, subsequently, the Intergovernmental Forum on Forests (IFF) Working Group on Forests from 1997-2000, established by the Commission on Sustainable Development (CSD), have played crucial role in forest negotiations.[224] Over the five years of their existence, the IPF and IFF examined a wide range of forest-related topics and generated proposals for acting on the sustainable management of the forests which are collectively regarded as the IPF/IFF Proposals for Action.[225] This document requires countries to prepare national information on the management, conservation, and sustainable development of all types of forests, indicating in that information anticipated steps for implementation.[226] A notable outcome of the development at these levels was the consensus on the need to establish the United Nations Forests Forum (UNFF).[227] The UNFF was established in 2000 to build on the activities of the IPF/IFF and provide a forum for 'continued policy development and dialogue among governments' on sustainable forest management.[228] After almost three years of tough negotiations, starting from the 5th session of the UNFF, an

[220] CBD, art 2 defines 'Biological diversity' as the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part including diversity within and between species and ecosystems
[221] Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development, para 45 generally
[222] Millennium Ecosystem Assessment (MEA) (2005)
[223] Outcome of the United Nations Conference on Sustainable Development (Rio+20) 'The future we want', Resolution adopted by the General Assembly, A/RES/66/288 paras 193-196 (The future we want)
[224] The future we want (n 223 above) paras 128-129
[225] 'IPF/IFF Proposals for Action' http://www.un.org/esa/forests/pdf/ipf-iff-proposalsforaction.pdf (accessed 20 November 2013)
[226] As above
[227] Humphreys (n 216 above) 133
[228] 'Report on the 4th session of Intergovernmental Forum on Forest' ECOSOC Resolution/2000/35, para 2(f) 3(a)

instrument tagged the 'Non-Legally Binding Instrument on All types of Forests' (All types of Forests Instrument) was adopted in 2007 at its 7th session.[229]

The purpose of the 'All Types of Forests Instrument' is to strengthen the political commitment on forest issues, promote the contribution of forests to the attainment of environmental sustainability and offer a framework for national action and global co-operation.[230] One of the primary objectives of the instrument is the commitment to work globally, regionally and nationally to achieve, by 2015, the reversal of the loss of forest cover through sustainable forest management 'including protection, restoration, afforestation and reforestation, and increased efforts to prevent forest degradation'.[231] The significance of this instrument and the need for member states to improve forest related legislation, enforcement and good governance in order to support sustainable development were emphasised at the 2013 session of the UNFF.[232]

The legal commitment in relation to the forests remains not binding but the issue of forests has taken a slightly different turn as an international climate mitigation response under the UNFCCC and, particularly, the Kyoto Protocol.

4.3.3 Forests as an international climate mitigation response

Despite much controversy around its definition, the UNFCCC sets out the basis for understanding that forests are critical to global climate change mitigation activities. As mentioned earlier, it enjoins parties to take measures to address human-induced emissions by sources and removals by sinks of all greenhouse gases.[233] The UNFCCC defines 'source' as 'any process or activity that releases a greenhouse gas, an aerosol or a precursor of a greenhouse gas into the atmosphere'. It defines a 'sink' as 'any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere'.[234] These provisions of UNFCCC are reinforced by the Kyoto Protocol which requires each of the parties listed under Annex 1 to implement policies and measures aimed at protecting sinks and

[229] 'Non-legally binding instrument on all types of forests' A/C.2/62/L.5 (All Types of Forests Instrument)
[230] All Types of Forests Instrument, para 1(a)-(c)
[231] On the objectives of the instrument, see All Types of Forests Instrument, para 5
[232] 'Resolution of Working Group One on Progress in implementation of the non-legally binding instrument on all types of forests (Item 3), Regional and subregional inputs (Item 4), Forests and economic development (Item 5), and Enhanced co-operation (Item 8)' as adopted during the last session of UNFF10 on Saturday 20 April 2013
[233] UNFCCC, art 4
[234] UNFCCC, art 1(8) and (9)

enhancing reservoirs of greenhouse gases not prescribed under the Montreal Protocol, 'taking into account its commitments under relevant international environmental agreements'.[235]

Arguably, forests fall within the above category definition as both a 'source' and 'sink' of greenhouse gases, not least because, as climate scientists have shown, the felling of forests for whatever purposes release carbon dioxide into the atmosphere and this situation contributes approximately 17-20% of total greenhouse gas emissions.[236] The protection of forests and their nurturing also serves as a 'sink' in that it can remove carbondioxide from the atmosphere.[237] Besides, forests are a significant storehouse of biodiversity.[238] Forests provide services for indigenous peoples and local communities who rely on them for services, including food, shelter, clean water and climate prediction.[239] It is thus not a surprise that experts argue that it is difficult to meet the commitment to limit global warming without encouraging developing countries to keep their forests 'standing'.[240] Similarly, economists are of the view that reducing forest loss offers a low option in terms of cost for reducing global climate change.[241]

In climate change discussions, the issue of forestry has featured under two distinct, but interrelated, mechanisms. It featured as an important component of the land use, land-use change and forestry (LULUCF) mitigation mechanism.[242] Forestry under the LULUCF is however limited in application to plantation forests, namely, afforestation and reforestation, as the only activities which, if carried out in developing countries, can be credited under the Clean Development Mechanism (CDM) of the Kyoto Protocol.[243] However, the CDM approach has been questioned for promoting large monoculture tree plantations under the veil of afforestation and reforestation.[244] Few countries have been able to participate under the CDM projects in

[235] Kyoto Protocol, art 2(1)(a)(ii)
[236] Van der Werf *et al* 'CO2 emissions from forest loss' (2009) 2 *Nature Geoscience* 737; PK Pachauri & A Reisinger (eds) *IPCC synthesis report: Climate change 2007 Contribution of Working Groups I, II, and III to the 4th Assessment Report of the Intergovernmental Panel on Climate Change* (2007)
[237] Van der Werf *et al* (n 236 above)
[238] E Wilson 'Nature Revealed-Selected Writings 1949–2006' (2006); earlier the World Bank Report showed that the livelihood of no less than 1.2 billion poor people depend on the forests, see World Bank *Sustaining forests. A development strategy* (2004)
[239] R Brunner *et al* 'Back to its roots: REDD+ via the Copenhagen Accord' (Fall 2010) 1 *Reconsidering Development* 2
[240] J Willem den Besten, B Arts & P Verkooijen 'The evolution of REDD+: An analysis of discursive institutional dynamics' (January 2014) 35 *Environmental Science & Policy* 40
[241] J Eliasch 'Climate change: Financing global forests', UK Office of Climate Change (2008); also see Stern (n 210 above) who considers the costs of mitigation generally and concludes that the costs of embarking on mitigation is lesser than the costs of inaction
[242] Kyoto Protocol, arts 3 (3) & 3(4) dealing with 'Land use, land-use change and forestry'
[243] Willem den Besten *et al* (n 240 above) 42
[244] J Kill *et al Trading carbon: How it works and why it is controversial* (2010) 119

forestry owing to its complex procedures.[245] In addition, the benefits of forest carbon projects under the CDM for the poor are doubted because of the low carbon price and its trade off with competing activities in support of local needs.[246] Ultimately, although not yet clearly defined, it is expected that afforestation and reforestation hitherto covered by the CDM will form part of the 'forest carbon enhancement' element of the REDD+. [247]

As a result, the debate has shifted to the operationalisation of REDD+.[248] The REDD+ initiative becomes inevitable because the Kyoto Protocol, which governs the LULUCF, does not offer developing countries a space to engage with emission reductions generated through reducing of deforestation. Yet, it is necessary in that, unless standing forests are allowed to attract financial credits, communities and governments in developing countries have little incentive to prevent deforestation.[249]

4.3.3.1 Reducing emissions from deforestation and forest degradation (REDD+)

Reducing Emissions from Deforestation and Forest Degradation (REDD+) as a mitigation initiative developed under the UNFCCC consists of five different activities: (1) reducing deforestation, (2) reducing degradation, (3) promotion of conservation of forest carbon stocks, (4) incentivising sustainable management of forests, and (5) the enhancement of forests as holders of stocks of carbon in developing countries.[250] Since it was proposed as a forest-based mitigation strategy for a post-2012 Kyoto climate regime, REDD+ seeks to operate as an incentive for the developing countries to protect and better manage their forest resources, by

[245] C Mbow, D Skole & D Moussa 'Challenges and prospects for REDD+ in Africa: Desk review of REDD+ implementation in Africa' (2012) GLP Report No.5 GLP-IPO, Copenhagen
[246] B Fischer *et al* `Implementation and opportunity costs of reducng deforestation and forest degradation in Tanzania' (2011) 1 *Nature Climate Change* 161-164; C Mbow 'Could carbon buy food? The stakes of mitigation versus adaptation to climate change in African Countries' (2009) 5 *GLP News Letter* 20-23
[247] UN-REDD Programme 'What are the ecosystem-derived benefits of REDD+ and why do they matter?' (1 October 2010) 3
[248] J Robledo *et al* 'Climate change: What are its implications for forest governance' in LA German, A Karsenty & A Tiani (eds) *Governing Africa's forest in a globalised world* (2010) 354-76; T Griffiths *Seeing "RED"? 'Avoided deforestation' and the rights of indigenous peoples and local communities* (2007) Forest Peoples Programme 8; D Takacs *Forest carbon law + property rights* (November 2009) 5-57
[249] UNFCCC 'Reducing emissions from deforestation in developing countries: approaches to stimulate action', Submission by the Governments of Papua New Guinea and Costa Rica to the provisional agenda of the Conference of the Parties at its 11th session' FCCC/CP/2005/MISC.1 3-4
[250] Centre for International Environmental Law (CIEL) *Know your rights related to REDD+: A guide for indigenous and local community leaders* (2014) 5; Wllem den Besten *et al* (n 240 above); UNFCCC 'Report of the Conference of the Parties on its 13th session, held in Bali from 3-15 December 2007, Addendum, Part Two, Action Taken by the Conference of Parties at its 13th session (2008) FCCC/CP/2007/6/Add.1; REDD may also offer to forest communities opportunity for poverty alleviation and thereby having some adaptation utility, see G Kowero 'Ideas on implementing REDD?' *African Forestry* (2010) 23; however, it is essentially a climate mitigation mechanism, see Mbow (n 245) 12

creating and recognising that standing forests have a financial value.[251] This financial value which will arise from the carbon stored by forests will evolve over time and, when traded, could attract similar or greater profits than the profits from logging, monoculture plantations, and agriculture which are drivers of deforestation.[252] To attain its current understanding in international climate change regulatory framework, REDD+ has evolved from two previous forms,[253] namely, Reducing Emissions from Deforestation (RED) and Reducing Emissions from Deforestation and Forest Degradation (REDD).[254]

a. On the road to RED

RED was proposed by Costa Rica and Papua New Guinea on behalf of the Coalition for Rainforest Nations (CRN) at the 2005 COP 11 in Montreal.[255] Prior to this proposal, the issue of forests was hotly contested in the build-up to the Kyoto Protocol, contributing largely to the stalling of the negotiations process. Several reasons have been presented as responsible for this development.[256] Developed countries argued for an arrangement that would allow them to credit the protection of their vast expanses of forests and use the credits to offset part of their obligations under the Kyoto Protocol regarding the reduction of carbon-dioxide emissions.[257] In the main, the argument of the developed countries was that forests should be credited even if not under the threat of deforestation in that, even if not under threat, forests continuously remove carbon from the atmosphere and function as carbon 'sinks'.[258]

The proposal was disputed as a result of issues such as 'leakage', 'permanence' and 'additionality', which were argued as potentially capable of undermining the effectiveness of including deforestation in the climate change mitigation scheme. For example, it has been shown

[251] E Corbera & H Schroeder 'Governing and implementing REDD+' (2011) 14 *Environmental Science & Policy* 89-99; Brunner *et al* (n 239 above) 5
[252] Brunner *et al* (n 239 above) 5
[253] Willem den Besten *et al* (n 240 above); D Humphreys 'The politics of 'avoided deforestation': Historical context and contemporary isssues' (2008) 10 *International Forestry Review* 433-442; PM Fearnside 'Saving tropical forests as a global warming countermeasure: An issue that divides the environmental movement' (2001) 39 *Ecological Economics* 167-184
[254] As above
[255] Other participating countries working under the CRN include: Bangladesh, Central African Republic, Cameroon, Chile, Congo, Colombia, Costa Rica, DRC, Dominican Republic, Ecuador, El Salvador, Fiji, Gabon, Ghana, Guatemala, Honduras, Indonesia, Kenya, Lesotho, Malaysia, Nicaragua, Nigeria, Panama, Papua New Guinea, Paraguay, Peru, Samoa, Solomon Islands, Thailand, Uruguay, Uganda, and Vanuatu, see Brunner *et al* (n 239) 5; L Constance *et al* 'Operationalizing social safeguards in REDD+: Actors, interests and ideas' (2012) 21 *Environmental Science & Policy* 63, 64
[256] Fearnside (n 253 above) 170; Humphreys (n 253 above) 434
[257] Willem Den Besten *et al* (n 240 above) 42; Humphreys (n 253 above) 434
[258] Willem Den Besten *et al* (n 240 above) 42

that 'leakage' is inevitable in that the conservation of forests in one area may lead to deforestation in another space outside the boundary of a given project.[259] Also, the issue of 'permanence' is important since forests do not live forever and the carbon stored may, eventually be released, hence, its benefit as a climate mitigation measure is non-permanent. The non-permanent nature of forests may be counterproductive as countries may be rewarded for forests which are potentially prone to subsequent deforestation.[260] 'Additionality' connotes that payments for keeping the forests standing may amount to rewarding countries where forests are not under threat and which have contributed nothing substantial to the mitigation of climate change.[261]

Owing to these controversies, the Marrakesh Accords afforded limited options for the crediting of forests, allowing only plantation forests, namely afforestation and reforestation, as part of the Clean Development Mechanism (CDM) under which natural forests was excluded.[262] By 2004, a coalition of policy makers, academics including Joseph Stiglitz and Jeffrey Sachs, and the former Prime Minister Somare of Papua New Guinea formed a network through which they argued the failure of CDM as an international mitigation mechanism as a result of its lack of incentive to protect natural forests.[263] It was this network that masterminded the submission for RED in 2005 by Papua New Guinea and Costa Rica at the COP 11, subsequent to which the SBSTA, in adopting the submission, called upon countries to present ideas on approaches to address technological and political issues pertaining to REDD.[264]

b. Departing from RED to REDD for REDD+

In the SBSTA, countries with similar forest situations came together to ensure that a future policy after RED in relation to the forests would include options that cover their situations.[265] Issues on which the attention of the debate focused were the types of forest cover and rate of deforestation necessary for inclusion in future policy. In respect of these issues, two divergent

[259] Humphreys (n 253 above) 439
[260] As above
[261] As above
[262] Willen den Besten *et al* (n 240 above) 42; A Nel & K Sharife 'East African trees and the green resource curse' in Bond *et al* (eds) *The CDM in Africa cannot deliver the money* (2012) A report by the University of KwaZulu Natal Centre for Civil Society (SA) and Dartmouth College Climate Justice Research Project (USA)
[263] Willen den Besten *et al* (n 240 above) 42; MT Somare 'Statement by Sir Michael T Somare, Prime Minister of Papua New Guinea' (2005); JE Stiglitz 'Conservation: Analysis' (2005) *The Independent*
[264] Willem den Besten *et al* (n 240 above) 42
[265] As above

coalition interests emerged from the countries working with the CRN. First, the countries that were mostly affected by forest degradation and not deforestation, contended the need for RED to address degradation. Leading this point were the countries in the Congo Basin which convinced others that it was technologically possible to account for carbon credits from reducing forest degradation.[266] Consequently, the focus in international climate change discourse shifted from RED to 'Reducing Emissions from Deforestation and Forest Degradation', or REDD, with 'forest degradation' indicating the additional 'D'. This change was required to tackle the problems of overgrazing and the degrading effects of deforestation which are peculiar to the forests system of developing countries.[267] The conceptual shift to REDD was officially recognised at the SBSTA in 2006.[268]

The second group, a coalition formed around a group of countries with low, but relatively stable forest cover, such as India, or even with expanding cover, such as China, promoted the inclusion of conservation, sustainable forest management and enhancement of forest carbon stocks as part of REDD's scope.[269] Their ideas faced strong opposition from countries with high deforestation rates, notably Brazil and other countries in South America, which insisted that payments for forest protection should not extend to forests that were not under imminent threat.[270] Nonetheless, there was consensus on the need to extend the scope of REDD to cover three elements, namely, conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, which became the '+' in REDD. It was officially recognised in 2007, at COP 13 in Bali , which adopted the Bali Plan of Action (BAP).[271]

Notable decisions in subsequent meetings of the COP have reinforced the emergence of REDD+. The Copenhagen Accord, which is the singular outcome of the event at COP 15, 2009, made progress in relation to issues, including its scope, guiding principles and safeguards of REDD+.

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[266] As above
[267] Willem den Besten *et al* (n 240 above) 43 ; Brunner *et al* (n 239 above) 5
[268] UNFCCC SBSTA 'Reducing Emissions from Deforestation in developing countries: Approaches to Stimulate Action' (2006) FCCC/SBSTA/2006/MISC.5
[269] I Fry 'Reducing emissions from deforestation and forest degradation: opportunities and pitfalls in developing a new legal regime.' (2008) 17 *RECIEL* 166–182; UNFCCC SBSTA'Views on the range of topics and other relevant information relating to Reducing Emissions from Deforestation in developing countries' (2007) (FCCC/SBSTA/2007/ MISC.2); UNFCCC SBSTA 'Report on the second workshop on reducing emissions from deforestation in developing countries, Note by the secretariat' (2007) FCCC/SBSTA/2007/3 (SBSTA Report)
[270] UNFCCC SBSTA 'Views on the range of topics and other relevant information relating to Reducing Emissions from Deforestation in developing countries' (FCCC/SBSTA/2007/ MISC.2); SBSTA Report (n 269)
[271] UNFCCC CP 'Bali Action Plan' Decision 1/CP.13, FCCC/CP/2007/6/Add.1

Signed by 114 nations amidst much disagreement regarding other matters on the agenda, the Copenhagen Accord sets the stage for REDD+ as a global initiative to decelerate the alarming rate of deforestation.[272] In particular, the COP 15 adopted a decision on REDD+.[273] In its decision, the COP provided guidance for REDD+, based on work undertaken by SBSTA in a follow-up to decision 2/CP.13. The decision requires developing countries to identify drivers of deforestation and forest degradation as well as the activities that may reduce emissions and increase removals, and promote the stabilisation of forest carbon stocks.[274]

Following negotiations, the contribution of COP 16 in 2010 at Cancun to the development of REDD+, is reflected in the Cancun Agreements: Outcome of the work of the Ad-Hoc Working Group on Long-term Cooperative Action under the Convention' (Cancun Agreements).[275] Reinstating the elements of REDD+, paragraph 70 of Cancun Agreements encourages parties from developing countries to contribute to mitigation actions in the forest sector by undertaking five activities, namely, (a) Reducing emissions from deforestation; (b) Reducing emissions from forest degradation; (c) Conservation of forest carbon stocks; (d) Sustainable management of forests; (e) Enhancement of forest carbon stocks. Importantly, the Cancun Agreements affirm, in implementing the activities mentioned under paragraph 70, that developing country parties should promote the safeguards referred to in paragraph 2 of appendix 1 of the agreement.[276]

At the Durban Climate Change Conference, COP 17, in 2011, the COP addressed REDD+ in key decisions. For instance, in Decision 2/CP.17, it agreed on certain positive incentives on issues relating to REDD+. It agreed, notwithstanding the source or type of financing, that REDD+ activities should be consistent with the safeguards in appendix I of the Cancun Agreements.[277] In that decision it also considered that 'appropriate market-based approaches' could be developed

[272] UNFCCC CP 'Copenhagen Accord' Decision 2/CP.15, FCCC/CP/2009/11/Add.1
[273] UNFCCC CP 'Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries' Decision 4/CP.15 , FCCC/CP/2009/11/Add.1 (Decision 4/CP.15)
[274] Decision 4/CP.15 (n 273 above) para 1 generally
[275] Decision 1/CP.16 (n 72 above) paras 2(c) and (d)
[276] Decision 1/CP.16 (n 72 above) para 69; see Appendix 1 'Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries', Decision 4/CP.15 (n 273 above)
[277] UNFCCC CP 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' Decision 2/CP.17, FCCC/CP/2011/9/Add.1, para 63 (Decision 2/CP.17)

by the COP for results-based actions,[278] and noted that non-market-based approaches, such as joint mitigation and adaptation approaches, could be developed.[279] In another decision, titled 'Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emission levels and forest reference levels as referred to in decision 1/CP.16',[280] the COP, agrees that systems for providing information on safeguards should be transparent and flexible as well as describe how all the safeguards are being addressed and respected.[281] Also, the COP agreed that countries should provide a summary of information relating to safeguards as part of their national communications.[282] In Durban the COP in another decision launched the Green Climate Fund, which will include REDD+.[283]

At COP 18, 2012, Durban, further decisions were taken in respect of policy approaches and positive incentives on REDD+.[284] In particular, section C of Decision 1/CP.18 deals with finance for REDD+ activities. In 2013, it was decided that the information with respect to compliance with safeguards should be done voluntarily, and may be included in national communication or other communication channels including the UNFCCC web platform.[285] The extent to which the international framework relating to REDD+ considers the indigenous peoples' land tenure and use remains to be seen.

As an international mitigation intervention, REDD+ is developed and supported by the governance structure of several international initiatives including the UN-REDD Programme, and other multilateral initiatives such as the Forest Carbon Partnership Facility (FCPF) hosted by the World Bank.[286] There are also voluntary and independent initiatives, such as the Climate,

[278] Decision 2/CP.17 (n 277 above) para 66
[279] Decision 2/CP.17 (n 277 above) para 67
[280] UNFCCC CP 'Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emission levels and forest reference levels as referred to in decision 1/CP.16' Decision 12/CP.17, FCCC/CP/2011/9/Add.2 (Decision 12/CP.17)
[281] Decision 12/CP.17 (n 280 above) para 2
[282] Decision 12/CP.17 (n 280 above) paras 3 - 5
[283] UNFCC CP 'Launching the Green Climate Fund, Annex Governing instrument for the Green Climate Fund' Decision 3/CP.17, FCCC/CP/2011/9/Add.1, para 35
[284] UNFCCC CP 'Agreed outcome pursuant to the Bali Action Plan' Decision 1/CP.18 , FCCC/CP/2012/8/Add.1
[285] UNFCCC CP 'The timing and the frequency of presentations of the summary of information on how all the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected' Decision 12/CP.19, FCCC/CP/2013/10/Add.1 (Decision 12/CP.19) paras 3 and 4
[286] UN-REDD Programme 'Frequently asked questions (FAQs) and answers about REDD+' http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx (accessed 18 October 2012) (UN-REDD Programme); K Barret 'The World Bank and UN-REDD: Big names and narrow focus' (2012) *Ecossytem Marketplace* 1; S Danon & D Bettiati 'Reducing Emissions from Deforestation and Forest Degradation (REDD+): What is behind the idea and what is the role of UN-REDD and Forest Carbon Partnership Facility (FCPF)' (2012) *South-East European Forestry Review Paper* 95, 97; B Bosquet & AR

Community and Biodiversity Alliance (CCBA).[287] The activities of these supporting initiatives overlap, for instance, as shall be indicated in subsequent chapter, as part of readiness activities for REDD+ at the national level, these initiatives use a joint template for preparing proposal and guidelines.

However, as the case studies on REDD+ used in this study to demonstrate a general trend in Africa fall into the categories mainly supported by UN-REDD programme, this section examines only the extent to which the institutions and instruments emanating from the UN-REDD National Programme involve indigenous peoples and accommodate their land use and tenure in the context of REDD+ activities.

4.3.3.2 United Nations Collaborative Programme on the Reduction of Emissions from Deforestation and Forest Degradation in Developing Countries: Institutions and instruments

a. Institutions and indigenous peoples

The UN-REDD National programme was launched in 2008 as a collaboration between three UN development Agencies, namely, the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP) and the Food and Agriculture Organisation (FAO).[288] Through the technical knowledge, institutional networks, political relations, and resources of these three development agencies particularly, in relation to the environment, the UN-REDD Programme aims to establish a structure to help nations prepare for participation in a REDD+ mechanism.[289] The UN-REDD is governed by a Policy Board, Administrative Agent

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Aquino 'Forest Carbon Partnership Facility: Demonstrating activities that reduce emissions from deforestation and forest degradation' 3; Barret (n 286 above)

[287] CCBA 'About CCBA' http://www.climate-standards.org/about-ccba/ (accessed 18 October 2012)

[288] UN-REDD Programme (n 286 above)

[289] UNEP was founded in 1972 as an institution within the United Nations system to promote the 'wise use and sustainable development of the global environment'. UNEP assesses global, regional and national environmental conditions and trends; develops international and national environmental instruments ; and strengthens institutions for the wise management of the environment , see http://www.unep.org/About/ (accessed 18 October 2013); since 1966, the United Nations Development Programme (UNDP) has been in partnership with people at different levels of society with the view of building crisis resilient nations and facilitating growth for lifestyle improvement. It has focused on four main areas including environment and sustainable development, see http://www.undp.org/content/undp/en/home/operations/about_us.html (accessed 18 October 2012); founded in 1943 by forty-four governments, meeting in Hot Springs, Virginia, the United States, one of the strategic objective of Food and Agriculture Organisation (FAO) of the United Nations is to make agriculture, forestries and fisheries more productive and sustainable, see http://www.fao.org/about/en/ .About (accessed 18 October 2012)

also known as the Multi-Partner Trust Fund Office (MPTF) and a Secretariat as other components of its structure.

The Policy Board is composed of one full member from each of the three regions in which the programme operates, that is, Africa, Asia-Pacific and Latin America-Carribean region and two alternate members from up to a maximum of nine countries. Up to three seats are available for donors while one member of civil society is selected as a representative and three operate as observers.[290] Selected from one of the participating countries and from one of the participating UN agencies, the Board has two co-chairs which rotate among the full members at least once yearly.[291] The UN-REDD Programme presently supports 48 partner countries across Africa, Asia-Pacific and Latin America and the Caribbean, particularly with funds aimed at developing and implementing National REDD+ Strategies.[292] In Africa, countries receiving support for UN-REDD Programme are the DRC, Nigeria, the Congo, the United Republic of Tanzania, and Zambia.[293]

The MPTF is the Administrative Agent (AA) of the UN-REDD Programme and it administers funds for REDD+ activities based on the decisions of the Policy Board. In addition to interfacing with donors, the MPTF performs other functions.[294] These include receiving funds from donors that wish to contribute, administration and the disbursement of funds as received, as well as the consolidation of statements and reports indicating how funds have been utilised.[295] Located in Geneva, the UN-REDD Programme Secretariat supports the Policy Board through a range of activities including organizing meetings, producing reports and monitoring implementation of Policy Board decisions.[296] In addition to serving as an important link for contact with the UN-REDD Programme, the Secretariat liaises with other REDD+ initiatives, such as the FCPF, for a

[290] The present full members are from Democratic Republic of Congo (DRC), Indonesia and Panama, see UN-REDD Programme 'Policy Board Composition' (2013) 2
[291] As above
[292] UN-REDD Programme 'Partner Countries' http://www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx(accessed 18 October 2013)
[293] There are other African nations which though are not part of UN-REDD National Programmes but do receive targeted assistance in form of knowledge sharing and capacity building. These are Cameroon, the Central African Republic, Côte d'Ivoire, Ethiopia, Gabon, Ghana, Kenya, Morocco, South Sudan, the Sudan,Tunisia and Uganda. ' UN-REDD Programme Partner Countries' http://www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx (accessed 18 October 2013)
[294] 'The Multi-Partner Trust Fund Office' http://mptf.undp.org/overview/office/what#mission (accessed 18 October 2013); `UN-REDD Programme Handbook for National Programmes and Other National-Level Activities' (2012) (Handbook for National Programmes)
[295] As above
[296] As above

variety of reasons, including the mobilization of funds.[297] The Secretariat offers leadership in 'strategic planning, and the development and management of reporting, monitoring and evaluation frameworks for the Programme'.[298] It encourages inter-agency partnership and communication in order to ensure effective implementation of the programme.[299]

Indigenous peoples feature in the UN-REDD institutional structure, particularly on the Policy Board. They are represented by the chair of the United Nations Permanent Forum on Indigenous Peoples (UNPFIP) as a full member and three observers.[300] Each of these observers has a representative from the three regions of programme operation.[301] The indigenous peoples' representatives with observer status are self-selected, although the process is facilitated by the UN-REDD secretariat and participating UN Organisations.[302] Funds are provided by the UN-REDD programme to enable the representatives of three indigenous peoples with observer status to attend policy board meetings.[303] It may be argued that this level of representation is low considering the diversity of indigenous peoples in the world and the urgency of their issues.[304] However, it is not a discouraging starting point in a mechanism which is still evolving. The presence of indigenous peoples' organisations at least will ensure that their voice is heard where it matters most: at the policy making level of the programme. The influence of their participation at that level cannot be overstated considering the presence of the chair of the UNPFII, an organisation which has helped in documenting the adverse impacts of climate change on indigenous peoples.[305] Thus, it is reasonable to expect that its participation can help in drawing attention and formulating responses to the adverse impacts of REDD+ activities on indigenous peoples' land use and tenure.

[297] Handbook for National Programme (n 294 above)
[298] As above
[299] As above
[300] UN-REDD Programme, Policy Board Composition (2013) 2
[301] As above
[302] UN-REDD Programme, Policy Board Composition (2013) 3
[303] As above
[304] Mr Kironyi from Tanzania also made this point in the interview with the author at the REDD+ Stakeholders Dialogue held at Cape Town South Africa 2013
[305] See for instance its commissioned work on climate change and mitigation indigenous peoples, 'Report on the impacts of climate change mitigation measures on indigenous peoples on their territories and lands' E/C 19/2008/10 (Unedited version) (Indigenous peoples climate change mitigation report)

b. REDD+ instruments and indigenous peoples

At the Cancun COP, the normative basis for implementing REDD+ was established in form of safeguards. According to paragraph 2 of Appendix 1 of the Cancun Agreements:[306]

> When undertaking the activities referred to in paragraph 70 of this decision, the following safeguards should be promoted and supported:
>
> (a) That actions complement or are consistent with the objectives of national forest programmes and relevant international conventions and agreements;
>
> (b) Transparent and effective national forest governance structures, taking into account national legislation and sovereignty;
>
> (c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples;
>
> (d) The full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities, in the actions referred to in paragraphs 70 and 72 of this decision;
>
> (e) That actions are consistent with the conservation of natural forests and biological diversity, ensuring that the actions referred to in paragraph 70 of this decision are not used for the conversion of natural forests, but are instead used to incentivise the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits;
>
> (f) Actions to address the risks of reversals;
>
> (g) Actions to reduce displacement of emissions.

The subsequent decisions of the COP, as earlier indicated, require that parties through national communications and other channels, indicate their level of compliance with these safeguards.[307] Relying on the foregoing, it can be stated that indigenous peoples' land use and tenure are expected to be respected in the implementation of REDD+ activities. Also, since the UN-REDD Programme is one of the international initiatives involved with the implementation of REDD+, the argument can be made, in line with the rider to paragraph 2 of Appendix 1 of the Cancun Agreements, that the UN-REDD Programme is expected to ensure the promotion and support of these safeguards which urge respect for the rights of indigenous peoples and, arguably, their land tenure and use.

[306] Decision 1/CP.16 (n 72 above)
[307] See Decision 12/CP.17 (n 280 above) and Decision 12/CP.19 (n 285 above) respectively

The validity of the argument is supported by a range of documents put in place by the UN-REDD Programme which draw from and are consistent with the broad guidance provided by the Cancun Agreements. Key examples of these documents being developed, and largely reflecting the Cancun safeguards, are the Social Principles Risk Assessment Tool, Social and Environmental Principles and Criteria, Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities, and the UN-REDD Guidelines on Free, Prior and Informed Consent.

i. Social Principles Risk Assessment Tools

The Social Principles Risk Assessment Tools (SPRAT) emerged against the backdrop that the effective management of forests and the distribution of its benefits are crucial to the success of REDD+ policies and measures.[308] It emerged within that thinking that stakeholders who depend on the forests are unlikely to refrain from using the forests as a source of income if distribution of benefits is uncertain or untimely or if corruption is perceived as high.[309] It is not surprising that a draft Social Principles Risk Assessment Tools (SPRAT) was developed in 2010 to be consistent with the safeguard guidance offered by the UNFCCC's draft AWG-LCA text on REDD+ which informed the Cancun Agreements.[310] The SPRAT offers three interrelated principles that have implications for indigenous peoples in the context of climate change. These are the principles of good governance, stakeholders' livelihoods and policy coherence.[311] Each of these principles contains criteria and questions to assist users in assessing the potential social risks of REDD+ as a mitigation strategy, particularly in the design and implementation of national UN-REDD programmes.[312] Accordingly, it can be expected, if appropriately deployed, that the SPRAT can help prevent social risks involved with REDD+ and hence protect indigenous peoples' land use and tenure in line with paragraph 2(c) of Cancun Agreements.

[308] UN-REDD National Programme 'Social Principles Risk Assessment Tools' October (SPRAT) (2010)
[309] As above
[310] As above
[311] As above
[312] McDermott *et al* (n 215 above) 68; 'The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries Supporting Inclusive and Effective National Governance Systems for REDD+' UNDP' (June 2010)

According to SPRAT,[313] the principle of good governance is to ascertain whether a programme meets the standards of good governance respecting elements such as integrity, transparency and accountability, as well as stakeholder participation. It seeks to avoid involuntary settlement, protect traditional knowledge and help in realising the social, as well as political, well-being of the stakeholders.[314] In addition to its reflection of paragraph 2(d) of the Cancun Agreements, in dealing with policy coherence, principle 3 expects mitigation measures to agree with the sustainable management of forest, forestry plans and other relevant policies and treaties which link with paragraph 2(e) of the Cancun Agreements.[315] To the indigenous peoples who may suffer displacement from their land as a result of project implementation, SPRAT offers some hope in the implementation of REDD+ as a climate mitigation measure.

ii. Social and Environmental Principles and Criteria

The Social and Environmental Principles and Criteria (SEPC) appear to be an extension of SPRAT since it is not certain that they have replaced the latter. Developed in collaboration between UNDP and UNEP,[316] SEPC is conceived with the understanding that REDD+ has beneficial potentials beyond carbon value. In addition to payments for carbon, the advantages from REDD+ can include financial benefits, such as employment, investments in local infrastructure and empowerment of communities in terms of access to forests, land and non-timber forest products, and enhanced local environmental quality.[317] However, as REDD+ can be harmful to the host communities ,[318] SEPC is designed to operate as a response not only to assist with the realisation of the benefits associated with REDD+, but to mitigate its risks.[319] The SEPC aligns with paragraph 2(e) of the Cancun Agreements in offering a guiding frame for the UN-REDD Programme to address social and environmental issues in UN-REDD National

[313] SPRAT (n 308 above)
[314] SPRAT (n 308 above) 2
[315] As above
[316] 'UN-REDD Programme Social & Environmental Principles and Criteria, version 1' UN-REDD/PB6/2011/IV/1 (SEPC); also see 'UN-REDD Programme Social and Environmental Principles and Criteria' UN-REDD Programme, (SEPC) 8th Policy Board meeting 25-26 March 2012 Asunción, Paraguay 3; UN-REDD Programme Social and Environmental Principles and Criteria, version 3 Draft for Consultation (SEPC Version 3)
[317] SEPC (n 316 above) 8
[318] As above
[319] As above

Programmes and other UN-REDD funded activities as well as helping countries to develop national approaches to REDD+ safeguards in accordance with the UNFCCC. [320]

SEPC consists of seven broad principles and associated criteria that further explain each principle,[321] and which are in line with the safeguards provided under the Cancun Agreements, particularly in relation to indigenous peoples.[322] Illustrating this congruence is principle 1 of SEPC which focuses on the need to ensure that the norms of democratic governance are reflected in the national commitments and agreements associated with REDD+. This principle agrees with paragraph 2(d) of Appendix 1 to the Cancun Agreements on the need for full and effective participation of relevant stakeholders, including indigenous peoples. Also, parties involved in the implementation of projects are urged under principle 2 to respect and protect stakeholders' rights in line with international obligations. This is similar to paragraph 2(c) of Appendix 1 to the Cancun Agreements for the knowledge of indigenous peoples and members of local communities in line with UNDRIP. According to principle 3, parties should ensure that projects promote sustainable livelihoods and poverty reduction; principle 4 requires a project to contribute to low-carbon and, climate-resilient sustainable development policy. These principles, together with principles 5, 6, and 7 which respectively enjoin parties to protect natural forests from degradation, enhance the multiple functions of forest and avoid or reduce adverse impacts of activities on non-forest ecosystem services and biodiversity, are compatible with paragraphs 2(f) and (g) of Appendix 1 to the Cancun Agreements. These paragraphs respectively require that REDD+ activities should support actions aimed at reducing emissions.

iii. Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities (Joint Stakeholder Guidelines)

The Joint Stakeholder Guidelines have an antecedent in the Operational Guidance on the Engagement of Indigenous Peoples and Other Forest-Dependent Communities[323] (Operational Guidance) which was developed by the UN-REDD Programme in 2009. The Operational

[320] SEPC (n 316 above) 3
[321] SEPC (n 316 above) 5-7
[322] See Decision 1/CP.16 (n 72 above) Appendix 1, para 2(e)
[323] UN-REDD 'Operational Guidance: Engagement of Indigenous Peoples and Other Forest-Dependent Communities' Working Document, 25 June 2009

Guidance built on the recommendations of the Global Indigenous Peoples' Consultation on REDD+ [324] held in Baguio City, the Philippines, in November 2008. A collaboration between the Forest Carbon Partnership Facility (FCPF) and the UN-REDD Programme, it aims to address the overlap involved in the performance of their functions in terms of scope of work and countries under their respective coverage.[325] It was felt that the challenge of needless duplication could be reduced through the development of joint materials focusing on effective participation and consultation, as well as stipulating concrete guidance for planning and implementing consultation.[326] It is intended to encourage effective stakeholder engagement in the context of REDD+.[327] In aiming at realising this end, the Joint Stakeholder Guidelines aligns with paragraph 2(d) of Appendix 1 to the Cancun Agreements which urges parties to respect the full and effective participation of relevant stakeholders.[328]

The Joint Stakeholder Guidelines are unique in that they particularly focus on indigenous peoples and forest-dependent communities. This is not surprising considering the precarious situation of these peoples and their valuable contribution to the forests on which they rely not only for their social and economic livelihoods, but also for their cultural and spiritual well-being.[329] The Guidelines contain a description of relevant policies on indigenous peoples and other forest-dependent communities, principles and guidance for effective stakeholder engagement; and practical steps to ensure planning and implementing effective consultations. The policies highlighted under the guidelines include international instruments such as UNDRIP, which in articles 20 to 24 allows for the protection of indigenous peoples' land rights. They also refer to the UN Common Understanding on the Human Rights Based Approach to Development Co-operation which affirms that all programmes on development should advance the realisation

[324] 'Global Indigenous Peoples' Consultation on Reducing Emissions from Deforestation and Forest Degradation (REDD)' http://archive.unu.edu/climate/activities/indigenousPeople_REDDConsultation.html(accessed 18 October 2013)
[325] 'Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities'(Joint Stakeholders' Guidelines) 20 April 2012 (revision of March 25th version)
[326] As above
[327] Stakeholders' Guidelines (n 325 above) para 4
[328] Decision 1/CP.16 (n 72 above) para 2(d)
[329] Stakeholders' Guidelines (n 325 above) 1-2

of human rights.[330] Arguably, it suggests that there is implied recognition that the protection of indigenous peoples is crucial in the implementation of REDD+.

Reference is also made to the UN General Assembly Programme of Action for the Second International Decade of the World's Indigenous Peoples; a document that urges states to take positive steps to respect the human rights of indigenous peoples without discrimination.[331] In the context of the FCPF, the Stakeholders' Guidelines refer to the World Bank Operational Policies which are of relevance to indigenous peoples. In particular, these include Operational Policy 4.10 on indigenous peoples that seek to ensure respect for the dignity, human rights, economies, and cultures of indigenous peoples by the projects or missions of the Bank.[332] The policy specifies that the Bank will provide financing for projects only where free, prior, and informed consultation brings about a broad community support to projects by indigenous peoples.[333] While the requirement for free prior and informed consultation is different from consent, it is not impossible, if genuinely carried out as anticipated by the document, that consent will be an inevitable outcome of consultation.

iv. Guidelines on Free, Prior and Informed Consent

The UN-REDD Guidelines on Free, Prior and Informed Consent (FPIC) are the result of an attempt to improve on the Joint Stakeholder Engagement Guidelines in that they set out the normative, policy and operational content for FPIC which are not described in detail under the Joint Stakeholder Engagement Guidelines.[334] To reach their present form, the FPIC Guidelines are an outcome of three regional consultations which were variously held with stakeholders in Vietnam, Panama and Tanzania.[335] Also, rather than using the word 'consultation', it affirms that 'consent' is the end of engaging with populations, including those with indigenous status. Although FPIC is not specifically mentioned, the Cancun Agreements stipulate, when undertaking REDD+ activities, that parties should ensure that such activities complement

[330] 'The human rights based approach to development co-operation: Towards a common understanding among UN Agencies' http://www.undg.org/archive_docs/6959 the_Human_Rights_Based_Approach_to_Development_Co-operation_Towards_a_Common_Understanding_among_UN.pdf (accessed 18 October 2013) (HRBA)
[331] 'Programme of action for the 2nd international decade of the world's indigenous people' Resolution adopted by the General Assembly on 16 December 2005, UN General Assembly Resolution, 60/142 60/142
[332] World Bank 'OP 4.10-Indigenous Peoples' (OP.4.10)
[333] OP.4.10 (n 332 above) para 7
[334] 'UN-REDD Guidelines on Free, Prior and Informed Consent' January 2013 (UN-REDD FPIC)
[335] UN-REDD FPIC (n 334 above) 9

international conventions and agreements.[336] Hence, since the Cancun Agreements incorporate conventions and instruments that provide for FPIC, such as ILO Convention 169 and the UNDRIP, it can be argued that the FPIC Guidelines aim to fulfil Cancun Safeguards. The FPIC Guidelines set out in clear terms the meaning of various elements of the FPIC:[337] they identify the expectations of the UN-REDD programme in relation to the role of the UN-REDD partner countries in REDD+ activities,[338] when FPIC is required and applied.[339] They shed light on the appropriate persons to seek out and gain consent from as well as highlight the outcome of the FPIC process,[340] the operational framework for seeking FPIC and national grievance mechanisms.[341]

Indigenous peoples' issues, particularly in relation to land use and tenure, are central to the explanation offered on FPIC in the Guidelines. First, in defining the various elements that constitute FPIC, the FPIC Guidelines rely on the understanding of FPIC endorsed by the United Nations Permanent Forum on Indigenous Issues (UNPFII).[342] It defines 'free' to mean consent which is given without 'coercion, intimidation or manipulation'.[343] This suggests that the process should be self-directed by the community and not externally imposed.[344] 'Prior' connotes that 'consent is sought sufficiently in advance of any authorization or commencement of activities'.[345] It further suggests that time is given to the community to 'understand, access, and analyze information on proposed activities'.[346] In this regard, information should be given to the community before activities are initiated.[347] According to the FPIC Guidelines, the 'informed' element of the FPIC deals mainly with 'the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the on-going consent processes'.[348] The information should be handy, complete, clear, in culturally acceptable language, widespread in reach, and touching the positive and negative aspects of REDD+

[336] Decision 1/CP.16 (n 72 above) para 2 (a)
[337] UN-REDD FPIC (n 334 above) 18
[338] UN-REDD FPIC (n 334 above) 22
[339] UN-REDD FPIC (n 334 above) 24-28
[340] UN-REDD FPIC (n 334 above) 29
[341] UN-REDD FPIC (n 334 above) 32-34
[342] 'Report of the international workshop on methodologies regarding free prior and informed consent' E/C.19/2005/3, endorsed by the UNPFII at its 4th session in 2005 (FPIC Report)
[343] FPIC Report (n 342 above) para 46(i); UN-REDD FPIC (n 334 above)18
[344] UN-REDD FPIC (n 334 above)18
[345] FPIC Report (n 342 above) para 46(i)
[346] UN-REDD FPIC (n 334 above)19
[347] As above
[348] UN-REDD FPIC (n 334 above) 19

projects.[349] 'Consent' means that the decision is collectively reached through the 'customary, decision-making processes of the affected peoples or communities'.[350] Consent, according to the FPIC Guidelines, is a 'freely given decision that may result to a yes or a no' but includes the option to reconsider if new circumstances emerge.[351] Consent is understood as a collective decision, which may be given or withheld in phases and reached in accordance with their own customs and traditions.[352]

In addition to the general link with indigenous peoples, more importantly, these instruments emphasise the land tenure and use by indigenous peoples and generally animate related issues of participation, carbon rights and benefit-sharing, and access to remedies.

c. Implications of instruments for indigenous peoples

i. Land tenure and use

SPRAT offers a range of principles that specifically speak to the situation of indigenous peoples' land use and tenure. For instance, in explaining principle 1 that deals with good governance, SPRAT requires project documentation to respond to a range of questions, including whether (i) UNDRIP and Convention 169 have been ratified or endorsed, (ii) there is sufficient documentation identifying these peoples, (iii) proposed projects will impact on indigenous peoples' lands, territories, resources or livelihood and (iv) the potential impacts of REDD programmes have been thoroughly analysed and communicated to these groups.[353]

In discussing the criteria associated with its principles, SEPC highlights issues that relate to indigenous peoples' land use and tenure. In elaborating on principle 2, for instance, participants in REDD+ are to safeguard the rights of indigenous peoples, local communities and other vulnerable and marginalised groups to land, territories and resources. In relation to realising principle 6, SEPC provides that land-use planning for REDD+ should respect local and other stakeholders' values. Also, regarding principle 7, project participants are enjoined to prevent or

[349] As above
[350] UN-REDD FPIC (n 334 above) 20
[351] As above
[352] As above
[353] UN-REDD FPIC (n 334 above) 7

avoid adverse activities in the form of land-use change to agriculture, or activities preventing an existing use of forests, such as grazing.[354]

The Joint Stakeholders' Guidelines urge that the issues of land tenure, resource-use rights, property rights and livelihoods are important to indigenous peoples[355] in that in many parts of tropical countries, it is certain that indigenous peoples' customary/ancestral rights may not be codified or consistent with national laws.[356] To this end, the Guidelines highlight the relevance of a legal and policy framework including international instruments, such as UNDRIP which copiously requires the protection of indigenous peoples' land rights. It obligates the states not to take any action likely to disposses indigenous peoples of their land,[357] or forcefully remove them,[358] but urges the states to maintain and strengthen the spiritual relationship of indigenous peoples with their land,[359] and legally to recognise and protect their land rights.[360]

The recognition of these instruments in the Joint Guidelines leaves little doubt that the protection of indigenous peoples, particularly their land use and tenure, is an essential component of the Joint Guidelines. The UN-REDD FPIC similarly sets out a framework including case-law, that should guide the REDD+ activities in dealing with indigenous peoples' land tenure and use. For instance, it refers to institutional policies, including the International Finance Corporation (IFC) Performance Standard which came into effect on January 2012.[361]According to the IFC Standard, FPIC of indigenous peoples should be secured in respect of activities involving the commercial

[354] UN-REDD FPIC (n 334 above) 11
[355] Joint Stakeholders' Guidelines (n 325 above)
[356] As above
[357] See UNDRIP, art 8(2)(b)
[358] UNDRIP, art 10
[359] UNDRIP, art 25
[360] UNDRIP, art 26
[361] 'IFC Performance Standard 7 – V2 Indigenous Peoples' is a product of revisions largely stemming from intensive study undertaken in 2009 by IFC management of its Sustainability Framework. The study is titled 'IFC's Policy and Performance Standards on Social and Environmental Sustainability, and Policy on Disclosure of Information: Report on the First Three Years of Application'. Comprising three components: (1) Policy on Environmental and Social Sustainability, which outlines the IFC's obligations with respect to environmental and social sustainability; (2) Performance Standards, which details IFC clients' responsibilities for mitigating their environmental and social risks; and (3) Access to Information Policy, which addresses transparency issues, the Sustainability Framework came into operation in April 30, 2006. The Performance Standard 7: Indigenous Peoples, adopted in 2006, provided for a standard of consultation in an FPIC and not consent. Hence, it was roundly condemned as weak by the civil society which also urged the IFC to adopt a 'consent' standard for projects dealing with indigenous peoples'. This call eventually made its way into the IFC Performance Standard 7 – V2 Indigenous Peoples. On the account of the evolution and criticism of the IFC Performance Standard 7 – V2 Indigenous Peoples, see SH Baker 'Why the IFC's free, prior, and informed consent policy does not matter (yet) to indigenous communities affected by development projects' (2013) 30 *Wisconsin International Law Journal* 668; for the section incorporating the IFC standard under UN-REDD FPIC, see UN-REDD FPIC (n 334 above) 25, 26

use of land and natural resources, cultural resources and the relocation of indigenous peoples.[362] The Environmental and Social Policy of the European Bank for Reconstruction and Development, like the FPIC Guidelines, lists similar circumstances in respect of which FPIC is required with regard to project-activities.[363]

In setting out the operational framework for seeking FPIC, the FPIC Guidelines seek to protect indigenous peoples' land rights. This is discernible from steps outlined under the operational framework which include the requirements that FPIC should be carried out by partner countries in collaboration with relevant right holders. The operational framework further indicates that the scoping review in respect of FPIC should include a description of the legal status of the land, territory and resources of which the project is being proposed and indicate its specificity, that is, whether formal and informal and/or customary use by the rights-holders.[364] In addition to identifying the circumstances in respect of which FPIC is required under the UNDRIP, the FPIC Guidelines set out the case-law from regional human rights system which considered indigenous peoples' land use and tenure. For instance, in explaining that states are required to secure the consent of indigenous peoples through their freely identified representatives or institutions,[365] the FPIC Guidelines refer to the decision of the Inter-American Commission of Human Rights in *Saramaka v Suriname*.[366] As subsequently confirmed by the Inter-American Court, consent is required in the cases of 'any development, investment, exploration or extraction plans' which are defined as 'large-scale development or investment projects that have a significant impact on the right of use and enjoyment of ancestral territories'.[367] Similarly, the FPIC Guidelines refer to the *Endorois* case where the Commission reached a similar conclusion as in the *Saramaka* case that consent is required for 'any development or investment projects that would have a major impact'.[368] This signifies that it is given that consent is necessary for any project that will disturb indigenous peoples' land use and tenure.

[362] IFC Performance Standard 7 – V2 Indigenous Peoples, para 16
[363] UN-REDD FPIC (n 334 above) 26
[364] UN-REDD FPIC (n 334 above) 32
[365] UN-REDD FPIC (n 334 above) 25
[366] *Saramaka People v Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, (28 November 2007) (*Suriname* case)
[367] *Suriname* case (n 366 above) paras 129, 137
[368] Communication 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)* (*Endorois* case) 27th Activity Report: June-November 2009, para 291

ii. Participation

The UN-REDD National Programme has a range of instruments with provisions that can motivate the participation of indigenous peoples and thereby avail them of the opportunity to take part in decisions affecting their land tenure and use. Principle 1 of SPRAT, dealing with good governance, itemises stakeholder participation as critical to the implementation of climate mitigation projects.[369] SPRAT requires projects to identify all stakeholders and give special attention to the most vulnerable groups by observing their free, prior and informed consent.[370] Also, programmes are expected to indicate whether a consultative process to seek free, prior and informed consent and the process to conduct it may be implemented.[371] According to the SEPC, stakeholders in project implementation should ensure full and effective participation of relevant stakeholders, especially indigenous peoples and forest-dependent communities.[372] Free, prior and informed consent is a critical requirement for the participation of indigenous peoples in all projects impacting on their lands, territories and resources.[373]

The Stakeholders' Guidelines set out common guidance principles for the effective engagement of indigenous peoples which REDD+ should observe whether supported by FCPF or UN-REDD.[374] According to the Guidelines, the consultation process should ensure that the voices of vulnerable groups are heard.[375] In conducting consultation, focus is required on issues such as transparency and timely access to information.[376] For consultation to be meaningful in the context of REDD+, the Stakeholders Guidelines urge that information on project implementation must be communicated to indigenous peoples in a culturally acceptable manner.[377] It must further aim at allowing project investors sufficient time to fully understand and incorporate the concerns and recommendations of local communities in the design of the consultation processes.[378] Indigenous peoples with complaints or issues relating to their land use and tenure can use the consultation in this context to make them known to other project stakeholders.

[369] SPRAT (n 308 above)
[370] SPRAT (n 308 above) 7, 8
[371] SPRAT (n 308 above) 8
[372] SEPC (n 316 above) 8
[373] SEPC (n 316 above) 9
[374] See generally Stakeholders' Guidelines (n 325 above) para 8
[375] Stakeholders' Guidelines (n 325 above) para 8(a) and (b)
[376] As above
[377] As above
[378] Stakeholders' Guidelines (n 325 above) para 8(b)

According to the Guidelines, consultation should occur voluntarily, leading either to the giving or withholding of consent in the case of UN-REDD Programme.[379] Such consultations should accommodate and respect the traditional institutions and organisations of indigenous peoples.[380]

Also, the Stakeholders' Guidelines outline and set out the practical steps on how to conduct consultation of relevance to indigenous peoples land use and tenure.[381] First, stakeholders are expected to define the desired outcomes of consultation. In the context of REDD+, this signifies that stakeholders should set out the mandate, degree of participation and access to information for the consultation exercise.[382] Second, the planner of the consultation should clearly identify the groups that have an interest/stake in the forest and those that will be affected by REDD+ activities and ensure their inclusion. Third, in accordance with the Stakeholders' Guidelines, issues to consult on should be defined and may include the type and pattern of land use by indigenous peoples and other forests dependent communities, land rights and tenure system, the opportunity cost of land use, as well as role of the private sector.[383] Fourth, the terms of the consultation should be defined and may include information on timing, the process of determining consultation outcome, and representation. Fifth, for an effective consultation, participants must decide on which approach to use for consultation and ensure that such an approach allows for bottom up participation and information sharing.[384] Sixth, where necessary, the initiator of REDD+ project should ensure that the capacity of stakeholders is developed, possibly through advance training, to ensure their contribution and understanding of issues.[385] Finally, consultation should be conducted in line with the terms and outcome of findings, and then analysed for dissemination to all participants.[386]

In specifying for details to be followed in relation to participation, the FPIC Guidelines will be useful in addressing issues relating to indigenous peoples' land use and tenure.

[379] Stakeholders' Guidelines (n 325 above) para 8(c)
[380] Stakeholders' Guidelines (n 325 above) para 8(d)
[381] Stakeholders' Guidelines (n 325 above) para 10 generally
[382] As above
[383] As above
[384] As above
[385] As above
[386] As above

iii. Carbon rights and benefit-sharing

The UN-REDD instruments are unique in terms of the provisions relating to carbon rights and benefit-sharing which are of significance, particularly in relation to mitigation activities on indigenous peoples' lands**.** Inspite of their general reference to carbon rights, none of the UN-REDD instruments offers a definition. However, there are scholarly attempts at definition of carbon rights.[387] According to Cotula and Mayers, 'carbon rights are a form of property right that "commoditise" carbon allowing for its trading'.[388] They have also been considered as 'intangible assets created by legislative and contractual arrangements that allow the recognition of separate benefits arising from the sequestration of carbon'.[389] In the view of Peskett and Brodnig, carbon rights simply refer to a new form of property right in forests in the light of the emerging negotiation in climate change discussions which is establishing new funds and markets for the purpose of REDD+.[390] As Peskett and Brodnig further explain, certain questions are pertinent for an understanding of the nature of carbon as property. These questions relate to what is being owned, who may own what, who has the right to benefits and how these may be integrated into international and national REDD+ regimes.[391]

The UN-REDD Programme instruments describe carbon rights in relation to the land tenure and use by indigenous peoples. Dealing with good governance, SPRAT requires that the project should spell out how carbon rights and other benefits are fairly distributed.[392] In explaining principle 2 of the SEPC, criterion 7 calls for the respect, promotion, recognition and 'exercise of equitable land tenure and carbon rights by indigenous peoples and other local communities'.[393] In explaining principle 3 of the SEPC,[394] criterion 12 requires parties to safeguard impartial, equal and transparent benefit-sharing and distribution among relevant stakeholders with special attention to the most vulnerable and marginalised groups.[395] In formulating and implementing REDD+, the Joint Guidelines call for clarification of the rights to land and carbon assets,

[387] L Peskett & G Brodnig *Carbon rights in REDD+: Exploring the implications for poor and vulnerable people* (2011) 3
[388] L Cotula & J Mayers 'Tenure in REDD start-point or afterthought?' (2009) IIED 9
[389] C Streck & R O'Sullivan 'Legal tools for the ENCOFOR Programme' (2007); UN-REDD 'Legal and institutional foundations for the national implementation of REDD: Lessons from early experience in developing and developed countries' (2009)
[390] Peskett & Brodnig (n 387 above)2; D Takacs *Forest carbon: Law and property rights* (2009)
[391] Peskett & Brodnig (n 387 above) 3
[392] Peskett & Brodnig (n 387 above) 6
[393] SEPC Version 3 (n 316 above) 5
[394] SEPC Version 3 (n 316 above) principle 3 deals with the promotion and enhancement of forests' contribution to sustainable livelihoods
[395] SEPC Version 3 (n 316 above) 5

including collective rights, in conjunction with other suites of indigenous peoples' rights enshrined in international instruments. According to the UN-REDD FPIC, a key consideration in determining whether FPIC is required for a project, is whether the benefits are derived from the lands and territories, and resources of indigenous peoples and forest-dependent communities.[396] In the case of carbon rights which are potential source of benefit to investors, it means FPIC is required for the purpose of consensus among all stakeholders on the benefit-sharing of indigenous peoples.

iv. Grievance mechanism and access to remedies

For the purpose of resolving grievances that may result from the formulation and implementation of a REDD+ project, the instruments under the UN-REDD National Programme recommend that a grievance mechanism is a prerequisite. The SPRAT highlights the importance of grievance mechanisms through its explanation of certain criteria key to ensure good governance. For instance, it specifies that participation of parties cannot be regarded as effective unless the programme accommodates 'an impartial grievance mechanism for all stakeholders'.[397] Also, as highlighted under criterion 4 dealing with principle 2 of the SPRAT, resettlement is involved, or an issue of traditional knowledge arises, a mechanism should be able to receive and resolve such grievances.[398] More importantly, according to SPRAT, a mechanism should be put in place for the effective resolution of disputes relating to the distribution of benefits.[399]

According to SEPC, a means of ensuring good governance of REDD+ activities is by establishing 'responsive national feedback, complaints and grievance mechanisms'.[400] The Joint Stakeholders Guidelines require an impartial, accessible and fair mechanism for grievance, conflict resolution and redress as a necessary component of the consultation process and all through the phases of implementing REDD+ policies, measures and activities.[401] National programmes, the Joint Stakeholders Guidelines affirm, should establish grievance mechanisms and, for this purpose they must embark on certain activities[402] which include an assessment of

[396] UN-REDD FPIC (n 334 above) 27
[397] SPRAT (n 308 above)
[398] As above
[399] As above
[400] SEPC Version 3 (n 316 above) 4
[401] Stakeholders' Guidelines (n 325 above)
[402] As above

existing formal or informal grievance mechanisms for the purposes of effecting appropriate modification and ensuring an 'accessible, transparent, fair, affordable, and effective' mechanism able to respond to the challenges in REDD+ implementation.[403] No doubt, considering that its focus is not on conventional modes of dispute resolution, such as the court system, a well-conducted assessment as prescribed should produce a grievance mechanism that accommodates the dispute- settlement approach and institutions of indigenous peoples on issues such as land use and tenure.

The UN-REDD FPIC points out that a grievance mechanism at the national level in the context of REDD+ is critical to ensuring the effective resolution of grievances and disputes.[404] Such a mechanism should be open to receiving and fast tracking the resolution of requests and complaints from affected communities or stakeholders, such as indigenous peoples, in relation to REDD+ activities, policies or programmes at the local or national level.[405] In terms of design, such a mechanism should be flexible enough to accommodate different options on problem-solving, including fact finding, dialogue, facilitation or mediation. In addition, it should respond to citizen concerns, pre-empt problems and foster confidence in and accountability from all stakeholders.[406] In the context of REDD+, it should be timely and available to all participating stakeholders 'at no cost' and without hindering resort to other administrative or lawful remedies.[407] By including options, from the menu of dispute settlement, such as dialogue, facilitation or mediation, the UN-REDD instruments certainly do not exclude the consensual manner of dispute resolution, a preferred mode of grievance resolution among indigenous peoples. The practice accords with the UNDRIP which recognises the right of indigenous peoples to decisions through a 'just and fair procedures for the resolution of conflicts' in line with their customs and traditions.[408]

In view of the foregoing, the conclusion can be drawn that there is emerging evidence that the international climate regulatory framework relating to adaptation and mitigation as responses to the adverse impacts of climate change accommodates indigenous peoples' issues in relation to

[403] Stakeholders' Guidelines (n 325 above)14
[404] Stakeholders' Guidelines (n 325 above) 34
[405] As above
[406] As above
[407] As above
[408] UNDRIP, art 40

their land use and tenure. However, as shall be shown in the ensuing section, there are certain notions, particularly under the framework, which can potentially limit the consideration afforded indigenous peoples' and legitimise the subordination of their land tenure and use at the national level.

4.4 Subordinating notions in the international climate regulatory framework

The emerging international climate change regulatory framework reflects certain notions which may legitimise states' inadequate formulation of the domestic regulatory framework in addresing the adverse impacts of climate change on indigenous peoples' land tenure and use. The key notions are 'sovereignty', 'country-driven', and 'national legislation'. Arguably, these notions limit the importance of an emerging development in the international climate change regulatory framework in addressing the adverse impacts of climate change on indigenous peoples' land use and tenure at the domestic level.

4.4.1 Notion of 'sovereignty'

The concept of 'sovereignty' is the keystone of international law.[409] There are various ways in which the concept has been discussed.[410] The traditional concept of international law considers sovereignty as a status in which each state is co-equal and has final authority within the limits of its territory.[411] This meaning of sovereignty under international law aptly reflects the definition by Max Huber in *Island of Palmas* case (*Netherlands v USA*). [412] In that matter, Hubber notes:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.[413]

[409] RC Gardner 'Respecting sovereignty' (2011) 8 *Fordham Environmental Law Review* 133; for a historical analysis of the concept see FH Hinsley *National sovereignty and international law* 2nd ed (1986) 158-235
[410] Four ways in which the term is used are 'domestic sovereignty' to refer to political authority and the level of control enjoyed by a state; 'interdependence sovereignty' dealing with the ability of a state to control movements across its border; 'international legal sovereignty' which treats the state as a subject of international law in the same way that an individual is considered as a citizen at national level ; 'Westphalian sovereignty' which construes the concept in two terms, namely, territorially and the exclusion of external actors from domestic structures of authority, see SD Krasner *Sovereignty: Organised hypocrisy* (1999) 73-90
[411] J Dugard *International law: A South African perspective* (4th ed 2012) 125; on the notion of co-equality, see however, A Cassese *International law in a divided World* (1986) 129, who contends that it is not valid to maintain that the United Nations is based on the full equality of its members, considering that art 27(3) of its Charter grants the right of veto to the permanent members of the Security Council only. Hence, at best, the principle of equality laid down in art 2(1) can only be interpreted as merely a general guideline, which is weakened by the exceptions particularly laid down in law
[412] *Island of Palmas* case (*Netherlands, USA*) 4 April 1928 vol II 829-871 (*Island of Palmas* case)
[413] *Island of Palmas* case (n 412 above) 838

Sharing the above position, in *Corfu Channel* (*UK v Albania*),[414] Alvarez J considered sovereignty as 'the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also its relations with other states'.[415] As Casssese argues, one of the sweeping powers and rights of sovereignty includes the power to assume authority over the populations in a given territory and the power to freely use and dispose of the territory under the state's jurisdiction and to do all activities considered essential for the benefit of the population.[416] The concept of 'sovereignty' has always been a major statement of defence in a world system largely considered by some as unequal. According to Keck and Sikkink, although the claims by third world leaders to sovereignty are viewed as the self-interested argument of authoritarian leaders, states' attachment to the concept is not without basis:

> The doctrines of sovereignty and non-intervention remain the main line of defence against foreign efforts to limit domestic and international choices that this world affairs (and their citizens) can make. Self-determination, because it has so rarely been practised in a satisfactory manner, remains a desired, if fading, utopia. Sovereignty over resources, as fundamental part of the discussions about a new international economic order, appears particularly to be threatened by international action on the environment. Even where third world activists may oppose the policies of their own governments, they have no reason to believe that international actors would do better, and considerable reason to suspect the contrary. In developing countries, it is much the idea of the state, and it is the state itself, that warrants loyalty. [417]

When sovereignty is applied in the context of the environment, it means that one state may not prescribe to another how the latter must regulate its activities, such as pollution or exploration of natural resources, in its jurisdiction.[418] This viewpoint is contentious as some scholars have shown that rigid adherence to such a conception of sovereignty may operate as an obstacle to the effective international response to environmental threats. The tension is not new in view of the provision of principle 21 of the 1972 Stockholm Declaration. According to the principle:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the

[414] *Corfu Channel (UK v Albania)* 1949 ICJ 39, 43 (*Corfu Channel* case)
[415] As above
[416] Cassese (n 411 above) 49-52
[417] ME Keck & K Sikkink *Activists beyond borders: Advocacy networks in international politics* (1998) 215
[418] Gardner (n 409 above) 133-134

> responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[419]

The UNFCCC similarly reiterates the sovereign right of the State to exploit its own resources in line with its own environmental and developmental policies. It, however, notes that states do have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to other states or states beyond their national jurisdiction.[420] Hence, while it is certain that the traditional notion of sovereignty remains crucial in international law, it is increasingly being challenged by the emphasis on interdependency or co-operation within the international community to address global environmental challenges such as climate change, transboundary pollution, the effects of which transcend national boundaries.[421] On this trend, Bowman observes:

> It has become common to observe that the natural environment knows no political boundaries and that the traditional regime of resource exploitation, grounded in the notion of territorial sovereignty requires to be replaced by more overtly collective approaches.[422]

Against this backdrop and in the interest of protecting varied elements of the environment, academia explores principles, such as precautionary measures,[423] 'trusteeship', 'guardianship','custodianship' and 'stewardship', all of which operate as limitation measures on the traditional notion of sovereignty.[424] Notwithstanding the above trend in international environmental law, key decisions and safeguards resulting from international climate change negotiation, particularly on the implementation of REDD+, appear to stress the traditional notion of sovereignty.

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[419] Gardner (n 409 above) 133
[420] UNFCCC, preamble
[421] Gardner (n 409 above) 134
[422] M Bowman 'The nature, development and philosophical foundations of the biodiversity concept in international law' in M Bowman & C Redgwell C (eds) *International law and the conservation of biological diversity* (1996) 12; also see FX Perrez 'Cooperative sovereignty: From independence to interdependency in the structure of international environmental law' (2000) 135 where the author argues that since in contemporary time, economic, social and ecological problems hardly conform to artificial boundaries, the earth should be viewed in an interdependent sense of a global system
[423] M Haritz 'Liability with and liability from the precautionary principle in climate change cases' in M Faure & M Peeters (eds) *Climate change liability* (2011) 15-32; D Freestone & E Hey 'Origins and development of the precautionary principle' in D Freestone & E Hey (eds) *The precautionary principle and international law: The challenges of implementation* (1996) 3; see also Rio Declaration, principle 15
[424] PH Sand 'Sovereignty bounded: Public trusteeship for common pool resources' (2004) 4 *Global Environmental Politics* 63

At least starting from the 26th session of the SBSTA, it has been signaled that the notion of 'sovereignty' will be critical to the negotiation of REDD+. In the Submission made by the UNFF, for instance,[425] it is indicated that the approach of states regarding topical issues such as land tenure law, rights of indigenous and local communities to the sustainable management of forests, will take into account the sovereign right of each country and its legal framework.[426] At the 27th session of the SBSTA in 2007, parties, particularly from developing countries left nothing in doubt that they hold the notion of sovereignty strongly. Tuvalu, for instance noted that the establishment of a new international regime to transfer the emissions entitlements in REDD activities may compromise a nation's sovereign right over their land in that it involves a transfer of carbon rights in standing trees to another. [427]

At the 28th session of the SBSTA, the joint submission made by parties, particularly from countries including African states, namely, Cameroon, Central African Republic, the Democratic Republic of Congo Equatorial Guinea, Kenya, Lesotho, Madagascar, Gabon, Ghana, Liberia and Uganda, emphasised their sovereign right to the exploration and use of their natural resources in accordance with their environmental and developmental policies for present and future generations.[428] The parties maintained that REDD+ activities should remain voluntary and that '[p]arties alone will determine how best to implement specific measure toward these objectives'.[429] This understanding of the process for REDD+ as voluntary together with the discretion of state to determine the direction of implementation, arguably explains the basis for including the concept of 'sovereignty' in subsequent decisions and safeguards for REDD+ implementation.

[425] UNFCCC SBSTA 'Paper no. 6: United Nations Forum on Forests' 26th session Bonn, 7-18 May 2007, Item 5 of the provisional agenda , Views on the range of topics and other relevant information relating to reducing emissions from deforestation in developing countries, Submissions from intergovernmental organisations, FCCC/SBSTA/2007/MISC.3 (UNFF paper)
[426] UNFF paper (n 425 above) 46-47
[427] UNFCCC SBSTA 'Submission from Tuvalu' 27th session Bali, 3-11 December 2007, Item 5 of the provisional agenda, Views on issues related to further steps under the Convention related to reducing emissions from deforestation in developing countries: approaches to stimulate action
[428] Other states are Belize, Bolivia, Costa Rica, Dominican Republic, Guatemala, Guyana, Honduras, Panama, Papua New Guinea, Singapore, Solomon Islands, Thailand,Vanua, see 'Submission from Belize, Bolivia, Cameroon, Central African Republic, Congo, Costa Rica, Democratic Republic of the Congo, Dominican Republic, Equatorial guinea, Gabon, Ghana, Guatemala, Guyana, Honduras, Kenya, Lesotho, Liberia, Madagascar, Panama, Papua New Guinea, Singapore, Solomon Islands, Thailand, Uganda and Vanuatu', see UNFCCC SBSTA 28th session Bonn, 4-13 June 2008, FCCC/SBSTA/2008/MISC.4/Add.1 (Cameroon Joint Submission)
[429] Cameroon Joint Submission (n 428 above) 3

The possibility that the issue of 'sovereignty' is controversial and can shape the approach of states in relation to indigenous peoples is evidenced in the response of parties and accredited observers to the invitation extended by the SBSTA at its 29th meeting.[430] This invitation sought their views on issues relating to indigenous peoples and local communities for the development and application of methodologies for REDD+.[431] Despite their active participation in previous SBSTA meetings, no submission was made by any state in Africa on this important issue. There may be other reasons responsible for this development, it may not be unconnected to the question of 'sovereignty' which the African states have alleged will be compromised if the phrase, 'indigenous peoples' is used and rights, such as self-determination as well as land and resource rights, are guaranteed to these populations on the continent.[432] Hence, the argument can be made that non-participation of states from Africa in the discussion may be a reflection of the age-old reluctance to accept the legal application of the word 'indigenous peoples' in their legal framework.

The Czech Republic on behalf of the European Community and its member states, Ecuador, Guatemala, Panama, Costa Rica, Bolivia and Tuvalu lodged submissions to the SBSTA secretariat by 15 February 2009. In these submissions, it was argued that states reserve to themselves a large measure of discretion on certain issues pertaining to indigenous peoples.[433] For instance, although some of the parties emphasised that indigenous peoples and local communities can be efficiently engaged in REDD monitoring and in the measurement of the carbon stocks of trees,[434] others generally prefer the principle of 'consultation', instead of 'consent'in dealing with climate- related actions affecting indigenous peoples.[435]

[430] UNFCCC SBSTA 'Report of the Subsidiary Body for Scientific and Technological Advice on its 29th session' held in Poznan from 1-10 December 2008, FCCC/SBSTA/2008/13 17 February 2009, para 45
[431] As above
[432] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights at its 41st ordinary session held in May 2007 in Accra, Ghana (Advisory Opinion) paras 9-13
[433] UNFCCC SBSTA 'Reducing emissions from deforestation in developing countries: approaches to stimulate action, Issues relating to indigenous people and local communities for the development and application of methodologies', 13th session Bonn, 10 June 2009, Item 5 of the provisional agenda, FCCC/SBSTA/2009/MISC.1
[434] UNFCCC SBSTA 'Paper No. 1: Czech Republic on behalf of the European Community and its member states', submission supported by Bosnia and Herzegovina, Croatia, Montenegro, FCCC/SBSTA/2009/MISC.1 3, 4 (Czech Submission); UNFCCC SBSTA 'Paper No. 4', Panama Submission FCCC/SBSTA/2009/MISC.1 9 (Panama Submission)
[435] UNFCCC SBSTA 'Paper No. 2: Ecuador' FCCC/SBSTA/2009/MISC.1 5; Czech Submission (n 434 above) 4; Panama Submission (n 434 above) 9

These arguments are in despite of the submissions of NGOs which were instructive in rendering some critical comments on the potential of states to undermine indigenous peoples' interest. In driving home this point, NGOs are critical of the use of the term 'consultation' and not 'consent', in the submission made by state parties. In their view, free, prior and informed consent in respect of REDD policies and the need for projects to avoid the displacement of indigenous peoples and local communities from their lands and territories are critical to the effective implementation of REDD+ at the national level.[436] Even in the discussions clearly invited on the inclusion of indigenous peoples in REDD+ activities, the states have not hesitated to assert a sweeping sovereign right on certain issues dealing with indigenous peoples.

The evidence that sovereignty is central to the implementation of REDD+ activities can be found elsewhere. Paragraph 1(e) of Appendix 1 to the Cancun Agreements provides that all the activities involved in REDD+ should respect 'sovereignty'.[437] Also, in the decision reached concerning the systems for providing information on the safeguards for REDD+ provided under paragraph 1 of Appendix 1 to the Cancun Agreements, the COP17 noted that such systems should be consistent with national sovereignty, legislation and circumstances.[438] Further reinforcing the 'sovereignty' requirement, the decision emphasises the need to take into account the 'national circumstances and respective capabilities' as well as 'national sovereignty and legislation, and relevant international obligations and agreements'.[439] It can be argued that the reference to 'relevant international obligations and agreements' signifies that the application of international standards is intended, yet, the provision is not clear on which should trump the other if there is incompatibility between national legislation and international obligations.

There is evidence of the possibility that international obligations will apply only in so far as they are compatible with national legislation in the subsequent discussions at the 15th session of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention in 2012 which

[436] 'Submission of the Climate Action Network International' 15 February 2009 http://unfccc.int/resource/docs/2009/smsn/ngo/098.pdf (accessed 18 October 2013) (Climate Action Submission); 'Submission to the United Nations Framework Convention on Climate Change regarding, views on issues relating to Indigenous Peoples and local communities for the development and application of methodologies for Reducing Emissions from Deforestation and Forest Degradation in Developing Countries by The Nature Conservancy' http://unfccc.int/resource/docs/2009/smsn/ngo/099.pdf (accessed 18 October 2013) (Nature Conservancy Submission); 'FPP submission to UNFCCC SBSTA', February 2009 http://unfccc.int/resource/docs/2009/smsn/ngo/104.pdf (accessed 18 October 2013) (FPP Submission)
[437] Decision 1/CP.16 (n 72 above)
[438] Decision 12/CP.17 (n 280 above) preamble
[439] Decision 12/CP.17 (n 280 above) 2

was convened to discuss the idea of creating a REDD+ Market mechanism. At that forum, nations belonging to the COMIFAC, that is Burundi, Cameroon, the Central African Republic, Chad, Congo, the DRC, Equatorial Guinea, Gabon, Rwanda, Sao Tome and Principe emphasised that to fully respect the notion of 'sovereignty', parties involved in REDD+ activities should have the discretion to decide the approach they deem most appropriate. In any event, the financing option for REDD+ must fulfil urgent adaptation and mitigation needs and comply with their national economic development programmes.[440] Hence, it is not surprising that the RPP Template incorporates safeguard principles as listed under Appendix 1 to the Cancun Agreements which include respect for sovereignty and national legislation, confirming their centrality to the implementation of REDD+ activities.[441] Indeed, the fact that nations place sovereignty above the climate change mitigation safeguards may well have informed the provision that compliance with the decision of the COP requesting state parties to describe activities on safeguards is voluntary.[442]

An argument can be made that the notion of 'sovereignty' not necessarily poses a problem as it implies 'responsibility to protect' human populations under international law. This argument may appear justified as scholarship has demonstrated the shift from the notion of 'unconditional' sovereignty to 'responsible sovereignty'. In this regard, Falk demonstrates, as the challenges of post-colonial Africa are different, that sovereignty should be erased from the minds of its political consciousness. Rather, political consciousness in the region should embrace the doctrine of sovereignty which follows the reasoning in the American and French revolution where sovereignty is associated with the rights of the citizens.[443] More aptly, Falk notes: [444]

> Government legitimacy that validates the exercise of sovereignty involves adherence to minimum humanitarian norms and a capacity to act effectively to protect citizens from acute threats to their security and well-being that derive from adverse conditions within a country

[440] UNFCCC AWGLCA 'Submission from Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Rwanda, Sao Tome and Principe' 15th session Bonn, 15-24 May 2012, FCCC/AWGLCA/2012/MISC.3/Add.2
[441] R-PP Template Version 6 Working Draft' April 4, 2012 which replaces Version 5 of December 22
[442] Decision 12/CP. 19 (n 285 above) para 5
[443] R Falk 'Sovereignty and human dignity: The search for reconciliation' in FM Deng and T Lyons *African reckoning: A quest for good governance* (1998)
[444] Falk (n 443 above) 14

However, this is not the case in most states in Africa in relation to indigenous peoples where basic instruments that specifically aim to safeguard their land rights are still not ratified. For instance, only one African state has ratified the ILO Convention 169.[445] Also, although the initial hesitance of African states was overcome, of the 13 African members of the Human Rights Council, only four voted in favour of its adoption.[446] When the final version of the Declaration was adopted on 13 September 2007, three African states, Burundi, Kenya and Nigeria abstained.[447] It is encouraging that a number of African states supported its adoption,[448] but this is not translated into any significant change in terms of recognition of rights in the legal framework at the domestic level.[449]

In all, it can be summed up that the foregoing discussion reflects the possibility that the notion of 'sovereignty' has the potential to inform a domestic climate change regulatory regime which essentially does not include normative content that recognises the protection of indigenous peoples' land use and tenure. It further signifies, in the context of climate change, that a state may justifiably hide under the concept of sovereignty to do as it wishes, including the exclusion of specific instruments dealing with indigenous peoples.

4.4.2 Notion of 'country-driven'

Related to the notion of 'sovereignty' is the concept of 'country-driven' which implies state ownership of implementation process and attracts significant mention in the climate change regulatory framework on adaptation and mitigation. The notion is perhaps justified considering when decisions are taken at that level, that at least, there is the presumption that it is taken for the purpose of implementation on behalf of the entire population, which include indigenous peoples. In relation to adaptation, state ownership of the concept is discernible from the documentation process for adaptation. Article 4(1)(b) of the UNFCCC enjoins all parties to 'formulate, implement, publish and regularly update national programmes on adequate adaptation and mitigation to climate change'. Also, article 4(1)(e) requires parties to the

[445] Only Central African Republic has ratified ILO Convention 169. It did so on 30 August 2010, see http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (accessed 14 September 2014)
[446] F Viljoen *International human rights law in Africa* (2012) 230
[447] As above
[448] As above
[449] Chapter 5 is particularly devoted to evidence of gap in the national climate change regulatory framework in relation to indigenous peoples' lands

UNFCCC to cooperate 'in preparing for adaptation to the impacts of climate change' as well as plans for 'coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly affected by drought and desertification, as well as floods' in Africa. Under the Kyoto Protocol it is similarly evident that the national level has the directing policy role to play in documenting and implementing adaptation and mitigation measures. Article 10(b)(ii) of the Kyoto Protocol enjoins parties to 'include in their national communications as appropriate, information on programmes which contain measures' that may be helpful in addressing climate change and its adverse impacts.

In the decisions of the COP, or as the CMP under the Kyoto Protocol, there is heavy focus on the state government for the facilitation of adaptation process. This began to feature prominently from the COP 7 held in 2001, which acknowledged the specific needs and concerns of developing country, including Least Developing Countries (LDC), and emphasised the unique role of states in addressing adaptation issues. It insisted that adaptation actions should follow a review process based on national communications and/or other relevant information.[450] It was equally stressed that support be given to the states in the preparation of NAPA.[451] Non-Annex I parties are urged to provide information in national communications and/or other relevant reports on concerns which may ensue from implementing response measures.[452] Guidelines were formulated for the preparation of National Adaptation Plan of Actions (NAPA Guidelines).[453] The NAPA Guidelines, in paragraphs 6(a) and (c), affirm that the programme will be 'action-oriented and country driven' and that NAPA will set out 'clear priorities for urgent and immediate adaptation activities in relation to the countries'. Paragraph 7(f) of the NAPA Guidelines reiterates that it is 'a country driven approach'. In paragraph 7(a), it is pointed out that NAPA is 'a participatory process involving stakeholders, particularly local communities' while paragraph 7(j) declares that the process will ensure 'flexibility of procedures based on individual country circumstances'.

[450] UNFCCC CP 'Implementation of Article 4, paragraphs 8 and 9, of the Convention (decision 3/CP.3 and Article 2, paragraph 3, and Article 3, paragraph 14, of the Kyoto Protocol)' FCCC/CP/2001/13/Add.1 (Decision 5/CP.7/2001) 2
[451] Decision 5/CP.7/2001 (n 450 above) para 15
[452] Decision 5/CP.7/2001 (n 450 above) para 20
[453] UNFCCC CP 'Guidelines for the preparation of national adaptation programmes of action' FCCC/CP/2001/13/Add.4 (Decision 28/CP.7/2001)

The COP 7 largely lays the ground which signifies that adaptation should be country driven and that policy measures at the national level are required in attending to adaptation needs. Subsequent COP meetings, namely COP 8,[454] and COP 9[455] respectively, endorsed the NAPA Guidelines. At the COP 10,[456] it was decided that actions in relation to adaptation and mitigation should reflect the needs and information indicated in national communications, thus tacitly highlighting the role of national communication on adaptation issues. The developing countries both in the LDC and non-LDC are enjoined to file a national communication to document their adaptive concerns and need for funds. The basis for this is article 12, paragraphs 1 and 4 of the UNFCCC. The combined reading of these paragraphs enjoins parties to the Convention to communicate to the COP measures being taken in response to climate change.

These views were taken forward at COP 12 in Nairobi, where adaptation, a major Africa concern, featured prominently. Significantly, there is an indication that activities to be funded under climate funds may consider national communications or national adaptation programmes of action, and other relevant information from the applicant state party.[457] At COP 13 held in Bali, an 'enhanced action on adaptation' was conceived as consisting of elements, including international co-operation, in order to support developing states in their vulnerability assessment and integration of actions into 'national planning, specific projects and programmes'.[458] This angle to the formulation of adaptation actions was projected at the Cancun meeting of COP 16 which emphasised country driven 'enhanced action on adaptation' and invites parties to take actions in NAPA and national communications toward its achievement.[459] Athough originally conceived for Least Developed Countries, at COP 17 held in Durban, South Africa, developing states that are not included as LDCs were encouraged to engage with NAPA. Such countries can use the guidelines for the national adaptation plans for LDCs in documenting their special circumstances in relation to adaptation.[460] At the same meeting, the LDCs were urged to provide

[454] UNFCCC CP 'Review of the guidelines for the preparation of national adaptation programmes of action' FCCC/CP/2002/7/Add.1 (Decision 9/CP.8/2002:1)
[455] UNFCCC CP 'Review of the guidelines for the preparation of national adaptation programmes of action' FCCC/CP/2003/6/Add.1 (Decision 8/CP.9/ 2003:1)
[456] UNFCCC CP 'Buenos Aires programme of work on adaptation and response measures' FCCC/CP/2004/10/Add.1 (Decision 1/CP.10/2004) 4
[457] UNFCCC CP 'Further guidance to an entity entrusted with the operation of the financial mechanism of the Convention, for the operation of the Special Climate Change Fund' FCCC/CP/2006/5/Add.1 (Decision 1/CP.12/ 2006)
[458] UNFCCC CP 'Bali Action Plan' FCCC/CP/2007/6/Add.1 (Decision 1/CP.13/2007)
[459] Decision 1/CP.16 (n 72 above)11-14
[460] UNFCCC CP 'National adaptation plan' FCCC/CP/2011/9/Add.1 (Decision 5/CP.17/2011) 28-29

in their national communications and other channels the steps they have taken in actualising NAPA.[461]

An emphasis on the notion of 'country driven' is discernible from the international climate change regulatory regime relating to REDD+ as a mitigation measure. Paragraph 1 of Appendix 1 (c) to the Cancun Agreements provides that the activities of REDD+ should follow a 'country driven' approach and consider 'options available to parties'. Although stakeholders' participation in the REDD+ process is key, this is generally intended to take place within 'country-specific interpretation of safeguards for REDD+ and in the development of the elements of the safeguards system'.[462] In a decision reached at COP 17, titled 'Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emission levels and forest reference levels as referred to in decision 1/CP.16', the COP agrees that the system for providing information on compliance with safeguards must be 'country driven and implemented at the national level'.[463] The notion is further reinforced by the template of the UN-REDD and FCPF for the Readiness Preparation Proposal (R-PP) which is state-centred.[464] For instance, funding or support for REDD+ activities is commenced by the formulation of a Readiness Proposal Idea Note (R-PIN), through which a country expresses its interest in participating in the FCPF and presents early ideas for how it might organise itself to get ready for REDD+. If successful, the country is then asked to formulate a Readiness Preparation Proposal (R-PP), with funding assistance subsequently made available to the country to carry out the activities laid out in the R-PP.[465]

In all, in focusing on the state, the possibility exists that a country-specific interpretation of safeguards for REDD+ may fall below the standard of protection afforded to indigenous peoples, particularly in relation to their land. The implication of this for indigenous peoples is that they may be excluded from the REDD+ process and access to funding. It is difficult to imagine an effective engagement with peculiar issues relating to indigenous peoples' land tenure and use when the state is the only recognised host of the project under the REDD+ activities. For

[461] Decision 5/CP.17/2011 (n 460 above) 33
[462] As above
[463] Decision 12/CP.17 (n 280 above)
[464] Forest Carbon Partnership Facility (FCPF) and the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) Readiness Preparation Proposal (R-PP) Version 6 Working Draft April 4, 2012
[465] As above

indigenous peoples, who are often marginalised underpowered or not recognised at all by the states, it is uncertain that REDD+ activities will be as beneficial to them, if at all, as would be the case if they could directly formulate proposals and participate in the initiative.

4.4.3 Deference to 'national legislation'

Also related to the notion of sovereignty is the trend in international climate change negotiation which generally places emphasis on national legislation without insistence on the need for such legislation to conform to an international framework on the implementation of programmes. This emphasis is more pronounced and can be illustrated in the regulatory framework emerging in relation to REDD+. An exception is a proposition found in the submission of Tuvalu in response to the invitation by SBSTA at its 29th session to seek the views of parties and accredited observers on issues relating to indigenous people and local communities for the development and application of methodologies for REDD+.[466] No African state made a submission in response to that call, but the submission made by Tuvalu on a model legal framework for REDD+ that safeguards indigenous peoples is most instructive. According to its submission, a legal framework for REDD+ should include the principles:

> [A]cknowledge and recognise the rights enshrined in the UN Declaration on the Rights of Indigenous Peoples; It should establish similar rights and provisions to those found within the UN Declaration on the Rights of Indigenous Peoples so that all UNFCCC Parties are able to apply these rights concurrently whether or not they are signatories to this Declaration and require that all Parties undertaking REDD activities to establish legal systems to recognise and put into place these rights; A framework should be established whereby indigenous peoples from all UN regions are fully represented on any decision-making body associated with REDD; it should establish a legal basis whereby no REDD legal regime is able to displace indigenous peoples or local communities from their land or expropriate their right to the use of their land; it should establish appropriate prior informed consent decision-making processes at the national and sub-national level to ensure that the rights of indigenous peoples and local communities are properly recognised.[467]

[466] UNFCCC SBSTA 'Report of the Subsidiary Body for Scientific and Technological Advice on its 29th session', held in Poznan from 1 to 10 December 2008, FCCC/SBSTA/2008/13 17 February 2009, para 45
[467] UNFCCC SBSTA 'Paper No. 3 Tuvalu', 13th session Bonn, 10 June 2009 Item 5 of the provisional agenda, reducing emissions from deforestation in developing countries: Approaches to stimulate action, issues relating to indigenous people and local communities for the development and application of methodologies, FCCC/SBSTA/2009/MISC.1

In order to achieve the foregoing, Tuvalu suggested a national legislation framework that protects the rights of indigenous peoples and local communities.[468] At the same session, Mexico, however, affirmed:

> We believe that indigenous peoples and local communities. rights, visions and experiences should be taken into account in the discussions of any topic regarding REDD. Furthermore, there should be enough flexibility in the discussion to allow for the consideration of parties. circumstances and legislation regarding consultation processes and property rights of these communities.[469]

The the position of the states from Africa on this matter is unknown, arguably, the foregoing viewpoints highlight the tension which has shaped discussion and negotiation of REDD+ at the international level. The consequence of this tension is a range of COP decisions and initiatives on safeguards stressing national legislation as a context for the implementation of REDD+. Evidence is found in paragraph 2 of the Appendix 1 to the Cancun Agreements: although it requires respect for the knowledge and rights of indigenous peoples and local communities, it only urges parties to note that the United Nations General Assembly has adopted UNDRIP.[470] Mainly, in respecting the knowledge and rights of indigenous peoples and local communities, it calls on parties to take into account relevant international obligations along with national circumstances and laws.[471] Also, parties are required to ensure that actions taken in connection with REDD+ are consistent with objectives of their national forest programmes along with applicable international conventions and agreements.[472]

Similarly, in its preamble to the COP 17 decision regarding the systems for providing information on the safeguards for REDD+ provided under paragraph 1 of the Appendix 1 to the Cancun Agreements, states that such systems should be consistent with national legislation and circumstances.[473] Although in contrast with the provisions that follow, a preamble is not a source of law, however, it has a significant legal effect.[474] It is useful in identifying the purpose of a statute and serves as an important aid in construing unclear legislative language.[475] In *Reference*

[468] As above
[469] UNFCCC SBSTA 'Paper no. 2: Mexico Submission' FCCC/SBSTA/2009/MISC.1 (Mexico Submission)
[470] Mexico Submission (n 469 above) 2 (c)
[471] As above
[472] Mexico Submission (n 469 above) 2 (a)
[473] Decision 12/CP.17 (n 280 above) preamble
[474] Decision 12/CP.17 (n 280 above) 216
[475] As above

re Remuneration of Judges, Chief Justice Lamer explained that 'the preamble articulates the political theory which the Act embodies'.[476] On this authority, it can be argued that in indicating in the preamble to this decision that reporting about REDD+ safeguards will be consistent with 'national legislation and circumstances', the instrument offers the necessary context in which the provisions following the preamble should be understood. Further reinforcing this position, the decision calling for the collection of information at the domestic level indicates, along with related international obligations and agreements, that there is the need to take into account the 'national circumstances and respective capabilities' as well as national legislation.[477]

At the 36th SBSTA meeting, suggestions were made on the elements to describe when giving information on how safeguards are being addressed. It underscored the need for parties to provide information on national forest governance structures, taking into account national legislation and indicating the applicable and relevant administrative bodies, laws, policies, regulations, and law enforcement mechanisms, the nature of land tenure and/or land rights for REDD+ activities, and arrangements on how to transfer the rights and incentives of carbon.[478] Similarly, at the 15th session of the Ad-hoc Working Group on Long Term Cooperative Action, in discussing the policy approaches and positive incentives on issues relating to REDD+ in developing countries, the joint submission made by nations including Cameroon, the Central African Republic, Congo (Republic), Cote d'Ivoire, the Democratic Republic of Congo, Gabon, Ghana, Kenya, Sierra Leone, and Uganda is relevant. Although no reference specifically was made to national legislation, these parties stressed that implementing REDD+ should be voluntary bearing in mind the national circumstances of developed and developing countries.[479] At the same session China, holding brief for developing countries, affirmed that the application and distribution of REDD+ finance should respect the domestic laws, regulations, and relevant institutional arrangements in developing countries.[480]

[476] See Lamer CJ in *Reference re Remuneration of Judges*, para 95
[477] Decision 12/CP.17 (n 280 above) 2
[478] UNFCCC SBSTA 'Submission from the United States of America: Potential additional guidance on-informing how all safeguards are being addressed and respected' 36th session Bonn, 14-25 May 2012, FCCC/SBSTA/2012/MISC.9 4
[479] UNFCCC AWGLCA 'Paper No. 1: Bangladesh, Cameroon, Central African Republic, Congo, Costa Rica, Côte d'Ivoire, Democratic Republic of the Congo, Dominican Republic, Fiji, Gabon, Ghana, Guyana, Honduras, Kenya, Pakistan, Panama, Papua New Guinea, Sierra Leone, Solomon Islands, Suriname and Uganda' 15th session Bonn, 15-24 May 2012, FCCC/AWGLCA/2012/MISC.3, para 10
[480] UNFCCC AWGLCA 'Paper No. 3: China's Submission on the Modalities and Procedures for Financing the Results-Based REDD-plus Actions' FCCC/AWGLCA/2012/MISC.3, para 20

In all, the foregoing notions set the ground for the legitimacy of a domestic climate change regulatory regime that may undermine the protection of indigenous peoples' lands in the context of adverse climate change impacts. In states where the identity of indigenous peoples and the use of their territories are disputed, an international climate change regulatory framework that defers to national legislation is capable of being interpreted as indirectly endorsing approaches which do not recognise or respect the existence of indigenous peoples and their right to the use of land.

4.5 Conclusion

The land tenure and use by indigenous peoples is progressively featuring in the emerging international climate regulatory framework. It is particularly discernible in the normative arrangement under the framework and the structure of the institution under its aegis Through their representation and presentations, issues around indigenous peoples' land use and tenure can feature in the activities of the key institutions of the international climate change framework, namely, the Conference of Parties (COP), Meeting of the Parties (MOP/CMP), the Intergovernmental Panel of Climate Change (IPCC), Subsidiary Body for Scientific and Technological Advice (SBSTA), Subsidiary Body for Implementation, and Ad-hoc Working Group on Long Term Cooperative Action Under the Convention, and Ad-hoc Working Group on Further Commitment for Annex 1 Parties Under the Kyoto Protocol.

The protection of indigenous peoples' land use and tenure features in the emerging international climate regulatory framework on adaptation and mitigation. In relation to adaptation, there is evidence which shows that indigenous peoples' land use and tenure are subjects on the agenda of the regulatory framework of funds for adaptation, mainly the Adaptation Fund (AF), the Least Developed Countries Fund (LDCF), the Special Climate Change Fund (SCCF), and Green Climate Fund (GCF). This is the position under the Global Environment Facility which manages the funds under the LDCF and SCCF, the Adaptation Fund Board which manages the AF and the GCF Board in charge of the GCF Board. Using the regulatory framework on REDD+ as an example,it has been also shown that in the context of the mitigation initiative, indigenous peoples' land tenure and use are an essential component of climate mitigation regulatory framework.

However, along with the developments within the international climate change regulatory framework, the recognition has emerged of the notions of 'sovereignty', 'country-driven' and 'national legislation'. In granting states the space to implement measures according to their sovereignty, approach and domestic laws, without qualification, these notions provide the basis for a climate change regulatory regime which may not protect indigenous peoples' land tenure and use. In the next chapter, evidence is urged to the effect, in fact, that this is the reality as the domestic climate change regulatory framework does not adequately address indigenous peoples land tenure and use in Africa.

Chapter 5

National climate change regulatory frameworks in relation to indigenous peoples' lands

5.1 Introduction

The previous chapter demonstrates that although there is an emerging focus on the protection of indigenous peoples' land tenure and use in the international climate change regulatory framework, it is limited. As it has been shown, there are notions which have emerged along with at that level that may legitimise at the national level a climate change regulatory regime that offers little or inadequate protection of indigenous peoples' land tenure and use. By way of illustration through examples of national climate change regulatory frameworks of selected states, this chapter demonstrates that, in fact, this is the reality in Africa. Evidence shows that the protection accorded indigenous peoples' lands under the national climate change framework is inadequate. This has negative implications for indigenous peoples' participation, carbon rights and benefit-sharing, as well their access to grievance mechanism and remedy.

After discussing the essence of the domestic application of a regulatory framework, this chapter examines the extent to which the domestic climate change regulatory framework in response to the adverse impacts of climate change protects indigenous peoples' land tenure and use in Africa. In doing so, the argument is made that the domestic climate change regulatory framework is inadequate in its protection of indigenous peoples' land tenure and use. This development has negative implications for their participation, carbon rights and benefit-sharing, grievance mechanism and access to remedy. This is followed by a conclusion.

5.2 Significance of a domestic regulatory framework

National implementation is a critical element in ensuring compliance with international environmental policy or law.[1] In addition to playing a crucial role in ensuring that international policies translate into domestic actions and impact, it serves other purposes. It can concretise the

[1] C Redgwell 'National implementation' in D Bodansky, J Brunee & E Heys (eds)*The oxford handbook on international environmental law* (2007) 922-946, 923

reform of institutions so as to enable stakeholders, including vulnerable groups, to take advantage of the strength of the global regulatory framework.[2] Also, with appropriate provisions, a national climate regulatory framework, for instance, can be used by parties as the basis for challenging government on the observance of safeguards dealing with the realisation and protection of rights where such are included in the framework. Redgwell makes the latter point clearly,[3] according to the author, it affords non-state actors the opportunity to effectively challenge 'national implementation of international environmental law.'[4]

Equally, the national implementation of human rights principles is crucial to the realisation of international human rights norms. According to Viljoen, since states are the primary duty bearers and breachers of human rights obligations, it is at the national level that human rights is most meaningful.[5] Therefore, at that level, appropriate legislation, particularly in the form of constitutional rights protecting vulnerable groups, including indigenous peoples, is necessary.[6] In the viewpoint of Swepston & Alfreðsson, in order to realise the rights set forth for indigenous peoples under international instruments, particularly in relation to land, adequate legislation is inevitable at the national level.[7] However, the ensuing discussion shows, an analysis of selected states in Africa reveals a trend which lends credence to the position that national climate change regulatory frameworks do not adequately safeguard indigenous peoples' land tenure and use and related rights in Africa.

5.2.1 Trend in national frameworks: Case studies in Africa

For the purpose of demonstrating the situation at the national level as it affects indigenous peoples' land tenure and use, developments in Tanzania, Zambia and Nigeria in relation to their existing regulatory environment for adaptation and mitigation processes are considered. This is followed by an analysis of extent to which indigenous peoples' land tenure and use are addressed in the selected national frameworks.

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[2] As above
[3] As above
[4] As above
[5] F Viljoen *International human rights law in Africa* (2012) 4, 21
[6] Viljoen (n 5 above) 4
[7] L Swepston & G Alfreðsson 'The rights of indigenous peoples and the contribution by Erica Daes' in GS Alfreðsson &M Stavropoulou (eds) *Justice pending: Indigenous peoples and other good causes: Essays in honour of Erica-Irene Daes* (2000) 74

5.2.1.1 The United Republic of Tanzania

The United Republic of Tanzania (Tanzania) is constituted by mainland Tanzania and Zanzibar. It is a vast country with a total area of 945,087 Sq. km comprised land area of 883,749 sq. km (881, 289 sq. km on the mainland and 2,460 sq. km of the island of Zanzibar), in addition to 59,050 sq. km of inland water.[8] According to the 2012 Population and Housing Census, the total population of Tanzania (mainland and Zanzibar) is 44,928,923.[9] It shares geographical borders with eight countries namely, Kenya and Uganda to the North, Rwanda, Burundi and the Democratic Republic of Congo (DRC) in the West, Zambia and Malawi in the South West and Mozambique in the South.[10] Mainland Tanzania borders the main water bodies of Africa. To the east is the Indian Ocean, to the north Lake Victoria, to the west Lake Tanganyika and to the south-west Lake Nyasa. Mainland Tanzania also has the highest mountain point in Africa. The snow-capped Mount Kilimanjaro is 5,950 metres high.[11] Tanzania is estimated to have a total of 125–130 ethnic groups, of which four groups have organised themselves and their struggles around the concept and movement of indigenous peoples. These groups are the hunter-gatherers Akie and Hadzabe, and the pastoralist Barabaig and Maasai.[12] Tanzania ratified the United Nations Framework Convention on Climate Change on 17 April 1996,[13] and became a party to the Kyoto Protocol on 26 August 2002.[14] Tanzania voted in support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[15]

The dominant sector of the Tanzania economy is agriculture, which provides livelihood, income and employment to over 80% of the population and accounted for 56% of Gross Domestic Product (GDP) and about 60% of export earnings making a significant contribution to the National GDP compared to other sectors.[16] It is an important economic sector in terms of food production, employment generation, production of raw materials for industries and generation of

[8] United Republic of Tanzania 'National Adaptation Programme of Action (NAPA)' (January 2007) 1 (Tanzania NAPA)
[9] 'Population and Housing Census Brief Results' http://www.nbs.go.tz/sensa/index.html (accessed 14 January 2014)
[10] Tanzania NAPA (n 8 above)
[11] As above
[12] IWGIA 'Tanzania' http://www.iwgia.org/regions/africa/tanzania (accessed 18 December 2013)
[13] UNFCCC 'Status of ratification to the Convention' http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (accessed 16 November 2013)
[14] Kyoto Protocol 'Status of ratification' http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (accessed 18 November 2013)
[15] OHCHR 'Declaration on the rights of indigenous peoples' http://www.ohchr.org/en/Issues/IPeoples/Pages/Declaration.aspx (accessed 18 January 2014)
[16] Tanzania NAPA (n 8 above)

foreign exchange.[17] Forecast on GDP cited at 6.8% has not been achievable due to severe drought which affected most parts of the country leading to acute food shortages, food insecurity and hunger.[18] It has been shown that while, according to predictions, climate change will bring about increase in rainfall in some parts of Tanzania and decrease in others, this variation will bring about increased vulnerability of communities, especially in sectors including agriculture, water, energy, health and forestry.[19]

Although about 88.6 million hectares of land in Tanzania are suitable for agricultural production, including 60 million hectares of rangelands suitable for livestock grazing, climate change will alter the distribution and productivity of land.[20] Projected and actual vulnerability in the agricultural sectors include decrease in crop production as a result of unpredictable season, erosion of natural resource base and environmental degradation.[21] This will affect agricultural products such as maize, coffee and cotton. The impact of climate change on the agricultural sector will be more serious on rangelands which are crucial for livestock keeping communities.[22] Shrinkage of rangelands is also expected to aggravate conflicts between livestock keepers and farmers in many areas as livestock keepers herd towards other parts of the country for pasture.[23]

Climate change will adversely affect several river basins such as those situated at Rufiji, Pangani, Ruvu, Great Ruaha, Malagarasi, Kagera, Mara, Ruvuma, and Ugalla which are of economic importance to daily livelihood of the local communities.[24] For instance, due to decreasing rainfall, the annual flow of river Pangani and the hydropower which it sustains, will be negatively impacted.[25] Floods along these river basins, particularly along the Rufiji and Pangani rivers, in addition to causing damage to major hydropower stations, may negatively affect the human settlements found along the river basins in the country.[26]

[17] As above
[18] As above
[19] Tanzania NAPA (n 8 above) 5
As above
[20] Tanzania NAPA (n 8 above) 6
[21] As above
[22] Tanzania NAPA (n 8 above) 7
[23] As above
[24] As above
[25] As above
[26] As above

Climate change also has adverse effects on the coastal and marine environments of Tanzania which are remarkable for their wide variety of species of flora and fauna on which the peoples living in those areas rely for sustenance.[27] Considering its role in boosting tourism, coast and marine resources constitute an important aspect of the cultural sketch of Tanzania.[28] However, with the advent of climate change, the state of the coast and marine in Tanzania is changing. Increase in temperature is expected to result into a rise in sea level which may ultimately cause the destruction of coastal resources and infrastructure.[29] This development, in turn, may lead to the deprivation of the local communities relying on such resources for sustenance.[30]

Tanzania is unique for its wildlife which is one of the richest and most diversified in Africa. Approximately 19 % of the country is protected as national parks or game and forest reserves.[31] Constituting the wildlife profile of Tanzania is a wide variety of species of primates, antelopes, fish, reptiles, amphibians, invertebrates and plants, several of which are endemic.[32] As a result of climate change, however, the impressive reservoir of wildlife and biological diversity is increasingly under threat.[33] Threats to wildlife are due to over-utilisation of resources and conflicts between agriculture and wildlife, persistent drought occasioning the migration and disappearance of some bird and animanl species.[34] The effect of this is more felt by local communities in Tanzania who regard and depend on wildlife as an important source of food and income.[35]

Apart from its significance to local communities relying on it for survival, the wildlife of Tanzania generates economic return from tourists who patronise it for its intrinsic beauty.[36] This explains the existence of no less than 12 national parks, 34 Game Reserves, and 38 Game Controlled Areas in Tanzania. Other popular tourists sites include Mount Kilimanjaro, Zanzibar's historic Stone Town, the Olduvai Gorge archaeological site and sand beaches.[37] Nevertheless, owing to climate change, some of these popular attractions including the ice cap of

[27] Tanzania NAPA (n 8 above) 9
[28] As above
[29] As above
[30] As above
[31] Tanzania NAPA (n 8 above) 12
[32] As above
[33] As above
[34] As above
[35] As above
[36] As above
[37] As above

Mount Kilimanjaro are shrinking. In addition to affecting tourism, reduced ice cap means declining water flow at the feet of the mountain where the local communities live.[38]

As a result of its forests, Tanzania is relevant in the global efforts on climate change mitigation. The total forest area in Mainland Tanzania is 33.428 million hectares (ha) representing 38% of the total land area while in Zanzibar, forest vegetation covers about 63,908 ha.[39] Approximately, 57% of all of these forests are on village land or general land with open access while only 43% of the forested land is designated as forest reserves (FRs) and national parks (protected).[40] Forests are managed for production and/or protection based on forest management plans in Tanzania with benefits ranging from ecosystem services to timber, and non-timber forest products (NTFP).[41] Ecosystem services for which the forests are useful include watershed functions, maintenance of soil fertility, and conservation of biodiversity, sustaining cultural values, removal of carbon dioxide from the atmosphere, improvement of climate condition, eco-tourism and livestock keeping.[42] In particular the NTFP services consist of game meat, medicinal plants, fodder, beverages, dyes, fibres, gums, oils, bees wax and honey and others.[43] To the local and forest-dependent communities, several of these products serve subsistence purpose that provides valuable source of nutrition. [44]

At the heart of trend in deforestation are human activities such as encroachment into reserved forests, shifting cultivation, wildfires, illegal logging, mining, overgrazing, wood-fuel extraction and the introduction of large-scale farming for bio-fuel production, among others. As *Milledge et al* have found, unsustainable logging is a main cause for loss of forest resources in different parts of Tanzania.[45] In addition to contributing to an increasing level of carbon-dioxide,

[38] Tanzania NAPA (n 8 above) 13
[39] United Republic of Tanzania 'National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+)' (December 2010) 30 (Tanzania National Strategy 1st Draft)
[40] Tanzania National Strategy 1st Draft (n 39 above) 28
[41] Tanzania National Strategy 1st Draft (n 39 above) 68
[42] As above
[43] As above
[44] As above
[45] ND Burgess *et al* 'Getting ready for REDD+ in Tanzania: A case study of progress and challenges'(2010) 44 *Fauna & Flora International* 339, 341; S Milledge, I Gelvas & A Ahrends 'Forestry, governance and national development: Lessons learned from a logging boom in Southern Tanzania' (2007)

deforestation also signifies loss of forest, a vital asset that can help in removing carbon from the atmosphere.[46]

In all, emerging variation of the climate has specific negative implications for the lifestyle of indigenous peoples in Tanzania. Declining resources connote an increasing possibility of conflicts between pastoralists and agriculturists. One of such conflicts, as has been reported, involved the Masungu Juu and Masungu Kati villages which are largely occupied by the pastoralists Maasai.[47] The incidence and intensity of drought and attendant limited access to natural resources, have also increased the vulnerability of indigenous peoples.[48] Particularly, the Hadzabe and Akie, largely hunters and gatherers experience reduced availability of water, wild plants and fruits resulting into their movement in search of food.[49] Also, the situation of the pastoralist Maasai is worsened by increasing temperatures, changes in the timing and volume of rainfalls, and reduced mobility associated with climate change.[50] Further adverse impacts are expected along the line of the implementation of REDD+ and commercialisation of forest services which may exclude these populations.[51]

5.2.1.2 Republic of Zambia

Republic of Zambia is a landlocked southern African country covering an area of 752, 614 sq. km.[52] Its boundaries are with Angola and Namibia in the west, the Democratic Republic of Congo (DRC) in the north, Malawi in the east, Mozambique in the Southeast, Zimbabwe in the South and Botswana in the southwest.[53] According to the 2010 Census of Population and

[46] Tanzania NAPA (n 8 above) 9
[47] GC Kajembe *et al* 'The Kilosa District REDD+ pilot project, Tanzania: A socioeconomic baseline survey' (2013) International Institute for Environment and Development (UK) 20
[48] IWGIA 'Country Technical Notes on Indigenous Peoples' Issues: The United Republic of Tanzania (2012) (IWGIA Report on Tanzania) 15
[49] The Guardian 'Hunger Threatens Kiteto's Akiye' February 26-March 3, 2012
[50] IWGIA Report on Tanzania (n 48 above)15
[51] E Laltaika 'REDD+ Implementation and the rights of indigenous peoples in Tanzania' Presented at the University of Colorado at Boulder (CU Boulder) May 3rd, 2013 https://www.academia.edu/3476775/_REDD_Implementation_and_the_rights_of_indigenous_peoples_in_Tanzania_Presented_at_the_University_of_Colorado_at_Boulder_CU_Boulder_May_3rd_2013 (accessed 20 June 2014)
[52] Republic of Zambia *National Adaptation Programme of Action on climate change* (September 2007) (Zambia NAPA) 1; Republic of Zambia *Initial National Comunication under the United Nations Framework Convention on Climate Change* (August 2002) (Zambia Initial National Communication) iv
[53] As above

Housing, the population of Zambia was 13,092,666.[54] Zambia is a multi-cultural and ethnic country consisting of groups such as the Bemba, Tonga, Lozi, Ngoni, Chewa, Kaonde and Luvale.[55] The vegetation comprises forests and grasslands with majority of its forest plantations at the Copperbelt Province providing habitation for wildlife and their habitats outside the forest areas.[56] The main sectors of the Zambia economy are namely agriculture, forestry and fishing, mining and quarrying.[57] Zambia is a party to the UNFCCC which it acceded on 28 May 1993,[58] and the Kyoto Protocol which it ratified on 7 July 2006.[59] Zambia voted in support of UNDRIP.[60]

There are five river systems at the centre of Zambia potential for high hydroelectricity. These are namely, Zambezi, Kafue, Luapula and Chambeshi, while its major lakes include Tanganyika, Bangweulu, Mweru and Kariba.[61] In addition to being in the tropics, Zambia is covered by rich vegetation consisting of open and closed forests and grasslands.[62] However, as a result of change in climate, seasonal droughts, occasional dry spells, intense rainfall, heat wave, high temperatures in valleys, floods, changes in growing season, delayed onset of rainy season and shortened growing period are being experienced.[63]

The agricultural sector is a significant sector of Zambia's national life in that it is linked with food security and supply of raw materials for the manufacturing sector.[64] Approximately 50% of the population in Zambia depends directly on agriculture for their livelihood with focus on products such as millet, cassava, maize, tea, coffee, sugar cane and sun flower.[65] Also, the livestock and fishery agricultural sub-sector respectively contributes 23 and 55% of the supply of

[54] 'Zambia 2010 Census population and housing' http://www.zamstats.gov.zm/report/Census/2010/2010%20Summary%20Census%20Wall%20Chart%20-%20Zambia.pdf (accessed 18 November 2013)
[55] Discussion with Professor Michelo Hansungule, Expert Member, Working Group on Extractive Industries, Environment and Human Rights Violations, on 4 August 2014; also seeWorld Directory of Minorities 'Zambia Overview' http://www.minorityrights.org/?lid=3922&tmpl=printpage (accessed 10 November 2013) identifies the Mambwe, Tumbuka and Lamba as minorities in Zambia
[56] Zambia Initial National Communication (n 52 above) 2
[57] Zambia Initial National Communication (n 52 above) 9
[58] UNFCCC 'Status of Ratification of the Convention' http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (accessed 10 November 2013)
[59] Kyoto Protocol 'Status of ratification' http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (accessed 18 November 2013)
[60] n 15 above
[61] Zambia Initial National Communication (n 52 above) iv
[62] As above
[63] Zambia NAPA (n 52 above)19
[64] Zambia NAPA (n 52 above)11
[65] As above

the protein in Zambia.[66] Nevertheless, climate change is affecting this sector to the extent of threatening food security.[67] Related predictions show that areas that are traditionally suitable for staple crops, such as maize production are likely to reduce by more than 80%.[68] Drought and floods are adversely affecting vulnerable communities who depend on rain-fed agriculture for their livelihoods.[69] Drought-induced crop failures may cause serious malnutrition in children, and in extreme cases, result into famine and loss of productive assets and lives.[70]

Climate change has negative implications for health profile in Zambia. For instance, increased cases of malaria and indeed other major are associated with floods and increased temperature regimes. Incidence of malaria is increasing due to the incursion of malaria.[71] A reason for this is that malaria is a climate-sensitive disease, that is, an illness that is sensitive to weather or climatic factors. Malaria is regarded as the leading killer disease in Zambia.[72] The natural resources inclusive of wildlife and forestry sectors are vulnerable to adverse impacts of climate change in Zambia. As documented by the national adaptation plan of action (NAPA) of Zambia,[73] the 1992 drought left in its wake the death of several hippopotamuses in South Luangwa National Park and the migration of most animals from the Park.[74] Also, in 2005, it was reported that drier weather occasioned changes in condition of elephants.[75]

Zambia has abundance of water since it holds much of the water in Southern African Development Community (SADC).[76] Due to harsh climatic condition, however, it has experienced consistent droughts bringing about water scarcity in several parts of the country. Excessive rainfall has disrupted communities living in the valley and towns with high water table such as Lusaka.[77] As a result of droughts, ground water resources are giving way to diminishing water tables as well as boreholes and rivers.[78] The potential in water sources such as Kariba

[66] As above
[67] As above
[68] As above
[69] Zambia NAPA (n 52 above) 37
[70] Zambia NAPA (n 52 above) 3
[71] Zambia NAPA (n 52 above) 62
[72] Zambia NAPA (n 52 above) 9
[73] As above
[74] As above
[75] As above
[76] Zambia National Communication (n 52 above) 58; Zambia NAPA (n 52 above) 12
[77] Zambia National Communication (n 52 above) 58
[78] As above

dam, and Kafue gorge for energy generation is also under threat, due to increasing droughts traceable to climate change.[79]

With an approximately 49,468,000 ha amounting to 67% of land surface covered by forests, Zambia is one of the most forested countries in Africa.[80] The most common forest type is Miombo woodland, covering 42% of the land area.[81] Generally forests play a significant role in the livelihoods of the vast majority of people living in the rural area. It serves as a means of subsistence, generating income and employment.[82] However, deforestation remains a challenge. Estimated at a growing rate of approximately 1.5% per annum, Zambia is ranked as one of the countries with the highest rates of deforestation in the world.[83] While there is emerging evidence of it in the North-Western province, major corridors of deforestation cover four key provinces, namely Southern, Lusaka, Central and Copperbelt.[84] In 1996, for instance, the Food and Agricultural Organisation (FAO), referring to the findings of Alajarvi,[85] reported that the annual average rate of deforestation in Zambia is around 250 000 ha per annum. Higher rate has been confirmed by subsequent findings of researchers, including Chidumayo, who reported a deforestation rate of 300 000 ha per annum, signifying that deforestation is scaling up.[86] Analysing the scenario in a more recent studies, Vinya *et al* predicted that, if not halted, the trend of deforestation in Zambia will dramatically increase, with Copperbelt being the worst affected province.[87]

In addition, there are a number of socio-economic reasons for which forests are depleted in Zambia. In both rural and urban areas, the forests serve as a source of fuelwood directly contributing to deforestation.[88] Also associated with deforestation are activities of socio-economic benefits,[89] such as, investment in charcoal industry which accounts for no less than

[79] Zambia NAPA (n 52 above) 10
[80] R Vinya *et al* 'Preliminary study on the drivers of deforestation and potential for REDD+ in Zambia' (2012) A consultancy report prepared for the Forestry Department and FAO under the national UN-REDD+ Programme Ministry of Lands & Natural Resources. Lusaka, Zambia, 2-3 (Zambia Preliminary Study)
[81] As above
[82] Zambia Preliminary Study (n 80 above) 8
[83] M Henry *et al* 'Implementation of REDD+ in sub-Saharan Africa: state of knowledge, challenges and opportunities' (2011) 16 *Environment & Development Economics* 381
[84] Zambia Preliminary Study (n 80 above) 8
[85] P Alajarvi *Forest management planning and inventory* (1996) ZFAP, MENR. Lusaka, Zambia
[86] EN Chidumayo *Development of reference emission levels for Zambia* (2012) Report prepared for FAO
[87] Zambia Preliminary Study (n 80 above) 10
[88] Zambia Preliminary Study (n 80 above) 21
[89] Zambia Preliminary Study (n 80 above) 23

80% of Zambia energy source[90] and agricultural expansion.[91] In the Central, Copperbelt, Northern and Western provinces, research findings have shown that agricultural expansion is the second most frequent driver of deforestation.[92] Similarly, the mining sector has greatly contributed to a declining forest cover.[93] Huge tract of lands are cleared as the need arises to make space for mining and its infrastructures.[94] It is estimated that at the Kalumbila Mining Concession, infrastructure preparations will result in the loss of more than 7 000 ha of land before the concession becomes fully operational.[95] Similarly, demographic factor in form of growth in populations contributes to increasing degradation of the forests.[96] Adverse effects of climate change are visible in Zambia's indigenous forests which have played a key role in providing timber and non-timber products for communities around forest reserves and the nation at large.[97] Due to increase in temperature, climate change impacts have been reported as reducing the capacity of regeneration of forests such as the Miombo forests, signifying fewer natural resources for communities that rely on them for livelihoods.[98]

In all, in addition to the general impacts of climate change, forest-dependent communities in Zambia face peculiar challenges of climate change due to its effect on forests resources. The added challenge of increase in temperature due to climate change,[99] for instance, has implications for key communities. These include communities which have traditionally dependent on these resources, such as the Nkoya and Tonga communities noted for traditional conservative lifestyles and practices around reserves including the Mwekera Forest Reserve and Katanino Joint Forest Reserve.[100] A similar trend is noticeable among the Lamba people, who have traditionally live in the Copperbelt Miombo woodlands.[101] In particular, there are threats to

[90] T Kalinda *et al Use of Integrated Land Use Assessment (ILUA) data for forestry and agricultural policy review and analysis in Zambia* (2008) 22
[91] Zambia Preliminary Study (n 80 above) 23
[92] Zambia Preliminary Study (n 80 above) 24
[93] Zambia Preliminary Study (n 80 above) 25
[94] As above
[95] Zambia Preliminary Study (n 80 above) 26
[96] FAO 'Global Outlook Study For Africa. Sub-regional Report: Southern Africa' (2005) African Development Bank/European Commission/FAO. Rome
[97] Zambia NAPA (n 52 above) 10
[98] Zambia NAPA (n 52 above) 51
[99] Zambia Preliminary study (n 80 above) 18
[100] FS Siangulube 'Local vegetation use and traditional conservation practices in the Zambian rural community: Implications on forest stability' (2007) A thesis submitted to the International Master Programme at the Swedish Biodiversity Centre 1-10
[101] FK Kalaba, CH Quinn & AJ Dougill 'Contribution of forest provisioning ecosystem services to rural livelihoods in Copperbelt's Miombo woodlands, Zambia' December, 2012 No. 41 6-7

the cultural and spiritual lifestyle of the Tonga of the southern Zambia, who have a long history of sustainable conservation through a worldview that forbids cutting down of trees.[102]

5.2.1.3 Federal Republic of Nigeria

Nigeria is situated in the western part of Africa and has a total area of 923 800 sq km.[103] It is bordered respectively in the North, East, and West by Niger, the Cameroon, and Benin Republic, the Gulf of Guinea, an arm of the Atlantic Ocean, forms the southern border of Nigeria.[104] The main drainage systems in Nigeria are the Niger-Benue, Chad, and coastal rivers while the main sources of the rivers include the North-Central Plateau, Western Uplands, Eastern Highlands, and the Udi Plateau.[105] According to the 2006 national census, Nigeria has a population of 140,431,790, making it the most populous nation in Africa.[106] Out of over 250 ethnic groups the most numerous are Yoruba, Igbo, and Hausa/Fulani, whose languages, according to article 55 of the 1999 Constitution are the official languages of the national assembly. Other groups include the Tiv, Ibibio, Ijaw, Edo, and Urhobo which have identified as indigenous peoples in Nigeria.[107] Nigeria ratified the UNFCCC on 29 August 1994,[108] and subsequently acceded to the Kyoto Protocol 10 December 2004.[109] Nigeria did not vote in support of the UNDRIP.[110]

Nigeria is richly endowed with reserves of diverse natural and mineral resources including uranium, gypsum, marble, tin, bitumen, coal and iron. More importantly, it is the 6th largest oil producer in the world, the 1st largest in Africa and has gas reserves which is the seventh largest in the world.[111] While crude oil is the most important source of national revenue, about 60% of

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[102] M Kokwe *Forest management practices with potential for REDD+ in Zambia* (2012) 10
[103] Federal Government of Nigeria 'Nigeria's path to sustainable development through green economy: Country Report to the Rio+20 Summit' June 2012 1.1; 'Nigeria: Demographic and health survey' (2008) http://www.population.gov.ng/images/Nigeria%20DHS%202008%20Final%20Report.pdf. (accessed 13 October 2013)
[104] As above
[105] As above
[106] As above
[107] ILO/ACHPR 'Nigeria: constitutional, legislative and administrative provisions concerning indigenous peoples' (2009) 1-5
[108] UNFCCC 'Status of ratification of the Convention' http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (accessed 16 November 2013)
[109] Kyoto Protocol 'Status of ratification' http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (accessed 18 November 2013)
[110] n 15 above
[111] O Oluduro *Oil exploitation and human rights violations in Nigeria's oil producing communities* (2014) 29; Y Omorogbe 'The legal framework for public participation in decision-making on mining and energy development in Nigeria: Giving voice to the voiceless' in D Zillman *et al* (eds) *Human right in national resources development* (2000) 557-558.

the labour force is still employed in agriculture.[112] Agriculture is the main source of food, industrial raw materials and foreign exchange with above 90% of agricultural production from rural-based, small-scale farmers.[113] In the northern part of the country, livestock production involves more than 12 million cattle, 24 million goats, and 8 million sheep while fisheries also offer windows of employment.[114] Effects of climate change are expected in this sector to lead to reduced livestock.[115] Similarly, it is predicted that rise in marine and freshwater temperature will impact adversely on fisheries.[116]

Climate change has negative effects on different categories of water sources, including direct use, river flow, lake systems, man-made reservoirs, and groundwater resources.[117] Rainfall is significant in this considering that most of the coastal areas receiving rainfall throughout the year have more water than necessary, while, on the other hand, water needs generally exceed supplies from rainfall in the areas to the North.[118] The adverse impacts of climate change on energy sector, as documented, will include increased demand for electricity for heating, cooling and water pumping, declined availability of hydroelectricity and fuelwood, and extensive damage to petrochemical industrial installations presently concentrated in the coastal belt.[119] Climate change will lead to the vulnerability of industrial and mining sectors and location.[120] For instance, sea level increase may affect industries located around seaports thereby necessitating their relocation.[121] Damaging erosion, water logging, and submergence of routes are climate change outcomes with adverse consequences for transportation in different parts of Nigeria.[122] Considering that tourism is a weather sensitive activity focusing among others on natural reserves and traditional festivals, this sector will be adversely affected by climate change.[123]

[112] 'Nigeria's 1st National Communication under the United Nations Framework Convention on Climate Change' (2003) 3 (Nigeria National Communication)
[113] As above
[114] Nigeria National Communication (n 112 above) 8
[115] As above
[116] Nigeria National Communication (n 112 above) 9
[117] Nigeria National Communication (n 112 above) 17
[118] As above
[119] Nigeria National Communication (n 112 above) 9, 30
[120] Nigeria National Communication (n 112 above) 9
[121] Nigeria National Communication (n 112 above) 78
[122] Nigeria National Communication (n 112 above) 10
[123] Nigeria National Communication (n 112 above) 10, 80

Climate change will compound an already poor ranking of the status of health in Nigeria which rates poorly with life expectancy less than 50 years.[124]

Of relevance to mitigation measures is the forest cover in Nigeria now under threat. With the deforestation rate at 3.7 %, one of the highest in Africa, the sector is susceptible to adverse effects of climate change.[125] These effects are already noticeable leaving less than 10% of Nigeria's forest cover, thus making its deforestation one of the highest in the world.[126] Largely what is left as tropical forest Nigeria is found in Cross River State (CRS).[127] At 1991, the total forest cover of CRS was 7920 sq. km, which accounted for 34.3% of the land area of CRS.[128] In 2001, the total forest cover which has now declined to 6406 sq. km constitutes about 30% of the total land area.[129] The CRS forests have a range of Nigeria's biodiversity, with many endemic fauna and flora species.[130] It also has one national park covering roughly 4,000 sq. km, about 2700 sq. km of forest reserves under the control of the CRS.[131] More forest losses have been reported lately with annual rate of deforestation put at 2.2 % per annum.[132] Although this compares fairly with yearly rate, it is expected to have declined considerably given the moratorium on logging granted by the state government and the establishment of the anti-deforestation task force.[133]

Generally in Nigeria, the principal driver of deforestation is agriculture while overgrazing and collection of trees for firewoods are largely accountable for deforestation in the North.[134] In the South, the driver of deforestation is unsustainable logging while infrastructure induced development in relation to construction of roads, powerlines and mining, to mention a few, also contribute to deforestation.[135] Land use for agricultural purpose has increased in all states except

[124] Nigeria National Communication (n 112 above) 8-10
[125] OJ Kamalu & CC Wokocha 'Land resource inventory and ecological vulnerability: Assessment of Onne area in Rivers State, Nigeria' (2011) 3 *Journal of Environmental &Earth Sciences* 438; UN-REDD Programme 'National Programme Document-Nigeria' (2011) UN-REDD/PB7/2011/8, 10 (Nigeria NPD)
[126] As above
[127] M Oyebo, F Bisong & T Morakinyo *A preliminary assessment of the context for REDD in Nigeria*, commissioned by the Federal Ministry of Environment, the Cross River State's Forestry Comission and UNDP 1 (Nigeria Preliminary Assessment)
[128] Nigeria Preliminary Assessment (n 127 above) 11
[129] As above
[130] As above
[131] Nigeria NPD (n 125 above)17
[132] As above
[133] Nigeria Preliminary Assessment (n 127 above) 1-2
[134] Nigeria Preliminary Assessment (n 127 above) 16
[135] As above

in Akwa Ibom, Imo Jigawa, Kano, Katsina, Ogun, Ondo/Ekiti and Osun state.[136] In states such as Adamawa, Benue, Cross River, Edo, and Oyo states, the increase in deforestation traceable to agriculture ranged between 120 900 ha and 200 400 ha.[137] Change in climate will affect flora and fauna bringing about significant reduction in products for which different parts of the country are known.[138] The northern zone will experience heightened drought and desertification while greater soil erosion and flooding in areas of higher rainfall will feature in the western and eastern zones.[139]

Heightened drought and desertification in the North is affecting the lifestyle of the pastoralist groups including the Fulani, Shuwa, Koyam, Badawi, Dark Buzza and Buduma,[140] who are mostly found in the arid and semi arid parts of Northern Nigeria. Increasing desertification due to climate variability is contraining movement of fulani herdsmen who are constantly locked in violent conflicts with local farmers across Nigeria.[141] In relation to forest-dependent communities, forest products are being adversely affected due to new range of climate variations. For instance, for the forest-dependent communities in CRS, in a survey that focused on nine of the 18 Local Government Areas where forest-dependent communities exist namely, Akamkpa, Biase, Obubra, Yakurr, Etung, Ikom, Boki, Obudu, and Obanliku, researchers found that lifelihood depends on income generated from forest products.[142] Yet, forest degradation constitutes a significant threat to the survival of these communities.[143]

Having looked at the general climate situation and impacts in these states, it is important to consider the extent to which the regulatory framework dealing with adaptation and mitigation which seeks to respond to the foregoing climate situation addresses indigenous peoples' land tenure and use as well as its implications.

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[136] As above
[137] Nigeria Preliminary Assessment (n 127 above) 7, 24 and 25
[138] Nigeria NPD (n 125 above) 17
[139] Federal Republic of Nigeria 'REDD+ Readiness Preparation Proposal (R-PP)' (November 2013) 5 (Nigeria R-PP)
[140] G Tahir *et al* 'Improving the quality of nomadic education in Nigeria, Association for the Development of Education in Africa (ADEA) 2005'http://www.ADEAnet.org (accessed 25 December 2011)
[141] IO Albert 'Climate change and conflict management in Nigeria' in WO Egbewole, MA Etudaiye & OA Olatunji (eds) *Law and climate change in Nigeria* (2011) 176-193; M Ogunsanya & SO Popoola 'Intervention in the conflict between the Yoruba Farmers and Fulani herdsmen in Oke –Ogun, Oyo State' in IO Albert (ed) *Building peace, advancing democracy: Experience with third party interventions in Nigeria's conflicts* (2001)
[142] WM Fonta, HE Ichoku & E Ayuk 'The distributional impacts of forest income on household welfare in rural Nigeria' (2011) 2 *Journal of Economics & Sustainable Development* 1
[143] Environmental Rights Action (ERA)/ Friends Of The Earth (FOE) 'Report of forum on red & forest-dependent communities' http://www.redd-monitor.org/2011/04/15/a-wolf-in-sheeps-clothing-redd-questioned-in-cross-river-state-nigeria/ (accessed 4 July 2014)

5.2.2 Domestic climate change regulatory response of adaptation

In line with the COP decision, Least Developed Countries (LDCs) are required to respond to exigent adaptation needs relating to adverse climate change impacts through the preparation of NAPA[144] or through national communications for non-LDC states.[145] Tanzania and Zambia have raised adaptation concerns through NAPAs,[146] while Nigeria being a non-LDC responded through its national communication.[147] The ensuing sub-section demonstrates that the concerns of indigenous peoples in relation to their land tenure and use are obscured in the official processes for capturing adaptation needs of the selected states.

5.2.2.1 The United Republic of Tanzania

Generally, the NAPA of Tanzania which was submitted in 2007 (Tanzania NAPA)[148] indicates adaptation concerns as including 'loss of human, natural, financial, social and physical capital, caused by the adverse impacts of climate change'. It also documents 'severe droughts and floods, among many other disasters'.[149] It is further mentioned in the NAPA that climate change is expected to reduce the rangelands that are significant for livestock keeping communities in Tanzania.[150] While this may be argued as embodying some of the concerns of indigenous peoples, it is not certain. A foremost reason for this position is that there is no mention of indigenous peoples or the special cricumstances of their plight in the context of climate change, despite their existence in Tanzania and the fragility of the ecosystem in which they have their abode. Also, as the NAPA stands, it is strong in its emphasis on the adverse impacts of climate change on the environment with no concrete indication on how to address the peculiar plight of indigenous peoples in relation to their land in Tanzania.

The position that the Tanzania NAPA is not aimed at addressing the issues of indigenous peoples in the light of climate challenge is more clearly discernible from the options

[144] UNFCCC COP 'National adaptation plans' FCCC/CP/2011/9/Add.1, Decision 5/CP.17 para 28 -29 (Decision 5/CP.17);each of the 33 African states belonging to LDC has filed a NAPA, see http://unfccc.int/adaptation/workstreams/national_adaptation_programmes_of_action/items/4585.php (accessed 18 November 2013)
[145] Decision 5/CP.17 (n 144 above) para 33
[146] Tanzania NAPA (n 8 above) ; Zambia NAPA (n 52 above)
[147] Nigeria National Communication (n 112 above)
[148] Tanzania (n 8 above)
[149] Tanzania NAPA (n 8 above) vi
[150] Tanzania NAPA (n 8 above) 7

recommended in the document for adapting to the adverse impacts of climate change. Some of these options are infact a threat to the relationship of indigenous peoples with their land use and tenure. This is certain of measures such as relocation of people living in wildlife corridors, zero grazing and the development of alternative means of income for the community in the tourist area.[151]Arguably, these approaches will potentially compromise the interest of the 'livestock communities', particularly, pastoralists in Tanzania.

5.2.2.2 Republic of Zambia

The Zambia NAPA of 2007 details the outcomes of vulnerability assessment carried out on a range of issues such as livelihoods, health and socio-economic situations in the Eastern and Southern provinces.[152] In these provinces, a wide range of participatory methods, such as focused group discussion, one-on-one household interviews, expert opinion and judgments were allegedly engaged in assessment.[153] Seasonal droughts, occasional dry spells, high temperatures, shortened growing season, and delayed on-set of rains are identified as climatic hazards in Zambia.[154] In the assessed provinces, the realities of these hazards are felt in sectors including agriculture and food security, human health, water and energy as well as wildlife and forest.[155] In response, the NAPA identifies a range of adaptive strategies including afforestation and re-afforestation programmes, provision of fuel wood in order to minimise encroachment of forests.[156] Other measures suggested in the NAPA are management measures to protect displaced wildlife populations, community based ranching for the protection of vulnerable species and development of dams to mitigate the effects of droughts.[157]

However, while the foregoing suggestions may have environmental benefits in Zambia, the NAPA does not respond to pertinent issues of land use and tenure protection which is crucial particularly to forest-dependent communities. Certainly, it neither indicates the role of their land use and tenure or its protection as crucial in the formulation of adaptive measures. It does not

[151] Tanzania NAPA (n 8 above) 29-31
[152] Zambia NAPA (n 52 above)
[153] Zambia NAPA (n 52 above) 13
[154] Zambia NAPA (n 52 above)19
[155] Zambia NAPA (n 52 above) 19-23
[156] As above
[157] Zambia NAPA (n 52 above) 20-22

signify the circumstances of the Tonga or any of its communities likely to be more acutely impacted by climate change.

5.2.2.3 Federal Republic of Nigeria

Nigeria is a non-LDC state and has shown no interest yet in filing a NAPA as required of a non-LDC under Decision 5/CP.17.[158] It has, however, filed a national communication which devotes a substantial attention to issues of adaptation in the country.[159] In its first and only national communication under the UNFCCC, the peculiar consequences resulting from climate change that are reported as requiring adaptive measures are soil erosion and flooding in the South Eastern part of the country, while the impacts of climate change on agriculture are assessed as including changes in temperature and rainfall on plants and animals as well as sea level rise on agricultural land.[160] Decrease in livestock production and increase in sea level are profiled in the national communication as likely to lead to considerable losses in the oil investments and developments in the Niger-Delta zone.[161]

However, while a reference is made to the adverse effects of climate change on 'the people in the coastal areas',[162] the Nigeria national communication in reporting on adaptation challenges largely focuses on environmental impacts of climate change. In doing so, it utilises mostly existing records such as 'socio-economic statistics, photographs, satellite imageries, geologic and oceanographic data, biological and fisheries data.'[163] Generally, communities affected by these scenarios are not mentioned, nor are pertinent issues relating to these communities discussed. Yet, a decline in pastureland as a result of climate change will not only affect the production of livestocks, but the lifestyle of the peoples such as the Mbororo who are traditionally connected to the use of land for cattle rearing. The passing reference to the people living in coastal areas as likely to experience flooding and erosion does not capture the larger problems faced by the

[158] UNFCCC COP 'National adaptation plans' FCCC/CP/2011/9/Add.1, Decision 5/CP.17 paras 28-31
[159] Nigeria National Communication (n 112 above), its chapter five is devoted to impacts, vulnerability assessment and adaptation measures
[160] Nigeria National Communication (n 112 above) 73
[161] Nigeria National Communication (n 112 above) 75
[162] Nigeria National Communication (n 112 above) 82
[163] Nigeria National Communication (n 112 above) 70

peoples of this region including the Itsekiris, Ukwanis, Isokos and Ogonis, who have for long experienced oil spillage, environmental protection, environmental losses and land degradation.[164]

5.2.2.4 Implications of inadequate reflection of land tenure and use in adaptation process

Viewed from the basis that it neglects the vulnerability of indigenous peoples, exclusion from adaptation documentation process is unhelpful to indigenous peoples' land use and tenure, at least, for four reasons.

First, the neglect of indigenous peoples' concerns in these documents raises serious doubt about their participation in the processes aimed at documenting evidence of vulnerability to the adverse impacts of climate change which requires adaptation intervention. Considering the adverse impacts of climate change, specific countries should ordinarily have used the opportunities to enhance the participation of indigenous peoples in national processes. More importantly, it should have utilised indigenous peoples' concerns in relation to their land as a gauging point for the adaptive needs of the countries where they are located. However, the documentation of these respective countries points toward a different approach. Hence, it is no surprise that indigenous peoples complain of exclusion from the discussions of issues relating to the process and implementation of projects under adaptation funds, particularly being managed by the Global Environment Facility (GEF).[165] It has been observed that GEF funds even where it mentions tenure reform and land titling, usually exempts protected areas, such as the forests and coastal areas, suggesting that the funds is not meant for furthering the land rights of indigenous peoples in these areas.[166]

Second, the neglect of indigenous peoples undermines a vital source of information that should ordinarily enrich a national communication or NAPA and thus help its international review process in forming a favourable decision on the eligibility of a given country for NAPA funds. This is in the sense that by detailing the circumstances of indigenous peoples in the documentation process, a country can justify its demand for funds using a range of indices which are peculiar to indigenous peoples. These indices, for instance, include the use of funds for

[164] Oluduro (n 111 above) 13, 214
[165] On the discussion of the Global Environmental Fund (GEF) in relation to adaptation see chapter 4; see generally, T Griffiths 'Help or hindrance? The global environment facility, biodiversity conservation, and indigenous peoples' (2010)
[166] As above

management of land resources and fragile ecosystems, and addressing episodes of droughts and floods in areas susceptible to extreme weather events. In applying for the Green Climate Fund (GCF), this would have constituted an evidence of 'urgent and immediate needs' demonstrating that populations in Africa are peculiarly vulnerable to the adverse impacts of climate change. Also, for a process such as the Adaptation Fund (AF), which seeks 'access to the fund in a balanced and equitable manner', documenting the concerns of indigenous peoples offers a strong equitable claim to the AF.

Third, the exclusion of indigenous peoples' voice from documentation disempowers them from any legal claim to the application of funds set up under the UNFCCC and Kyoto Protocol for adaptive needs. This is moreso as, thus far, in the context of adaptation funds, accessibility is largely understood as the access of national government to funds.[167] This contrasts with the position of the International Indigenous Peoples' Forum on Climate Change (IIPFCC), a forum through which indigenous peoples discuss and agree on key climate change issues.[168] In relation to climate finance, the IIPFCC has insisted that 'direct access' under the funds be interpreted as access by indigenous peoples, noting that 'direct access' is still understood in the climate change discussion as access by national governments and the ability of accredited national implementing entities to access the funds.[169] The exclusion of indigenous peoples from the documentation process effectively confirms that states can exercise discretion to use funds as they wish, not necessarily for the improvement of their welfare.

Finally, an essential feature in the formulation of these documentations deals with profiling adaptive measures or coping mechanisms being employed in response to climate change by the populations in a given country. For instance, primary aims for calling for the preparation of NAPAs include, the reporting of information on adverse effects of climate change, and profiling of coping strategies which could be collated and reviewed.[170] The essence of documenting the coping strategies is in order to enable NAPAs address the 'urgent and immediate adaptation

[167] AfDB 'Operationalising the Green Climate Fund: Enabling African Access' (October, 2012) 3
[168] IIPFCC is the joint indigenous caucus in the UNFCCC process. It is open to indigenous activists who are interested in engaging in the climate change negotiations, see http://www.iwgia.org/human-rights/un-mechanisms-and-processes/un-framework-convention-on-climate-change-unfccc (accessed 18 November 2013)
[169] Cited in F Martone & J Rubis 'Indigenous peoples and the Green Climate Fund: A technical briefing for indigenous peoples, policymakers and support groups' (August 2012) 6, 9
[170] 'Guidelines for the preparation of national adaptation programmes of action' Annex to Decision 28/ CP.7, para 8(b)(i) (Annex to Decision 28/ CP.7)

needs'.[171] Accordingly, scanty or no reference to indigenous peoples in the documentation does not only overlook their concerns, it signifies that indigenous peoples' adaptive measures over time may never be profiled, let alone benefit, from the assistance under the financial arrangements for its development.

Having examined the extent of consideration for the land tenure and use of indigenous peoples in the adaptation process and its implications, the next section examines the same question in the context of climate change mitigation with focus on REDD+.

5.2.3 National climate change regulatory response of REDD+ as a mitigation measure

At the national level, UN-REDD Programme is a key initiative supporting REDD+, as a climate mitigation measure.[172] The UN-REDD Programme operates through two complementary modalities, namely National Programme[173] and the Global Programme.[174] According to the UN-REDD 2012 programme Strategy (UN-REDD Strategy document), at the national level, REDD+ activities are categorised into three phases. At phase 1, the focus is on the formulation and development of national strategies or action plans. Also known as the inception or readiness phase, at this stage, capacity is given to developing states to ensure that a national strategy is formulated.[175] There is no particular description of what a national strategy should contain in the UN-REDD Strategy document. However, according to USLEGAL online legal definition, a strategy is defined as:

[171] Annex to Decision 28/ CP.7 (n 170 above) preamble
[172] As mentioned in chapter five of this study , there are other mitigation measures forming part of climate change negotiation, particularly under the CDM
[173] There are three stages in National Programme cycle. These are Stage 1 (Scoping), Stage 2 (Finalization) and Stage 3 (implementation). At the Scoping stage, activities required are the formulation of draft Readiness Preparation Plan (R-PP) and draft National Programme Document (NPD) , Validation of draft R-PP , Independent external review and Policy Board approval of the UN-REDD Programme contribution to the R-PP. Stage 2 activities commence with budget allocation and conclude with the receipt of the signed NP by the UN-REDD Programme Secretariat. At that point, NP implementation (Stage 3) is ready to begin. The stage entails activities including the transfer of funds, inception phase and the actual implementation of REDD+, see UN-REDD Programme 'UN-REDD Programme Handbook for National Programmes and Other National-Level Activities' (Handbook for National Programme)
[174] 'The UN-REDD Programme Strategy 2011-2015' 10 (UN-REDD Programme Strategy); the global outlet of REDD+ is based on the rationale that countries involved in REDD+ can share experience and best practices with one another, see UN-REDD Programme Strategy (above) 23
[175] UN-REDD Programme Strategy (n 174 above) 3; M Herold *et al* 'A step-wise framework for setting REDD+ forest reference emission levels and forest reference levels' *Infobriefs* No. 52 (April 2012)

> [c]hoices and decisions concerning future action at a level of generality which permits flexible implementation within the broad outline that the strategy presents. A strategy is more specific than a policy but more general than a plan yet has aspects of both.[176]

Hence, since it is employed alternatively to an action plan, it can be stated that a national strategy in the context of REDD+ will include the goal to be achieved, sequence of steps that must be taken in the realisation of that goal, what should be done and by whom, duration, and available resources for specific activities.[177] More importantly, at this stage, participating states are to ensure that laws and institutions are reformed in readiness for REDD+. For instance, the UN-REDD National programme requires that the REDD+ preparation proposal (R-PP) of states should include information on land use and tenure as well as forest law, policy and governance.[178] Similarly, the R-PP template stresses that a critical element in developing a REDD+ strategy is the review of laws and policies relating to land use.[179] The emphasis on the component of laws and policies is particularly significant for indigenous peoples and the REDD+ process. This is considering, as earlier explained in previous chapter, the Cancun Agreements call upon states involved in REDD activities to take into consideration national laws and international obligation towards UNDRIP for the protection of indigenous peoples.[180]

The second phase of the REDD+ activities is otherwise known as the results-based demonstration phase.[181] This phase includes the implementation of national strategies or action plans which could advance capacity building, technology development and transfer.[182] This stage largely focuses on further capacity building for the monitoring and measurement, report and verification (MRV) of activities.[183] The phase 3 of REDD+ deals with positive incentives for rewarding verified performances and entails the monitoring of national policies and measures, particularly in relation to the MRV.[184]

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[176] USLEGAL 'Online legal definition' http://definitions.uslegal.com/s/strategy/(accessed 18 November 2013)
[177] http://www.businessdictionary.com/definition/strategy.html (accessed 18 November 2013)
[178] Handbook for National Programme (n 173 above)11
[179] Forest Carbon Partnership Facility (FCPF) and The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) Readiness Preparation Proposal (R-PP) Version 6 (FCFP & UN-REDD Template) 18, 32, 36
[180] UNFCCC CP 'The Cancun Agreements: Outcome of the work of the Ad-hoc Working Group on Long-term Cooperative Action under the Convention' Decision 1/CP.16, FCCC/CP/2010/7/Add.1 (Decision 1/CP.16) Appendix 1 para 2(c)
[181] Herold *et al* (n 175 above)
[182] Herold *et al* (n 175 above); UN-REDD Programme Strategy (n 174 above)
[183] As above
[184] UN-REDD Programme Strategy (n 174 above)

According to the UN-REDD 2012 programme Strategy, during the period 2011-2015, the UN-REDD will focus on supporting countries to develop and implement their REDD+ strategies efficiently, effectively and equitably so as to speed up their REDD+ readiness and sustainably change their land-use and forest management.[185] Hence, the UN-REDD Programme is so far active in phase 1 and has delivered technical support and funding for the development of national REDD+ strategies in pilot countries.[186]

5.2.3.1 REDD+ readiness in selected states of Africa in relation to indigenous peoples' lands

In relation to phase 1, when activities began in 2005, it was with nine countries, under an initiative referred to as 'Quick Start support'. This arrangement aims at building capacity of selected countries to implement REDD actions, maximise emission reductions and activities at the national and local levels, as well as test preliminary concepts and scenarios for REDD for the purpose of improving knowledge base about successes and failures. It also aims at paving way for long-term engagement of REDD into the carbon market through payment for ecosystem services.[187] Of the nine countries selected for this support, DRC, Tanzania and Zambia are in Africa.[188] In addition to these initial pilot countries, in 2011, the UN-REDD Programme Policy Board approved funding for National Programmes in five more countries including Nigeria.[189] While Tanzania has concluded Phase 1 with a national strategy and ready to move into implementation phase,[190] Zambia and Nigeria are still at different stages in phase 1.[191]

The argument is made that in the preparation for REDD+ implementation, the national climate regulatory framework is inconsistent with international standard required for activities under the

[185] As above
[186] UN-REDD Programme Strategy (n 174 above) 4
[187] 'Quick Start support' refers to a support programmes developed in co-operation with the nine pilot countries and any other additional National Programmes approved by the Policy Board before 2011, see UN-REDD Programme Strategy (n 174 above) 22, 23; 'Draft for Discussion Quick Start Actions and Establishment of the Multi-Donor Trust Fund for the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation (UN-REDD) in Developing Countries' 14 May 2008, 2 http://www.un-redd.org/Portals/15/documents/publications/UN-REDD_QuickStartActions.pdf/(accessed 18 November 2013)
[188] Other countries are Indonesia, Papua New Guinea and Viet Nam (Asia and the Pacific), Bolivia, Panama and Paraguay (Latin America and the Caribbean), see Handbook for National Programmes (n 173 above)
[189] Other nations are Cambodia, Ecuador, the Philippines and Solomon Islands, see UN-REDD Programme 'Report of the Seventh Policy Board meeting' 13-14 October 2011, Berlin, Germany 4
[190] This fact is also confirmed by Mr Kiroyi during my interview with him at the Rights based REDD+ dialogue II 18-19 October 2013 at Cape Town
[191] This is also confirmed by Mr Victor Chiiba during my interview with him at the Rights based REDD+ dialogue II 18-19 October 2013 at Cape Town; also in relation to Nigeria, see interview with an official of the Nigeria Federal Ministry of the Environment who mentioned that Nigeria is getting ready for implementation of REDD+ in accordance with NPD, NTA 9 pm News, 29 December 2013

UN-REDD National programme. This is demonstrated by using three countries, that is Zambia, Tanzania and Nigeria as a typology for Africa.

1. Tanzania and readiness for REDD+

The involvement of Tanzania in the REDD+ activities dates back to 2009 when it started its formulation of a national framework to guide the development of a REDD+ Strategy.[192] The process is financially supported by the UN-REDD programme (USD 4.3 million) and the Royal Norwegian Government (USD 80 million).[193] Tanzania is also part of the World Bank Forest Carbon Partnership Facility (FCPF), but does not currently receive any funding from it because the readiness phase is already funded by the Royal Norwegian Government and UN-REDD.[194] FCPF membership merely serves as a way for Tanzania to be up-to-date with international REDD+ policy and to learn from other partnership members.[195] It has completed an R-PP,[196] and finalising a draft national strategy in place,[197] and REDD Social Environmental Safeguards (Tanzania REDD+ SES).[198]

Arguably, in terms of the protection of indigenous peoples' land tenure and use, there appears to be little departure from the status quo in the regulatory framework in readiness for REDD+ activities in Tanzania. This is evident from an analysis of the regulatory framework with focus on institutions and instruments being formulated in Tanzania as carried out below.

a. Readiness institutions and composition

The composition of the decision-making institutions involved in the preparation of the R-PP evidences that nothing much has changed in terms of indigenous peoples' land tenure and use protection. These key institutions include the National REDD+ Task Force (NRTF), National

[192] Tanzania *REDD readiness progress fact sheet* (March, 2012) (Tanzania Fact Sheet)
[193] Burgess *et al* (n 45 above) 340; SA Milledge 'Getting REDDy in Tanzania: Principles, preparations and perspectives' (2009) *The Arc Journal* 2
[194] Tanzania Fact Sheet (n 192 above)
[195] 'REDD in Tanzania' http://theredddesk.org/countries/tanzania//(accessed 18 November 2013)
[196] Tanzania 'Final Draft: Forest Carbon Partnership Facility (FCPF) and Readiness Preparation Proposal (R-PP)'15th June 2010 (Tanzania R-PP)
[197] United Republic of Tanzania 'National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+) 2nd Draft (June 2012)
[198] United Republic of Tanzania *Tanzania REDD+ Social and Environmental Safeguards* (June 2013) Draft, Annex 1: Glossary of Key Terms (Tanzania REDD+ SES)

Climate Change Steering Committee (NCCSC), and the National Climate Change Technical Committee (NCCTC).

In terms of their composition, these institutions are predominantly made of government officials allowing for little or no representation for indigenous peoples. The NCCSC is composed of Permanent Secretaries (PS) from Ministries, that is, Prime Minister's Office (PMO), Ministry of Energy and Minerals (MEM), Ministry of Finance and Economic Affairs (MFEA), Ministry of Industry, Trade and Cooperatives (MITC), Ministry of Natural Resources and Tourism (MNRT), Ministry of Justice and Constitutional Affaires (MJCA), Ministry of Lands Housing and Settlements (MLHC), Ministry of Agriculture and Food Security (MAFS), Ministry of Fisheries and Livestock Development (MFLD), Ministry of Foreign Affairs and International Co-operation (MFIC), and the Ministry of Agriculture, Livestock and Environment, Zanzibar (MALE).[199]

With composition largely dominated by directors of the various ministries in the National Steering Committee, the NCCTC is not different. Similar gap is noticeable in the NRTF which operated as an interim arrangement to manage implementation of technical and operational issues in relation to REDD readiness. The NRTF largely consists technical officers drawn by government from ministries and a representation from civil society organisations including the Vice President's Office, Environment, Ministry of Natural Resources and Tourism/Tanzania Forestry Services, Prime Minister's Office Regional Administration and Local Governments, Ministry of Energy and Minerals, Ministry of Lands, Housing and Human Settlements Development, Department of Forestry and Non-Renewable Natural Resources-Zanzibar, Ministry of Agriculture Food and Cooperatives, Ministry of Community Development, Gender and Children, Department of Environment, Zanzibar and the Ministry of Finance.[200]

Although if properly constituted, these institutions can perform crucial role which may benefit indigenous peoples in terms of the protection of their rights, this is not yet the case. For instance, the NCCTC oversees all technical issues related to the implementation of climate change issues including REDD,[201] while the NRTF is tasked with the responsibility of anchoring the

[199] Tanzania R-PP (n 196 above) 6
[200] Tanzania National Strategy (n 39 above) 5
[201] Tanzania National Strategy (n 39 above) xiv

stakeholders' consultation.[202] With the limited space provided for representation of civil society in these institutions, it is difficult to imagine that the functioning of these institutions will be tailored to the interests of indigenous peoples particularly in relation to their land use and tenure. This arrangement is not in line with the UN-REDD Programme international safeguards that require for the representation of indigenous peoples in the decision-making set up for REDD+ as a critical component in ensuring their participation.[203] It can be argued that accommodating a limited representation of the civil society in the NRFT already prepares the ground for the possibility that the approach of the NRTP is not fundamentally set out to protect the interests of indigenous peoples. A better approach for these institutions should at least have reflected the example offered by the Policy Board of the UN-REDD Programme which has indigenous peoples' representative as a permanent member.[204] Arguably, the failure to make specific provision for a representation of indigenous peoples in the NRTF falls short of this arrangement. Given the state centred composition of these institutions, there is little hesitation about a conclusion that it is unhelpful arrangement to address indigenous peoples' concerns.

b. Regulatory framework and indigenous peoples' lands

REDD+ regulatory framework in Tanzania can be broadly categorised into policies and legislation identified as relevant to the implementation of REDD+ process. These policies and legislation are referred to in the Tanzania National Strategy and National Safeguards, and therefore, are the instruments constituting the regulatory regime within which Tanzania will implement the REDD+ under the UN-REDD National Programme. However, as shall be made evident in the ensuing paragraps, there is a general insecurity of indigenous peoples' land tenure and use under the regulatory regime for REDD+ in Tanzania.

[202] As above
[203] See for instance, Decision 1/CP.16 (n 180 above) para 2; REDD+ SES 'REDD+ Social & Environmental Standards' Version 2, 10 September 2012 (REDD+ SES), principle 6 provides that all relevant rights holders and stakeholders participate fully and effectively in the REDD+ programme. As an indicator to attain this, this connotes that REDD+ programme governance structures and processes should include opportunities of stake and right holders to participate in decision-making
[204] UN-REDD Programme 'Policy Board Composition' (2013) 2

i. Legislation environment and REDD+

The Tanzania National Strategy for REDD 2013 lists a range of laws as critical in the implementation of strategy for REDD+.[205] These are: the Land Act (1999), Village Land Act (1999) for Tanzania Mainland, Environmental Management Act (2004), the Forest Act (2002), the Beekeeping Act (2002), the Wildlife Conservation Act (2009), and the Fisheries Act (2010) and Forest Resources Conservation and Management Act Zanzibar (1996). However, these laws contain provisions which are conflicting with international safeguards of UN-REDD Programme and are therefore inadequate for the purpose of protecting the concerns of indigenous peoples land use and tenure.

In profiling the legal framework for REDD+, the National Strategy does not make reference to the constitution, despite its importance to land tenure holding in Tanzania. Even then, the lack of reference to the constitution does not suggest that the strategy is to be understood outside the provisions of the constitution.[206] For instance, in providing that policies and programmes shall be directed towards ensuring that human rights and human dignity are respected,[207] the constitution sets an important stage for the application and implementation of strategy on REDD+. However, there are specific provisions which may undermine the protection of indigenous peoples' land tenure and use. Among these are the provision guaranteeing equality before the law without discrimination with the caveat that discrimination should not be understood as preventing government from taking steps to rectify 'disabilities in the society'.[208] In its clause dealing with limitation of rights, the Constitution provides that enjoyment of rights does not negate 'any existing law or prohibit the enactment of any law' for purposes including exploitation and utilisation of natural resources or 'development of property of any other interests' for public benefit.[209] In effect, these provisions offer the state the platform to enact laws to acquire land or pursue development programme in national interest even if it infringes on the rights of others. That the above is infact the reality is seen in the limitations in a range of laws applicable in the implementation of REDD+ .

[205] Tanzania National Strategy (n 39 above) 29
[206] The Constitution of the United Republic of Tanzania, 1977 (as amended)
[207] The Constitution of the United Republic of Tanzania, art 9(a)
[208] The Constitution of the United Republic of Tanzania, art 13(5)
[209] The Constitution of the United Republic of Tanzania, art 30 (2)(b)

The Land Act of Tanzania aims at ensuring that land is productively and sustainably used.[210] Considering that the lifestyle of indigenous peoples leaves scanty physical evidence of occupation of possession, these provisions provide the basis for expropriation on the ground that such lands are idle or unoccupied. No doubt, the Land Act urges that land use accords with commerce,[211] and requires that this should be done without disadvantaging small-holders and groups such as the pastoralists.[212] The Land Act recognises customary right of occupancy which includes 'deemed right of occupancy' signifying the title of 'a Tanzania citizen of African descent or a community of Tanzania citizens of African descent using or occupying land under and in accordance with customary law'.[213] Yet, as promising as this may seem in implementing REDD+ activities, these provisions are significantly qualified by a range of provisions in the Act. For instance, all land in Tanzania is public and generally vested in the President who holds same as trustee for and on behalf of all citizens of Tanzania. Public land is categorised as general, village and reserved land.[214] Under the Land Act, the President may subject to compensation,[215] compulsorily acquire a land for the purpose of transferring from one category of governance to the other.[216] Similarly, according to article 14 of the Village Land Act, a landholding may be allowed under customary right of occupancy if it is held in such circumstances before the coming into effect of the Act. While this may be beneficial to indigenous peoples, this is limited in its application as customary right of occupancy may be revoked if such land is adjudged as lying fallow for about five years or used for any purpose which is considered illegal.[217] Also, the president reserves the right to transfer any land held under the Village Act into a general or reserved land for the purpose of public interests which may include investments or national interests.[218]

The possibility that the the above provisions may be construed in a manner that subordinate the customary or traditional land tenure of indigenous populations is discernible from case-law. In *Attorney General v Lohay Akonaay and Joseph Lohay*,[219] the respondents had acquired land

[210] The Land Act (1999), Cap 113, section 1 (1)(e)
[211] The Land Act (1999) section 1(1)(i)
[212] The Land Act (1999) section 1(1)(k)
[213] The Land Act (1999) preamble
[214] The Land Act (1999) section 4
[215] The Land Act (1999) section 9
[216] The Land Act (1999) section 7
[217] Village Land Act (1999) art 45(a)
[218] Village Land Act (1999) art 4
[219] *Attorney General v Lohay Akonaay and Joseph Lohay* 1995 TLR 80 (CA) (*Akonaay* case)

rights under customary law but were dispossessed by the state. Although their action at the High Court challenging the constitutionality of the acquisition and adequacy of compensation was successful and subsequently affirmed at the Court of Appeal, the latter Court held that customary or deemed rights in land are by 'their nature nothing but rights to occupy and use the land' and its transfer from native to non-native requires presidential consent.[220] In a sense, the judgment reinforces the notion that expropriation is fair in so far as adequation compensation is paid. Also, the limited power of village councils in respect of customary tenureship was also portrayed by the decision of the Court of Appeal in *National Agricultural and Food Corporation* (NAFCO) *v Mulbadaw Village Council and others*.[221] In reversing the order made in favour of the respondents by the High Court as the owner of disputed land, the Court of Appeal held that the Village Council can only hold and exercise power in respect of the land allocated to it by the District Development Council and that villagers cultivating land through the permission of the applicants were at best licensees.[222]

Furthermore, the right held under any category of governance including customary law may be forfeited if land is adjudged as abandoned. Circumstances upon which such conclusion can be drawn by the authority include: continuing default in the payment of rent, taxes or dues on the said land for a period not less than five years, or structures on the land has fallen into a state of disrepair,[223] and by reason of this neglect, land is incapable of productive purposes without substantial costs being incurred.[224] Once this is proved, the Commissioner can commence the proceedings which may lead to the revocation of the right of occupancy.[225] It has been argued that since pasture may not be regarded as an improvement, the pastoralists are not entitled to compensation based on this decision.[226]

The Land Acquisition Act empowers the State to acquire land for purposes including development of agricultural land or provision of sites for 'industrial, agricultural or commercial

[220] *Akonaay* case (n 219 above) 91
[221] *National Agricultural and Food Corporation v Mulbadaw Village Council & others* 1985 TLR 88 (CA) (*Mulbadaw* case)
[222] *Mulbadaw* case (n 221 above) 90
[223] The Land Act (1999) section 51(1) (c) generally
[224] The Land Act (1999) section 51 (1)(e)(i)
[225] The Land Act (1999) section 51 (4)
[226] B Lobulu 'Dispossession and land tenure in Tanzania: What hope from the courts?' https://www.culturalsurvival.org/publications/cultural-survival-quarterly/tanzania/dispossession-and-land-tenure-tanzania-what-hope-c (accessed 24 May 2014)

development, social services or housing'.[227] For indigenous peoples whose lifestyles barely touch on land resources and may lack the presence of physical structure on land, there is the possibility that this might be regarded as unproductive use of land. This is not unlikely considering that the National Strategy relies on the Land Act, signifying that this may be used in declaring land traditionally belonging to indigenous peoples as vacant for REDD+ activities.

The Forest Act of Tanzania is also regarded by the National Strategy as critical in the implementation of the REDD+ particularly its provisions on participatory forest management (PFM) through Community Based Forest Management (CBFM) Scheme.[228] The basis for this viewpoint is that section 3(b) encourages the facilitation of active participation of citizen in 'sustainable planning, management, use and conservation of forest resources'. However, the Minister is empowered under the Act to declare any given land a national or local authority forest reserves.[229] Subject to the right to receive compensation, a national forest or local authority forest area may be so declared for the purposes of production and protection of the forest.[230] The limiting effect of the Forest Act on the use and tenure of forests by indigenous peoples is similarly reflected in the Beekeeping Act of 2002. According to this Act, the Minister may in similar circumstances as applicable in forest reserves, declare a given area as a Beekeeping Zone.[231] This zone refers to an area either within national or local forests reserves in which activities relating to beekeeping are taking place.[232] Related to this is the Wildlife Conservation Act 2009 which defines a conservation area in relation to wildlife as including forest reserve under the Forest Act.[233] The Act empowers the Minister to declare any area of land as a game controlled area and prohibits activities which are incompatible with the Forest Act, the Beekeeping Act, the Environmental Management Act or any other relevant laws.[234]

The Environmental Management Act, among other things, ensures clean, safe and healthy environment and motivates actions on environment and promotes the national environmental

[227] Land Acquisition Act (1967) section 4(1)
[228] Tanzania National Strategy (n 39 above) 29
[229] The Forest Act (2002) section 22(1)(a) and (b)
[230] The Forest Act (2002) section 22(4) and (5)
[231] The Beekeeping Act (2002) section 11
[232] The Beekeeping Act (2002) preamble
[233] Wildlife Conservation Act (2009)
[234] Wildlife Conservation Act (2009) section 31(6)

policy.[235] Its main objective is to promote the 'enhancement, protection, conservation and management of the environment'.[236] However, the power of the minister to declare a given land as environmentally protected area[237] may have a qualifying effect on the land use and tenure of indigenous peoples. While there is a provision that in coming to a decision of acquisition, the minister may take into considerations the representations made by persons or NGOs with public or private interests,[238] local communities' interests,[239] and international obligations.[240] This is, nonetheless, unhelpful to indigenous peoples, as there is no indication under the Act that the discretion of the minister can be halted by the representations made by groups or individual.

Article 53 of the Environmental Management Act also limits the application of the Village Land Act that allows for sharing arrangement between pastoralists and agriculturists. This is because it enables the minister to prescribe conditions subject to which customary rights of occupancy should be enjoyed. This constitutes a limitation to the provision of section 58 of the Village Land Act that permits land sharing arrangement, and other provisions allowing for customary occupancy of land.[241]

The implication of the foregoing is that contrary to the international safeguards applicable under the UN-REDD Programme, these laws permit states to apply restrictive measures which may justify the displacement of indigenous peoples from their land for the purpose of implementing REDD+ activities.

ii. Policy environment and REDD+

With respect to policy environment for REDD+, a range of policies are recognised in the National Strategies of 2013 in the Tanzania (Mainland) and Zanzibar as adequate for realising the implementation of REDD+.[242] In Tanzania, pillar policies are National Environmental Policy,[243] National Forest Policy,[244] National Water Policy,[245] National Energy Policy,[246] and

[235] The Environmental Management Act (2004) arts 4, 5 and 6
[236] The Environmental Management Act (2004) art 7
[237] The Environmental Management Act (2004) art 47
[238] The Environmental Management Act (2004) section 47(3)(a)
[239] The Environmental Management Act (2004) section 47 (3)(f)
[240] The Environmental Management Act (2004) section 47(3)(g)
[241] Village Land Act (1999) art 14
[242] Tanzania National Strategy (n 39 above)
[243] National Environmental Policy (1997)
[244] National Forest Policy (1998)
[245] National Water Policy (2002)

National Human Settlements Development Policy.[247] For Zanzibar, key policies are the National Forest Policy,[248] Environmental Policy,[249] Agricultural Sector Policy,[250] Tourism Policy,[251] National Land Policy,[252] and Energy Policy (2009).[253]

These policies are relevant for REDD+ process in Tanzania in the sense that each contains one provision or the other directly or indirectly linked to land and forests governance which are central to the REDD+ process. Section 11(a) and (f) of the National Environmental policy respectively identifies land degradation and deforestation as a matter of environmental concern in Tanzania. It notes that due to activities including clearance for agriculture, wood fuel and other demands, Tanzania forests is declining.[254] This informed the overall objectives of the policy which include the prevention and control of environmental degradation and enhancement as well as conservation of natural and man-made heritage.[255]

While these provisions seem promising, the policy is silent on the steps to be taken toward the realisation of its goal. In particular, there is no indication on how to ensure that ownership of land of indigenous peoples is guaranteed and respected in the context of environmental protection. Yet, notwithstanding this gap, the National Strategy 2013 refers to National Environmental Policy as providing guidance on sustainable use of the environment and natural resources.[256] Without a clear role for indigenous peoples, it is difficult to see how sustainable use of the environment can be achieved.

The National Forest Policy identifies constraints hindering sustainable management of forests. These include inadequate resources to implement active and sustainable management of forests and related resources.[257] It acknowledges that much remains to be done in terms of benefit-sharing accruing from wildlife management in some areas, despite efforts aimed at involving

[246] National Energy Policy (2003)
[247] National Human Settlements Development Policy (2000)
[248] National Forest Policy (1995)
[249] Environmental Policy (1992)
[250] Agricultural Sector Policy (2002)
[251] Tourism Policy (2004)
[252] National Land Policy (1995)
[253] Energy Policy (2009)
[254] National Environmental Policy (1997) section 12(f)
[255] National Environmental Policy (1997) section 18 generally
[256] Tanzania National Strategy (n 39 above) 23
[257] National Forestry Policy (1995) section 2

local people.[258] For policy statements, it describes the scope of forest management as including central and local government reserves as well as forest on public land (non -reserved forest land) and private and community forestry.[259] While central and local government forests are respectively under the management of central and local government or agencies to which this role may have been designated,[260] the management of forest on public lands can be allocated to villages, private individuals and the governments.[261]

In relation to land tenure and use by local communities, the National Forestry Policy acknowledges the role of local communities in sustainable management of the forests. However, it is uncertain in its protection of land and tree tenure. This contrasts with the assertion in the National Strategy that the National Forest Policy promotes individual, group and community forests full rights of ownership and management of forest through establishment of Village Land Forest Reserves (VLFRs).[262] The reality is that in addition to being a misrepresentation of the National Forest Policy, these provisions, at any rate, are not up to the standard of respect for land ownership and use as well as participation in decision-making enunciated in the UN-REDD safeguards.[263]

There are specific objectives of the National Human Settlements Development Policy that are relevant to REDD+ process. These include the need to make serviced land available for shelter and human settlements to all sections of the communities including the disadvantaged,[264] and protect environment from destruction.[265] To realise these objectives, the government undertakes to embark upon certain steps. These include taking steps to ensure the availability of land to all, fast track and ensure adequate compensation to holders of land required for expansion.[266] However, the prescription of procedures 'for getting legal rights of occupancy' to land seems discriminatory as it presupposes that the informal tenure of indigenous peoples such as the Maasai is inferior. Also, the provision that land can be expropriated for expansion purpose may

[258] National Forestry Policy (1995) section 2(3)
[259] National Forestry Policy (1995) section 4(1)(1), 4(1)(2) and 4(1)(3) respectively
[260] National Forestry Policy (1995) section 4(1)(1)
[261] National Forestry Policy (1995) section 4(1)(2)
[262] Tanzania National Strategy (n 39 above) 26
[263] See generally, Decision 1/CP.16 (n 180 above) embodying the safeguards; REDD+ SES (n 203 above)
[264] National Human Settlements Development Policy (2000) section 3(2)(i)
[265] National Human Settlements Development Policy (2000) section 3(2)(vi)
[266] National Human Settlements Development Policy (2000) section 4(1)(1), 4(2)(i), (ii) and (iii)

undermine UN-REDD international safeguards which require that free, prior and informed consent of indigenous peoples be observed in projects intended for execution on their lands.

Other policies which directly link with forest are the National Land Policy, National Water Policy and National Energy Policy. One of the objectives of the National Land Policy is to ensure that customary rights of groups such as peasants and herdsmen are recognised and secured in law.[267] What seems like a set of promising provisions are, however limited by several qualifications. For instance, land in Tanzania is regarded as 'public land', whether granted, customary or unoccupied, and are vested in the President as trustee on behalf of all citizens.[268] It also recognises that the president in the exercise of this power may compulsorily acquire the land and tenancy may be revoked in the interest of the public.[269]

The National Water Policy links with forestry in the sense that the latter has an important effect on the conservation of water resources.[270] Also, section 17 of the National Energy Policy acknowledges that trees are main source of biomass- based fuels in Tanzania and are being harvested at a faster rate than its regeneration rate. Hence, one of the policy objectives of implication for forestry is that it seeks to 'arrest woodfuel depletion by evolving more appropriate land management practices'.[271] It views forest clearance as a negative trigger of environmental challenge.[272] In order to contribute to the preservation of the environment, the National Energy Policy requires for environmental impact assessment,[273] and implementation of measures such as afforestation and reforestation.[274] However, the provision that forbids forest clearance as part of policy environment for the implementation of the REDD+ process,[275] may be counterproductive for indigenous peoples. This is in the sense that such provision may undermine their subsistence lifestyle and ultimately deprive them access to land use and tenure.

Zanzibar also has relevant laws and policies which have been identified by the National Strategy for Tanzania as supporting REDD+ activities. These include Zanzibar National Policy, National

[267] National Land Policy (1997) section 2(2)
[268] National Land Policy (1997) section 4(1)(1)
[269] National Land Policy (1997) section 4(2)(1)(3) to 4(2)(14)
[270] National Water Policy (2002) section 2(10)
[271] National Energy Policy (2009) section 28(5)
[272] National Energy Policy (2009) section 139
[273] National Energy Policy (2009) section 148(iii)
[274] National Energy Policy (2009) section 148 (viii)
[275] National Water Policy (2002) section 27

Environmental Policy, Zanzibar Agricultural Policy of 2002, Zanzibar Tourism Policy and Forest Resources Conservation and Management Act Zanzibar (1996).

c. Zanzibar: Regulatory framework and indigenous peoples' lands

i. Legislation environment and REDD+

The Forest Resources Conservation and Management Act Zanzibar (1996) is useful in shaping the implementation of REDD+ activities.[276] It allows members of the community to enter into forest management arrangement with the Forest Administrator over an area designated as 'Community Forest Management Area'.[277] However, this merely relate to the use and not tenure of the forests. Reinforcing this gap is the fact that community forest management area can only be granted by Forest Administrator after a consultation with relevant authorities and community leaders.[278]

Furthermore, akin to the position with mainstream Tanzania, the minister is vested with the power to declare any land subject to certain conditions, a forest reserve in Zanzibar.[279] In such areas, except where license is given, activities including felling or extraction of trees, taking of forest produce, uprooting of vegetation, erection of buildings or livestock enclosures are prohibited.[280] Also, the Forest Administrator is empowered to revoke management arrangement in the event of violation of management agreement or failure of community to remedy violation within reasonable time after receiving notice.[281] Along similar line, section 91 criminalises the killing, destroying, capturing or taking of animals or plants without a special permit. In all, these provisions generally criminalise or restrain the subsistence use of land of indigenous peoples and undermine their tenure on land.

ii. Policy environment and REDD+

Zanzibar National Environmental Policy proposes the notion of 'community forestry' which refers to targets such as the village, group and individuals as critical to planning and

[276] Tanzania National Strategy (n 39 above) 29
[277] The Forest Resources Conservation and Management Act Zanzibar (1996) preamble
[278] The Forest Resources Conservation and Management Act Zanzibar (1996) section 38
[279] The Forest Resources Conservation and Management Act Zanzibar (1996) section 15
[280] The Forest Resources Conservation and Management Act Zanzibar (1996) section 32
[281] The Forest Resources Conservation and Management Act Zanzibar (1996) section 47(1)

implementation of sustainable forestry programmes. It also advances a legislation regime which establishes a secure and flexible legal framework for community initiatives.[282] While this seems helpful, this policy essentially recognises the resource access of the communities and not tenure right. For instance, it limits their rights to management and protection of resources.[283] Also, instead of safeguarding land tenure, the policy merely encourages participation of community including private individuals and ngos in environmental programme.[284]

A critical aspect of the Zanzibar Agricultural Policy of 2002 is to ensure that agricultural approach integrates crops, livestock and agro-forestry as major farming systems. As part of measure to combat degradation, the policy urges the promotion of agro-forestry practices.[285] Showing that it does not depart from the provisions of similar policy in mainland Tanzania, in its agricultural agenda, Zanzibar endorses the Land Act and affirms that it will ensure land ownership as established under the Land Act.[286] Arguably, in endorsing the Land Act, the law indirectly agrees with its weaknesses in terms of inadequate protection of indigenous peoples land use and tenure.

d. Implications of inadequate land tenure and use legislation

The foregoing regulatory framework in relation to land tenure and use while preparing for REDD+ in Tanzania Mainland and Zanzibar has implications for a number of issues highlighted in the UN-REDD instruments, namely participation, carbon rights and benefit-sharing, as well as grievance mechanism and access to remedies. In the main, inadequate protection of land tenure and use may also have informed the restrictive approach of states to these issues equally relevant in the protection of indigenous peoples' land tenure and use.

i. Participation

The Environmental Management Act requires any one exercising power under the Act to observe principle of participation to involve people in the development of policies and processes and

[282] The National Environmental Policy for Zanzibar (1992) section 5
[283] The National Environmental Policy for Zanzibar (1992) section 2(e)
[284] The National Environmental Policy for Zanzibar (1992) section 9
[285] Zanzibar Agriculture Policy (2002) 12
[286] Zanzibar Agriculture Policy (2002) 8

management of the environment.[287] The Land Act also provides that citizens of Tanzania can participate in decision-making on matters pertaining to occupation and use of land.[288] The National Forestry Policy indicates that local communities and other stakeholders shall be included in the conservation and management of natural forests,[289] and requires environmental impact assessment (EIA) which requires consultation as a vital element.[290]

The Forest Act recognises the right of given community, including forest-dependent community to form and participate in community forest management group.[291] The Beekeeping Zone Act allows the participation of entities including a local authority, village, group or NGOs.[292] In order to contribute to the preservation of the environment, the National Energy Policy similarly requires EIA.[293] The National Human Settlements Development Policy promotes participation of communities in the planning, development and management of settlement.[294] Similarly, the Zanzibar National Environmental Policy encourages participation of community including private individuals and NGOs in environmental programme.[295] The Zanzibar Tourism Policy indicates that conservation and protection of the environment as well as EIA are a crucial component of the tourism agenda.[296] It encourages public participation and seeks to conserve the cultural way of life of the people.[297]

However, in the context of preparation for REDD+, much remains to be desired about the foregoing provisions on participation. This is because, thus far, civil society has criticised the process which led to the formulation of the R-PP as not being participatory, arguing that while the process was supposed to gain experience from those 'on the ground', this was not well reflected.[298] For instance, of the thirty organisations indicated in the report as having given input

[287] The Environmental Management Act (2004) section 7(3)(c)
[288] The Land Act (1999) section 1(1)(i)
[289] The National Forestry Policy (1995) section 4(3)(1)(1)
[290] FAO *Environmental impact assessment: Guidelines for FAO field projects* (2012); A Boyle 'Developments in the international law of environmental impact assessments and their relation to the Espoo Convention' (2011) 20 *Review of European Community & International Environmental Law* 227–231
[291] Tanzania Forest Act (2002) art 47(g)
[292] Tanzania Forest Act (2002) art 16
[293] Tanzania Forest Act (2002) art 148(iii)
[294] National Human Settlements Development Policy (2000) section 3(2)(v)
[295] The National Environmental Policy for Zanzibar (1992) section 9
[296] Zanzibar Tourism Policy (2005) para 4.1.6
[297] Zanzibar Tourism Policy (2005) para 4.1.7
[298] 'TZ – REDD Newsletter' Issue 3 January 2011 http://www.tfcg.org/pdf/TZ%20REDD%20Newsletter3.pdf (accessed 14 January 2014)

into the preparation of documentation,[299] none is specifically focused or based on indigenous peoples. Contrary to the approach taken by the state while formulating the R-PP, among other things, the civil society expects the authors of R-PP to propose clearer approach to consultation and incorporation of feedback into decision-making.[300]

Arguably, the weakness in consultation demonstrates the gap in the normative basis for the process and reflects the conventional approach of non-recognition which has for long typified state relationship with indigenous peoples. This is somewhat linked with the notion that land and forests are generally state owned and the claim of indigenous peoples to this is subordinate.

ii. Carbon rights and benefit-sharing

The Draft National Safeguards define carbon rights in the context of Tanzania to mean:

> [t]he rights to enter into contracts and national or international transactions for the transfer of ownership of greenhouse gas emissions reductions or removals and the maintenance of carbon stocks.[301]

It describes benefits as including 'financial benefits such as payments for carbon, employment or investments in local infrastructure'.[302] It also entails non-financial benefits including 'improved access to forests, land and non-timber forest products, and enhanced local environmental quality'.[303]

It further indicates that the 'rights to carbon credits are important because REDD+ credits and other carbon benefits will most directly accrue to whoever holds them.'[304] Hence, in accordance with principle 2 of the safeguard, Tanzania committs itself to implement REDD+ initiative in such manner that enables ownership of carbon rights resulting from either statutory or customary rights to natural resources. Accordingly, in addition to the recognition of the rights to carbon of

[299] As above
[300] As above
[301] United Republic of Tanzania *Tanzania REDD+ Social and Environmental Safeguards* (June 2013) Draft, Annex 1: Glossary of Key Terms (Tanzania REDD+ SES) 23
[302] As above
[303] As above
[304] Tanzania REDD+ SES (n 301 above) 8

forest-dependent communities, it shall ensure that they are trained in the measurement and evaluation of carbon 'in order to recognise their carbon rights'.[305]

However, in addition to not specifying the modalities for sharing the benefits that will accrue, it is not clear how the provisions in relation to carbon rights in its national safeguards can be achieved without further reforming its legislation and policies on REDD+ implementation. A close examination of these laws reveals an inconsistent position with the National Safeguards pointing at the conclusion that management and use of resources may not include forest tenure security. This is the conclusion that can be drawn from the reliance placed by the National Safeguards on national legislation such as the Forest Act. For example, while the Forest Act aims at developing individual and community rights arising from customary law,[306] its inherent drawback is that it seeks to achieve this only through joint management which allows for a village council to manage a forest reserve with community groups.[307]Although the Environmental Management Act allows a space for benefit-sharing in the design of environmental plans for national protected areas,[308] that is only possible in the restricting context of the power of the minister to declare a given land as environmentally protected area.[309] This approach also applies in relation to the Village Land Act, as the Environmental Management Act empowers the minister to prescribe the conditions to which customary rights of occupancy should be enjoyed.[310]

The National Environmental Policy (NEP) notes that 'the ownership of land and land resources, access to and the right to use them are of fundamental importance'. This is necessary so as to encourage care for the environment and enable people control their resource base.[311] Again distinguishable from the right to carbon, section 27 of the NEP merely commits the state to grant access to land resources to comunities. In fact, the Zanzibar National Policy essentially recognises the resource access of the communities and not tenure.

[305] Tanzania REDD+ SES (n 301 above)10
[306] Forest Act (2002) art 3(b)
[307] Forest Act (2002) art 16(c)
[308] Environmental Management Act (2004) section 49(3)(e)
[309] Environmental Management Act (2004) section 47
[310] Environmental Management Act (2004) art 53
[311] National Environmental Policy (1997) section 26

Taken together, the above approach merely enables members of a village living in or near the forest or part of to manage a forest reserve for purposes of use and benefit.[312] It is incapable of an interpretation that confers ownership of benefits from carbon rights on groups such as indigenous peoples. Ensuring that proper ownership of land to the forest-dependent signifies that they will have the rights to contract and share the profit from carbon trading. This is not assured in the legislation. In all, these provisions may potentially undermine the entitlement of indigenous peoples to contract carbon rights and appropriate benefits as envisaged under the Tanzania National Safeguards.

Hence, it is not surprising that at the RPP preparation, recommendations were made offering insight into areas of concerns particularly of indigenous peoples.[313] The civil society urges the authors of R-PP to propose a mechanism for trailing management and distribution of REDD benefits.[314] Other notable recommendations emphasise the need to clearly state an approach on how land, forest and carbon tenure issues will be addressed in the development and implementation of the proposed REDD strategy and elaborate on the specific capacity constraints of forest management agencies, local governments and other stakeholders.[315]

Thus far, the attention of the National Strategy and Draft Safeguards to these issues seems limited and buttresses the scepticism that benefits from carbon will not solely apply in the interest of indigenous peoples. In proof of this viewpoint, in promoting the PFM, the National Strategy draws a distinction between the CBFM and JFM arguing that the two approaches differ in terms of forest ownership and benefit flows. CBFM allows trees to be owned and managed by a village government through a Village Natural Resources Committee (VNRC). The JFM allows for the management of state owned forests, with management responsibilities and returns divided between the state and the communities.[316] Effectively in this context, ownership of carbon rights cannot be interpreted as belonging to communities such as indigenous peoples. Rather, what is clear is that the National Strategy allows user's rights to local communities or forest-dependent communities. This is because in an arrangement such as the CBFM where trees are owned, the

[312] Forest Act (2002) art 42(1)
[313] 'Tanzanian civil society comments on R-PP'- pdf.wri.org/rpp_country_table_tanzania.pdf (accessed 25 December 2013); 'Civil society organisations proposes recommendations for the National REDD Strategy' - http://www.tnrf.org/node/21152 (accessed 25 December 2013)
[314] As above
[315] As above
[316] Tanzania National Strategy (n 39 above) xi

communities merely enjoy such ownership as proxies for government. This sense of ownership is certainly not the same as indigenous peoples' concept of land tenure and use. In an arrangement where ownership of the forest remains uncertain, it will be difficult if not impossible to confer benefits solely on indigenous peoples.

iii. Grievance mechanism and access to remedies

Despite its controversial provisions, the Environmental Management Act is silent on the options available where the decision to declare an area as environmentally protected is opposed. Such opposition can be envisaged from the implementation of provisions dealing with zoning, restrictions of access and use, and any other appropriate measure for use of the area.[317] Furthermore, there are provisions that criminalise the failure by anyone to comply with a regulation declaring a land as environmentally sensitive for protection.[318] Also, grievance may result where land areas are declared as closed 'to livestock keeping, occupation and other specified activities'.[319] This is not attended to by the Act. What seems a remedy can be found in the Zanzibar Environmental Policy which offers some hope in its prescription that government will assist the local communities in resolving conflicts over the use of local resources.[320] However, the provision falls short of the expectation of safeguards which require that institutions of indigenous peoples should be respected in resolving disputes arising from REDD+ process.

It is thus not a surprise that at the R-PP preparation, among other things, the civil society urges the authors of R-PP to explain mechanism for resolving disputes.[321] In addition to not addressing this gap, nothing in terms of grievance handling mechanism has changed even under the Draft Safeguards for REDD+ in Tanzania. Principle 8 of the Safeguards confirms that existing complaint and dispute resolution mechanism at both local and national levels will be used for REDD+ related claims such as the disputes related to benefit-sharing, participation, and rights to lands, territories and resources that communities have been using or have acquired. From the existing framework, it seems clear that the main focus is on formal means of dispute resolution which it lists as including the Land Courts, Magistrate Courts, High Courts in the case of

[317] Environmental Management Act (2004) section 49(3)
[318] Environmental Management Act (2004) section 51(3)
[319] Environmental Management Act (2004) section 52(f)
[320] The National Environmental Policy for Zanzibar (1992) section 2(e)
[321] n 313 above

mainland Tanzania, and The Magistrate Court The Kadhis Court, High Court Act of 1985, Land Tribunal in the case of Zanzibar.[322] It canvasses the need for stakeholders' forum in the areas implementing REDD+ to handle conflicts that does not need the attention of courts. However, it does not specify for the use of indigenous peoples' institutions of dispute resolution nor indicate modalities to encourage this in the implementation of REDD+ activities. The preference for formal court system and the idea of stakeholder's conference indicate a top down approach which may compromise indigenous peoples' access to remedy in REDD+ matters.

2. Zambia and readiness for REDD+

Zambia became one of the pilot countries for the UN-REDD Programme in 2010. Since that period, a National Programme Document (NPD) document has been formulated and approved for REDD+ preparation.[323] The legal framework for REDD+ has been profiled in a report on the study on legal preparedness for REDD+ in Zambia.[324] It is currently in the first phase of preparing for REDD+.[325] Although a national REDD+ Strategy was expected to be completed in the second quarter of 2013,[326] this was not possible. The process has been extended to December 2014 by the UN-REDD Policy Board which approved a request made by Zambia for an extension on 8 October 2013.[327] However, as shall be demonstrated by examining key steps taken so far in the Zambia REDD+ readiness activities, the emerging regulatory environment inclusive of readiness institutions does not adequately safeguard indigenous peoples land tenure and use.

a. Readiness institutions and composition

In preparing for REDD+ activities, Zambia benefits from the Integrated Land Use Assessments (ILUA) which aimed at identifying key information needs related to agriculture and forestry for relevant national policies and action plans.[328] However, the management and coordination of

[322] Tanzania REDD+ SES (n 301 above) 18
[323] UN-REDD Programme 'National Programme Document-Zambia'(17-19 March 2010) UN-REDD/PB4/4ci/ENG, (Zambia Programme Document)
[324] International Development Law Organisation (IDLO), Food and Agriculture Organisation of the United Nations (FAO) 'Legal Preparedness for REDD+ in Zambia' (November 2011) (Zambia Legal Preparedness)
[325] 'REDD in Zambia' http://theredddesk.org/countries/zambia (accessed 25 December 2013)
[326] As above
[327] UN-REDD Programme 'Demande de décision intersession du Conseil d'orientation concernant le prolongement sans frais additionnel du programme national de la Papua Nouvelle Guinée (PNG)' 8 October 2013
[328] Kalinda *et al* (n 90 above) 1

REDD+ are still emerging. Presently, a governance structure is being established to coordinate and manage its implementation. As part of activities, an analysis of the legal and policy environment has been completed for REDD+ readiness and stakeholder engagements are still being carried out.[329]

The present REDD structure in Zambia consists of a REDD Coordination Unit (RCU), whose activities are supported by REDD+ Secretariat, REDD+ Steering Committee and Joint Steering Committee of the Environment and Natural Resources Management and Mainstreaming Programme (ENRMMP).[330] The RCU has the role of administering the day to day functioning of the programme, facilitating workshops and consultants as well as carrying out monitoring and evaluation.[331]

The main roles of the National REDD+ Secretariat are to support the policy board, handle external relationship with partners and ensure quality assurance and oversight over the programme.[332] Further funtions of the REDD+ Steering Committee include the provision of guidance on budget management and programme activities, facilitation of programme activities across institutions and ensuring effective partnering with implementing ministries.[333] Also, the Steering Committee defines the functions, responsibilities and powers of the implementing agencies, makes policy related recommendations to the ENRMMP, provides guidance on the implementation of REDD activities by various institutions, reviews work plan and proposed activities as well as identifies strategies for REDD.[334] The ENRMMP is established within the Ministry of Tourism, Environment and Natural Resources (MTENR) to coordinate environmental resource management priorities and policies across ministries.[335]

However, except for the limited space given to the representatives of NGOs, House of Chiefs and Community Based Organisations (CBOs), the above institutions, in terms of their composition, are largely dominated by representatives of governmental agencies. For instance, the RCU is hosted within the Forestry Department of the Ministry of Tourism, Environment and

[329] 'Zambia: The REDD Desk' http://theredddesk.org/countries/zambia (accessed 18 November 2013)
[330] As above
[331] UN-REDD Programme 'National Programme Document – Zambia'(17-19 March 2010) UN-REDD/PB4/4ci/ENG, (Zambia Programme Document) 67
[332] As above
[333] Zambia Programme Document (n 323 above) 119
[334] Zambia Programme Document (n 323 above) 119
[335] Zambia Programme Document (n 323 above) 39

Natural Resources and serviced by the REDD+ secretariat existing within the Forestry Department to provide administrative assistance in day-to-day activities and coordination.[336] The Steering Committee comprises Ministry of Tourism, Environment and Natural Resources, Ministry of Agriculture and Cooperatives, Ministry of Lands, Ministry of Energy and Water Development, Ministry of Community Development and Social Services, Ministry of Justice, Ministry of Finance, Ministry of Commerce Trade Industry, Ministry of Local Government and Housing, NGOs, Private Sector, House of Chiefs and CBOs.[337] The ENRMMP consists of government ministries including Ministry of Tourism, Environment and Natural Resources, Ministry of Lands, Ministry of Agricultural and Cooperatives, Central Statistical Office, Environmental Council of Zambia, Zambia Wildlife Authority, Donors and CSOs.[338]

It may be argued that the composition of these institutions in this manner is necessary considering that REDD+ issues are cross-sectoral entailing the mandate of different ministries, and that the inclusion of external actors such as the Non-Governmental Organisations (NGOs), House of Chiefs and CBOs should ensure that indigenous peoples issues are mainstreamed in the operation of these institutions. This reasoning is, however, questioned considering that there is no specific representation of forest-dependent communities in the ENRMMP.[339]

b. Regulatory framework and indigenous peoples' lands

It is noteworthy that forests in Zambia are categorised according to the land on which it rests.[340] Divided into state land, customary land and land under leasehold, in that context, forests exist at the national level as state reserves and on customary land vested in the Presidency while trees on leasehold arrangement belong to the leaseholder for a term of years.[341] The examination of regulatory framework for REDD+ in Zambia, as evidenced below, reveals that the policy and legal environment within which Zambia is preparing for REDD+ activities is either outdated or inadequate.

[336] Zambia Programme Document (n 323 above) 121-122
[337] As above; the structure of government ministries in Zambia is, however, still evolving. Government is renaming ministries such that Forestry and Environment are now under the Ministry of Lands
[338] Republic of Zambia 'Integrated Land Use Assessment (ILUA) II, Project Plan' 31
[339] UN-REDD Programme 'Report on the UN-REDD Mission to Zambia 28-29th September 2009' 06 November 2009
[340] Zambia Programme Document (n 323 above) 46
[341] Zambia Programme Document (n 323 above) 14, 15 and 46 profiles rather incorrectly, private ownership of land as part of tenure structure in Zambia

i. Legislation environment and REDD+

The legislation environment in which the government is preparing for REDD+ is inadequate in its protection of indigenous peoples' land tenure and use. To begin with, the Constitution of Zambia has interesting provisions which relate to sustainable use of land and environment and applicable in the context of climate change response initiative.[342] Under the fundamental directives section, article 112(i) affirms the aspiration of the Zambia state to promote awareness of the need to manage land, air and water resources in a sustainable manner for the present and future generation. Also, the state undertakes to provide a clean and healthy environment for all in Zambia.[343] Although the word 'forest' appears nowhere in the constitution, viewed as a land resource, it can be argued that these provisions extend to sustainable management of the forest in Zambia. However, the constitution of Zambia contains a number of provisions which undermine its usefulness for the implementation of REDD+ activities. For instance, the right not to be discriminated against under article 23 of the Zambia constitution does not apply with respect to non-citizens of Zambia, and matters under customary law.[344] This provision may operate as a legal basis for justifying unfair measures or initiatives against the traditional tenure system for which indigenous peoples are known.

Similar criticisms can be made of the Lands Act of 1995 which has a range of provisions which have implications for the implementation of REDD+ activities in Zambia, particularly indigenous peoples' land tenure and use. According to section 3(4) of the Act, land held under customary tenure cannot be alienated by the president without considering the local customary laws on land tenure,[345] consultation with the Chiefs and the Director of National Parks and Wildlife Service, in the case of a game management area,[346] consultation of anyone likely to be affected by the alienation,[347] and prior approval of the Chief and local government where land is situated.[348]

[342] Republic of Zambia Constitution (1996)
[343] Republic of Zambia Constitution (1996) art 112 (h)
[344] Republic of Zambia Constitution (1996) art 23(4)(d)
[345] Lands Act (1995) Cap 184, section 3(4)(a)
[346] Lands Act (1995) section 3(4)(b)
[347] Lands Act (1995) section 3(4()c)
[348] Lands Act (1995) section 3(4)(d)

However, the foregoing provisions are largely curtailed by other provisions within the Act. In addition to the general provision of the Act that vests all land in Zambia in the president,[349] the Act is limited in its relevance in other respects. The conversion of customary tenure to leasehold which may help in formal security of the land and be useful in accessing the land of indigenous peoples for use and benefit in implementing REDD+ activities is only possible with the approval of chiefs and local authorities.[350] This can be problematic as no criteria are prescribed under the Act to inform chiefs and the local authorities in reaching a decision one way or the other. This leaves the process open to a wide discretion which may be adversely exercised against the interest of indigenous peoples in securing their tenure. Also, even where land is possessed under leasehold title by any person including indigenous peoples, another limitation exists in that no person is permitted to'sell, transfer or assign any land without the consent of the president'.[351] In *Bridget Mutwale v Professional Services Limited*, the Supreme Court of Zambia held that failure to obtan consent for a sub-lease renders the whole of the contract including the provision for payment of rent unenforceable.[352]

There are other concerns that can militate against the application of the Lands Act to REDD+ activities in protection of indigenous peoples. This is the doctrine of 'vacant land' which though colonial in history found itself entrenched in the Zambian land law regime. According to section 9(1) of the Lands Act, it is unlawful for anyone to continue to occupy a vacant land. As what amounts to a 'vacant land' is not defined anywhere under the Act, this provision can be used in criminalizing the occupation and use of indigenous peoples of forests and its resources as well as dispossess forest-dependent populations of their traditional territories. This possibility is reinforced by another provison of the Act which allows for the eviction of persons occupying undeveloped lands [353]

The Lands Acquisition Act (LAC) of 1970 constitutes a weak link in the legal environment within which REDD+ activities are being pursued in Zambia. The LAC allows the President, where he deems it necessary in the interests of the public to compulsorily acquire any property of

[349] Section 3(1) of the Lands Act provides that notwithstanding anything to the contrary contained in any other law, instrument or document, but subject to this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia
[350] Lands Act (1995) section 8(2)
[351] Lands Act (1995) section 5
[352] *Bridget Mutwale v Professional Services Limited* (1984) ZR 72 (SC) 76
[353] Lands Act (1995) section 9(2)

any description.[354] It is, however, silent on whether there will be the consideration for free, prior informed consent of the person in the exercise of such authority. Indeed, this is unlikely in that the owner of the land or property to be acquired is only entitled to notification which, among others, is required to contain the description of the land to be required and date for raising objection if any.[355] Also, in what confirms a detrimental approach to the interest of forest-dependent communities who may not have tangible structures on land as evidence of possession, section 15(2) of the LAC does not allow for compensation in respect of undeveloped land or unutilised land.

For purposes that are consistent with the aims of REDD+ programme, the Zambia Forest Act designates some land as national and local forests.[356] For the national forests, these purposes are for security of forest resources which are of national significance, conservation of the ecosystem, improved management of forest resources as well as management of water catchments and head waters.[357] In relation to the local forests, these also include security of forest resources and protection of eco-system of 'local strategic importance', enhanced management and sustainability of forest resources at local level.[358] Upon the endorsement of the Commission established under the Act, local community or owners or occupiers of an area in a forest, the Forest Act empowers the minister to establish institutional management structure for the forests such as the 'Joint Forest Management'.[359] In what seems as an acknowledgment of their presence on the land, the law further requires for the consent of the local community before an area can be declared as JFM.[360]

However, there are a number of gaps in the Forests Act which weaken its potential relevance for the protection of indigenous peoples in REDD+ activities. Unless lawfully transferred under any written law, according to the Forests Act of 1999, the ownership of all trees and forests produce derived from customary areas, National Forests, Local Forests, State Lands and open areas is

[354] Lands Acquisition Act (1970) Cap 189
[355] Lands Acquisition Act (1970), sections 5 & 7
[356] The Forests Act (1999) sections 9 and 17
[357] The Forests Act (1999) section 12 (a)-(d); also see section 20 dealing with the purpose of local forest for similar provisions exempt the qualification of 'national significance'
[358] The Forests Act (1999) section 13
[359] The Forests Act (1999) section 25(1)
[360] The Forests Act (1999) section 25(2)

vested in the President to hold on behalf of the people of Zambia.[361] Also, strengthening the president in the exercise of his power on the recommendation of the Commission, he may trigger the LAC to compulsorily acquire any land for the purpose of national and local forests if it is in interest of the public to so act.[362] Similarly, despite the arrangements such as the JFM, license is required before activities such as felling, cutting taking and collection and removal of forest product can be carried out in a forest,[363] while a license is required to enter national forest.[364]

Since forests are often linked with water sources, the Water Resources Management Act of 2011 is a vital component of the legal framework deserving consideration in the preparing for REDD+ activities in Zambia. It aims at ensuring forest-related objectives such as the protection, conservation and sustenance of the environment, environmental impact assessment where necessary, fostering collaboration with appropriate authorities including forestry and ensuring right of access by members to places related to a water resource.[365] The Act, however, confers the powers to execute certain functions on the President and the Board of the Water Management Authority which may have undermining effect on indigenous peoples land tenure and use. For instance, the president may, in accordance with the provisions of LAC compulsorily acquire any land for the purpose of protecting a water resource area.[366] The Board can after consulting an appropriate authority or conservancy authority be declared as a water resource area.[367]

In contrast with the approach to the protection of the environment offered under the fundamental directive of the states in the Zambia Constitution, the Environmental Management Act of 2011 establishes the right to clean, safe and healthy environment.[368] However, what would have amounted to inconsistency with the provision of the constitution is avoided by the clause which subjects the superiority of the Act and particularly the enjoyment of the right to clean, safe and healthy environment to the provision of the Constitution.[369] While it directs that as with other

[361] The Forests Act (1999) section 3
[362] The Forests Act (1999) sections 11 and 19
[363] The Forests Act (1999) section 24(1)(a)
[364] The Forests Act (1999) section 16(1)
[365] Lands Acquisition Act (1970) section 30 (a), (c), (e) and (f) respectively
[366] Lands Acquisition Act (1970) section 41
[367] Water Resources Management Act (2011) section 29(1)
[368] Environmental Management Act (2011) section 4
[369] See sections 3 and 4(1) which respectively describe the limit of the superiority clause and the right to to clean, safe and healthy environment

sectors, the forestry resources shall be managed in line with the Forests Act,[370] the Environmental Management Act requires the state through the minister to prepare a State of Environment Report and develop National Environmental Action Plan as well as develop environmental management strategies.[371] Proponents of projects likely to have adverse effects on the environment are also required to conduct strategic environmental assessment.[372] The Act empowers the Minister to declare area of land environmentally fragile, taking into consideration such factors as natural feature of the area, cultural features, the interests of the local communities and compliance with any international obligations to which Zambia is a party.[373]

As significant as the foregoing provisions are, the Act does not make any reference to land tenure and use of indigenous peoples. It also does not make reference to REDD+ activities to which Zambia is committed. While this may be excused as unnecessary considering its provision that Forestry Act shall regulate forestry resources,[374] this can be questioned. First, this Act emerged after the commencement of the REDD+ activities in Zambia. Hence, one would expect that given its recent nature, it will include the issue of REDD+ as part of its provision dealing with integrated management of the environment. Also, one would expect that the protection and promotion of tenure and use by indigenous peoples and forest-dependent communities are clearly articulated as crucial to the implementation of environmental programme and more so, REDD+ activities. However, this is not the case.

A provision of similar consequence exists in the Town and Country Planning (Amendment) Act[375] which empowers the president, upon the recommendation of the Minister, to acquire land if such is required for inclusion in a structure plan or local plan or approved structure plan or approved local plan.[376] The possibility that this provision can negatively impact REDD+ activities is real considering that forestry is categorised as one of the items that may be included in the exercise of the ministerial power.[377] Hence, where Zambia decides to establish a regional

[370] Environmental Management Act (2011) section 76(1)(c)
[371] Environmental Management Act (2011) sections 20, 21 and 22 respectively
[372] Environmental Management Act (2011) section 23
[373] Environmental Management Act (2011) section 24(4)
[374] Environmental Management Act (2011) section 76(1)(c)
[375] Town and Country Planning (Amendment) Act (1997)
[376] Town and Country Planning (Amendment) Act (1997) section 40
[377] Town and Country Planning (Amendment) Act (1997) second schedule (sections 16 and 44) matters for which provision may be made in a development plan

plan for REDD+ projects, it could use the Town and County (Amendment) Act as a legal tool to evade land use management rights of local communities on customary lands.[378]

The link that forests often have with mineral resources makes the Mines and Minerals Development Act of Zambia key in the implementation of REDD+ activities.[379] According to section 15(1) (c) of the Act, the land in respect of which prospecting license may be sought may include the national or local forests as defined by the Forests Act.[380] It is thus not strange that the Act contains provisions which may be used in undermining the rights of forest-dependents. For instance, except for the requirement that environmental impact study is necessary in any area where mining activities are being proposed,[381] no obligation in terms of consultation and protection of tenure and benefit-sharing is anticipated to the communities that live on such land. Indeed, this expectation is impossible in the light of the provision of section 3 of the Act that vests rights of ownership for the prospecting and disposing of minerals in the President notwithstanding any right, title or interest that any person may possess in or over the soil in or under which minerals are found in Zambia.[382]

ii. Policy environment and REDD+

The policies indicated in the NPD and Legal Preparedness document as critical to the implementation of REDD+ activities in Zambia include the Vision 2030,[383] National Environmental Action Plan,[384] National Policy on Environment,[385] Forestry Policy,[386] Zambia Forest Action Plan,[387] National Agricultural Policy,[388] Irrigation Policy and Strategy,[389] National Biodiversity Strategy and Action Plan,[390] National Energy Policy,[391] and National Water

[378] Zambia Legal Preparedness (n 324 above) 20
[379] Mines and minerals Development Act (2008)
[380] 'Local forest' means an area declared as such under section 17 of the Forest Act, while 'National Forest' means an area declared as such under section 8 of the Forests Act, see section 2 of the Mines and Minerals Development Act (2008)
[381] Mines and minerals Development Act (2008) section 25(5) and 36(4)
[382] Mines and Minerals Development Act (2008) section 3
[383] Zambia 'Vision 2030 A prosperous Middle-income Nation by 2030' (Zambia Vision 2030)
[384] National Environmental Action Plan (1994)
[385] National Policy on Environment (2007)
[386] Forestry Policy (1998)
[387] Zambia Forest Action Plan (ZFAP), (1995)
[388] National Agricultural Policy (1995)
[389] Irrigation Policy and Strategy (2004)
[390] National Biodiversity Strategy and Action Plan (1999)
[391] National Energy Policy (2008)

Policy.[392] These policies as indicated in the NJP and Legal Preparedness document are linked with different aspects of forest governance.

In its Vision 2030, Zambia indicates its target and goals for a 'prosperous middle income nation', basing this drive on key principles including sustainable development, respect for human rights, democratic principles, private -public partnership and good traditional values.[393] It undertakes to pursue development policies compatible with sustainable environment and natural resource. As one of its main challenges, it identifies the maintenance of a safe, sustainable and secure environment.[394] Zambia Vision 2030 also considers land as critical to the realisation of its goals. Hence, it seeks to improve access to land by 'both men and women',[395] and considers a 'secure, fair and equitable access and control of land' as critical to social economic development of Zambia.[396] It also seeks to ensure access to information for participation purpose in socioeconomic development.[397]

However, Vision 2030 promotes principles which may be detrimental to the secured ownership and access of forest-dependent populations to land in implementing REDD+ activities. At least, this can be said of its component dealing with mining and agriculture which projects that, Zambia shall increase exploration of mineral resources by up to 30% and agricultural productivity and land under cultivation.[398] Arguably, these activities may lead to further degradation of forests and displacement of the forest-dependent peoples. While the statement that government shall reduce environmental degradation and promote principles such as human rights, traditional values and sustainable development seems hopeful, this is of doubtful help to the forest- dependent peoples in Zambia. The policy does not identify the land tenure and use of these groups for protection let alone the potential benefits which should accrue should they be involved in emerging activities such as REDD+.

[392] National Water Policy (1994)
[393] Other principles are fostering family values; (v) a positive attitude to work; (vi) peaceful coexistence, see Zambia Vision 2030 (n 383 above) 2
[394] Zambia Vision 2030 (n 383 above) 4
[395] Zambia Vision 2030 (n 383 above) 5
[396] Zambia Vision 2030 (n 383 above) 30
[397] Zambia Vision 2030 (n 383 above) 6
[398] Zambia Vision 2030 (n 383 above) 30

The National Policy on Environment identifies deforestation as a major consideration in addressing climate change,[399] and recognises the importance of the participation and reward of the local communities in the management of forest resources.[400] Particularly, a strategy for the implementation of the policy is to engage local communities in afforestation and rehabilitation of bare, fragile or erosion-prone areas,[401] and establish a forum where interested parties in forestry issues can share ideas.[402] The guiding principles of the policy indicate that a comprehensive land tenure and use policy should embody property and resource rights as well as the need to grant permission to community based organisations in managing and regulating resources on common property in their respective areas.[403] Nonetheless, these provisions are doubtful for the protection of forest-dependent peoples' interest in REDD+. For instance, the provision dealing with tenure security is only ensured for 'smallholder farmers'.[404] Similarly, although the policy expresses that customary rights to land and resource use will be recognised and protected,[405] with no strategy indicated as to how this is to be achieved, this statement of policy is at best an expression of intention. It contrasts poorly with the categorical affirmation made elsewhere in the policy that state will increase rents reflecting market value with the view of promoting sustainable leasehold land.[406]

Of importance to forest management in Zambia is the National Forest Policy of 1998 which has been criticised on a number of grounds. Foremost of the criticisms is its lack of implementation as a result of want of active Forestry Act.[407] Among other things, it has also been shown that there is general gap in the policy to adequately address the issues of collaboration between local communities and government, involvement of local communities and other stakeholders in forest management. Other concerns made in relation to the policy are the absence of guidelines on forest resource tenure, stakeholders' role, costs as well as benefit-sharing arrangements.[408] Against this backdrop, a review has been carried out leading to the formulation of a draft

[399] National Policy on Environment (2007) para 7(2)(4)(2)(a)
[400] National Policy on Environment (2007) para 7(2)(4)(2)(e)
[401] National Policy on Environment (2007) para 7(2)(4)(3)(j)
[402] National Policy on Environment (2007) para 7(2)(4)(3)(o)
[403] National Policy on Environment (2007) para 7(1)(13)(2) (b) ,(c) and (d)
[404] National Policy on Environment (2007) para 7(1)(13)(2)
[405] National Policy on Environment (2007) para 7(1)(13)(2)(c)
[406] National Policy on Environment (2007) para 7(1)(13)(2)(h)
[407] Zambia Programme Document (n 323 above) 43
[408] Zambia Programme Document (n 323 above) 44

National Forest Policy 2009 which was developed along Zambia's preparation for REDD+ readiness.[409] The Draft National Forest Policy for 2009 still awaits the approval of parliament.[410]

The Draft National Forest Policy 2009 seeks to encourage the collaboration of stakeholders including local communities and individuals to promote dialogue, ownership and equitable benefit-sharing arising from sustainable management.[411] It purports to offer clarity with respect to 'stakeholders' rights, obligations and benefits on trees, forests and forest associated products and services'.[412] Toward realizing this end, the objectives of the policy include adequate protection of the forest with the view of empowering local communities and encouraging the development of alternatives to forest products and services.[413] For this purpose, the strategies include incorporation in the Forest Act provisions that will ensure participation of local communities by defining their role, responsibilities and benefits as well as incentives sharing.[414] Another strategy relating to tenure seeks to ensure that classification of land for forest protection and management does not compromise traditional tenure system.[415] Nonetheless, in addition to not articulating clearly what these role and responsibilities are, the Draft National Policy offers no significant improvement on the Policy of 1998 in relation to the source and the mode of the proposed incentive sharing. Also, it does not depart from the principle which vests ownership of all trees in the President to hold on behalf of the Zambians. Yet, this may be a hindrance to the effective exercise of role, responsibilities and benefits contemplated for groups such as indigenous peoples or forest-dependent in relation to implementation of REDD+ activities.

Aimed at serving as a robust document on the direction for agriculture in Zambia, the National Agricultural Policy[416] identifies forest-related issues such as rapid deforestation and land degradation as some of the environmental challenges to agricultural sector in Zambia.[417] It proposes solutions such as the promotion of conservation farming, afforestation and agro-forestry as environmental friendly farming system and strategy to achieve sustainable

[409] Zambia Legal Preparedness (n 324 above) vii
[410] Zambia 'Plans and policies' http://theredddesk.org/countries/zambia/plans-policies (accessed 19 December 2013)
[411] National Forest Policy (2009) 3
[412] National Forest Policy (2009) 4
[413] National Forest Policy (2009) 14
[414] As above
[415] National Forest Policy (2009) 30
[416] National Agricultural Policy (1995)
[417] National Agricultural Policy (1995)7

agricultural practices.[418] In describing the issue of land tenure, the National Agricultural Policy merely conceives security of land tenure as a means to ensuring the utility of land to its fullness by farmers.[419] Although presented as relevant to the implementation of REDD+ activities in Zambia,[420] the National Agricultural Policy does not consider the land tenure and use of forest-dependent communities as a significant issue which may become compromised if its solutions and propositions are strictly applied. Also, in endorsing the expansion of commercial farming to attract investment without providing appropriate safeguards, the policy conflicts with REDD+ strategies as it signifies that farming developments can expand to forested lands.[421]

The National Energy Policy[422] implicates forests in a number of areas. Foremost is that it identifies the forests as a component of energy sources for Zambia.[423] As the main source of woodfuel particularly for the low income earners, forests, according to the National Energy Policy, will continue to dominate the energy consumption of Zambia.[424] As a way to address this trend, the National Energy Policy contemplates a switch from what it considers as a 'low quality energy sources' to an improved energy sources such as electricity, petroleum products, biofuels and biogas for domestic use.[425] It also underscores the need for a regulatory framework to coordinate activities between institutions responsible for energy, agriculture and forestry.[426] Other measures suggested in the National Energy Policy include improved management and use of forests resources,[427] promotion of forest plantation,[428] and agroforestry.[429]

However, in addition to non-reference to land tenure anywhere in the policy, there are initiatives aimed at improving energy resources which particularly exclude groups such as indigenous peoples or forest-dependent communities. For instance, the prevention of exploitation of local peoples mentioned in the policy is only in respect of biofuel projects.[430] Arguably, this may not include the exploitation of these peoples in forest related projects such as REDD+. In all, the gap

[418] National Agricultural Policy (1995) 12
[419] National Agricultural Policy (1995) 23
[420] Zambia Legal Preparedness (n 324 above) 60
[421] Zambia Legal Preparedness (n 324 above) 24
[422] National Energy Policy (2008)
[423] National Energy Policy (2008) para 2(1)
[424] National Energy Policy (2008) para 2(1)(1)(1)
[425] National Energy Policy (2008) para 5(2)
[426] National Energy Policy (2008) para 5(2)(2) (c)(ii)
[427] National Energy Policy (2008) para 5(2)(2)(1)(a)(i)
[428] National Energy Policy (2008) para 5(2)(2)(1)(a)(iii)
[429] National Energy Policy (2008) para 5(2)(2)(1)(d)
[430] National Energy Policy (2008) para 5(2)(2)(2)(d)(iii)

in tenureship affects negatively consultation, carbon rights, access to benefit as well as remedies of indigenous peoples and forest-dependent communities in Zambia.

c. Implications of inadequate land tenure and use legislation

i. Participation

So far, consultation or stakeholder engagement has been carried out mainly during the development of the NPD. Prepared as the first step toward implementing REDD+ activities, the NPD profiles steps so far taken in preparing Zambian institutions and stakeholders for effective nationwide implementation of the REDD+ mechanism.[431] In this regard, meetings were held in Lusaka in 2009.[432] The meetings aimed at sensitizing stakeholders including agencies and NGOs working on forest related issues in developing the NPD.[433] Issues relating to engagement approach featured at the meetings with the result that emphasis was placed upon UN-REDD Safeguards such as the Operational Guidance on the Engagement of Indigenous Peoples and other Forest-Dependent Communities.[434] Participants also discussed the steps that must be taken to ensure representation, participation, transparency and accountability in the UN-REDD Programme for Indigenous Peoples and Forest-Dependent Communities.[435] Particularly, participants stressed the need to clarify land tenure arrangements in preparing for REDD activities.[436]

As part of the process, stakeholders' views were also made at the validation meeting held for the NPD. According to the Validation meeting minutes, stakeholders discussed issues relating to the management of forest resources and proposed certain changes to the NPD.[437] Additionally, it was suggested that law reform and harmonisation of legislation related to forestry is necessary for an effective implementation of REDD+.[438] In 2011, workshops were held with participants drawn from different governmental departments, NGOs, forest officers representing all Zambia's nine

[431] Zambia Programme Document (n 323 above) 7
[432] UN-REDD Programme 'Stakeholder sensitization meeting report' Chrismar Hotel Lusaka, 7th May 2009; Ministry of Tourism, Environment and Natural Resources Forestry Department 'UN REDD Stakeholders' consultative meeting report' Mulungushi International Conference Centre, 29 September 2009
[433] As above
[434] As above
[435] As above
[436] As above
[437] UN-REDD Programme 'Validation meeting minutes 17-19 March 2010' 3 (Validation minutes)
[438] Validation minutes (n 437 above) 5

provinces. In addition to promoting the understanding of the REDD+ mechanism, a significant goal of the workshop was to foster multi-stakeholder engagement and dialogue on REDD+.[439] While participating at that forum, the Climate Network in Zambia noted that REDD+ funds must be targeted to actors actually involved in forest conservation and restoration such as indigenous peoples and local communities so as to avoid 'capture by Elites'.[440]

Between October and December 2011, the UN-REDD Programme embarked upon stakeholder analysis at the provincial, district and village levels across all the 10 provinces, with the aim of developing a Stakeholder Assessment and Engagement Plan (SAEP) for REDD+. [441] However, stakeholders engagement in REDD+ process activities have been generally criticised as inadequate as non-governmental stakeholders are of the view that they have been largely excluded from the national REDD+ process leading to the NPD in Zambia.[442] It is therefore not strange that it has been suggested that more consultations are needful as activities progress to readiness stage.[443] Inadequate consultation of the forest-dependent communities itself reflects that government does not consider their concern over land tenure and use as substantial enough to make them partners on equal footing in REDD+ issues. Yet, without their adequate consultation, participation cannot be regarded as effective. In fact it can be argued that this will also compromise the entittlement to benefit-sharing of indigenous peoples.

ii. Carbon rights and benefit-sharing

The gap in tenure security will have adverse effect on the claim of indigenous peoples and forest-dependent populations in Zambia to benefits that will arise from trade in carbon. Except inferred, existing laws mostly predate law REDD+ activities and do not have provisions directly dealing with carbon ownership. Instead, the Zambia Legal Preparedness, makes a distinction between 'property rights tied to forests and those tied to land'.[444] According to the document, this connotes that investors may enjoy carbon rights over trees in the forest without having title to

[439] K Kallio-koski 'The first REDD+ Orientation Workshop was recently held in Zambia with the goal to enhance understanding of the REDD+ mechanism and the challenges for its design in Zambia'
[440] Zambia Climate Change Network 'Contexturizing REDD+ in the global climate change regime: A CSO perspective' presented at the UN-REDD Orientation Workshop 27-29 June 2011 Crestra Golf View Hotel Lusaka
[441] n 437 above
[442] As above
[443] UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries National Joint Programme Document 'Independent Technical Review: Zambia'
[444] Zambia Legal Preparedness (n 324 above) 30

land. By extension this also signifies that those who hold land tenure may not own forest produce and therefore accruing carbon for REDD+ compensation.[445] In coming to this conclusion, the Zambia Legal Preparedness places reliance on section 4(2)(h) of the Land Act of 1995 which empowers the president to expropriate land for 'the preservation, conservation, development or control of forest produce'. Consequently, if carbon is conceived as 'forest product', it means that its ownership belongs to the president to hold in trust.[446]

The lack of clarity of the carbon ownership in the existing framework is further compounded by the legal reality that indigenous peoples' title to land is informally held under customary law. As it may remain largely undeveloped, it may not benefit from the general provision of the Lands Acquisition Act, which allows for compensation to any person whose property is acquired.[447] Rather, it will fall under the exception of the Lands Acquisition Act which exempts compensation. According to section 15(2) of the Lands Acquisition Act, 'no compensation shall be payable in respect of undeveloped land or unutilised land'. This provision can be used in dispossessing indigenous peoples from their land without compensation and therefore exclude them from a claim to benefits from carbon transaction. This fact is further buttressed under the Act which describes land solely used for cultivation or pasturage as unutilised.[448] In view of these provisions, barring a new legal regime, it is doubtful that indigenous peoples can legally claim for compensation or benefits sharing over the implementation of REDD+.

Agitation against non-clarity of tenure featured at the formulation of the NPD in Zambia. At the sensitization meeting held in 2009, participants indicated that there is need to clarify issue around land ownership so as to attract confidence in the discussion around incentives. It was reasoned that without assuring rights to land, there can be no incentive for participation in REDD+ activities.[449] Yet, the response of the NPD on this issue appears unclear. This indeed is reflected in the findings made by the Independent Expert while reviewing the NPD. It indicates

[445] Zambia Legal Preparedness (n 324 above) 44
[446] Zambia Legal Preparedness (n 324 above) 40
[447] Land Acquisition Act (1970) sections 10-14
[448] Land Acquisition Act (1970) section 15(4)(b)(iii)
[449] Zambia Programme Document (n 323 above)

the need for the NPD to consider the recognition of communal tenure arrangement with appropriate legal rights to manage forests and receive performance based payments.[450]

As it is realised that without clear tenure, there cannot be effective benefit-sharing from REDD+ activities, stakeholders complain that the issue of benefit-sharing requires transparency and needs to be presented in such a way that allows local communities to understand the process.[451] According to the report of the Independent Expert, although the NPD emphasises community involvement and benefit-sharing,[452] there remains the need for the NPD to include the development of legal provisions to support and regulate benefit-sharing arrangements for REDD+ activities in Zambia.[453]

iii. Grievance mechanism and access to remedies

According to the Zambia Legal Preparedness document, accessibility, fairness and independence of grievance mechanisms is a key aspect of REDD+ governance.[454] Hence, the formulation of an appropriate conflict resolution mechanism in the preparation and implementation process is one of the key challenges indicated in the preparedness for REDD+ activities in Zambia.[455] The NPD also captures this challenge when it notes the need to review existing conflict resolution mechanism for stakeholders' conflict and develop where necessary an institutional framework that employs conflict-resolution strategies and appropriate arbitration processes.[456]

However, as it turns out, no new grievance mechanism has been put in place to address likely grievances of people alleging adverse effects related to the implementation of the UN-REDD national programme. In fact as shown from the reports so far made on the UN-REDD programme, the government has indicated that formulating such mechanism is not applicable to the preparation of the NPD.[457] This is surprising as it has been reported that an off shoot of the existing legal regime relating to land use planning regime has been a 'devastating effect on the

[450] UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries National Joint Programme Document 'Independent Expert Review'
[451] Validation minutes (n 437 above) 8
[452] Zambia Programme Document (n 323 above) 8
[453] Zambia Legal Preparedness (n 344 above)
[454] Zambia Legal Preparedness (n 344 above) 4
[455] Zambia Legal Preparedness (n 344 above) 44
[456] Zambia Programme Document (n 323 above) 54
[457] UN-REDD Programme 'National Programme 2012 Annual Report-Zambia' March 2013, 32; also see UN-REDD Programme 'Zambia National Programme 2011 Annual Report 31st January 2012 (Final Draft)' 24

rates of deforestation and forest degradation', which in turn is emerging with a spate of disputes 'between community members and government agencies, and government agencies amongst themselves.'[458]

The mechanism available for conflict resolution remains largely what exists under the regime before REDD+. For instance, disputes regarding the compulsory acquisition of land, except for the level of compensation, can be brought by legal proceedings before the High Court of Zambia.[459] The Ministry of Lands also has units including the Lands Tribunal that carry out dispute resolution service.[460] It might be possible to find remedies in existing dispute resolution mechanisms established under the existing legal framework on less critical issues. This optimism is discernible from the case of *Zambia Community Based National Resource Management Forum and 5 others v Attorney General and I other*.[461] In that case, the High Court had granted to the appellants an order *ex parte* staying the execution of the decision of the Minister of Lands, Natural Resources and Environment which granted the second respondent the approval to carry out large scale mining activities in the National Park. This was, in the main, based on the grounds that the approval neglected the findings and recommendations by the Zambia Environmental Management Agency and the report that the EIA was based on technical inadequacies.[462] While upholding the order of stay of execution pending the determination of the substantive suit, the High Court took the view that the appeal will be rendered academic if the order of stay was vacated.[463] On the argument of the respondents that the appellants had no locus to sue, the Court was of the view that 'damage to the environment is a matter of public concern and interests which affect all people born and unborn'.[464]

However, caution should be exercised in respect of the optimism raised by the above decision. In the case of implementing REDD+, resorting to the Court for a decision on issues such as benefit-sharing and compensation, land tenure and use may be of limited benefit. For instance, as interesting as the decision is, the matter has not been finally disposed off and the matter can go

[458] Zambia Legal Preparedness (n 324 above) 49
[459] Zambia Programme Document (n 323 above) 60
[460] Zambia Programme Document (n 323 above) 16
[461] *Zambia Community Based National Resource Management Forum and 5 others v Attorney General and I other* 2014/HP/A/006 (*Zambia Community* case)
[462] *Zambia Community* case (n 461 above) 3-6
[463] *Zambia Community* case (n 461 above) 14
[464] *Zambia Community* case (n 461 above) 22

as far as the highest court. This is unlike the flexible arrangements that are more amenable to compromise and flexibility which are not adequately on offer in the technical procedures and practices of the courtroom. Besides, courts have other challenges, including jurisdictions. For instance, the Lands Tribunal lacks jurisdiction to hear matters arising from customary land management unless the dispute arises from a decision made by the Commissioner of Lands, Minister or the Registrar.[465] Generally, there are concerns around delay in the administration of justice in Zambia.[466]

Without an appropriate tenure regime guaranteed in the legal framework, approaching this conventional and formal dispute resolution mechanism may achieve little in addressing the concerns of the forest-dependent peoples in Zambia. It is an unjustified optimism to expect a legal framework which has compromised the tenure system to offer effective remedy upon any allegation of adverse effect related to the implementation of the UN-REDD national programme in Zambia.

3 Nigeria and readiness for REDD+

The involvement of Nigeria in REDD+ programme dates back to 2009 when it requested along with Cross River State (CRS) to implement REDD+. Support was given to the request by the UN-REDD programme which led to the formulation of a proposal on national programme for REDD+.[467] Its primary objective is to implement the REDD+ programme, using CRS, one of the 36 states in Nigeria as a demonstration model.[468] The current version of Nigeria R-PP was submitted by Nigeria to the World Bank Forest Carbon Partnership (FCPF) and the UN-REDD Programme, in November 2013.[469] Toward the process of phase 1, Nigeria has been supported with a financial allocation of US$ 4 million for the period 2012-2015.[470] Also, it applied for 3.6 million dollars from the FCPF Programme.[471]

[465] Zambia Programme Document (n 323 above) 17
[466] Zambia Legal Preparedness (n 344 above) 44; See P Matibini 'Access to justice and the rule of law: An Issue Paper presented for the Commission on legal empowerment of the poor' www.undp.org/legalempowerment/Zambia/27_3_Access_to_Justice.pdf. (accessed 24 October 2013)
[467] Nigeria R-PP (n 139 above) 6
[468] Nigeria NPD (n 125 above)
[469] Nigeria R-PP (n 139 above) 6
[470] Nigeria R-PP (n 139 above) 6
[471] G Odu-Oji 'Seminar Presentation on Status of UN-REDD+ in Nigeria: Challenges and policy option' (August 2013) University of Ibadan, Ibadan, Center for Sustainable Development (CESDEV)

Commencing the process in 2011, it has prepared and submitted to the UN-REDD Policy Board a National Programme Document (NPD) which sets out the approaches to achieve REDD+ Readiness.[472] These approaches are through the development of institutional and technical capacities at the federal level, and building of institution and demonstration activities using CRS as a model. This model approach is expected to shape the national process that will then drive other states that may wish to implement REDD+ activities.[473] The foregoing documents along with the 'Preliminary Assessment of the Context for REDD in Nigeria' describe the regulatory context, namely institutional and normative context in which Nigeria is engaging REDD+ activities.[474] These documents are analyzed to show that not much has changed in terms of the protection of the land tenure and use of indigenous peoples in preparation for the REDD+ activities in Nigeria.

a. REDD+ institutions and composition

The institutional structure for the REDD+ programme in Nigeria is in two tiers, namely the national and state levels. Generally, the institutional framework for forestry development at the national level includes the Federal Ministry of Environment (FME) and parastatals, the National Forestry Development Committee (NFDC), National Council on Environment, Ministries of Finance, Tourism, Agriculture and Women Affairs.[475] The FME has established the Special Climate Change Unit (SCCU), which is vested with mandates including negotiation, planning, policy, education and carbon finance.[476] Among other things, the mandates of the SCCU involve the assessment of vulnerability in Nigeria to climate change as well as impacts of climate change. Its roles further include the promotion of public awareness and facilitation of education about climate change as well as representation of Nigeria in international climate change negotiation.[477]

Established in April 2013, the National Climate Change Committee (NCCC) is an inter-ministerial body that includes the ministers of national planning commission, aviation,

[472] Nigeria NPD (n 125 above)
[473] Nigeria NPD (n 125 above) 11
[474] 'Review synthesis of Nigeria R-PP', October and November 2013 (Nigeria synthesis report)
[475] Nigeria NPD (n 125 above) 20
[476] Federal Ministry of Environment 'Nigeria Climate Change Unit' http://www.climatechange.gov.ng/ (accessed 18 December 2013)
[477] Federal Ministry of Environment 'What we do' http://www.climatechange.gov.ng/index.php/the-special-climate-change-unit/what-we-do (accessed 18 December 2013); Nigeria NPD (n 125 above) 20

agriculture and rural development and environment. Others are ministers of works, science and technology, water resources, health, and transport.[478] While the Minister of National Planning is the Chairman, the Minister of Aviation acts as Vice Chairman.[479] The NCCC is with the mandate to develop a national framework for application of climate services which will promote, among others, national food security and lead to reduction in severe weather events, health hazards and vulnerability.[480] The NCCC allows for cross-sectoral coordination of national climate change policies.[481]

The institutions established so far in the process of preparation for REDD+ in Nigeria still remain predominantly composed of government agencies. This is the case with the National Advisory Council on REDD+, National REDD+ Subcommittee, National Climate Change Technical Committee, the National REDD+ Secretariat, UN-REDD Nigeria Programme Steering Committee and National Stakeholder Platform for REDD+.[482] The National Advisory Council is hosted by the Ministry for the Environment and is made up of representatives including the National REDD+ Coordinator, the Governor of Cross River State (co-Chairperson), the Chairman of Cross River State Forestry Commission, the UN Resident Coordinator (co-Chairperson), the Climate Change Department (representing also the National REDD+ Subcommittee), the Federal Department of Forestry, the Chief Technical Advisor of the Programme (as observer), CSO/NGO REDD+ representatives (federal level), Forest-Dependent Community representatives, the National Planning Commission and the Ecological Fund Office.[483]

The National Advisory Council was formally endorsed by the local Programme Appraisal Committee. The role of the Council includes the provision of policy advice and guidance on all National REDD+ processes and supervision of the activities of the National Technical REDD+ Committee.[484] It also carries out oversight functions over consultancies on National REDD+ issues, offers guidance to a REDD+ plan of operations, annual work plans, annual budgets,

[478] 'Nigeria inaugurates Inter-ministerial committee on national framework for application of climate services' http://www.gfcs-climate.org/content/nigeria-inaugurates-inter-ministerial-committee-national-framework-application-climate (accessed 18 December 2013)
[479] As above
[480] As above
[481] Nigeria R-PP (n 139 above) 13
[482] Nigeria R-PP (n 139 above) 12-17
[483] As above
[484] As above

monitoring and evaluation process and implementation. Once inaugurated this Council will meet once in a year. [485]

In addition to the inadequacy of this representation, sandwitched among government controlled agencies, it is not unlikely that the presence of the spot offered the forest-dependent peoples in the composition of the National Advisory Council may be compromised. Also, the fact that the documentation is silent on the process through which these representatives are selected shows that the slots meant for the forest-dependent communities may infact be occupied by government loyalists which may affect the accountability of these representatives to the local constituency.

Previously known as the National Technical REDD+ Committee, the National REDD+ Subcommittee is linked with the NCCC. The Committee comprises 25 members consisting largely of experts and government agencies. These include technical experts from the various government ministries and agencies such as the Federal Ministry of Environment, the Department of Climate Change, National Advisory Council REDD+, Federal Department of Forestry, National Planning Commission, Federal Ministry of Agriculture and Rural Development.[486] Other members are Federal Ministry of Energy, National Park Services, Federal Ministry of Women Affairs, Nigeria Air Space Research and Development Agency (NASRDA), research institutes, Forestry Research Institute of Nigeria (FRIN), NGO/CSO representatives, forest and agriculture enterprises, UN Donor Agencies, bilateral donor Agencies and Academia.[487] The Committee meets twice a year.[488]

A closer examination of this composition leaves one with the impression that the Sub-Committee has too much presence of government. Also, without clearly defining the role for each of these members, the mandate of the Sub-committee may be stifled by bureaucracy. The responsibilities of the Sub-Committee show that it is largely a top-down institution. This is because even the responsibilities that the forest -dependent communities are best left to handle at their level are on the list of mandate of the Subcommittee. These responsibilities include identifying and advising on the roles of relevant stakeholders for the implementation of REDD+ processes in Nigeria, recommending measures and programmes that will ensure awareness creation, education,

[485] Nigeria R-PP (n 139 above)12
[486] Nigeria R-PP (n 139 above)14
[487] As above
[488] As above

training and institutional capacity building on REDD+ issues.[489] Directly affected by REDD+ activities, one would expect that forest-dependents are better placed to suggest and recommend programmes to enable effective implementation of activities in the sites that are part of their daily existence and survival.

Located within the Department of Forestry in the Federal Ministry of Environment, the National REDD+ Secretariat is tasked with the implementation and the management of the REDD+ readiness process at the federal level, as well as the overall coordination and supervision of programme nation wide. It is headed by the National REDD+ Coordinator.[490] In dealing with daily management of federal level activities, the Secretariat performs a range of functions.[491] These functions include the preparation of workplan, overseeing of programme activities and consultants; coordination of inputs and outputs from the various REDD+ programmes and related programmes.[492] Other functions include the offering of progress and monitoring reports, coordination of national REDD+ activities and programmes, and ensuring efficient record of programme payment in line with international standards.[493] The Secretariat is expected to strengthen the engagement of Nigeria with the international community and international negotiations, particularly in the UNFCCC.[494] Overall, the National REDD+ Secretariat is required to provide coordination and REDD+ readiness management roles, and offer administrative coordination for the National Advisory Council on REDD+ and the National REDD+ Subcommittee as well as the REDD+ Pilot States.[495]

Considering the critical role of this Secretariat to the implementation of the REDD+ activities, the relationship with forest- dependent communities should ordinarily have mutual benefit for its activities and the communities. For instance, given its mandate at strengthening the involvement of Nigeria at international negotiations, regular interaction with the Forest-dependent communities can equip it with feedbacks that may shape the fulfillment of its role. However, this is not yet achieved as there is no clearly set out platform which is specifically linked with these

[489] As above
[490] As above
[491] As above
[492] As above
[493] As above
[494] As above
[495] Nigeria R-PP (n 139 above) 15

communities and aimed at incorporating their worldview into the national and international dimensions of the overall activities of the Secretariat.

Established in April 2013, the UN-REDD Nigeria Programme Steering Committee (PSC) consists of key government and UN staff, as well as two representatives from Civil Society Organisations.[496] The PSC is tasked with the coordination of programme including the approval of work-plans and budgets and overall monitoring.[497] Other functions of the PSC include the provision of strategic direction for the implementation of the programme with the approval of the UN-REDD Policy Board, as well as creation of synergies and forging of agreements with related national programmes elsewhere. In all, in addition to making use of their members, the functions of the PSC are generally complementary to the REDD+ National Advisory Council and UN-REDD+ Sub-Committee.[498]

In its design, the PSC does not specifically include the forest- dependent peoples in its formation. The slot given to civil society representation does not necessarily guarantee that those belonging to the communities where REDD+ initiatives are carried out will be part of the PSC mechanism. This leaves much to be desired considering the key role of the institution in the implementation of REDD+ activities. The UN-REDD Policy Board, for instance, which performs similar strategic role as the PSC, at least, creates space for a representation by indigenous peoples and in a way allows for a reflection of their view in its discussion.

Existing as part of the architecture of the national REDD+ programme is the National Stakeholder Platform for REDD+.[499] This platform, according to the R-PP of Nigeria, ensures representation of women, youth, indigenous groups, forest-dependent communities including the ones in CRS and other groups identified as marginal or vulnerable groups.[500] Members to the platform are selected on their records and their past engagement and activity.[501] As indicated in the R-PP, membership is open to any NGO or organisation that has shown some commitment to REDD+ or to related issues. Groups with intention to become member will do a letter to the

[496] As above
[497] As above
[498] As above
[499] As above
[500] As above
[501] As above

Department of Forestry which examines the track record of the organisation and comes to a decision as to whether or not to allow such groups become members and attend meetings.[502]

Although this seems a great platform to secure a broad based participation in the REDD+ activities, the process of becoming membership is cumbersome and subordinating. It is cumbersome particularly for forest-dependent communities who may be mostly illiterate and lack physical access to the location of this department. Also, it is not clear yet whether associations formed by forest-dependent populations are eligible as members. Similarly, it is certainly not obvious in the R-PP nor the NPD how the National Stakeholders Platform will feed into other institutional arrangements already discussed. The process is subordinating in the sense that it confers the wide discretion on the platform to decide as they wish on who to allow as members. This may shut the door against the membership and indeed participation of groups that have alternative or opposing views about the implementation of REDD+ in Nigeria.

The architecture at state level in Cross River mainly mirrors what exists at the national level and portrays an arrangement whereby state agencies largely dominate institutional architecture for the implementation of REDD+ activities. This is the case with the arrangement of the CRS Forest Commission which is mainly a governmental entity providing general oversight for REDD+ activities at the state level. The Commission's effort is administered through the Cross River State REDD+ Unit that is situated within the Commission.[503] This Unit performs similar duties as it is with the Federal REDD+ Secretariat, and is accountable for the daily management of REDD+ activities in the state.[504]

Similarly, the CRS Technical REDD+ Committee is composed of governmental entities such as the Forestry Commission, the Ministry of Environment, the Ministry of Agriculture, the Ministry of Lands, the Ministry of Works and the Tourism Bureau.[505] Other members are the Department of Forestry and Wildlife, the Faculty of Environmental Sciences of the Cross River State University of Science and Technology, the State Planning Commission, the Department for Donor Support and the Cross River State National Park.[506] There is space for at least three ngo

[502] As above
[503] Nigeria NPD (n 125 above) 73
[504] As above
[505] As above
[506] As above

representatives, four community representatives and the Chairperson of the CRS House of Assembly's Committee on Environment.[507] While this composition is relevant to the REDD+ activities, it is not clear what specific role these non-governmental institutions will play in a committee heavily dominated by governmental agencies. Except this is well set out, allowing such a limited space for ngos and community representation do not necessarily guarantee that on critical issues, the position of the communities will trump that of the vast majority of the Committee who are likely to pursue uncritical implementation of government policies on the matter of REDD+.

Offering some hope in terms of participation of the forest-dependent communities is the Cross River State Stakeholder Forum on REDD+ which was established in 2010.[508] The forum aims at ensuring that the knowledge and perspective of all non-governmental participants and stakeholders are adequately reflected in the programme's approach and strategies.[509] According to the R-PP, in establishing this forum, the focus is on ethnic diversity in a manner that ensures representation by women, youth, forest-dependent communities and other identified marginal or vulnerable groups.[510] Other roles of this forum include the discussion of programme progress, contribution to programme planning and activities, as well as the running comment on draft documentations.[511] However, the potential in this forum is undermined by the indication in the R-PP denying the existence of indigenous peoples in Nigeria. According to the R-PP, there is no 'single marginalised ethnic groups or indigenous people, because the country is shaped by a very strong ethnic diversity'.[512] This observation, however, flies in the face of findings of the Working Group that prescribe the conditionalities for identifying indigenous peoples and identifies some groups in Nigeria as such. This approach may compromise those groups of communities who may self-identify and base their claim for special recognition on strong attachment to forest land.

Equally reflecting the heavy presence of state agencies, the State Climate Change Council is composed of the Governor, serving as the Chairman with other members as Commissioners of

[507] Nigeria R-PP (n 139 above) 16
[508] Nigeria R-PP (n 139 above) 17
[509] As above
[510] As above
[511] As above
[512] As above

Justice, Finance, Agriculture, Environment and Lands, State Planning Commission, Department for International Donor Support and the Chairman of the Forestry Commission, serving as the Coordinator.[513] The Council acts as an inter-ministerial body which ensures there is co-ordination across different sectors.[514]

In all, in terms of the evolving institutional design for REDD+ activities in Nigeria, the conclusion can be made that the institutions anchoring these activities are mainly governmental with scanty presence of community members such as the forest-dependent populations who are likely to have effect and be affected negatively by the implementation of REDD+ activities.

b. Regulatory framework and indigenous peoples' lands

While examining the framework for Nigerian environmental protection, Fagbohun highlights twenty four sectors of laws and regulations dealing with environmental protection in Nigeria.[515] The first sector is what the author regards as the general framework, namely, Constitution of the Federal Republic of Nigeria,[516] National Policy on Environment,[517] and National Environmental Standards and Regulations Enforcement Agency Act.[518] The other sectors are specific consisting of industries,[519] permitting and licensing system,[520] telecommunications,[521] noise,[522] marine and coastal areas resources,[523] sanitation,[524] mining & mineral resources,[525] greenhouse gas emission,[526] pest management,[527] water quality, efficiency and resources,[528] flora and fauna,[529]

[513] As above
[514] As above
[515] O Fagbohun 'Mournful remedies, endless conflicts and inconsistencies in Nigeria's quest for environmental governance: Rethinking the Legal possibilities for sustainability' (2012) Nigerian Institute of Advanced Legal Studies19-24
[516] Constitution of the Federal Republic of Nigeria (1999)
[517] National Policy on Environment, Act 42 (1988)
[518] National Environmental Standards and Regulations Enforcement Agency Act (NESREA), (2007)
[519] National Environmental (Domestic and Industries Plastic, Rubber and Foam Sector) Regulations (2011); National Environmental (Food, Beverages and Tobacco Sector) Regulations (2009); National Environment (Textile, Wearing Apparel, Leather and Footwear Industries) Regulation (2009); National Environment (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) Regulations (2009); National Environment (Electrical/ Electronic Sector) Regulations (2011)
[520] National Environmental (Permitting and Licensing System) Regulations (2009)
[521] National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations (2011)
[522] National Environmental (Noise, Standards and Control) Regulations (2009)
[523] National Environmental (Coastal and Marine Area Protection) Regulations (2011)
[524] National Environmental (Sanitation and Wastes Control) Regulations (2009); Quarantine Act (2004)
[525] National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations (2009) Minerals and Mining Act, LFN, 2004; National Environmental (Non-Metalic Mineral Manufacturing Industries Sector) Regulations (2011); Oil Pipelines Act, Cap. 07, LFN (2004); Petroleum Act, Cap. P10 LFN (2004); Petroleum Regulations, L.N 71 of 1967; Petroleum (Drilling & Production) Regulations, L.N. 69 of 1967; Oil in Navigable Waters Act, Cap. 06 LFN 2004; Oil in Navigable Waters Regulations, L.N 101 (1968)
[526] National Environmental (Ozone Layer Protection) Regulations (2009)
[527] Bees (Import Control and Management) Act, LFN (2004); Animal Diseases (Control) Act (2004)

waste management,[530] settlements,[531] energy use,[532] noise pollution,[533] land use and soil conservation,[534] toxic and hazardous substances,[535] water resources,[536] resource conservation,[537] wildlife,[538] forestry,[539] and air pollution.[540] Although this categorisation may be a useful tool of analysis of climate change regulatory environment in Nigeria, as some of these sectors may overlap, it is merely one of academic convenience. For instance, a sector such as forestry which author highlights as a stand-alone is certainly a component reflected in other sectors including wildlife, resource conservation, land use and soil conservation, water quality, efficiency and resources.[541]

Illustrating that this sectional overlap cannot be ruled out in the context of climate change regulatory framework is the REDD+ measure which though relates closely to forestry but is governed by laws and policies cutting across different sectors relating to the environment. Hence, in assessing the regulatory framework in Nigeria, the above framework dealing with REDD+ is of little assistance. Rather, what is important are the instruments highlighted in the documentation filed by Nigeria. As indicated in the documentation, the applicable framework features instruments namely, National Forestry Policy,[542] National Policy on Environment,[543]

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[528] National Water Resources Institute Act, Cap W2, LFN (2004); Oil in Navigable Waters Act, Cap O6, LFN (2004) Water Resources Act, Cap W2, LFN (2004); National Environmental (Surface and Groundwater Quality Control) Regulations (2011)
[529] National Crop Varieties and Livestock Breeds (Regulation) Act, LFN (2004)
[530] National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations (1991); Harmful Waste (Special Criminal Provisions) Act, Cap H1, LFN (2004)
[531] Nigerian Urban and Regional Planning Act, Cap N138, LFN (2004)
[532] Energy Commission of Nigeria Act, Cap E10, LFN (2004); National Atomic Energy Commission Act, Cap N91, LFN (2004); National Safety and Radiation Protection Act, Cap N142, LFN (2004)
[533] National Environmental (Noise, Standards and Control) Regulations (2009)
[534] Land Use Act, L5, LFN (2004); Land Use (Validation of Certain Laws, etc) Act, Cap L6, LFN (2004); Land (Title Vesting, etc.) Act, LFN (2004); National Environmental (Soil Erosion and Flood Control) Regulations (2011); National Environmental (Construction Sector) Regulation (2011)
[535] Harmful Waste (Special Criminal Provisions) Act, Cap H1 (2004); National Environmental (Base Metals, Iron and Steel Manufacturing/ Recycling Industries Sector) Regulations (2011)
[536] National Water Resources Institute Act, Cap N83, LFN (2004); Territorial Waters Act, Cap T5, LFN (2004)
[537] Federal National Park Service Act, Cap N65, LFN (2004); National Environmental (Access to Genetic Resources and Benefit-Sharing) Regulations (2009)
[538] Endangered Species (Control of International Trade and Traffic) Act, LFN (2004) Gaming Machines (Prohibition) Act, Cap G1, LFN (2004); Hides and Skin Act, Cap H3, LFN (2004); Animal Disease (Control) Act, Cap A17, LFN (2004); National Environmental (Protection of Endangered Species in International Trade) Regulations, 2011
[539] National Forestry Policy (1988)
[540] National Effluent Limitation Regulations, Special Instrument No 8, (1991); Associated Gas Re-injection Act, Cap A25, LFN (2004); The Associated Gas Re-injection (continued flaring of Gas) Regulation, LFN (2004); National Environmental Protection (Effluent Limitation) Regulations (1991); National Environmental (Control of Bush, Forest Fire and Open Burning) Regulations, (2011); National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations (2011)
[541] Fagbohun (n 515 above)
[542] National Forestry Policy (1988)
[543] National Policy on Environment, Act 42 (1988)

Land Use Act,[544] National Environmental Standards and Regulations Enforcement Agency (NESREA) Act,[545] and the Law on the Management and Sustainable Use of the Forest Resources of Cross River State.[546] The argument is made that in ensuing section that while there are useful provisions in these policies and laws relevant to REDD+ activities in Nigeria, generally these policies and laws remain inadequate in safeguarding the land tenure and use of indigenous peoples.

i. Legislation environment and REDD+

The 1999 Constitution recognises in its provisions, the significance of improving and protecting the environment. For instance, according to its section 20, it is a key aspect of state fundamental objective to improve and protect the air, land, water, forest and wildlife of Nigeria. This provision when interpreted along with the African Charter to which Nigeria is a state party can be progressively engaged, as it has been argued, to safeguard the right to healthy environment in Nigeria.[547] It is, however, of doubtful relevance for safeguarding the right to land of indigenous peoples in the context of the implementation of REDD+. What is more certain is that it can be used as a sword by the state to displace forest-dependent populations on the ground that their activities are detrimental to the environment. The possibility of this is visible in the content of laws made often pursuant to the Constitution.

For instance, the Land Use Act undermines the customary ownership of land through a number of its provisions. The purport of section 1 of the Act is to vest ownership of land in the State to hold in trust and administered for the use and common benefit of all Nigerians while section 2 of the Act empowers the Governor of a State as well as the Local Government to assume control and management over all the lands in their respective territories. Further reinforcing these provisions, section 28 of the Act provides that land may be appropriated for 'overriding public

[544] Land Use Act L5, LFN (2004)
[545] National Environmental Standards and Regulations Enforcement Agency Act (NESREA), (2007)
[546] Cross River State of Nigeria *A Law to make provisions for the establishment of the State Forestry Commission; and for the purposes of providing sustainable management of the forest and wild life resources, preservation and protection of the ecosystem in Cross River and others connected therewith* Law No.3, 2010 (Cross-River Law on Sustainable Management of Forest Resources)
[547] EP Amech 'Litigating right to healthy environment in Nigeria: An examination of the impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009 in ensuring access to justice for victims of environmental degradation' (2010) 6 *Law, Environment &Development Journal* 320

interests' which is defined as including 'the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith'.

The impact of the foregoing provisions on customary ownership of land in Nigeria has been considered by the Supreme Court in *Abioye v Yakubu*.[548] In that case, the Court held that the effects of the Act on customary land-holding included the:

> (1) removal of the radical title in land from individual Nigerians, families, and communities and vesting the same in the governor of each state of the federation in trust for the use and benefit of all Nigerians (leaving individuals, etc, with 'rights of occupancy'); and
>
> (2) removal of the control and management of lands from family and community heads, chiefs and vesting the same in the governors of each state of the federation (in the case of urban lands) and in the appropriate local government (in the case of rural lands).[549]

The injustices of the foregoing impact of the Act, particularly in relation to customary ownership of land resources have been a subject of spirited academic discourse. In Omeje's view, the Act 'technically facilitates the acquisition and use of land for oil activities',[550] and in the context of Niger Delta, Ako argues that the Act is a triggerer of conflict and an obstruction to the realisation of environmental justice.[551] Arguably, the Land Use Act is a disincentive to co-operation of indigenous communities in implementing the REDD+ activities. This is because it curtails the customary ownership of land, which is critical in forest protection.

A bill on National Forestry was produced in 2006 and it has since been reviewed by the National Assembly. If the aim of this bill, as it has been mentioned,[552] is to give legal backing to the National Forestry Policy, then the Act will contribute little to safeguarding the land tenure and use of indigenous peoples or forest-dependent communities in Nigeria. Supporting this position is the reference of the National Forestry Policy to the Land Use Act, the application of which is implied in the Draft National Forestry bill. Arguably, the reference to the Land Use Act by the Policy connotes that provisions of the Act which undermine indigenous peoples' land tenure and use will equally govern the application of bill if eventually passed into law.

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[548] *Abioye v Yakubu* (1991) 5 NWLR (pt 190) 130 (*Yakubu* case)
[549] *Yakubu* (n 548 above) 223, paras (d)-(g) per Obaseki JSC
[550] K Omeje *High stakes and stakeholders: Oil conflict and security in Nigeria* (2006) 47
[551] RT Ako 'Nigeria's Land Use Act: An anti-thesis to environmental justice' (2009) 53 *Journal of African Law* 289-304
[552] Draft National Forestry Act (2006)

Another law indicated by the NPD as relevant to REDD+ activities in Nigeria is the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act,[553] which repealed the Federal Environmental Protection Agency Act (FEPA Act) of 1988.[554] The responsibilities of NESREA that are of particular relevance to the implementation of REDD+ activities are encapsulated in section 7 of the Act. These generally include enforcement and awareness facilitation. The enforcement responsibilities deal largely with formulation of environmental standards,[555] while awareness facilitation, which may also overlap into compliance responsibilities, centres on liaising with stakeholders and creation of public awareness on environmental standards and sustainable management.[556] To assist the Agency in giving full effect to its functions under the Act, section 34(b) of the Act empowers the Minister to make further regulations.[557]

Significantly, in addition to being silent on the issue of land tenure, NESREA embodies certain provisions which may undermine the implementation of the REDD+ project. Section 29 of NESREA empowers the Agency to co-operate with other Government agencies for 'the removal of any pollutant excluding oil and gas related ones discharged into the Nigerian environment'. However, as pollution in oil and gas activities may be connected with exploration of forest resources,[558] in exempting oil and gas pollution from its line of activities, this provision may compromise the need for consultation and compensation of forest-dependent communities and thus set bad precedent for dealing with these populations while implementing REDD+. Moreover, the Act criminalises conduct by any person which violate the provisions of section 26(1) dealing with the protection and improvement of the environment and land resources.[559] This can be detrimental to the forest-dependent communities while implementing REDD+ as it

[553] NESREA (2007); Nigeria NPD (n 125 above)
[554] For some relevance of FEPA and criticisms against its lifetime, see Fagbohun (n 515 above); OA Fagbohun '19 Years After FEPA Act: What future for the new Environmental Enforcement Agency Act, 2007' (2007) 2 *Journal of Current Practice* cited in Fagbohun (n 515 above)
[555] NESREA (2007 above) section 7 (a), (c), (d), (e), (f), (g), (h),(i) and (j)
[556] NESREA (2007 above) section 7(a) and (l) respectively
[557] So far in 2009, NESREA introduced 11 subsidiary legislation pursuant to section 34 of the Act while additional 13 subsidiary legislation were further introduced in 2011. For a list of NESREA laws and regulations, see, National Environmental Standards and Regulations Enforcement Agency 'Laws and regulations' http://www.nesrea.gov.ng/regulations/index.php (accessed 20 January 2014); see Fagbohun (n 515 above) 25
[558] R Ako & O Oluduro 'Bureaucratic rhetoric of climate change in Nigeria: International aspiration versus local realities' in F Maes *et al* (eds) *Biodiversity and climate change: Linkages at international, national and local levels* (2013) 3-31; AO Jegede 'Trouble in paradise: Prosecution of climate change related laws in Nigeria' in Gerardu, J *et al* (eds.) *Compliance strategies to deliver climate benefits* (2013) 50-53
[559] NESREA (2007 above) section 26(2)

can potentially be used in checkmating legitimate resistance of these communities about REDD+ projects on their land.

In CRS, the law titled 'A Law to make provisions for the establishment of the State Forestry Commission; and for the purposes of providing sustainable management of the forest and wild life resources, preservation and protection of the ecosystem in Cross River and others connected therewith' is a specialised law dealing with management of forest and resources.[560] This law contains provisions in respect of all the different types of forests within the state.[561] It defines the roles and responsibilities of all the potential stakeholders and beneficiaries of forest resources in the state.[562] The law allows for the protection, control and management of the forest to be directed by an established Commission in collaboration with other stakeholders including communities, civil society, and community based forest management association.[563] The law can indeed serve as a legal basis for the establishment of community based forest management (CBFM) to develop and manage resources from forest for 'sustainable use, socio-economic development of the community, protection and benefit-sharing'.[564] Interestingly, the law requires the Commission to comply with 'international conventions and treaties on natural resources management'.[565] A novel department that the law proposes is the Carbon Credit Unit that is largely required to give effect to the realisation of its provisions.[566]

Despite the forward looking provisions above, the reality is that the law will be largely shaped by the controversial content of existing legislation particularly the Land Use Act and the National Forest Policy. For instance, although it seems promising that the law offers a legal basis for the establishment of CBFM in which forest-dependent communities may participate, the control that these communities may have over affairs is limited. Rights which are crucial to indigenous peoples are curtailed by the provisions of the law forbidding alienation, lease, sale, transfer of

[560] Cross-River Law on Sustainable Management of Forest Resources (n 546 above)
[561] These are namely, state forest reserve, local government forest, community forest, private forest, wildlife sanctuary, forest plantation, strict nature reserve and gaden, park and urban forest; see section 24, Cross-River Law on Sustainable Management of Forest Resources (n 546 above)
[562] See for instances, Cross-River Law on Sustainable Management of Forest Resources (n 546 above) sections 1 and 3 respectively establishing the commission and its composition; section 9(1) which set out the various departments within the commission; section 29 on the duty of reserve settlement officer; sections 59 and 60 dealing with community based forest mangement
[563] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 42
[564] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 59
[565] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 6 (e)
[566] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 9 (3)

land without approval of the governor.[567] Further reinforcing this position are provisions affirming that the 'protection, control and management of forest reserves' shall be 'directed' by the Commission,[568] which is empowered to close right of way or water course in forest reserve.[569] In the law, there is overbearing prohibition of activities including cutting of forest for any use,[570] and harvesting of forest products.[571] With provisions criminalising activities such as cultivation of soil, herbage, erection of building and residence in the forests,[572] it effectively means that the forests is not legally inhabitable as territories belonging to the peoples who have historically lived and depended on its resources for survival.

Although the law provides for the Commission to be guided by international conventions which raises some hope about the application of a standard that can be beneficial to the forest-dependent communities, this is difficult to achieve. This is considering that being a unit in the federal system of Nigeria, CRS does not have the power to enter into a treaty by itself.[573] More importantly, going by the doctrine of covering the field,[574] the provision in the state law calling for strict compliance with international treaties can only be interpreted and understood in the light of article 12(1) of the 1999 Constitution which affirms that no treaty shall have the force of law except passed into law by the National Assembly. This signifies that international treaties will only apply in CRS in so far as they form part of the treaties ratified by the federal government. Finally, viewed from the angle of forest-dependent communities who live and use forests products for subsistence purposes, the law of CRS is unusually punitive as it places on the accused the burden of proof that he is not a criminal if found with forest products.[575] This approach itself is incompatible with article 36(5) of the 1999 Constitution which requires presumption of innocence as an important element of the right of an accused person to a fair trial.

[567] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 39
[568] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 42
[569] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 40(1)
[570] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 48
[571] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 50(1)
[572] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 83(1)
[573] Nigeria 1999 Constitution, art 12(1)
[574] Traceable to the common law, the doctrine of covering the field is a rule in constitutional law theory which applies to a federal government essentially to mean that acts of the federal government in a federal system of government are binding on the states and their agencies; for the meaning and judicial application of this doctrine in Nigeria, see *AG Abia and others v AG Federation and others* S.C. 99/2005, S.C. 121/2005, S.C. 216/2005 (Consolidated)
[575] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 92

ii. Policy environment and REDD+

The National Environmental Policy embodies a range of interesting provisions which are relevant to sustainable management of forests. In addition to its aim of securing a quality environment adequate for good health and well-being, the policy seeks the use and conservation of environment and natural resources for the benefit of present and future generations.[576] It also promotes enhancement of the ecosystem, public awareness, the understanding of the essential linkages between the environment, resources and development, as well as the encouragement of individual and community participation in environmental efforts.[577] A strategy for achieving this is through the prevention of the depletion of forests by controlling the demands and patterns of land resources usage as well as promoting alternative use of energy.[578] In order to promote land use and conservation, the National Policy encourages afforestation and reforestation programmes such as community based agro-forestry for soil enhancement,[579] and urges the prevention of excessive destruction of the forest as a means of protecting the forest.[580]

In order to achieve the health component of its vision, the policy aims at aiding community participation in the preparation and implementation of health and environmental activities and projects.[581] It supports the sharing of benefits and knowledge, expertise and technologies to ensure fair and equitable use of the biodiversity.[582] However, the policy has no provision on the tenure of indigenous peoples or forest-dependent peoples. This suggests that the issue of tenure is not considered as essential to environmental goal of the policy. Yet, this should not be the case considering that tenure is the corner stone of provisions relating to sustainable management of the environment.[583]

The overall objective of the National Forestry Policy is to achieve sustainable forest management, leading to sustainable increases in the economic, social and environmental benefits from forests and trees, for present and future generations, including the poor and vulnerable

[576] National Policy on the Environment, Act 42 (1988) section 2(a)(b) and (c)
[577] As above
[578] National Policy on the Environment, Act 42 (1988) section 4(10(i)
[579] National Policy on the Environment, Act 42 (1988) section 4(6)(h) and (9)(h)
[580] National Policy on the Environment, Act 42 (1988) section 4(9)(l)
[581] National Policy on the Environment, Act 42 (1988)section 4(16)(n); see generally, section 6(6) which deals with public participation
[582] National Policy on the Environment, Act 42 (1988) section 4(4)(g) and (20)(f)
[583] Rights and Resources Initiative *What future reform? Progress and slowdown in forest tenure reform since 2002* (2014)

groups.[584] The policy specifically seeks to support schemes that facilitate access to carbon markets,[585] and encourage forest-dependent people, farmers and local communities to advance their livelihoods through novel methods to forestry.[586] The strategy to implement this policy includes promoting broad partnerships, decentralization, community participation, and the active participation of women, youth and vulnerable groups.[587] It aims at assisting the poor in adapting to the impacts of climate change and benefiting from evolving carbon markets, through tree cultivation of forests.[588] It also provides that the aim of the policy is to guarantee tree ownership rights within the enabling laws and traditional practices and customs.[589]

However, while the policy makes copious references to land tenure and use, it is in the context of promoting the market and economic value of the forest for investment purposes. This is reflected in a number of its provisions. For instance, it aims at incentivising investment in forestry through improved land tenure and use.[590] Hence, the strategies to help in realising this include the building of a supportive legal basis for tree tenure, access rights, and sharing of benefits from wood and non-wood forest products.[591] Arguably, these provisions do not offer space for forest-dependent communities that may wish to refuse the implementation of REDD+projects. Also, the idea that the community may have unassailable tenure guarantee is undermined through the reference of the policy to the position under the 1978 Land Use Act that all land, including trees growing on it belongs to the state.

c. Implications of inadequate land tenure and use legislation

Emerging gap in land use and tenure security for indigenous peoples in the legal environment within which Nigeria is preparing for REDD+ activities connote further negative consequences for their participation, carbon rights and benefit-sharing, grievance mechanism and access to remedies.

[584] National Forestry Policy (1988) section 3(i)
[585] National Forestry Policy (1988) section 3(10(ii)
[586] National Forestry Policy (1988) section 3(1)(v)
[587] National Forestry Policy (1988) section 3(2) generally
[588] National Forestry Policy (1988) section 3(3)(10)(2)(vi)
[589] National Forestry Policy (1988) section 3(2)(27)
[590] National Forestry Policy (1988) section 3(1)(ix)
[591] National Forestry Policy (1988) section 3(3)(2)(3)(i)

i. Participation

That consultation has featured in the preparation for REDD+ activities cannot be disputed. The R-PP chronicles this range of events. On 31 January 2011, CRS REDD+ stakeholders forum was held to discuss Nigeria's REDD+ proposal workplan by government, formation of NGO and community stakeholders as well as committees to help with the preparation of the proposal and other REDD+ readiness activities.[592] The review of first draft of the REDD+ Readiness proposal was the focus of another dialogue which took place on 5 february 2011 with the representatives of federal government and CRS along with NGO and community stakeholders reportedly in attendance.[593] Subsequent submission of the draft proposal was followed by second mission visit by the UN-REDD to Nigeria in connection with the drafting of Nigeria REDD+ Readiness programme document. In this regard, an appraisal workshop was held in Calabar while a national validation workshop was held in Abuja between 14 and 23 february 2011.[594]

Between 18 and 20 May 2011, a Workshop on participatory governance assessments and their role in REDD+ (PGA/REDD+) was also held.[595] The outcome of this was the launch of Lagos Nigeria's PGA/REDD+ initiative. Supported by the United Nations Development Programme (UNDP), the PGAs aim at building governance for REDD under a country-led vision.[596] The added value of the PGA/REDD+ initiative lies in the fact that it aims at promoting ownership, stakeholder engagement and grassroots-based building of governance capacities. PGAs for REDD+ emphasise the inclusion of a wide range of stakeholders such as government officials, civil society actors, forest-dependent communities, national statistics offices, fiduciary control agencies, academia, and the media.[597] Launched in 2012, the PGA further aims at enhancing stakeholder's engagement participation in REDD+ governance. In January 2013, the preliminary results of the PGA/REDD+ research team was presented and discussed in a multi-stakeholder forum.[598]

[592] As above
[593] As above
[594] As above
[595] As above
[596] As above
[597] Nigeria NPD (n 125 above) 35
[598] Nigeria R-PP (n 139 above) 21

There are other reported consultative meetings held in connection with REDD+ activities. The Technical Consultation on Social and Environmental Safeguards in Nigeria was convened between 2 and 4 August 2011 to discuss the multiple benefits and risks associated with REDD+.[599] At that forum, participants provided comments on the draft UN-REDD Social and Environmental Principles & Criteria. On 20 August 2011, a Stakeholder workshop took place to review the comments received on the draft Nigeria REDD+ Readiness Programme, and proposed revisions and improvements, in the light of comments. On 21 July 2013, another round of R-PP consultation was convened to present the draft REDD+ R-PP to civil society members from CRS, potential new states and national level stakeholders in Abuja for their input.[600] Attention was paid at that meeting on consultation mechanism, stakeholder concerns and suggestions for a stronger involvement of the civil society,[601]and with input this was submitted to the UN-REDD Board in november 2013.

While the RPP documents series of meetings which have been held so far in connection with preparation for REDD+ activities,[602] concerns still exist that key stakeholders particularly the forest-dependent communities are not adequately represented at meetings. It has been reported that communities have in fact being wary of REDD activities because forest-dependent communities who are the traditional custodians of native forests have not been effectively involved in the REDD negotiation process.[603] Hence, in the guise of implementing REDD+, the concern has been expressed that these populations are likely going to be evicted from their land and denied access to the forests that constitutes the basis of their culture and livelihoods.[604] Indeed, the current view is that awareness about the mechanism remains low at all levels of engagement and that the attraction in REDD+ for the Nigerian government is not the protection or safeguard of the environment. Rather, it is the huge funds involved in the programme.[605]

[599] As above
[600] As above
[601] 'Notes from R-PP civil society consultations' FCPF R-PP CSO consultative meeting held on 22 July 2013, Organised by UNDP/Federal Ministry of Environment, Abuja in Nigeria' Annex 1b (ii) to the Nigeria R-PP (n 139 above)
[602] Nigeria R-PP (n 139 above) 56-57
[603] 'Don't sale forests, groups urge Nigerian governments' Appendix xiv to Nigeria Preliminary Assessment (n 133 above); REDD Monitor 'A wolf in sheep's clothing: REDD questioned in Cross River State, Nigeria' http://www.redd-monitor.org/2011/04/15/a-wolf-in-sheeps-clothing-redd-questioned-in-cross-river-state-nigeria/ (accessed 23 June 2014)
[604] As above
[605] As above

This concern resonates in the review of the R-PP of Nigeria. The Technical Advisory Panel (TAP), in its view comments that in spite of reported recognition given to community participation, much still requires to be done. Particularly, the RPP is criticised for not indicating any 'strong programme to support communities to build strong organisational structures and be equipped with the basic skills to participate in REDD+ projects'. This, in its view, is necessary so as to make these communities competent long term allies of REDD+ programmes.[606]

The TAP considers that the institutional arrangement for REDD+ activities particularly at the national level may lead to inefficiency of the mechanism. For instance, the TAP reasons that considering the federal structure of the country, there is need for R-PP to propose fewer but efficient structures for the management of REDD+ at both Federal and State levels.[607] This will reduce the potential risks of having too many structures and administrative layers, with attendant inefficiencies.[608] Particularly, the TAP regrets inadequate participation of forest users and community participation groups and recommends that the representation of such groups is vital in a National Stakeholder Platform for REDD+.[609]

The foregoing comments, however, ignore the crux of the issue that the approach so far being taken proceeds on the assumption of state ownership of land. Effective engagement of the forest-dependent communities in Nigeria in preparing for REDD+ activities will remain illusory if the issue of customary ownership of land is not safeguarded in the process of preparation. Excluding tenure security for forest-dependent communities in the REDD+ will continually undermine participation in the programme.

ii. Carbon rights and benefit-sharing

To accord carbon rights to the forest-dependent communities or involve them in equitable benefit-sharing without security of tenure is hardly possible. It is an important incentive for them to protect the area and fulfill the ultimate end of REDD+. According to the RPP, the National REDD+ Programme will aim at land tenure and use rights to local forest groups.[610] It also

[606] Nigeria synthesis report (n 474 above) 3
[607] Nigeria synthesis report (n 474 above) 4
[608] As above
[609] As above; this viewpoint was also confirmed by a participant from Nigeria at the UNFCCC 'Africa Regional Workshop for Designated National Authorities' 30 June-4 July 2014, Windhoek, Namibia
[610] Nigeria R-PP (n 139 above) 52

indicates the importance of defining the concept of 'carbon concession' to encompass 'rights by individuals, communities, or the state, or a mix of rights and responsibilities among them'.[611] However, this suggestion is hardly possible without revamping the entire framework dealing with land tenure and use in Nigeria. For instance, as earlier mentioned, forest-dependent communities or indigenous peoples in Nigeria cannot enjoy carbon rights or exercise grant of concessions except if land tenure and use is recognised.

Closely associated with the foregoing is the issue of benefit-sharing. While the specialised law in CRS at least embodies provisions dealing with carbon and concessions,[612] these provisions seem redundant due to continuing influence of the Land Use Act which prescribes an unhelpful approach to compensation. According to the Land Use Act, where land is expropriated by the state, compensation will apply as follows:

> If the holder or the occupier entitled to compensation under the section is a community, the governor may direct that any compensation payable to it shall be paid to the chief or leader of the community to be disposed of by him for the benefit of the community, in accordance with applicable customary law.[613]

The implication of the above provision on benefit-sharing is that the government prefers to deal with chief or leader of the forest-dependent communities for the purpose of sharing proceeds emanating from REDD+ process. This is risky in that with such an approach, benefits may not get to the hand of the mainstream population. Obeku has, for instance, demonstrated that in case of compensation for land compulsorily acquired for oil production in the Niger Delta Region, compensation is paid by government to community headsmen and community members hardly receive any portion.[614] It is therefore not surprising that in reviewing the RPP, the TAP notes that it is important that government should pay attention to the issue of carbon rights and benefits as these are an important framework on which depends the participation, particularly by rural communities,[615] and arguably their co-operation for the success of REDD+.

[611] Nigeria R-PP (n 139 above) 61
[612] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 9(3)
[613] Land Use Act, section 29 (3)(b)
[614] K Ebeku 'Oil and the Niger Delta people: The injustice of the Land Use Act' (2001) *CEPMLP Internet Journal* 9-14; also see Constitutional Rights Project (CRP) 'Land, oil and human rights in Nigeria's delta region (1999, CRP) 15-16
[615] Nigeria synthesis report (n 474 above) 9

iii. Grievance mechanism and access to remedies

As part of the evolving national REDD+ activities, according to the R-PP, a mechanism for securing effective communication and redressing of concerns is necessary. Examples of such concerns may arise over the implementation of measures or the process of seeking Free Prior Informed Consent (FPIC).[616] This is indeed important to ensure that the concerns of marginal or vulnerable groups are adequately represented and respected.[617] However, in prescribing the appropriate grievance mechanism, the R-PP proposes for Nigeria an 'internet-based grievance mechanism and a 'red-line' to the REDD+ Secretariat. In explaining what is meant by the 'red-line', it indicates that this includes phone calls on REDD+ including complaints.[618]

The above grievance model being proposed appears culturally insensitive and inconsiderate of the realities of the forest-dependent communities who may have no access to any of these facilities let alone utilise it for complaint solving purposes. There is potential adverse consequence to this in that it may lead to self-help for the resolution of their grievances and access to deserving remedies. In preparing for the REDD+ process, this option is infact reactive rather than preventative and further undermine the concept of dispute resolution as understood by these populations. It is thus not surprising that in reviewing the R-PP, the TAP notes that as part of the implementation process, there is need for a clear grievance mechanism indicating procedures of seeking redress, 'which goes beyond communication of problems and concerns'.[619] While, under the CRS Law on Sustainable Management of Forest Resources, the options of resorting to a 'dispute settlement committee' for resolving issues is on offer,[620] this is of little assistance. The Committee is set up by the commission pursuant to the law and not in line with the customs and traditions of these communities.[621] Besides, without the recognition of a secured tenure system for indigenous peoples, the grievance mechanism model being proposed by the R-PP for access to remedy cannot be effective. This is because the non-recognition of tenure already defines the scope of disputes which may be entertained by such dispute settlement Committee.

[616] Nigeria R-PP (n 139 above) 32
[617] Nigeria R-PP (n 139 above) 16
[618] Nigeria R-PP (n 139 above) 32
[619] Nigeria synthesis report (n 474 above)
[620] Cross-River Law on Sustainable Management of Forest Resources (n 546 above) section 60(5)
[621] As above

5.3 Conclusion

The national level offers a platform for the domestic application of international policy content. However, evidence from states in Africa such as Tanzania, Zambia and Nigeria indicates the trend in the national application of international climate change regulatory framework on adaptation and mitigation may not safeguard the land tenure and use of indigenous peoples in Africa. With respect to adaptation, the process and compilation of NAPA and national communications are necessary to access different adaptation funds on offer at the international level. In consequence, the NAPA of Tanzania indicates that adaptation concerns in that country include human, social, financial and physical losses due to the adverse impacts of climate change. Issues detailed for Zambia include climate adverse effects around livelihoods, health and socio-economic sectors. For Nigeria, being a non-LDC state, it has filed a communication with an adaptation component instead of a NAPA which reveals soil erosion, flooding and the loss of livestock as general challenges. However, the NAPA and national communication of these states are silent on pertinent issues relating to land use and tenure system of indigenous populations. This raises a serious doubt about the participation of indigenous peoples, quality of the process, accessibility to adaptation funds and neglect of the coping strategies of indigenous peoples.

As a core mitigation measure, Tanzania, Nigeria and Zambia are participating in the REDD+ initiative under the UN-REDD national programme. The UN-REDD Programme between 2011 and 2015 focuses on rendering support to the participating countries in getting ready for the implementation of REDD+. A critical aspect of this stage is the reform of the policy and legal environment in preparation for the implementation of the REDD+. Efforts are being made by Tanzania, Nigeria and Zambia to reform laws in preparation for the implementation of the REDD+. Nonetheless, an assessment of the domestic regulatory framework in place for the implementation of the REDD+ in relation to indigenous peoples' land tenure and use, reveals that the institutional, as well as the normative, reality at the domestic level does not offer much protection to indigenous peoples. In addition to the inadequate protection of land tenure and use, the arrangement can be faulted on the grounds of inadequate attention to participation, carbon rights and benefit-sharing, as well as a grievance mechanism and access to remedy. The next chapter demonstrates how human rights can be constructed as a regional response to address this weakness.

Chapter 6

The inadequacy of the national climate change regulatory framework in relation to indigenous peoples' lands: Human rights as regional response

6.1 Introduction

The preceding chapter demonstrates that the climate change regulatory framework at the national level in relation to the protection of indigenous peoples' lands is inadequate and of implications for other issues, namely indigenous peoples' participation, carbon rights and benefit-sharing, as well as access to grievance mechanism and remedies. Against this backdrop, this chapter argues that recourse can be had to regional human rights instruments and institutions to address the inadequate protection of indigenous peoples' lands under the domestic climate change regulatory framework. The chapter anchors the argument by three legal reasons. The first is the incompatibility of the inadequate climate change regulatory framework at the domestic level with the regional human rights obligations of state and rights guaranteed under regional human rights instruments. The second ground is that there is potential in the emerging regional climate change regulatory framework to link it to human rights. Finally, the argument in support of recourse to the regional human rights system is based on the potential of the regional human rights mechanisms to address the inadequacy of the climate change regulatory framework at the national level in relation to the protection of indigenous peoples' lands in Africa.

6.2 Legal basis for engaging human rights at the regional level

Scholars of regionalism have shown that some potential exists at the regional level to solve cross border challenges. The role of regional institutions in shaping human rights at the national level has also been discussed. For instance, although arguing that the ideal situation is that international human rights should be enforceable and implemented at the national level for it to be meaningful, Viljoen notes that a regional human rights system is not without its benefit, allowing for 'interlocking interests, opening the possibility for faster response and improved

implementation when states are closely bound by economic and political terms'.[1] This reasoning seems also a valid justification of regional human rights system because, if a national government is unwilling to observe human rights, seeing or experiencing that states with which it has 'interlocking interests' are observing rights may be a strong incentive within the regional system toward implementing human rights at the national level. In reinforcing this position, Ssenyonjo argues:

> Where national courts have for political reasons been unwilling to enforce human rights, the African human rights institutions established under the African Charter or its Protocol have been an effective forum for holding States accountable.[2]

Hence, human rights at the regional level can serve as a veritable tool in shaping domestic compliance.

Similarly, in terms of a global environmental issue such as climate change, the effectiveness of regionalism has been a subject of discussion in the literature. Alagappa explains that regional institutions are a significant 'component of the global architecture for environmental governance'.[3] Explaining the different waves of regionalism in the context of environmental protection, Hettne notes that regionalism is useful in solving transboundary environmental problems, particularly those that 'were not effectively tackled at the national level'.[4] Regional institutions are helpful, according to Birdsall and Lawrence, in addressing challenges to environmental protection.[5] Considering that it operates between the national and global level, Katzenstein notes that regional developments 'as in the story of Goldilocks, are neither too hot, nor too cold, but just right'.[6] In line with a regional approach, the preamble of the United Nations Framework Convention on Climate Change (UNFCCC) recognises the vulnerability of populations to the impact of climate change and enjoins regional policies and programmes on

[1] F Viljoen *International human rights law in Africa* (2012) 10
[2] M Ssenyonjo 'Strengthening the African Regional Human Rights System' in M Ssenyonjo (ed) *The African regional human rights system: 30 Years after the African Charter on Human and Peoples' Rights* (2011) 455-480, 456
[3] M Alagappa 'Energy and the environment in Asia-Pacific : Regional co-operation and market governance' in PS Chasek (ed) *The global environment in the twenty-first century: Prospects for international co-operation* (2000) 255-270
[4] B Hettne 'Beyond the 'new' regionalism' (2005) 10 *New Political Economy* 543, 549
[5] N Birdsall & RZ Lawrence 'Deep integration and trade agreements: Good for developing countries?' in I Kaul, I Grunberg & MA Stern (eds) *Global public goods: International co-operation in the 21st Century* (1999) 128-51
[6] PJ Katzenstein 'After the global crises: What next for regionalism?' (September1999) http://www2.warwick.ac.uk/fac/soc/csgr/events/conferences/1999_conferences/3rdannualconference/papers/bowles.pdf (accessed 19 April 2014)

mitigation and adaptation.[7] However, states are yet to fully tap from the added value of regional environmental architecture. As Elliot and Breslin argue, with the exception of the European Union where there is extensive development of activities and corresponding literature, detailed analysis of regional activities elsewhere is a 'fairly new and thinly populated areas of academic investigation'.[8]

In making the argument for the necessity of resorting to a regional solution for addressing the inadequacy of the climate change regulatory framework and how human rights can be employed in this regard, it is important to note that a regional system is not without its challenges. There is evidence which warns that the usefulness of the approach should not be overrated. For instance, in the case of the human rights system, these weaknesses include weak compliance with decisions, inadequate capacity and resources.[9] Also, in the specific context of the adverse impacts of climate change, as observed earlier, Africa does not have an homogenous experience of climate change.[10] A fact that can be used in supporting the argument that, despite the general weaknesses of national regulatory frameworks, interventions at that level are the most effective. However, these arguments can be countered.

First, weak compliance with regional decisions is problematic, but it is not yet proved that governments are more willing to comply with the unfavourable decisions of their national courts than they are with foreign decisions of a similar nature. Rather, the unfortunate reality is that whether decisions against the state are national or regional, the political leadership ultimately takes the decision on compliance and non-compliance with decisions.[11] Second, even if its decisions are not complied with, the regional system arguably fulfills its purposes of oversight and standard setting in so far as individuals are able to derive solutions from the system that are unavailable at the domestic level. Hence, the potential to be vocal on an issue in respect of which

[7] United Nations Framework Convention on Climate Change (UNFCCC) adopted at World Conference on Environment and Development at Rio de Janeiro, 3-14 June 1992, Preamble and art 4(1)(b)
[8] L Elliot & S Breslin 'Researching comparative regional environmental governance: Causes, cases and consequences' in L Elliot & S Breslin (eds) *Comparative regional environmentalism* (2011) 1-18, 2
[9] Viljoen (n 1 above)
[10] P Collier, G Conway & T Venables 'Climate change and Africa'(2008) 24 *Oxford Review of Economic Policy* 337
[11] In Nigeria, for instance, under a democratic regime, the then administration of Chief Olusegun Obasanjo did not comply with decision of the Supreme Court of Nigeria, see AC Dialla 'The dawn of constitutionalism in Nigeria' in M Mbondeyi & T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* (2013) 135-162; however his administration is zealous about implementing the decision of the International Court of Justice on the Bakassi region, see Political Records 'Address by President Obasanjo on the transfer of Bakassi' http://politicalrecords.blogspot.com/2013/05/address-by-president-obasanjo-on.html (accessed 20 May 2014)

the domestic system is quiet is an important element that distinguishes recourse to a regional system. Third, the issue of oversight and standard setting is particularly important in the context of protection of vulnerable groups, such as indigenous peoples, and addressing a global challenge such as climate change. This is because the absence of such oversight and standard setting can be fatal. For indigenous peoples in Africa, for instance, merely abandoning their protection to domestic framework may endorse a differentiated approach whereby one national government recognises the peculiar plight they suffer in the light of adverse effects of climate change, their identity and land rights while another state may act to the contrary. Such differentiated approach is inconsistent with the notion of universality of human rights. Last, even if the experience of climate change differs, there is a commonality in terms of its negative consequences, particularly in relation to indigenous peoples' vulnerability. It thus merits consideration the extent to which human rights at the regional level can complement the emerging climate change regulatory framework in addressing the gap at the domestic level.

Resorting to regional human rights for the protection of indigenous peoples is based on certain reasons. First it is due to the inconsistency of a weak framework at the national level with the obligations of state under regional human rights instruments. The second reason is that there is potential in the emerging regional climate change regulatory framework for a link with human rights. The last basis is that potential exists within the regional human rights mechanisms to address the inadequacy of the climate change regulatory framework at the national level in relation to the protection of indigenous peoples' lands in Africa.

6.2.1 Inconsistency with obligations and range of rights under human rights instruments

The incompatibility of the weakness of the climate change regulatory framework at the national level with their obligations and the range of rights is a strong legal basis for resorting to human rights instruments at the regional level for the protection of indigenous peoples' land use and tenure. Failure by a state to formulate appropriate legislation for the protection of indigenous peoples' land tenure and use in the context of the adverse impacts of climate change at the national level is incompatible with the obligations of that state and constitutes a threat to a range of rights guaranteed under human rights instruments.

6.2.1.1 Human rights instruments and state obligations

From the outset, it should be noted that application of human rights instruments with reference to accountability in respect of the subject of climate change is problematic because every nation, developed or developing, contributes to climate change as a result of the quest for development.[12] Also, developed states, which are involved in the implementation of climate response projects, are not accountable under international human rights law in the domestic courts of the states where projects are implemented.[13] Additionally, as the current state of international human rights indicates, suits against international organisations from domestic jurisdiction,[14] and accountability of non-state actors,[15] in the implementation of the climate change response measures are in doubt.[16] It is not surprising that outcomes have shown the challenge and frustration in relying on quasi and judicial bodies to address the climate change problem.

For instance, in *KIP Barhaugh and others v State of Montana*,[17] the Montana Supreme Court denied a petition to declare that the atmosphere is a public trust and that the government has a duty to protect and preserve the atmosphere. The Court stated that it is ill-equipped to deal with the factual matters in the case. Academic writers have resonated a similar position. Allen argues that it will be difficult to sue any State for damaging the climate.[18] Also, when indigenous peoples attempted to challenge the United States before the Inter-American Commission for its failure to regulate the activities of its companies, which they argue are largely responsible for the

[12] S Adelman 'Rethinking human rights : The impact of climate change on the dominant discourse' in S Humphreys (ed) *Human rights and climate change* (2010) 159-179, 169
[13] In Nigeria, Sweden is involved in Kanji Hydropower Electrification Process, see 'Project Design Document Form (CDM PDD) - Version 03' http://cdm.unfccc.int/filestorage/u/q/6UQ72R4GL19SC0EPOJFZAT83NXHDYB.pdf/PDD_Kanji_121220.pdf?t=V1l8bjBzNnJofDDA0TH8Clb1e-j1CW2RGt3r (accessed 10 March 2014)
[14] In the case of REDD+ activities in Cross River State Nigeria, participating United Nations Organisations are Food Agricultural Organisation (FAO), United Nations Environmental Programme (UNEP) and United Nations Development Programme (UNDP) see UN-REDD Programme 'National Programme Document Nigeria' (2011) UN-REDD/PB7/2011/8
[15] In the Kanji Hydropower Electrification Process, International International Bank for Reconstruction and Development is involved as a private party see 'Project Design Document Form (CDM PDD)-Version 03' http://cdm.unfccc.int/filestorage/u/q/6UQ72R4GL19SC0EPOJFZAT83NXHDYB.pdf/PDD_Kanji_121220.pdf?t=V1l8bjBzNnJofDDA0TH8Clb1e-j1CW2RGt3r (accessed 10 March 2014)
[16] For instance, international organisations generally enjoy immunity when performing their institutional purpose, see K Tesfagabir 'The state of functional immunity of international organisations and their officials and why it should be streamlined' (2011) 10 *Chinese Journal of International Law* 97, 99
[17] *KIP Barhaugh and others v State of Montana* No. OP 11-0258; also see, *Bund für Umwelt und Naturschutz Deutschland e and others v the Federal Republic of Germany* , VG 10 A 215.04
[18] M Allen 'Liability for climate change: Will it ever be possible to sue anyone for damaging the climate?' (2003) 421 *Commentary in Nature* 891; RE Jacobs 'Treading deep waters: Substantive law issues in Tuvalu's threat to sue the United States in the International Court of Justice' (2003) 14 *Pacific Rim Law & Policy Journal* 103

current climate status and the despoliation of the Arctic, the outcome was unsuccessful.[19] Hence, the experience at regional level confirms the views of Posner and Shi-Ling Hsu, who respectively argue that it is unwise to expect that litigation can be used in addressing climate change impacts and, even if successful, that it is unlikely to make any difference.[20]

Notwithstanding the foregoing, it is commonplace that states in Africa, as duty bearers, have an obligation under international human rights law towards their citizens, as rights holders.[21] It is against this backdrop that this section discusses the obligations of states and their accountability under human rights in three regional instruments which have a direct bearing on the circumstances of indigenous peoples in the context of the adverse impacts of climate change in Africa: the African Charter on Human and Peoples' Rights (African Charter),[22] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),[23] and the African Convention on the Conservation of Nature and Natural Resources (Revised version).[24]

a. African Charter on Human and Peoples' Rights

Since its adoption on 27 June 1981, all fifty four states in Africa, except South Sudan, have ratified the African Charter.[25] Arguably, the wide ratification of the instrument makes it the most effective tool at the regional level to address the gap in the domestic climate change regulatory framework in respect of the protection of indigenous peoples' land rights. Generally, the Charter recognises the collective rights and state obligations which can be engaged by indigenous peoples in addressing areas in which the protection of rights is weak at a national climate change

[19] 'Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations resulting from global warming caused by acts and omissions of the United States on behalf of all Inuit of the Arctic Regions of the United States and Canada' http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf (accessed 13 December 2013) (Inuit Petition)
[20] Shi-Ling Hsu 'A realistic evaluation of climate change litigation through the lens of a hypothetical lawsuit' (2008) 79 *University of Colorado Law Review* 101; EA Posner 'Climate change and international human rights litigation:A critical appraisal' (2007) 155 *University of Pennsylvania Law Review* 1925; also see, J Gupta 'Legal steps outside the Climate Convention: litigation as a tool to address climate change' (2007) 16 *RECIEL* 76
[21] S McInerney-Lankford 'Climate change and human rights: An introduction to legal issues' (2009) 33 *Harvard Environmental Law Review* 431; IE Koch 'Dichotomies, trichotomies or waves of duties?' (2005) 5 *Human Rights Law Review* 81
[22] African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986 (African Charter)
[23] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted by the Special Summit of the Union held in Kampala, Uganda, 23rd October 2009
[24] The African Convention on the Conservation of Nature and Natural Resources (Revised version) (Conservation Convention 2003)
[25] 'Ratification table: African Charter on Human and Peoples' Rights' http://www.achpr.org/instruments/achpr/ratification/ (accessed 20 April 2014); for a history on the development leading to the adoption of the African Charter, see Viljoen (n 1 above) 151-161

regulatory framework level. In addition to providing in article 24 for the right to a satisfactory environment, other collective rights in the African Charter are, namely, the rights to existence and self-determination,[26] free disposal of wealth and natural resources,[27] economic, social and cultural development,[28] and national and international peace.[29] The rights guaranteed under the Charter include a range of individual rights, notably, freedom from discrimination, equality before the law, respect for life and integrity of person, human dignity, liberty and security of the person, access to judicial remedies, freedom of conscience, freedom of information and free association, assembly, movement, participation, property, employment, physical and mental health, and education.[30] The African Charter provides for specific obligations such as the adoption of 'appropriate legislative or other measures to give effect' to the rights guaranteed under the Charter,[31] and the 'establishment and improvement of appropriate national institutions' with a view to protecting rights under the Charter.[32]

Articles 60 and 61 of the African Charter empower the African Commission on Human and Peoples' Rights (the Commission) to draw inspiration from international law and international human right laws and consider such as part of subsidiary measures to determine legal principles. Essentially, it signifies that the African Charter can be used as a basis to imply human rights implicit in the Charter, more so when they are relevant to the protection of rights and are guaranteed under other human rights instruments.[33]

b. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa

The Kampala Convention is a regional instrument that specifically aims at protecting and assisting persons displaced internally in Africa. Although largely devoted to displacement within a national boundary, when read with the African Charter, a number of its provisions portray that the instrument is capable of application in the protection of indigenous communities displaced by

[26] African Charter, art 20
[27] African Charter, art 21
[28] African Charter, art 22
[29] African Charter, art 23
[30] See respectively, African Charter, arts 2-17
[31] African Charter, art 1
[32] African Charter, art 26
[33] On implied rights, see Viljoen (n 1 above) 327-329 which is explained by the author as the acceptance and application by the Commission of rights implicit but not explicitly guaranteed under the African Charter

climate change in Africa. In doing so, the Kampala Convention serves as an important bridge over the weakness in the climate change regulatory framework in protecting indigenous peoples' lands. The basis for such a linkage is article 20(1) of the Kampala Convention which requires that the provisions of the African Charter that safeguard human rights should be used in interpreting the Convention. Particularly, reinforcing the incorporation of the African Charter by the Kampala Convention, is article 20(2). According to this provision, the Kampala Convention shall apply 'without prejudice to the human rights of internally displaced persons' under the African Charter and other relevant instruments of international human rights law or international humanitarian laws. It further indicates that no provision of the Kampala Convention should be 'understood, construed or interpreted as restricting, modifying or impeding existing protection under any instruments mentioned under the Convention'.

Article 20(3) signifies that the provisions of the Convention are enforceable under the African human rights system as a result of its endorsement of the right of internally displaced persons to lodge a complaint with the Commission or the African Court of Justice and Human Rights, or any other competent international body.[34] In addition to the incorporation of the African Charter, the Convention has unique provisions of its own. For instance, it defines internally displaced persons as:

> [p]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.[35]

In addition to highlighting that displacement can arise from 'natural or human- made disasters', the Kampala Convention specifically refers to the obligations of states to protect and assist persons displaced by climate change. In particular, article 5(4) requires states to take measures to protect and assist persons who have been internally displaced due to natural or human-made disasters, including climate change. Similarly, the possibility that persons adversely affected by climate change may include indigenous communities, is recognised through article 4(5) of the Kampala Convention which enjoins parties to the Convention to 'protect communities with

[34] Kampala Convention, art 20(3)
[35] Kampala Convention, art 1(k)

special attachment to, and dependency, on land due to their particular culture and spiritual values'. The Kampala Convention further provides that parties should ensure that such communities are not displaced from their lands, except for compelling and overriding public interests.[36]

c. African Convention on the Conservation of Nature and Natural Resources

Adopted in Maputo, Mozambique, on 11 July 2003, the African Convention on the Conservation of Nature and Natural Resources, as revised (Conservation Convention),[37] is an improvement upon its antecedent, the African Convention on the Conservation of Nature and Natural Resources.[38] It has a range of interesting provisions that have direct and indirect potential to address the gap in the climate change regulatory framework on the protection of indigenous peoples' land use and tenure. More specifically, it calls for states to take measures in key areas which are vital in addressing the impacts of climate change on indigenous peoples' lands. States are to take measures to prevent land and soil degradation, protect and conserve vegetation cover which include forest covers[39] and manage water resources.[40]

Viljoen has questioned whether the instrument is a human rights instrument and therefore amenable to interpretation by the African Court of Human and Peoples' Rights.[41] The basis for this, as the author argues, lies in its article XXXV which provides that its provisions 'do not affect the rights and obligations of any Party deriving from existing international treaties, conventions or agreements'.[42] This provision can be interpreted as distinguishing the Conservation Convention from other human rights treaties, such as the African Charter.[43] The argument is further buttressed by the fact that the provisions of the instrument are not framed in the language of rights but rather as obligations of the state.[44]

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[36] Kampala Convention, art 4(5)
[37] So far, 42 states in Africa have signed the Convention while 11 states have ratified. It shall enter into force thirty (30) days after the deposit of the fifteenth (15th) instrument of ratification, see http://www.au.int/en/sites/default/files/Revised%20-%20Nature%20and%20Natural%20Resources_0.pdf (accessed 10 March 2014)
[38] African Convention on the Conservation of Nature and Natural Resources ,Algeria on 15th September 1968 OAU Doc CAB/LEG/24.1
[39] Conservation Convention, art VI
[40] Conservation Convention, art VIII
[41] Viljoen (n 1 above) 270
[42] As above
[43] As above
[44] As above

However, as the author explains, at least, the preamble of the instrument suggests that it is to be interpreted as consistent with the protection of human rights under the African Charter and other human rights instruments.[45] For instance, in coming to an agreement on the provisions of the Conservation Convention, the preamble recalls the commitment of states to the African Charter. Also, though the instrument does not have a specific reference to 'indigenous peoples', it provides that the traditional rights of local communities should be respected through the adoption of legislative and other measures.[46] Accordingly, it can be said that the Conservation Convention, at least, is complementary to the provisions of the African Charter guaranteeing the protection of rights. The Conservation Convention situates its implementation in the context of the protection of the environment and the right to development.[47] The preamble of the Conservation Convention gives the indication of the former when it declares:

> Conscious that the natural environment of Africa and the natural resources with which Africa is endowed are irreplaceable part of the African heritage and constitute a capital of vital importance to the continent and humankind as a whole….

The conception of the environmental natural resources of Africa as 'irreplaceable' is significant when borne in mind the potential threat that climate change has for these resources.[48] Arguably, the provision accommodates the land of indigenous peoples which is part of the physical environment where most of these resources are found.[49] Also, the Conservation Convention acknowledges, in the pursuit of right to development, that state parties should consider the protection of the environment. This is discernible from the preamble which affirms that states have:

> [i]n accordance with the Charter of the United Nations and the principles of international law, a sovereign right to exploit their own resources pursuant to their environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction

[45] As above
[46] Communication 276/03, *Centre for Minority Rights Development* (Kenya) *and Minority Rights Group (on behalf of Endorois Welfare Council)* (*Endorois* case) 27th Activity Report: June - November 2009
[47] Viljoen (n 1 above) 270
[48] On the impact of climate change in relation to the environment see, C Wold, D Hunter & M Powers *Climate change and the law* (2009)
[49] ILO Convention 169 defines lands as the 'total environment occupied by the indigenous peoples'

Along similar lines, article IV affirms the obligation of state parties to adopt and implement all measures, including the application of the precautionary principle, in order to achieve the objectives of the instrument. Strengthening this provision, article XIV requires states to consider 'conservation and management of natural resources as an integral part of national and/or local development plans' and to formulate 'developmental plans' bearing in mind 'ecological, as well as economic, cultural and social factors'.

Hence, the conclusion can be made that the African Charter, the Kampala Convention and the Conservation Convention contain obligations which have a direct bearing on the circumstances of indigenous peoples in the context of the adverse impacts of climate change in Africa.

6.2.2 Incompatibility of weak national climate regulatory framework with obligations of states

The obligation to comply with internationally recognised human rights requires three levels of duty from states: the duty to respect, protect and fulfil human rights. The obligation to respect signifies that states must refrain from interfering with or hindering the enjoyment of human rights. The obligation to protect demands that individual and groups should be protected from human rights abuses, especially by non-state actors. The obligation to fulfil requires states to take positive action to facilitate the enjoyment of basic human rights.[50] The conceptualisation of these obligations owes its introduction and current influence on international human rights law to the pioneering work of Shue and Eide.[51] In Shue's view, the tripartite typology of duties include, (1) duties to avoid the deprivation of the right concerned, (2) duties to protect rights holders from deprivation, and (3) duties to aid rights holders who have been deprived.[52] The tripartite obligations have since gained international acceptance, first among scholars working on the right to food, and then in the broader area of economic, social and cultural rights.[53]

[50] O De Schutter 'Economic, Social and Cultural Rights as Human Rights: An introduction' CRIDHO Working Paper 2013/2 6 http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP2013-2-ODeSchutterESCRights.pdf (accessed 19 January 2014); OHCHR 'International human rights law' http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx (accessed 19 January 2014)
[51] De Schutter (n 50 above) 5
[52] S Shue *Basic rights: Subsistence, affluence, and U.S. Foreign Policy* (1980) 2 ed 52
[53] General Comment No. 12: The right to adequate food, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 20th Sess., 14-20, U.N. Doc. E/C.12/1999/5 (1999) (United Nations General Comment No.12); General Comment No. 13:The right to education, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 21st Sess., 46–48 (1999) (United Nations General Comment No.13)

Reinforcing the foregoing view, Eide argues that the tripartite obligations entail the negative obligation to abstain from acts contrary to human rights principles and a positive duty as a 'protector and provider' of rights.[54] The foregoing views continue to influence the Committee on the Economic, Social and Cultural Rights (CESCR) in its review of state reports. Hence, the CESCR, in emphasising these layers of obligation note that the protection of 'all human rights, imposes three types or levels of obligations on state parties: the obligations to respect, protect and fulfil'.[55] Also, it has been shown that these layers of obligation apply to civil and political rights.[56]

The African human rights system offers four layers of obligations. In *Ogoniland* case, [57] the Commission, in the context of environmental claims over the degradation of the land of Ogoni people developed jurisprudence on a four-layer of obligation in respect of the rights, civil, political and socio- economic rights, guaranteed under the African Charter. The obligation to 'respect', 'protect', 'promote' and 'fulfil'. According to the Commission, the obligation to respect entails that states should not interfere in the enjoyment of human rights. Also, it signifies that there should be respect on the part of the state for 'right-holders, their freedoms, autonomy, resources, and liberty of their action'.[58] In relation to the situation of a collective group, the obligation to respect entails that resources collectively belonging to this group should be respected.[59] In discussing the obligation to protect, the Commission enjoins the state to adopt measures, including legislation, and provide effective remedies in protection of right holders 'against political, economic and social interferences'. It further requires the regulation of non-state actors to ensure that their operation does not hinder the realisation of rights.[60] Corresponding to the obligation to protect human rights, according to the Commission, is the obligation to promote the enjoyment of all human rights,[61] which entails that the state should ensure 'that individuals are able to exercise their rights, for example, by promoting tolerance,

[54] A Eide 'Realisation of social and economic rights and the minimum threshold approach'(1989)10 *Human Rights Law Journal* 35, 37
[55] Committee on Economic, Social and Cultural Rights 'Report on the 22nd, 23rd and 24th Sessions, E/2001/22E/C.12/2000/21para 33
[56] M Nowak *U.N. Covenant on Civil and Political Rights:CCPR Commentary* 2d ed (2005) 37 - 41
[57] *Social and Economic Rights Action Centre* (SERAC) *and Another v Nigeria* (2001) AHRLR 60 (ACHPR) (*Ogoniland* case)
[58] *Ogoniland* case (n 57 above) para 45
[59] As above
[60] *Ogoniland* case (n 57 above) 46
[61] As above

raising awareness, and even building infrastructures'.[62] The obligation to fulfil, according to the Commission, requires the state to mobilise 'its machinery towards the actual realisation of the rights'.[63]

Arguably, failure by a state to formulate appropriate legislation for the protection of indigenous peoples' land tenure and use in the context of climate change at the national level is incompatible with the levels of duties imposed on states by African regional jurisprudence. It offends the obligation to respect because it signifies that states in Africa can be involved in climate change response projects without an appropriate legal basis to address its consequences, such as the displacement of indigenous communities. It motivates the implementation of these projects even where it is certain that the land rights of indigenous peoples will be compromised. This situation flies in the face of the provision of the Kampala Convention that requires parties to ensure that communities are not displaced from their lands, except for compelling and overriding public interests.[64]

Furthermore, it is in breach of the obligation to protect because the inadequacy of the climate change regulatory framework at the national level represents a contrast to the formulation of legislation for the provision of effective remedies, and the regulation of non-state actors which the obligation to protect embodies. Failure to do this runs foul of article 3(h) of the Kampala Convention which places an obligation on the State in respect of the accountability of non-state actors, including 'multinational companies and private military or security companies, for acts of arbitrary displacement or complicity in such acts'. The obligation toward accountability extends to situations where non-state actors are involved in the 'exploration and exploitation of economic and natural resources leading to displacement'.[65] An inadequate climate change regulatory framework means that the involvement of non-state actors in projects such as REDD+ which may displace indigenous peoples, can remain largely unchecked. This is inconsistent with the spirit and letter of the Kampala Convention. Indeed, it is incompatible with article IV of the Conservation Convention which affirms the obligation of state parties to adopt and implement preventive measures.

[62] As above
[63] *Ogoniland* case (n 57 above) para 47
[64] Kampala Convention, art 4(5)
[65] Kampala Convention, art 3 (i)

Also, inadequate attention by the national legal framework to climate initiatives is inconsistent with the obligation of states in Africa to promote the enjoyment of rights. Contrary to the promotion of a culture of tolerance and awareness- raising that the obligation entails, a weak framework indicates that there remains a lack of tolerance for the culture and lifestyle of indigenous communities in relation to their land, even in the face of the adverse impacts of climate change. It sends a wrong signal to non-state actors and international organisations involved in the implementation of projects, demonstrating that respect for the identity of indigenous communities is not required in Africa.

Finally, it is difficult to imagine that a weak legal framework on climate-related initiatives reflects the mobilisation of the 'machinery towards the actual realisation of the rights' of indigenous peoples, as required by the obligation of the State to fulfil human rights.[66] For instance, where implementation of projects leads to displacement or other abuses, a weak legal framework at the national level will make the claim for international assistance by states in respect of these peoples an awkward one. It seems illogical to require assistance in respect of a population whose identity and existence are disputed by states. Therefore, it undermines the provision of Kampala Convention that highlights the responsibility of states to seek the 'assistance of international organisations and humanitarian agencies, civil society organisations and other relevant actors' where available resources are insufficient to offer protection and assistance to internally displaced persons.[67] It may also hinder the obligation of states to provide these peoples with the necessary access to survival amenities.[68]

The urgency of such assistance in the context of a harsh environmental situation is not in doubt, as demonstrated by the decision of the Indian Supreme Court in *Peoples' Union for Civil Liberties v Union of India*.[69] In that case, the Supreme Court of India was approached for relief after several states in Indian faced acute drought. The Court ordered the provision of food to vulnerable groups, including the disabled, aged, destitute women, men and children, particularly those who were impecunious.[70] Although not a case dealing with indigenous populations, arguably, it is amenable to such application at the regional level in Africa in view of article 60 of

[66] *Ogoniland case* (n 57 above) para 47
[67] Kampala Convention, art 4(3)
[68] *Ogoniland case* (n 57 above) para 47
[69] *Peoples' Union for Civil Liberties v Union of India* [(Civil) No.196 of 2001] (SC)
[70] As above

the African Charter that allows the Commission to draw inspiration from other jurisdictions. It is a legal basis for the Commission to hold, in deserving circumstances, that resources should be made available to address acute environmental conditions challenging the rights of indigenous communities facing the harsh reality of climate change.

The failure to formulate appropriate legislation at the national level for the protection of indigenous peoples' land tenure and use not only is in breach of the foregoing layers of obligation required of states under the regional human rights instruments, but the inadequate climate regulatory framework also affects a range of rights guaranteed under these instruments.

6.2.3 Threat to a range of rights guaranteed under the African Charter

It can be argued that a failure to formulate appropriate legislation for the protection of indigenous peoples' land tenure and use in the context of the adverse impacts of climate change at the national level is a threat to a range of rights guaranteed under the African Charter. Some of the relevant rights are examined below with particular reference to indigenous peoples.

6.2.3.1 Right to property

Weak guarantees in the climate institutional and regulatory framework at the international and national levels have implications for the right to property as guaranteed under the African Charter. Issues, such as land tenure and use, carbon rights, compensation and benefit-sharing by indigenous peoples, have implications for the right to property under the African Charter. The right to land is not expressly safeguarded under the African Charter, article 14 of the African Charter guarantees the right to property, providing that it can be limited only in the interest of public policy and in accordance with the provision of the law. This provision is crucial particularly considering the activities of REDD+. There are laws of states, as has been shown, that may be used by the government to expropriate land in implementing adaptation and mitigation programmes. These laws raise the question as to whether the collective and informal form of land ownership for which indigenous peoples are known are adequate as legal title and support claims for compensations or benefit-sharing.

In relation to the foregoing issues, the right to property under the African Charter can be activated. For this viewpoint, the jurisprudence of the Commission is instructive. For instance, in

the *Endorois* case, the complainants sought restitution and compensation in relation to their land which was allegedly expropriated by the government of Kenya for game-reserve purposes.[71] In its decision, the Commission found that the claim for compensation was validly made considering that the community is excluded from sharing in the benefits accruing from 'a restriction or deprivation of their right to the use and enjoyment of their traditional lands'.[72] Hence, the Commission took the view, in line with African Charter, that benefit-sharing in the form of 'equitable compensation' resulting from the use of indigenous peoples' traditionally owned lands should be awarded.[73] Accordingly, the Commission found a violation of the right to property.[74]

Although it has been criticised for limiting its analysis to indigenous peoples, thereby excluding other populations who though not indigenous do depend on land for cultural survival and practise informal land tenure,[75] the decision of the Commission in relation to right to property is groundbreaking generally for customary land tenure. This is in the sense that it interpretes the right to property to accommodate ownership of land and informal title as proof which appears a departure from western notion of property generally restricted to varying possessory rights and documentary title.[76] Without doubt, such construction of customary land tenure, even though interpreted in the context of an application lodged by indigenous populations, applies to populations whose land tenure is informal even if they are not indigenous.

In achieving this end, the Court referred to the jurisprudence of the Inter- American human rights system for relevant cases to determine the key elements of indigenous peoples' land rights. Arguably, this case-law which is applicable by virtue of articles 60 and 61 of the African Charter, may shape the understanding and interpretation of indigenous peoples' rights in relation to climate change response projects on their land. For instance, in *Mayagna* (Sumo) *Awas Tingni*

[71] *Endorois case* (n 46 above) para 22
[72] *Endorois case* (n 46 above) para 295
[73] *Endorois case* (n 46 above) para 296
[74] *Endorois case* (n 46 above) para 298
[75] W Wilcomb & H Smith 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision' (2011) 11 *African Human Rights Law Journal* 422; RC Williams 'The African Commission "Endorois Case" – Toward a global doctrine of customary tenure?' http://terra0nullius.wordpress.com/2010/02/17/the-african-commission-endorois-case-toward-a-global-doctrine-of-customary-tenure/ (accessed 23 March 2012)
[76] K Gray &SF Gray 'The idea of property in land' in S Bright & JK Dewar (eds) *Land law: Themes and perspectives* (1998) 15-51

v Nicaragua,[77] using the right to property provision in the Inter-American Convention as guidance, the Court recognised the right of indigenous communities within the framework of communal property and held that possession of the land should be sufficient even if lacking real title to obtain official recognition of that property. In the case of *Saramaka People v Suriname*,[78] the Court defines states' obligation in relation to the exploitation of natural resources on the land of indigenous peoples. The Court defined collective property right as the practice among indigenous peoples that does not place ownership of land in the hands of one individual, but in the whole community.[79] According to the Court, this form of ownership is linked to the cultural and spiritual worldview of indigenous peoples and 'not merely a matter of possession and production'.[80] Accordingly, the Court ordered Suriname to change its domestic legislation so as to allow for legal recognition of customary titles to the territorial lands of indigenous community and its demarcation.[81]

On the issue of compensation and benefit-sharing, the case of *Yakye Axa Indigenous Community v Paraguay*,[82] is instructive. In that case the Court admitted that the right to property can be limited by law, necessity, proportionality, and attainment of a legitimate goal in a democratic society.[83] More importantly, however, the state is required to award compensation taking into account the dependency of the community on their land resources.[84] In the *Suriname* case, it was affirmed that the state must ensure that reasonable benefit is awarded to indigenous communities in the event of the alienation of the 'use and enjoyment of their traditional lands and of those natural resources necessary for their survival.'[85]

The foregoing case-law has not been decided in the context of climate change or its response measures, but it can be argued, in recognising the rights of indigenous peoples over their land and resources, that the case-law aligns with all issues in relation to indigenous peoples' lands in the context of climate change and the implementation of response projects. These issues include

[77] *Mayagna* (Sumo) *Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights 31 August 2001, (*Awas Tingni* case) paras 140(b) and 151
[78] *Saramaka People v Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, (28 November 2007) (*Saramaka* case)
[79] *Saramaka* case (n 78 above) 149
[80] As above
[81] As above
[82] *Yakye Axa v Paraguay*, Inter.Am. Ct. H.R. (ser. C) No 146, (17 June 2005) (*Yakye* case)
[83] *Yakye* case (n 82 above) para 145
[84] *Yakye* case (n 82 above) para 151
[85] *Yakye* case (n 82 above) para 139

the recognition of title, benefit-sharing and the participation of indigenous peoples. Hence, in the light of the foregoing jurisprudence, it appears that the weakness in the national framework will render indigenous peoples vulnerable to the violation of the right to property guaranteed by the African Charter.

6.2.3.2 Right of participation

Participation is important in the implementation of projects under the international climate change regulatory framework at the national level. It is important, for instance, both in the formulation of the proposal on REDD+ and the development of a national adaptation plan of action (NAPA). As a community, indigenous groups may resort to the regional system to address issues with regard to their participation in the processes. There are relevant norms, as shown in chapter two, on participation and inclusion as core principles in human rights which can help address indigenous peoples' claims in respect of rights to land in a climate change context. Indigenous peoples can ground the claim for effective engagement in climate change negotiation on the right to participation. They can use this principle in drawing attention to the importance of recognising their land rights in the climate change regulatory framework and implementation.

Reinforcing the foregoing argument, the Conservation Convention endorses article 24 of the African Charter dealing with the protection of the environment. It requires the parties to adopt legislative and regulatory measures necessary to ensure proper dissemination to and access by the public of environmental information as well as to safeguard the 'participation of the public in decision-making with a potentially significant environmental impact' and access to justice on issues affecting environmental and natural resources protection.[86] Similarly, article XVIL (3) requires states to take the necessary measures to enable active participation of natural resources dependent communities and encourage their conservation practices.

In the event that climate change results in internal displacement, the Kampala Convention requires states to consult with the displaced persons and allow them to participate in decisions

[86] See generally, Conservation Convention 2003 art XVI

affecting their protection and assistance.[87] Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides:

> The Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.[88]

Article 21 of the Universal Declaration of Human Rights (UDHR) provides that everyone has the right to take part in the governance of his or her country.[89] This right is also guaranteed under article 25 of ICCPR which forbids unreasonable restrictions on taking part 'in the conduct of public affairs, directly or through freely chosen representatives'.[90] Article 25 of the ICCPR also provides for participation in terms of taking part in the conduct of public affairs and access to public services in a given country.[91] The Human Rights Committee has interpreted 'conduct of public affairs' broadly to include the 'exercise of political power and in particular the exercise of legislative, executive and administrative powers' extending to the formulation and implementation of policy at international, regional and national levels.[92]

In the *Endorois* case, the Commission considered that an essential element of deciding whether land is appropriated in accordance with law relates to the consultation of indigenous peoples.[93] It is required for an effective consultation, that consent should be obtained and a failure to observe this requirement may lead to the violation of the right to property.[94] In determining this case, the Commission relied on the *Saramaka* case.[95] In that case, the Inter-American Court underscored the need for participation in considering whether the right to property is violated. It observed that effective participation is necessary in conformity with their customs and traditions. The Court stressed that the State has a duty to consult indigenous peoples during the early stages of any

[87] Kampala Convention, art 10(2)(k)
[88] United Nations Declaration on the Rights of Indigenous Persons (UNDRIP), adopted by a majority vote of the United Nations (UN) General Assembly on September 13, 2007, also see generally arts 5, 27 and 41
[89] United Nations Declaration on Human Rights, art 21
[90] International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, art 25
[91] As above
[92] Human Rights Committee, General Comment No. 25 (1996) , UN doc. CCPR/C/21/Rev.1/Add.7, para 5 (United Nations General Comment No. 25)
[93] *Endorois* case (n 46 above)
[94] *Endorois* case (n 46 above) 226
[95] *Saramaka* case (n 78 above)

proposed plan, respecting their customs and traditions. In certain cases, the State not only is required to consult, but is to obtain the 'free, prior and informed consent' of the affected group.[96]

Another important decision on the participation of indigenous peoples in projects affecting their land is the case of *Apirana Mahuika et al v New Zealand*.[97] This matter arose out of the attempt by government to regulate the commercial and non-commercial fishing of the Maori indigenous peoples. Following extensive negotiations, a deed of settlement was executed by representatives of the government and the Maori to regulate all fisheries issues between the parties. Alleging that the contents of the settlement were not always adequately disclosed or explained, the petitioners moved the Human Rights Committee (HRC) to find a violation of a number of their rights including the right to freely determine their political status. However, the HRC, considered the consultation carried out by the government adequate though complicated, and, therefore, was unable to find a violation of Maori fishing rights.[98]

In summary, embarking upon the implementation of climate change response measures without an appropriate legal framework for the protection of indigenous peoples in relation to participation in matters affecting them will offend the right of indigenous peoples to participation as guaranteed under human rights instruments, including the African Charter, Kampala Convention and the Conservation Convention.

6.2.3.3 Right to food

Article 14(1) to (3) of the ILO Convention 169 protects indigenous peoples' right to subsistence and enjoins government to take steps to guarantee their ownership of land so as to ensure their subsistence. The right to food is guaranteed under article 11 of the ICESCR and expatiated upon by General Comment 12.[99] According to General Comment 12, the right to adequate food comprises four elements, namely, availability, accessibility, acceptability and safety. Food availability refers to options of obtaining food, such as (a) through means of subsistence farming and other direct use of natural resources, or (b) by means of a functioning market system. Food

[96] *Saramaka* case (n 78 above) para 134
[97] *Apirana Mahuika et al v New Zealand*, Communication No. 547/1992, CCPR/C/70/D/547/1993
[98] See generally D Shelton 'Human rights and the environment: Jurisprudence of human rights bodies' http://www2.ohchr.org/english/issues/environment/environ/bp2.htm (accessed 18 October 2013) where the author presents a summary of decisions, recommendations and comments of global and regional human rights bodies on issues of environmental protection and human rights
[99] United Nations General Comment No. 12 paras 10-13

accessibility entails economic and physical accessibility. Economic accessibility refers to the acquisition pattern through which food is procured, such as land in the case of subsistence farming, and 'physical accessibility' requires that food is within the reach of everyone. Food acceptability and safety refer to the cultural and biochemical edibility of food.[100] In Africa, for pastoralists especially, as earlier indicated, changing weather condition, resulting from climate change can lead to the destruction of grazing land, low yield of farm products, and little or no production of meat and milk.[101] All these constitute a significant threat to the different elements of the right to food of populations in Africa.

Although not categorically stated under the African Charter, it is evident from the jurisprudence of the Commission that the right to food is justiciable. The Commission considered the right to food in an environmental context in *Ogoniland* case. In that case, the Commission interpreted articles 4 (right to life), 16 (right to health) and 22 (right to economic, social and cultural development) to ground a violation of the right to food. Also, in its more focused decision on indigenous peoples, the Commission mentioned that displacement of an indigenous community from their ancestral land may hinder access to food.[102]

Therefore, where there is inadequate legal framework at the national level to deal with the adverse effects of climate change and response mechanisms, considering its adequacy for the availability, accessibility, acceptability and safety of food of indigenous peoples, the argument can be made that inadequacy constitutes a threat to their right to food as guaranteed under the human rights instruments.

6.2.3.4 Right to water

Water is of great importance to the traditional lifestyle of indigenous peoples, particularly those who engage in pastoralism. Yet, generally, according to reports, 345 million of populations in Africa lack access to safe drinking water.[103] The impact of climate change will worsen an already calamitous situation of access to water in Africa: water stress exists in various countries

[100] As above
[101] CH Bals, S Harmeling & M Windfuhr *Climate change, food security and the right to adequate food* (2008) 84-99
[102] *Endorois* case (n 46 above)
[103] WaterOrg 'Africa' http://water.org/water-crisis/water-facts/water/ (accessed 20 July 2014); also see United Nations World Water Development Report 3 *Water in a changing world* (2009) 11 which put the figure at 340 million and 500 million without sanitation

including Tunisia, Algeria, Morrocco, Sudan and, indeed, in most part of sub-Saharan Africa.[104] The right to water is not expressly mentioned in the African Charter, but can be derived from article 16(1). The right to water is not expressly mentioned in the ICESCR but can be inferred from article 11, more so as General Comment 15 of the CESCR recognises that the right to water is 'fundamental for life and health' and a 'prerequisite for the realisation of other human rights'.[105] According to the General Comment, the normative contents of the right to water are availability, quality and accessibility. Availability connotes that the '[w]ater supply for each person must be sufficient and continuous for personal and domestic uses',[106] quality entails that water must be safe and free of any substance that is harmful to health.[107] Water accessibility has four dimensions, namely, physical, economic and non-discrimination and information dimensions.[108]

In the light of climate change, the inaccessibility of adaptation funds, for example, may lead to neglect or the worsening condition of local technology which helps to address water scarcity. Also, the implementation of an international mitigation measure may result in the displacement of indigenous peoples or forest-dependent populations from their land and, therefore, render their water resources inaccessible. In the absence of a strong regulatory framework at the national level, responding to these challenges may be a sham. Climate change may challenge the availability, accessibility and affordability elements of the right to water of indigenous peoples in Africa and constitutes a breach of article 16(1) of the African Charter.

6.2.3.5 Right to adequate housing

Climate change can affect the settlement of indigenous peoples and therefore constitute a threat to their right to housing. This is particularly so in Africa, where, notwithstanding a low adaptive capacity, global warming will generate problems, including heat waves, flooding, pollution and a rise in sea level.[109] Also, mitigation measures which essentially involve Africa, as explained earlier, can occasion displacement of population. This development, no doubt, poses a challenge

[104] C Toulmin *Climate change in Africa* (2009) 40
[105] 'United Nations General Comment No. 15: The right to water, arts 11 and 12' (2000) para 1 (United Nations General Comment No. 15)
[106] United Nations General Comment No. 15 para 12(a)
[107] United Nations General Comment No. 15 para 12(b)
[108] United Nations General Comment No. 15 para 12(c)
[109] Toulmin (n 104 above) 87

to the right to adequate housing which principally aims at providing and setting standards for adequate shelter. General Comment 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) enunciates the seven elements constituting the normative content of the right to adequate housing.[110] These are legal security of tenure, availability of services, materials, facilities and infrastructure, accessibility, location, affordability, habitability, and cultural adequacy.[111]

Legal security of tenure refers to different forms of tenure, such as rental accommodation, cooperative housing, lease, owner occupation, emergency housing and informal settlements.[112] It does not necessarily mean a right to land, but it imposes a legal protection against forced eviction and harassment, regardless of the type of tenure.[113] The availability of services, materials, facilities and infrastructure links the right to housing to other substantial rights, such as the right to health, the right to water, and the right to food, because it requires facilities such as safe drinking water and energy for cooking as essential ingredients of availability.[114] Accessibility to housing focuses on support for disadvantaged groups to achieve adequate shelter, whereas location mainly addresses the issue of nearness of settlements to vital services and sources of income or subsistence.[115] The affordability element of the right to housing requires that the costs of housing should be at a level that enhances the acquisition of housing,[116] whereas habitability connotes that adequate housing should allow for appropriate space and protection from 'cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors'.[117] The cultural adequacy of housing demands that in constructing a house, 'the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing'.[118]

[110] United Nations General Comment No. 4: The right to adequate housing, art 11 (1) of the Covenant (1991) 6th session (United Nations General Comment No. 4)
[111] United Nations General Comment No. 4 para 8
[112] United Nations General Comment No. 4 para 8(a)
[113] United Nations General Comment No. 4 para 8(a)
[114] United Nations General Comment No. 4 para 8(b)
[115] United Nations General Comment No. 4 paras 8(e) & (f)
[116] United Nations General Comment No. 4 para 8(c)
[117] United Nations General Comment No. 4 para 8(d)
[118] United Nations General Comment No. 4 para 8(g)

General Comment 4 is further strengthened by a subsequent General Comment 7 on the right to housing, which deals with the issue of forced evictions[119] defined as:

> [P]ermanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.[120]

Forced evictions do not interfere only with the right to housing, but with several other rights of the ICESCR, and with rights enshrined in the International Covenant on Civil and Political Rights (ICCPR). These rights include the right to life, the right to security of person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.[121] Where the implementation of adaptation and mitigation measures leads to displacement and the forced eviction of indigenous peoples from their traditional places of abode, these effectively undermine their right to adequate housing. All the elements in the right to adequate housing, namely, legal security of tenure, availability of services, materials, facilities and infrastructure, accessibility, location, affordability, habitability, and cultural adequacy are disturbed when populations are displaced or forcefully evicted from their shelter in the event of climate change and implementation of adaptation and mitigation initiatives without alternative provision that meets with their rights. The failure of a regulatory framework on climate change effectively to address these possibilities at the national level therefore constitutes a breach of the right to housing of indigenous peoples as grounded in articles 14 and 16 of the African Charter.

6.2.3.6 Right to healthy environment

Climate change has implications for the enjoyment of the right to environment by indigenous peoples as guaranteed under article 24 of the African Charter. The significance of a healthy environment to the realisation of political and socio-economic rights is not ignored in the work of the CESCR for example: reference is made to environmental conditions in its general

[119] 'United Nations General Comment No. 7: The right to adequate housing, art 11 (1) of the Covenant: Forced evictions' (1997) 16th session (United Nations General Comment No. 7)
[120] United Nations General Comment No. 7 para 3
[121] United Nations General Comment No. 7 para 4

comments on the right to water,[122] the right to health,[123] the right to food,[124] and the right to housing.[125] More particularly, the General Comment on the right to health acknowledges that:

> The right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as…a healthy environment.[126]

Among other things, the CESCR in its General Comment on the right to food considers that the right to food is inseparable from environmental and social policies.[127] If unsustainably carried out, activities such as land clearing, logging and mining, in addition to releasing carbon into the atmosphere, may contribute to the non-viability of the land of indigenous peoples thereby compromising their environmental integrity. It signifies that these activities may undermine the conservation efforts for which indigenous peoples are noted.[128] Such a development is contrary to article 29(1) of UNDRIP that confers on indigenous peoples the right to conservation and protection of the environment. It is also incompatible with article XIV(3) of the Conservation Convention that requires states to take appropriate measures to ensure active participation in and provide local populations with required incentives to encourage conservation.

The jurisprudence from the regional system shows that if the foregoing arises, it can be challenged by invoking the right to a healthy environment under article 24 of the African Charter. In the *Ogoniland* case, the complainant alleged that the oil production operations of the military government of Nigeria, through the Nigerian National Petroleum Corporation (NNPC), have been carried out without regard to the health of people or the environment of the local communities. These activities, therefore, have resulted in environmental degradation and the health problems of the people. In finding the government of Nigeria liable for violating the rights of the Ogoni people, the Commission noted that article 24 imposes obligations upon government to take reasonable and other measures to prevent pollution and ecological degradation, promote

[122] United Nations General Comment No. 15 paras 6, 8, 22, 48 & 53
[123] United Nations General Comment No. 14: The right to the highest attainable standard of health (2000) E/C.12/2000/4 paras 4, 11 & 15
[124] United Nations General Comment No. 12: The right to adequate food (1999) paras 4, 10 & 20
[125] M Orellana, M Kothari & S Chaudhry 'Climate change in the work of the Committee on Economic, Social and Cultural Rights' (2010) 20
[126] United Nations General Comment No. 12 para 4
[127] United Nations General Comment No. 12 para 4
[128] E Desmet *Indigenous rights entwined in nature conservation* (2011) 50

conservation, and secure an ecologically sustainable development and use of natural resources.[129] Hence, in its decision the Commission recommends 'a comprehensive clean-up of lands and rivers damaged by oil operations' and advises the government to ensure that appropriate environmental assessment is conducted for any future development.[130] Similarly, this jurisprudence is supported by the Inter-American human rights system in the *Saramaka* case where the Court ordered Suriname to repair the environmental damages caused by the logging companies and to provide equitable compensation to the community.[131]

The foregoing demonstrate that the failure of states to formulate an appropriate national framework in the face of adverse climate impacts on the environment of indigenous peoples, a component of their notion of land,[132] is incompatible with the right to the environment under the African Charter. Such inadequacy of the framework is in breach of article XVI of the Conservation Convention requiring states to adopt legislative and regulatory measures to ensure procedural rights. It is also incompatible with article 10(2) of the Kampala Convention that places the obligation on states to carry out socio-economic and environmental impact assessment (EIA) on proposed development projects.[133]

6.2.3.7 Right to peace

Where accessibility to natural resources such as water is hindered as a result of adverse impacts of climate change and response measures, it is capable of driving indigenous population into clashes with settled populations and will result in their displacement from their traditional territories. The link between access to resources due to climate conditions and conflict is not new. For instance, the incidence of conflict in Darfur has been connected with drought and famine which led to dislocation in social and economic life and loss to herding and farming

[129] *Ogoniland* case (n 57 above) para 52
[130] *Ogoniland* case (n 57 above) para 71
[131] *Saramaka* case (n 78 above)
[132] n 49 above
[133] Kampala Convention, art 10(3)

families.[134] Further reiterating such a possibility is the evidence in West African states, including Ghana and Burkina Faso, where climate change has been found to have security implications.[135]

In the Eastern part of Africa, competition for resources among pastoralists has been reported as having a significant impact on the risk of conflict between diverse groups of land users.[136] The failure of an appropriate legal framework to anticipate that scarcity of natural resources due to the adverse impacts of climate change can lead to conflict will constitute a threat to the right to peace under article 23 of the African Charter which safeguards the right of 'all peoples' to national and international peace and security.

6.2.3.8 Right to self-determination

The adverse impacts of climate change and its response measures have the potential to displace indigenous peoples from their land and resources. In a sense, even if effectively implemented, such occurrences will disturb or restrain the access of indigenous peoples to the use or enyoyment of land and resources in the way they have always done. Hence, the failure to put in place appopriate legislation to address or, at least, minimise these potential impacts is necessarily a breach of their right to self-determination.

The right to self-determination is guaranteed under different instruments applicable to indigenous peoples. The right to self-determination is recognised in the common articles 1 of the ICESCR and ICCPR. The UNDRIP spells out what can be regarded as the normative content of the right to self-determination in articles 3 and 4. Specifically, article 4 provides:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The above provisions shows that the normative content of the right to self-determination of indigenous peoples ranges across political choice and the freedom to pursue economic, social and cultural development. When the land tenure and use of indigenous peoples are not effectively protected, it calls into question the respect that states have for their political status as

[134] Toulmin (n 104 above) 111; O Brown, A Hammill & R Mcleman 'Climate change as the 'new' security threat: Implications for Africa' (2007) 83 *International Affairs* 1143-1144
[135] O Brown & A Crawford *Assessing the security implications of climate change for West Africa' country case studies of Ghana and Burkina Faso* (2008) 9-39
[136] Oxfam '*Survival of the fittest: Pastoralism and climate change in East Africa'* (2008) 21

a group and undermines a genuine willingness to support their pursuit of economic, social and cultural development because land tenure and use are at the core of their subsistence lifestyle. Equally, as has been shown,[137] they are central to the cultural attachment and relationships that indigenous peoples have with their generation and their environment. The importance of its protection in national legislation is emphasised by the HRC when it calls upon states to 'describe the constitutional and political processes which in practice allow the exercise' of the right to self-determination.[138]

The right to self-determination is critical to indigenous peoples' land use and tenure, the scope of the rights itself is disputed in law. The HRC does not resolve this dilemma: nowhere is the scope of the concept clearly defined in its general comment. However, as Sterio notes, scholars and courts agree on two different forms of self-determination, that is, internal versus external self-determination.[139] In what appears to define internal self-determination, Viljoen,[140] and Alfreðsson,[141] have shown that groups, as 'peoples', particularly vulnerable groups, should have their rights, such as cultural, social, political, linguistic and religious rights, respected within their states. Similarly, external self-determination has been discussed as not legally impossible for oppressed peoples whose basic rights are denied by their states.[142] As Alfreðsson maintains, arguments can be made in support of the rights of indigenous peoples to external self-determination.[143]

In article 20(1), the African Charter guarantees the rights of all peoples to existence and self-determination within which they can freely determine their political status and pursue 'their economic and social development according to the policy they have freely chosen'. This provision connotes that this right is to be exercised within the state (internal self-determination), whereas article 20(2) indicates that colonised or oppressed peoples have the right to freedom from domination. Arguably, the use of the word 'oppressed peoples' removes the feasibility of

[137] See chapter 3 of the thesis
[138] UN Human Rights Committee (HRC) General Comment No.12, Article 1 (21st session,1984) (Right to self determination), UN Doc HRI/GEN/1/Rev.1 para. 4
[139] M Sterio 'On the right to external self-determination: "Selfstans", secession and the great powers' rule'(2010) 19 *Minnesota Journal of International Law* 1
[140] Vijoen (n 1 above) 226
[141] G Alfreðsson 'A frame an incomplete painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures' (2000) 7 *International Journal on Minority & Group Rights* 291, 303
[142] MP Scharf 'Earned sovereignty: Judicial underpinnings' (2003) 31 *Denver Journal of Law and Policy* 373, 379
[143] G Alfreðsson 'Indigenous peoples and autonomy' in M Suksi (ed) *Autonomy: Applications and implications* (1998) 133

this provision from the context of colonialism alone and, at least theoretically, should allow a claim for external self-determination or secession made by oppressed vulnerable groups within a state. Linked to self-dermination as envisaged in the General Comment of the HRC are the provisions of the African Charter dealing with the rights to economic, social and cultural development.[144]

Although the initial reluctance of political leadership to adopt the UNDRIP is associated with its provision on self-determination, which they claim will offend the sovereignty and unity of African states,[145] the jurisprudence of the Commission cannot be interpreted as indicating that external self-determination is off its menu of remedies. Rather its jurisprudence has shown a consideration for both options, namely, internal and external self-determination, in the work of the Commission. Responding to the claim of the Kantangese Peoples' Congress for the right to self-determination in the form of secession,[146] the Commission sets out the conditions in which the right to internal and external self determination can be invoked. In its view, it can be invoked in ways including 'independence, self-government, local government, federalism, confederalism and unitarism'.[147] It, however, dismissed the case of the complainants on the ground of a lack of evidence showing that the Katangese peoples have been denied the right to exercise the right to self-determination internally through participation.[148] This view corresponds to the position of Viljoen that self-determination may be exercised to allow independence to 'groups who are persecuted, whose rights are consistently violated and who are denied a meaningful say in government'.[149]

In addition to the criticism that it fails clearly to articulate the distinction between internal and external self-determination,[150] a limitation on the option to exercise self-determination externally is noticeable in the subsequent case of *Gunme v Cameroon* (*Southern Cameroon* case).[151] While

[144] African Charter art 22(1) and (2)
[145] 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' adopted by the African Commission on Human and Peoples' Rights at its 41st ordinary session held in May 2007 in Accra, Ghana 2007, para 16
[146] Communication 75/92, *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1005) (8th Annual Activity Report) (*Katangese* case)
[147] *Katangese* case (n 146 above) para 4
[148] *Katangese* case (n 146 above) para 6
[149] Viljoen (n 1 above) 224
[150] Viljoen (n 1 above) 225
[151] Communication 266/03, *Gunme and others v Cameroon* (2009) AHRLR 9 (ACHPR) (26th Activity Report) (*Southern Cameroon* case)

independence and self government are listed as options of self-determination in the Katangese case, they are left out of consideration in the *Southern Cameroon* case. Rather the view of the Commission was that various forms of governance or self determination such as 'federalism, local government, unitarism, confederacy, and self government can only be exercised subject to state sovereignty and territorial integrity'.[152] In what seems as a ray of hope, without making a distinction between external and internal self-determination, the Commission noted, however, that oppression and domination are key to a successful claim to the right for self-determination.[153] It is thus understandable the argument by scholars that the jurisprudence of the Commission could have supported secession and independence in *Darfur* case,[154] had the case been made before the Commission. As Shelton contends, based on its approach, the Commission could have found 'the level of oppression and the massive human rights violations justified secession and independence for Darfur'.[155]

The following provisions have not been tested in the context of the adverse impacts of climate change and response mechanisms on indigenous peoples' land tenure and use, the argument can be made, however, that failure of government to enact appropriate laws may set the scene for the oppression and domination of indigenous peoples. Inadequate laws will expose indigenous peoples to economic exploitation and marginalisation, discrimination and weak representation in the measures and initiatives meant to address the adverse impacts of climate change. Particularly, the implementation of climate change response measures, in involving their land, will affect their cultural lifestyle and self-determined economic development. Depending on the degree of such oppression and domination, indigenous peoples should, at the very least, be able to make a case for internal self-determination in the face of the adverse impacts of climate change and response measures on their land.

In all, failure by the state to formulate appropriate legislation for the protection of indigenous peoples' land tenure and use in the context of climate change at the national level is incompatible with the levels of duties and a range of rights guaranteed under the regional human rights

[152] *Southern Cameroon* (n 151 above) para 199
[153] *Southern Cameroon* (n 151 above) paras 197 & 198
[154] Communications 279/03 290/05 (joined), *Sudan Human Rights Organisation and another v Sudan* (2009) AHRLR 75 (ACHPR 2009) (28th Activity Report) (*Darfur* case)
[155] D Shelton 'Self-Determination in regional human rights law: From Kosovo to Cameroon' (2011) 105 *American Journal of International Law* 60, 71; also see Viljoen (n 1 above) 225

instruments of Africa. However, while the foregoing constitutes a strong basis for resorting to human rights at the regional level for the protection of indigenous peoples' lands, it is not the only legal reason. Another basis for this necessity is, unlike the reality at the national level, that the emerging regional climate change regulatory framework even though not sufficient in itself, has the potential to be linked to human rights concepts for the protection of indigenous peoples' land use and tenure in Africa.

6.3 The regional climate change regulatory framework and potential for human rights

At the regional level there is no one single framework in relation to climate change. This itself may not be problematic considering that climate change affects different sectors and disciplines.[156] It may explain why climate change has featured in the mandate of a range of institutions and initiatives as well as their enabling instruments. That these institutions and initiatives have the potential to be linked to human rights for the protection of indigenous peoples' lands is an additional legal ground for resorting to regional protection in the light of weak protection at the national level. There are several institutions and instruments that may have indirect bearing on this discussion, but, attention is placed here on key institutions and initiatives as well as their enabling instruments with a clear mandate on climate change.

As the mandate of the institutions and initiatives are often intertwined with the instruments establishing them, these are not considered under separate heads. These institutions and initiatives are the Committee of African Heads of State and Government on Climate Change (CAHOSCC), African Ministerial Conference on the Environment (AMCEN), the ClimDev-Africa Programme which operates through the three channels of African Climate Policy Centre (ACPC), Climate Change and Desertification Unit (CCDU) and ClimDev Special Fund (CDSF). Other institutions and initiatives are the African Union Commission (AUS), New Partnership for African Development (NEPAD), Pan-African Parliament and the Peace and Security Council (PSC).

[156] See chapter 1 on some of the angles taken so far in conceptualising climate change

6.3.1 Committee of African Heads of State and Government on Climate Change

The AU Assembly established the Committee of African Heads of State and Government on Climate Change (CAHOSCC) in 2009 which began to work with COP 15 in Copenhagen to ensure that Africa speaks with one voice in global climate change negotiations.[157] The CAHOSCC comprises the heads of state of Algeria, Nigeria, Republic of Congo, Ethiopia, Uganda, Mauritius, Mozambique, Kenya, the chairperson of AMCEN and negotiators/experts on climate change (NECC) from all member states.[158] According to the AU Assembly decision, the coordination of CAHOSCC rotates over a period of two years. In order to ensure a proper support structure it requires that the country of the host of the presidency of AMCEN should serve as the coordinator at the summit level and the president of the AMCEN serves as coordinator at the ministerial level. The African Group of Negotiators on Climate Change (AGN) serves as the coordinator at the experts' level.[159]

The main mandate of the CAHOSCC is to advance a common African position on climate change.[160] The African common position was released in preparation for the fifteenth Conference of the Parties to the UNFCCC held in Copenhagen, Denmark in 2009.[161] It underscores that although Africa contributes least to global warming, it faces its worst consequences. Therefore international negotiations and initiatives in response to climate change should embrace the claim by Africa for compensation against the damage that global warming has caused its economy. It also affirms that a single delegation will represent the interest of Africa in climate change discussion and requires the member states to promote the Algiers Declaration.[162] The position

[157] Decision on the Coordination of the Committee of African Heads of State and Government on Climate Change (CAHOSCC) and Africa's Preparation for COP 19/CMP 9 Doc. Assembly/AU/6(XX), see generally para 6 (CAHOSCC Decision) ; W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 1
[158] Decision on the implementation of the decision on the African Common Position on Climate Change EX.CL/Dec.500(XV)
[159] Decision on the Coordination of the Committee of African Heads of State and Government on Climate Change (CAHOSCC) and Africa's Preparation for COP 19/CMP 9 Doc. Assembly/AU/6(XX) , see generally para 6 (CAHOSCC Decision)
[160] CAHOSCC Decision (n 157 above) para 6; Scholtz (n 157 above) 11
[161] Algiers Declaration on African Common Position on Climate Change, also see http://climate-l.iisd.org/news/african-union-announces-position-on-climate-change/ (accessed 18 April 2014)
[162] 'Decision on the African Common Position on Climate Change' AUDoc. Assembly/AU/8(XII) Add.6 paras 5,6,7

subsequently has been affirmed and improved in the 2009 Nairobi Declaration,[163] and the 2013 Gaborone Declaration.[164]

Since its creation, the CAHOSCC has made an effort to fulfill its mandate. For instance, in 2009, it argued that Africa contributes little to the pollution responsible for global warming but will be hard hit by climate-related disasters such as droughts, floods and rising sea levels. Hence, it put a cost of $4 67 billion and a demand for compensation to that amount from the developed states.[165] In preparation for the COP 17 held in Durban, CAHOSCC noted that it would focus on the 'continuation of the Kyoto Protocol and operationalization of the Green Climate Fund for the second commitment period' as well as stress the importance of mitigation and adaptation funds for Africa.[166] Indeed, CAHOSCC has been commended for a valued and continued commitment' in climate change negotiations.[167]

However, there are gaps in relation to the African Common Position on Climate Change as well as its implementation in the functioning of the CAHOSCC. First, in terms of approach aimed at implementing climate response measures, the common position offers indigenous peoples nothing different from what obtains at the international level. For instance, it insists that to national adaptation plan process should not be prescriptive, rather, it 'should facilitate country-owned and country-driven action'.[168] This approach, as has been shown, can be used by states to formulate climate change regulatory framework that does not protect the interest of indigenous peoples.

Also, in the functioning of the CAHOSCC, there have been accusations that it has not always represented the position of Africa. For instance, it came out clearly at Copenhagen where it was

[163] 'Nairobi Declaration on the African Process for Combating Climate Change' (Nairobi Declaration) http://www.unep.org/roa/Amcen/Amcen_Events/3rd_ss/Docs/nairobi-Decration-2009.pdf (accessed 18 April 2014)
[164] Gaborone Declaration on Climate Change and Africa's Development (Gaborone Declaration) http://www.unep.org/roa/amcen/Amcen_Events/5th_ss/Docs/K1353541%20%20Gaborone%20Declaration%20by%20the%205th%20Special%20session%20of%20AMCEN%20-%20Final%2022102013%20EN.pdf (accessed 10 April 2014)
[165] OK Fauchald, W Xi &D Hunter *Yearbook of International Environmental Law 2009* (2011) 799; 'Africa demands compo for climate chaos' http://www.abc.net.au/news/2009-08-25/africa-demands-compo-for-climate-chaos/1404220 (accessed 18 April 2014)
[166] 'Report of H.E. Mr. Meles Zenawi, Prime Minister of the Federal Democratic Republic of Ethiopia and Coordinator of the Committee of African Heads of State and Government on Climate Change (CAHOSCC) on the Outcome of the17th Conference of Parties of the UNFCCC (COP 17)', Durban, South Africa, 28 November-9 December 2011, Assembly of the Union 18th ordinary session 29-30 January 2012 Addis Ababa, Ethiopia
[167] 'Decision on the Warsaw Climate Change Conference and Africa's Preparation for the 20th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 20 / CMP 10)' Assembly/AU/Dec.514(XXII) para 3
[168] Gaborone Declaration (n 164 above) para 8

criticised for taking sides with developed countries to short-changing Africa in the sense that the position scaled-back the demand on funding and settling upon what was considered 'more reliable funding,'[169] It is also clear that the CAHOSCC does not view issues of indigenous peoples in Africa as deserving a special consideration in its reports and presentations. For instance, in its recent report on the 2013 COP, there is no reference to the peculiar plight of vulnerable groups, such as indigenous peoples, even though it recorded that Africa spoke with 'one voice' on the issue of climate change. It does not include the plight of indigenous peoples whose identity is often denied.[170]

CAHOSCC has no normative basis not to use its platform to advance the cause of vulnerable groups, such as indigenous peoples, in climate negotiation. The participation of African states in the process that led to the adoption of UNDRIP and their signing of it,[171] commit states in Africa and, arguably, CAHOSCC not to act contrary to the intention of the instrument more so as UNDRIP does not create a new set of rights but only explicates on existing rights as they are peculiar to indigenous peoples.[172] Also, in so far as the content of UNDRIP consists of customary international law principles,[173] one can legally expect CAHOSCC to be committed to UNDRIP ideals in climate negotiation even if some of its members did not sign the UNDRIP. Such an expectation is in line with an overarching principle of the African Union, which is to respect 'democratic principles, human rights, the rule of law and good governance'.[174]

[169] 'Ethiopia-African Delegates accuse Meles Zenawi of shortchanging Africa' http://nazret.com/blog/index.php/2009/12/16/ethiopia_african_delegates_accuse_meles (accessed 18 January 2014)
[170] 'President Kikwete at COP 19: The situation is tough and challenging' Nov.21.2013 http://pages.au.int/cop19/events/president-kikwete-cop-19-situation-tough-and-challenging (accessed 18 January 2014)
[171] UNDRIP was adopted by a majority of 143 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine), see OHCHR 'Declaration on the rights of indigenous peoples' http://www.ohchr.org/en/Issues/IPeoples/Pages/Declaration.aspx _(accessed 18 January 2014); for a detailed legislative history of the Declaration, see Viljoen (n 1 above)
[172] Indigenous Bar Association *Understanding and implementing the UN Declaration on the Rights of Indigenous Peoples: An introductory handbook* (2011) 7
[173] See for example, International Law Association *Rights of Indigenous Peoples Committee of the International Law Association* (2010) Interim Report for the Hague Conference, 4 http://www.ila-hq.org/download.cfm/docid/9E2AEDE9-BB41-42BA-9999F0359E79F62D. (accessed 12 February2014)
[174] Constitutive Act of the African Union, adopted by the 36th ordinary session of the Assembly of the Heads of State and Government 11 July2000, Lome, Togo, art 4(m)

6.3.2 African Ministerial Conference on the Environment

Established in 1985, the African Ministerial Conference on the Environment (AMCEN) has played a critical role in climate change negotiation.[175] The mandate of AMCEN includes the provision of advocacy for environmental protection in Africa and the observance of the implementation of environmental conventions including the UNFCCC and the Kyoto Protocol.[176] The further role of AMCEN includes the promotion of awareness on global and regional environmental matters, the development of a common position to direct representatives while negotiating legally binding international environmental agreements, and the enhancement of African participation at international discussions of global issues. Other functions of AMCEN are the appraisal of environmental programmes at the regional, sub-regional and national levels, capacity building in environmental management, the advancement of treaty ratification of multilateral and regional environmental agreements that are relevant to the region, as well as promotion of regional environmental initiatives.[177]

AMCEN meets yearly and has an organisation structure consisting of Conference, Bureau, Secretariat, African Technical Regional Environment Group and Inter-Agency Working Group.[178] In its functioning, the highest organ of AMCEN is the Conference which is composed of the ministers in charge of the environment from states in Africa.[179] In addition to reviewing the main tasks, including the implementation of regional projects, establishment of priority sub regional activities, and financial arrangements,[180] the AMCEN Conference has a broader mandate that requires it to serve as a forum for discussing all relevant environmental issues and initiatives for Africa. [181]

Composed of a president, five vice-presidents and a rapporteur elected at the Conference in accordance with the principle of equitable geographical distribution among the sub regions of Africa, the Bureau of AMCEN decides on priority action as well as recommendations for

[175] P Acquah, S Torheim & E Njenga *History of the African Ministerial Conference on the Environment 1985 – 2005* (2006) 12-13
[176] 'AMCEN at a glance' http://www.unep.org/roa/amcen/About_AMCEN/default.asp (accessed 26 June 2013)
[177] 'AMCEN Role' http://www.unep.org/roa/amcen/About_AMCEN/default2.asp (accessed 26 June 2013)
[178] Acquah *et al* (n 175 above) 14-17
[179] n 175 above
[180] 'Environmental co-operation in Africa: Cairo Programme for African Co-operation' Resolution adopted by the Conference at its 1st session UNEP/AEC. 1/2 Annex I
[181] Acquah *et al* (n 175 above) 14

submission to the AMCEN session.[182] It is also responsible for the implementation of the Conference decisions and receives decisions, recommendations and proposals from committees and network of AMCEN.[183] The UNEP and the Economic Commission for Africa and the AU serve as the secretariat for AMCEN. [184] As part of its tasks, the Secretariat organises the work of AMCEN in between sessions and offers secretariat services during sessions to AMCEN and other organs under the President and the Rapporteur. [185]

The African Technical Regional Environment Group was established at the second session of AMCEN and comprises national focal points generally made up from the principal officers of the national environmental agencies within the member states.[186] The group serves as a 'technical advisory group of experts' to AMCEN and helps the Conference secretariat in terms of problem identification and formulation of proposals for approval.[187] Consisting of an Inter-Agency Working Group, representatives of specialised agencies and programmes of the United Nations and other international organisations, the Inter-Agency Working Group was established on the recommendations adopted by AMCEN at its 1st session.[188] The Inter-Agency group coordinates the activities of most importance to the implementation of the Cairo Programme and serves as a scientific and technical advisory body to the Bureau of the Conference through the secretariat. Also, the individual members of the Inter-Agency group participates in appropriate AMCEN activities.[189]

Since its 1st session of AMCEN, a number of programmes and initiatives have been developed to facilitate the effective implementation of its mandate in respect of environmental protection in Africa. For instance, the Conference urges states in Africa to participate actively in the global negotiations of climate change,[190] and calls for effective implementation of climate change

[182] Acquah *et al* (n 175 above) 15
[183] As above
[184] 'The African Ministerial Conference on the Environment', Resolutions adopted by the Conference at its 3rd session UNEP/AMCEN. 3/2 Annex I, paras 1 and 2
[185] Acquah *et al* (n 175 above) 15
[186] 'Regional technical co-operation on the environment in Africa: The African Ministerial Conference on the Environment' UNEP/AEC.2/3 Annex I, Resolution adopted by the Conference at its 2nd session, paras 5 and 6
[187] Acquah *et al* (n 175 above) 16
[188] 'Environmental co-operation in Africa', Resolution adopted by the Conference at its 1st session 1/1 UNEP/AEC. 1/2 Annex I para 6; Acquah *et al* (n 175 above) 16
[189] Acquah *et al* (n 175 above) 16-17
[190] Acquah *et al* (n 175 above) 18

instruments.[191] At its 5th session, it emphasised the management of environmental impacts of climate change in Africa as a key policy area. At its 8th session, AMCEN agreed upon a strong political commitment from its member states to defend their interests in 'new and complex areas', including climate change.[192] Also, its work programme, for instance for the period 2005-2006, consists of the management of forest resources and climate change.[193] Its activities include conducting a preparatory conference resulting in an African common position on climate change.[194] Earlier, at Kampala, the AMCEN, in welcoming the creation of the African Union, expressed concern about the vulnerability of African peoples in the face of 'global environmental changes including the impacts of climate change and desertification'.[195]

Subsequently, AMCEN has raised awareness with a view to increase the participation of African peoples in building a regional consensus on climate issues. Arguably, this approach showcases AMCEN as an institution with potential relevance for the realisation of the human rights of indigenous peoples. This potential is indeed reflected in a range of meetings coordinated by AMCEN. For instance, during the Central African sub-regional meetings, awareness-raising for major stakeholders, sustainable forest management, land tenure and use and carbon payments are core issues raised by indigenous peoples and local communities as deserving attention in implementing climate mitigation responses.[196] Similar issues were reiterated at the East African sub-regional meeting where representatives of local populations stressed that 'unequal distribution of land and property rights, together with access to land and resources' should be taken into consideration while addressing climate change impacts.[197] A key element which was stressed in the North and Southern African dialogue is the promotion of 'traditional technologies based on indigenous cultural identities, knowledge and experience'.[198] At least those suggestions would have been impossible without the participation of indigenous peoples and signifies that

[191] Acquah *et al* (n 175 above) 52
[192] Acquah *et al* (n 175 above) 43
[193] Acquah et al (n 175 above) 51
[194] Acquah *et al* (n 175 above) 55
[195] 'Kampala Declaration on the Environment for Development' http://gridnairobi.unep.org/chm/roa/AMCEN/Declaration%20Kampala%204-5%20July%202002.pdf (accessed 26 June 2013)
[196] 'Report of the Central African sub regional meeting on climate change convened by the African Ministerial Conference on the Environment' (15 October 2009) (*Central African Report*)AMCEN/CA/CC/1 1-15, para 31; 'Draft enhanced conceptual framework proposed for adaptation and mitigation measures to combat climate change in Central Africa' AMCEN/CA/CC/1 Annex III
[197] 'Report of the Eastern African sub regional meeting on climate change, jointly convened by the East African Community and the African Ministerial Conference on the Environment' (3 September 2009) AMCEN/EAC/CC/1 1-31 para 70
[198] 'Report of the North and Southern African sub-regional meeting on climate change' (19 April 2010) AMCEN/NSA/CC/1 1-15 para 13(d)

the functioning of AMCEN, at least to some extent, allows for the participation of indigenous peoples and has the potential to improve.

6.3.3 Climate for Development in Africa (ClimDev-Africa) Programme

The ClimDev-Africa Programme is established to create a concrete basis for Africa's response to climate change. It is an initiative of the African Union Commission (AUC), the African Development Bank (AfDB) and the United Nations Economic Commission for Africa. Its evolution dates back to 2007 when the Africa Union 8th ordinary session[199] endorsed an 'Action Plan for Africa', and calls for the integration of climate change in development strategies designed by member states in conjuction with entities including regional economic communities (REC), private sector, civil society and development partners. In response to this call, the Conference of African Ministers of Finance, Planning and Economic Development requested collaboration involving organisations, including the AUC and AfDB on the need for appropriate action in effectively developing and implementing the ClimDev-Africa Programme.[200]

The ClimDev-Africa focuses on (i) building a solid science and observational infrastructure, (ii) enabling strong working partnerships between government institutions, private sector, civil society and vulnerable communities, and (iii) creating and strengthening knowledge frameworks to support and integrate the actions required.[201] Principal stakeholders in the ClimDev Africa Programme are identified as including 'poor rural people whose livelihoods are sensitive to climate variability',[202] which, arguably, may include indigenous peoples whose land is negatively impacted by land.

The structure of governance for the ClimDev-Africa Programme consists of the meetings of the Chief Executives of AUC/ECA/AfDB, Steering Committee (SC), Joint Secretariat Working Group (JSWG), Annual Climate Change and Development in Africa Conference (CCDA) and Technical Advisory Panel.[203] The meetings of the Chief Executive of AUC/ECA/AfDB is composed of the chief executives of the three African institutions with the main responsibility of

[199] 'Decision on Climate Change and Development in Africa' Doc.Assembly/AU/12(VIII)
[200] Economic Commission for Africa: Conference of African Ministers of Finance, Planning and Economic Development Fortieth session of the Commission , Addis Ababa, Ethiopia 2-3 April 2007, 'Ministerial Statement' E/ECA/COE/26/L6, para 24
[201] EAC, AUC & AfDB *Revised ClimDev-Africa Framework Programme Document* (2012) 15 (EAC, AUC & AfDB Document)
[202] EAC, AUC & AfDB Document (n 201 above)17
[203] As above

providing direct oversight of the Programme.[204] It receives the annual report of the operation of ClimDev-Africa Programme and the minutes of all Steering Committee meetings. It oversees accountability for the operation of ClimDev.[205] Although not involved in the daily decision-making of the programme, it delivers the ClimDev-Africa Programme in line with the general principles of work among the three agencies.[206] The SC provides the principal oversight and supervision of the ClimDev Africa Programme. It approves the work plans of the Programme and follows up on the progress of the Programme and is the governing council for the ClimDev Special Fund (CDSF).[207] A division of the SC, the ClimDev Joint Secretariat Working Group (JSWG) meets in between SC meetings with the view to ensure the timely decision-making required for the functioning of the Programme.[208]

Arguably, the ClimDev-Africa Programme links with human rights through its Annual Climate Change and Development in Africa Conference (CCDA Conference). Established principally to nurture and manage linkages between stakeholders, the CCDA Conference acts as a forum of consultation, provides opportunities for the exchange of information, ensures the coherence of ClimDev-Africa with other activities; and allows stakeholders to make representations to the CDSC where necessary.[209] Participants in the CCDA Conference may include civil society organisations and NGOs from across Africa, International NGOs as well as farmer, herder and fisherman representatives.[210] In the three conferences organised thus far, [211] the CCDA raises a hope that indigenous peoples' representatives may participate and influence decisions in relation to their land use and tenure. For instance, the second conference of the CCDA indicated participants which included over 300 participants from African member states, regional economic communities (REC), river basin organisations, NGOs, private sector, academia and development partners.[212] The involvement of NGOs in the meetings shows that there is potential

[204] As above
[205] As above
[206] EAC, AUC & AfDB Document (n 201 above) 22
[207] EAC, AUC & AfDB Document (n 201 above) 22-23
[208] EAC, AUC & AfDB Document (n 201 above) 22
[209] EAC, AUC & AfDB Document (n 201 above) 23
[210] As above
[211] 'Second Annual Conference on Climate Change and Development in Africa-Outcome Statement Climate Change and Development in Africa (CCDA-II)' Addis Ababa, Ethiopia 19-20 October 2012 http://www.uneca.org/publications/second-annual-conference-climate-change-and-development-africa-outcome-statement (accessed 26 June 2013); 'Third Annual Conference on Climate Change and Development in Africa(CCDA-III)' 2013 http://rea.au.int/en/content/third-annual-conference-climate-change-and-development-africaccda-iii (accessed 26 March 2014)
[212] As above

for indigenous peoples' representatives to participate in and contribute to the discussions of the CCDA.

In addition to the foregoing, the ClimDev-Africa Programme has key input areas of human rights significance. These areas are, namely, the African Climate Policy Centre (ACPC), the Climate Change and Desertification Unit (CCDU) and the ClimDev Special Fund (CDSF).[213]

6.3.3.1 African Climate Policy Centre (ACPC)

Established as a centre of the United Nations Economic Commission for Africa (UNECA) under the Food Security and Sustainable Development Division (FSSDD), the ACPC is one of the components of the ClimDev.[214] Toward facilitating the realisation of the ClimDev objectives, the ACPC's main goal is to recommend appropriate policy options and offer technical support on sustainable development as well as effective management of climate risks.[215] In the pursuit of this goal, the ACPC's tasks include the rendering of assistance on the integration of climate change in the economic planning process and the development of an African consensus in preparation for international negotiations on climate change and development.[216] It offers policy guidance on climate change and environment, organises the climate change mitigation and adaptation processes in Africa, assists with climate policy formulation and analysis at the national level, as well as ensures that climate information and climate-related studies, reports and policy briefs are publicly accessible.[217] In addition, the ACPC performs secretariat and administrative roles, such as acting as Secretariat to the CDSC, carrying out of programme outreach, the dissemination of information, interfacing with key stakeholders and representing the ClimDev when required.[218]

As its contribution to knowledge generation, sharing and networking on climate response by adaptation, the ACPC is costing climate adaptation by focusing on five river basins in Southern

[213] EAC, AUC & AfDB *ClimDev-Africa Programme Work Plan and Budget for 2012-2014* (2012) (*ClimDev -Africa Budget*); EAC, AUC & AfDB Document (n 201 above) 20
[214] United Nations Economic and Social Council 'Report on Climate for Development (ClimDev-Africa) in Africa Programme' E/ECA/CFSSD/8/8 19-21 November 2012, 2 (UNESCO Report)
[215] EAC, AUC & AfDB Document (n 201 above) 24; UNESCO Report (n 214 above) 3
[216] EAC, AUC & AfDB Document (n 201 above) 24
[217] EAC, AUC & AfDB Document (n 201 above) 25-26
[218] As above

Africa.[219] Between 2011 and 2012, the ACPC undertook knowledge generation and sharing activities in key areas of climate finance for adaptation.[220] To advance the awareness in relation to climate change adaptation, it organises a workshop on the management risks of extreme events and disasters[221] and the effective use of appropriate technology for adaptation in agricultural production in North Africa.[222] It also undertook knowledge generation and sharing of activities in connection with mitigation.[223] It shared with the Economic Community of West African State (ECOWAS), information and news on negotiations and development.[224] It has teamed up with UNEP to develop a project that will assist Kenya, Rwanda, Mali, Zambia and the Gambia to make a 'quick start' on technology-based mitigation activities consistent with nationally-appropriate mitigation actions.[225] Also, the ACPC supported the preparation for (COP17) of the UNFCCC in South Africa with technical papers for the purpose of strengthening the African common position on climate change. The papers focused on several aspects of adaptation and mitigation negotiations including adaptation finance and experience the 1st commitment period under the Kyoto Protocol.[226]

Even if not in the specific context of indigenous peoples, the ACPC has been carrying out tasks in relation to the impacts of climate change and response measures which potentially can affect positively their human rights. In relation to the impact of climate change in Africa, the ACPC is assisting the AGN by providing technical support on 'the loss and damage' arising from climate change, particularly on the economic estimates of hazards such as sea level rise, flooding, drought and cyclones, as well as estimates of the effect on economic sectors and performance.[227] Similarly, in order to encourage an effective response to climate change, the ACPC established a partnership with the Pan-African Chamber of Commerce and Industry which has a membership consisting of the chambers of commerce in all African countries.[228] In some of its key-note papers, focus has been on the impact and challenges of climate change on water resources and

[219] EAC, AUC & AfDB Document (n 201 above) 3-4
[220] Economic Commission for Africa 8th session of the Committee on Food Security and Sustainable Development and the regional implementation meeting for the 20th session of the Commission on Sustainable Development 'Report on Climate for Development (ClimDev-Africa) in Africa Programme' E/ECA/CFSSD/8/8 13 November 2012 5 (ClimDev-Africa Report)
[221] ClimDev-Africa Report (n 220 above) 6
[222] ClimDev-Africa Report (n 220 above) 8
[223] ClimDev-Africa Report (n 220 above) 5
[224] ClimDev-Africa Report (n 220 above) 6
[225] ClimDev-Africa Report (n 220 above) 11
[226] ClimDev-Africa Report (n 220 above) 9
[227] ClimDev-Africa Report (n 220 above) 4
[228] ClimDev-Africa Report (n 220 above) 5

hydropower sustainability in Africa.[229] It disseminates technical information concerning the impacts of climate change on agriculture in Africa.[230] Other climate impact-related activities include the sectoral analysis of climate change impact in areas including agriculture, tourism, forestry, water and energy, as well as an assessment of technology and the exploration of development.[231] It has also carried out workshops on climate and health.[232]

As mentioned earlier, indigenous peoples may not be specifically mentioned, but the activities of the ACPC aimed at addressing 'loss' and 'damage' as a result of climate change can be to their benefit. For instance, there are indigenous peoples living in regions where drought is intensive.[233] Hence, if resources are effectively deployed and their tenure is assured, they should benefit from efforts aimed at addressing the phenomenon. Similarly, information dissemination can contribute to their ability to cope with climate change. The foregoing signifies that there is a possibility that the activities of the ACPC can be of benefit in addressing the plight of indigenous peoples facing the adverse impacts of climate change in relation to their land tenure and use.

6.3.3.2 Climate Change and Desertification Unit

Potentially of relevance to addressing the policy gap in relation to the protection of indigenous peoples' lands in Africa is the Climate Change and Desertification Unit (CCDU). The establishment of the CCDU arises from the felt need of the Heads of States and Government of the African Union to address the challenges of climate change through the implementation of measures that respond to its several effects on Africa and its peoples.[234] The establishment of the CCDU was recommended by the Executive Council of the AU,[235] and approved at the thirteenth ordinary session of the Assembly of Heads of State and Government of the African Union where member states of the African Union were also urged to accede to the United Nations Conventions to Combat Desertification.[236] It was reasoned that the CCDU will help the Africa

[229] As above
[230] ClimDev-Africa Report (n 220 above) 9
[231] ClimDev-Africa Report (n 220 above) 13
[232] ClimDev-Africa Report (n 220 above) 6
[233] General adverse effects of climate change on the environment of the indigenous peoples, see chapter 3
[234] ClimDev-Africa Report (n 220 above) 16
[235] 'Decision on the African Common Position on Climate Change', adopted by the 15th ordinary session of the Executive Council in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 1 July 2009 Doc. EX.CL/525(XV) para 7
[236] 'Decision on the African Union Accession to the United Nations Convention to Combat Desertification (UNCCD)' Assembly/AU/Dec.255(XIII), adopted by the 13th ordinary session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009 Doc.EX.CL/512(XV) Add.3 para 3; EAC, AUC & AfDB Document (n 201 above) 27

Group at that forum in bringing about a positive impact in a systematic and sustained manner.[237] Thus, the CCDU aims to enhance the efforts of the African Union Commission in promoting and strengthening synergies and complementarities between stakeholders involved in the area of climate change and desertification in Africa.[238] The key functions of the CCDU are to provide policy and political guidance as well as enhance coordination and harmonisation of Africa's activities in the field of climate change, particularly in relation to desertification. This function entails an effective engagement of Africa's political leadership at all levels in advancing climate change and desertification issues.[239]

The specific objectives of the CCDU are to coordinate policies and decisions on climate change and desertification, integrate concerns around climate change and desertification into continental, regional and planning development frameworks. The CCDU also seeks to mobilise resources for the effective implementation of decisions, as well as to improve, coordinate, document and disseminate climate change and desertification research and information. It further focuses on capacity building for RECs and member states in the implementation of climate change and desertification- related decisions.[240] In relation to adaptation and mitigation measures, the CCDU seeks to boost the capacities of member states and stakeholders to enhance the integration of adaptation and mitigation measures in development policies and risk management practices in all activities related to climate change and desertification. It also aims to promote the mainstreaming of climate and desertification-related concerns in the development policies, strategies and plans of member states.[241] The EU has pledged €2 million (approximately $2.5 million) over a four year period, but the bulk of the resources required to operate the CCDU will be provided at the regional level.[242]

The CCDU has only recently received funds to commence its activities,[243] due to the nature of its objectives it will play a role in the implementation of the Great Green Wall for Sahara and Sahel

[237] ClimDev-Africa Report (n 220 above) 17
[238] ClimDev-Africa Report (n 220 above) 18; 'Climate Change and Desertification Unit (CCDU)' http://www.climdev-africa.org/Climate-Change-and-Desertification-Unit (accessed 26 March 2014)
[239] ClimDev-Africa Report (n 220 above) 18
[240] As above
[241] As above
[242] ClimDev-Africa Budget (n 213 above) 16
[243] ClimDev-Africa Report (n 220 above) 18

Initiative.[244] This initiative aims not only at tree planting, but at tackling the adverse social, economic and environmental impact of land degradation and desertification in the Sahara and Sahel region across partner countries, including Algeria, Burkina Faso, Chad, Djibouti, Egypt, Ethiopia, Mali, Mauritania, Niger, Nigeria, Senegal, Sudan, and the Gambia.[245]

That the foregoing, if effectively implemented, may contribute to addressing the adverse impacts of climate change and thereby enhance the realisation of the rights of indigenous peoples in relation to land is possible. For instance, where concerns around climate change and desertification are integrated in the official policy of the states, this may have the indirect benefit of contributing to the improved physical condition of indigenous peoples' lands. Also, the integration of adaptation and mitigation measures in activities relating to climate change and desertification as well as the coordination and dissemination of climate change and desertification research and information, potentially may address the plight of indigenous peoples living across the corridors of desertification.

6.3.3.3 ClimDev Special Fund

The purpose of the ClimDev Special Fund (CDSF) is to pool resources from different sources including donors, to finance climate-related programmes and information at all levels in Africa.[246] The establishment of the CDSF is linked to the 1st joint annual meeting of the African Union Conference of Ministers on the Economy and Finance and the Conference of African Ministers of Finance, Planning and Economic Development of the UN Economic Commission for Africa held in Addis Ababa in April 2008.[247] At that meeting, a request was made to the ECA, along with the AUC and the AfDB, to take appropriate measures for the effective implementation of the ClimDev Africa.[248] Acting in line with article 8 of the Agreement establishing the Bank, which allows the AfDB to establish or be entrusted with the

[244] AU-EU Partnership 'Achievements and milestones' http://www.africa-eu-partnership.org/areas-co-operation/climate-change/achievements-and-milestones (accessed 26 February 2014)
[245] 'Great Green Wall for Sahara and Sahel-Combat desertification, improving food security and climate change adaptation (29/09/2011)' http://eeas.europa.eu/delegations/african_union/press_corner/all_news/news/2011/20110929_01_en.htm (accessed 13 February 2014)
[246] AfDB *Climate for Development in Africa Instrument for the Establishment of the ClimDev-Africa Special Fund (Administered by the African Development Bank)* (AfDB Climate Instrument) 2
[247] United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD), adopted in Paris, 14 October 1994 para 3(c)
[248] UNCCD, para 3

administration of special funds, the AfDB accepted the request to establish the ClimDev-Africa Special Fund and to administer its resources.[249]

There is a rationale for establishing the CDSF in the Bank. The first is that the AfDB attaches priority to addressing the adverse impacts of climate change, particularly through its Climate Risk Management and Adaptation Strategy (CRMAS).[250] The CRMAS serves as a platform to influence national development and policies and plans to accommodate climate risk management and adaptation strategies.[251] Second, in implementing projects and programmes that use special funds over the years that use special funds, the bank has accumulated experience which is useful in managing the CDSF.[252] Finally, unless addressed, climate change may undermine the efforts of the bank in the areas of poverty reduction and sustainable development.[253]

The governance of the CDSF is largely made up of member countries of the Bank and other organisations acceptable to the Bank.[254] The governing council is composed of nine members, comprising one representative each from the Bank, the United Nations Economic Commission for Africa (UNECA) and the AUC, one representative from the World Meteorological Organisation (WMO), one representative from the Global Climate Observation System, one member appointed by donors to the CDSF who are not otherwise represented on the Governing Council. Although not specifically mentioned, the governance structure provides a window of opportunity for indigenous peoples' representation, considering that it allows for the participation of two stakeholder representatives selected from civil society organisations by agreement between the principal partners (AUC, UNECA and AfDB), and the coordinator of the CDSF.[255] Since indigenous peoples' organisations qualify as civil society organisations, this connotes that there is a potential opportunity for them to make it into the CDSF and participate in issues concerning project affecting their lands.

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[249] UNCCD, paras 5 and 6; AfDB 'Establishment of the ClimDev-Africa Special Fund' Resolution B/BG/2010/14, adopted at the 1st sitting of the 45th annual meeting of the African Development Bank, on 27 May 2010 http://www.afdb.org/fileadmin/uploads/afdb/Documents/Boards-Documents/2010%20Annual%20Meetings%20%20-%20Official%20Record%20-%20Package%20-%20English.pdf (accessed 13 February 2014)
[250] African Development Bank 'Framework Document for the Establishment of the ClimDev-Africa Special Fund (CDSF) (October 2009) (AfDB Climate Framework) 3
[251] As above
[252] As above
[253] As above
[254] AfDB Climate Instrument (n 246 above) 4
[255] As above

The scope of CDSF intervention may accommodate proposals made by indigenous peoples for combating challenges to their land posed by climate change. These areas of intervention are threefold, namely, the generation and dissemination of climate-related information, the capacity enhancement of policy makers and policy support institutions on the integration of climate information, and the implementation of pilot adaptation practices.[256]

The generation and wide dissemination of climate-related information entails activities involving the upgrading of observation networks and infrastructure, capacity building to collect and manage climate data, the monitoring of air quality, inland lakes, the development of early warning systems and seasonal forecasts and effective packaging and dissemination of climate information.[257] For indigenous peoples who have had a special relationship with their land for centuries, proposals which seek to improve traditional weather forecasts and adaptation strategies can be initiated and come under this category of intervention. Considering the potential in this activity to generate first-hand information about the state of their environment, it can contribute to addressing the impact of climate change on the land and resources of indigenous peoples.

In relation to capacity-enhancement to integrate climate change information, proposals that seek funding for activities which develop knowledge management, experience and best practices are within the scope of intervention.[258] It also entails proposals focusing on risks, vulnerability and costs assessment, capacity building and support.[259] Of particular importance to the participation of indigenous peoples in the component are programmes dealing with training and the awareness of local communities as how to address climate change adverse impacts. This component particularly demands that in order to attract funding, focus is given to groups including civil society organisations, NGOs, vulnerable communities and populations, as potential beneficiaries.[260] This component is important because, though indigenous peoples have adaptive practices that have proved useful over the years, the intensity of the climate change challenge suggests that training and awareness activities are required for them to cope effectively. Hence, the accommodation of proposals dealing with this area is a motivation for the indigenous peoples' right to participation and information.

[256] AfDB Climate Instrument (n 246 above) 2
[257] AfDB Climate Framework (n 250 above)
[258] AfDB Climate Framework (n 250 above) 4
[259] AfDB Climate Framework (n 250 above) 4
[260] AfDB Climate Framework (n 250 above) 5

The criteria on recipient and project-eligibility for funding suggests that indigenous peoples groups are not exempted from the CDSF. To qualify as a recipient of financial or other assistance under the CDSF, countries are not the only eligible parties. NGOs, CSOs and CBOs are eligible.[261] Similarly, the projects addressing the peculiar circumstances of indigenous peoples in the face of climate change challenges are covered by the eligibility criteria: projects are acceptable once they meet the requirements, including the demonstration of 'positive impact (direct or indirect) on the livelihood of stakeholders' such as 'the poor, women, and vulnerable communities and population groups'.[262]

6.3.4 African Union Commission

The African Union Commission (AUC) operates as the Secretariat that is responsible for the daily functioning of the operations of the African Union (AU).[263] Headed by a chairperson, the Commission is composed of eight commissioners handling different portfolios: Peace and Security, Political Affairs, Trade and Industry, Infrastructure and Energy, Social Affairs, Rural Economy and Agriculture, Human Resources, Science and Technology, and Economic Affairs.[264] Of all the portfolios, the Department of Rural Economy and Agriculture (DREA) is particularly relevant to the issue of climate change in Africa. As part of its objectives, the DREA seeks to ensure the effective protection and development of the environment based on sound management of the environment and natural resources, including disaster-risk reduction and adaptation to climate change.[265] The Environmental and Natural Resources division influences issues relating to climate change through its two arms: the Multilateral Environmental Agreements (MEA) and the African Monitoring of Environment for Sustainable Development (AMESD).[266]

Through the MEA of the DREA, the AUC has coordinated programmes aimed at improving the capacity of negotiators from Africa in negotiating international environmental instruments.[267]

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[261] ECA & AUC *ClimDev special fund operational procedures manual* (December 2011) 12-13 (ClimDev Special Fund Operational Procedures)
[262] ClimDev Special Fund Operational Procedures (n 261 above)13
[263] Viljoen (n 1 above) 191
[264] 'The Commission' http://www.au.int/en/commission (accessed 13 February 2014)
[265] 'Department of Rural Economy and Agriculture (DREA)' http://rea.au.int/en/about (accessed 13 February 2014)
[266] 'DREA' http://rea.au.int/en/ (accessed 13 February 2014)
[267] 'The EC-ACP Capacity Building Programme on Multilateral Environmental Agreements-The Africa Hub-African Union Commission Training of African Negotiators'

Under the AMESD, financial assistance from the European Commission through the European Development Fund managed by the AUC aims to equip all African nations with the resources, including the required environmental data, to improve decision-making processes at the national and regional policy levels.[268] In implementing this project, the AUC operates through the African, Carribean Pacific Group of States (ACP) Secretariat and a Steering Committee composed of the main AMESD stakeholders, namely the five Regional Economic Communities (RECs) the Economic Community of West African States (ECOWAS), Southern African Development Community (SADC), Economic Community of Central African States (ECCAS), the Intergovernmental Authority on Development (IGAD), Indian Ocean Commission (IOC).[269]

The themes being implemented in each of the regions are water resources management in the DRC belonging to the CEMAC region; agricultural and environmental-resource management in Bostwana in the region of the SADC; land degradation and desertification mitigation and natural habitat conservation, in Kenya in the region of the IGAD; marine and coastal management in Mauritius in the region of the IOC; and crop and range land management in Niamey, in the region of the ECOWAS.[270] The AUC serves as the political head for the CDSF by coordinating regional support by governments and policy response.[271] It is involved in the decision-making process of the ClimDev-Africa secretariat and the CDSF.[272]

Since the focus of the projects is on essential areas, such as water and the conservation of forest resources, the foregoing activities are of potential benefit to indigenous peoples in the face of the climate change challenge. Where such projects accommodate indigenous peoples, they will enhance their realisation of a range of socio-economic rights, including the rights to water, food and housing. This optimism fits into the focus of the DREA to ensure sound management of environment and natural resources. Similarly, the programmes of the AMESD, which aim at generating environmental data for national and regional policy processes, can be of mutual

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file:///C:/Users/User/Downloads/MEAs%20Write%20up%20for%20MEAs%20and%20DREA%20Websites%20%2014-9-11.pdf (accessed 10 February 2014)

[268] 'African Monitoring of the Environment for Sustainable Development (AMESD)' http://www.eumetsat.int/website/home/AboutUs/InternationalCo-operation/Africa/AfricanMonitoringoftheEnvironmentforSustainableDevelopmentAMESD/index.html (accessed 13 February 2014)

[269] As above

[270] As above

[271] ClimDev-Africa Budget (n 213 above) 3; AfDB Climate Framework (n 250 above) 7

[272] AfDB Climate Framework (n 250 above) 8

benefit to indigenous peoples and the AMESD focus. Indigenous peoples' knowledge may be helpful in generating environmental data for the AMESD. Where the data-generation process includes indigenous peoples, it is likely that such information can reveal their peculiar circumstances and feed into national policies and, in turn, benefit indigenous peoples.

6.3.5 New Partnership for African Development

The New Partnership for African Development (NEPAD) framework document was adopted in July 2001 by the OAU Assembly of Heads of State and Government.[273] While NEPAD does not implement projects or distribute funds, it aims to identify problems, pinpoint solutions and, where needed, exert high-level political pressure to promote change.[274] The implementation Committee of NEPAD consists of four heads of state or government for each of the five regions of Africa, and a Steering Committee composed of the personal representatives of the members of the Implementation Committee which oversees the work of the NEPAD Secretariat.[275] The NEPAD also works with the AUC, regional economic communities, national governments, civil society and the private sector on programmes and projects that focus on improving the lives of populations in Africa.[276]

In what seems to define the NEPAD angle to assist with the realisation of the right to environment in Africa, the framework document identifies resources, such as 'rainforests, and the minimal presence of emissions and effluents that are harmful to the environment', as resources that distinguish Africa as a continent with 'an indispensable resource base that has served all humanity for so many centuries'.[277] It acknowledges that Africa has a significant role to play in the protection of the environment. Hence, there is a clear indication that the document

[273] 'The New Partnership for Africa's Development' (NEPAD) http://www.nepad.org (accessed 13 February 2014) (NEPAD Framework Document). On the evolution of NEPAD, see I Taylor *NEPAD: Toward Africa's development or another false start?* (2005); M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41
[274] R Herbert 'NEPAD and the many challenges of Africa' in G Lundy, S Pennington & B Bowes (eds) *South Africa 2014: The story of our future* (2004)
[275] Kilander (n 273 above) 42-43
[276] 'AUC and NEPAD Agency set out to galvanise the African voice in time for the next G8/Africa Summit' http://www.nepad.org/nepad/news/2119/auc-and-nepad-agency-set-out-galvanise-african-voice-time-next-g8africa-summit (accessed 14 October 2014)
[277] NEPAD Framework Document (n 273 above) para 10

commits itself to the nurturing of environmental resources 'using them for the development of the African continent while, at the same time preserving them for all humanity'.[278]

As far back as 2003 it identified climate change as a threat and suggested the need to set up a task force effectively to respond to its negative impact.[279] Around the same period, NEPAD formulated an action plan for the environment which includes climate change. In that action plan, it asserts that climate change is a major threat to the atmosphere and that its impacts will be 'varied, irreversible and long-term'.[280] As a response, NEPAD has a specific theme focusing on climate change and natural resources management.[281] The main aim of NEPAD under this theme is to advance regional and national programmes that can address the environmental threats posed by climate change.[282] It seeks to bring together regional and continental stakeholders to manage, share knowledge and encourage one another in addressing the threat of climate change.[283] In operationalising this theme, a range of approaches are employed, including brainstorming and conferences across the continent, supporting the AMCEN meetings, participating in relevant climate change conferences, and the preparation of policy briefs and provision of technical support in developing African positions.[284] The programme further focuses on generating data and information on climate change mitigation and adaptation in Africa with the view of establishing a database of relevant climate change information.[285] The programme also aims to develop sub-regional climate change frameworks in the REC, focusing on environment, energy and water.[286]

Toward actualising the foregoing, the NEPAD Climate Change Fund was established in 2014 by the NEPAD Planning group with support from the Government of Germany. The Fund aims to offer technical and financial assistance to AU member states, REC and institutions that meet the

[278] NEPAD Framework Document (n 273 above) para 12
[279] Open Society Foundation 'The New Partnership for Africa's Development (N EPAD) in plain language: A resource for organisations' (2003) 39-40
[280] African Union and NEPAD 'New Partnership for Africa's Development (NEPAD) action plan of the environment initiative' (October 2003) paras 32 and 33
[281] Other themes are the agriculture and food security, regional integration and infrastructure, human development, economic and corporate governance, cross-cutting Issues, including gender, capacity development and ICT, see http://www.nepad.org/climatechangeandsustainabledevelopment (accessed 13 February 2014)
[282] 'Climate change and national resource management NEPAD Thematic areas' http://www.nepad.org/thematic-area (accessed 10 February 2014)
[283] As above
[284] As above
[285] As above
[286] http://www.nepad.org/climatechangeandsustainabledevelopment (accessed 10 January 2014)

eligibility criteria and the clearly-defined targeted areas of support by the fund.[287] In awarding funds, according to the Climate Funds Guidelines, applicants and institutions which will be given priority are government institutions, such as the ministries of environment and agriculture, and municipalities. Others are REC as well as regional and national coalitions of civil society organisations focusing on the target areas of the Fund.[288] Overall, the Fund aims at firming the resilience of African countries to climate change by developing national, sub-regional and continental capacity. The current Fund operates for a period of two years (2014-2015).[289]

Closely linked with fulfilling the goal of NEPAD is the African Peer Review Mechanism (APRM) which was established in 2003 as a 'self-monitoring mechanism' to promote and reinforce high standard of governance.[290] The APRM seeks to inspire common approach to fulfilling political, economic and corporate governance values, codes and standards, among African countries within the New Partnership for Africa's Development.[291] Participation in the process commences upon the adoption of the Declaration on Democracy, Political, Economic and Corporate Governance,[292] by which a country notifies the Chairman of the NEPAD Heads of State and Government of its willingness to participate.[293] Related to climate change is the set of indicators dealing with the protection of the environment to which states are to respond as a fulfilment of the APRM mandate for ensuring corporate governance.[294] Member states are expected to indicate what is being done to ensure that corporations contribute to environmental sustainability,[295] to establish an enabling environment and to indicate the existence of an EIA

[287] http://www.nepad.org/climatechangeandsustainabledevelopment/climate-change-fund (accessed 10 January 2014)
[288] 'Guidelines for the NEPAD Climate Change Fund' http://www.nepad.org/sites/default/files/Guidelines%20for%20Applicants%20%28NEPAD%20Climate%20Change%20Fund%29.pdf (accessed 13 February 2014) section 111
[289] 'Climate Change Fund' http://www.nepad.org/climatechangeandsustainabledevelopment/climate-change-fund (accessed 13 February 2014)
[290] The New Partnership for Africa's Development 'The African Peer Review Mechanism Base Document' (2003) para 1
[291] APRM 'Mission' http://aprm-au.org/mission (accessed 22 May 2014)
[292] Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) ANNEX 1 endorsed by the inaugural Summit of the African Union in Durban South Africa , July 2002
[293] The New Partnership for Africa's Development 'The African Peer Review Mechanism Base Document' (2003) para 5
[294] APRM 'Member countries' http://aprm-au.org/aprm-map (accessed 22 May 2014), other areas are democracy and good political governance, economic governance and management and socio-economic development
[295] APRM 'Objectives, standards, criteria and indicators for the African Peer Review Mechanism' NEPAD/HSGIC-03-2003/APRM/Guidelines/OSCI/9 March 2003 21 (APRM Standard document)

programme,[296] as well as the realisation of human rights which generally feature in all the thematic areas of the APRM.[297]

Arguably, the NEPAD framework document and the tool of APRM have the potential to address the gap in the climate change regulatory framework at the national level in relation to safeguarding indigenous peoples' lands in facing the threat of climate change. In operationalising the theme on climate change and natural resource management, the approaches that allow for brainstorming and conferences across the continent may involve and engage indigenous peoples and their land issues. This engagement will enable them to draw attention to factors occasioning the degradation of the land of indigenous peoples, the need for recognition of identity and land rights and, in so doing, shape the content preparation of policy briefs and the provision of technical support in developing African positions. Ultimately, when effectively carried out, it will contribute to the realisation of their rights to land. It will help in drawing attention to combating challenges, such as desertification and bringing about the rehabilitation of degraded land. Also, through this approach, the traditional practices of indigenous peoples can be engaged in the monitoring and regulating of the impacts of climate change. By giving priority to a coalition of NGOs to access funding, indigenous peoples' groups or representatives may be able to access the funds needed to address the adverse effects of climate change on their land. The prospects of compensation and benefit-sharing in a fund directly accessible by indigenous peoples will address the concerns relating to the implementation of climate response projects on their land.

6.3.6 Pan-African Parliament

In explaining the legal basis for the Pan-African Parliament (PAP), its objectives and functions, four instruments are relevant. These are the African Economic Community (AEC) Treaty,[298] Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament (PAP Protocol),[299] the AU Constitutive Act[300] and the Pan African Parliament Rules

[296] APRM Standard document (n 295 above) 22
[297] APRM Standard document (n 295 above)
[298] Treaty Establishing the African Economic Community adopted in Abuja , Nigeria, 1991 and entered into force in 1994 (AEC Treaty)
[299] Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament, adopted in Sirte, Libya, on 2 March 2001, and entered into force 14 December 2003 (PAP Protocol)

of Procedures (PAP Rules).[301] The AEC set the tone for the establishment of PAP: it proposed that the realisation of its objectives is to be carried out in stages.[302] With regard to establishing PAP, the AEC Treaty indicates that its membership would be determined within five years after establishing an African common market.[303] The treaty however defers the description of the powers, composition, organisation and functions of the PAP to be set out by the PAP Protocol at a later date.[304] Adopted in 2001, the Constitutive Act provides for the establishment of PAP as one of the organs of the African Union,[305] and reiterates that among others, the reason for establishing the PAP is to ensure 'full participation of African peoples in the development and economic integration of the continent'.[306]

Article 11 of the PAP Protocol sets out nine functions and powers for PAP that are of significance to human rights.These functions and powers are to examine and make the necessary recommendations pertaining to the protection of human rights and the budget of the community.[307] The functions and powers, further, are to assist with harmonising the laws of member states, contribute to the realisation of the objectives of the AU/AEC, promote their programmes and objectives, and coordinate the harmonisation of policies of the REC and parliamentary fora in Africa.[308] The functions and powers include adopting appropriate rules of procedures and the performance of other functions as may be deemed appropriate in actualising the objectives of PAP.[309] These functions and powers, particularly those dealing with the examination and making recommendations in relation to human rights, as well as the harmonisation of policies and measures, are of particular importance to indigenous peoples facing the adverse impacts of climate change. Through the examination and making of recommendations, the PAP can initiate and generate information as well as document data on climate change and response measures on indigenous peoples' lands and request for the formulation of laws for their protection, particularly at the national level. In calling for the

[300] Constitutive Act of the African Union adopted in Lome Togo on 11 July 2000 and entered into force on 26 May 2001 (Constitutive Act)
[301] Pan African Parliament Rules of Procedures
[302] BR Dinokopila 'The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration' (2013) 13 *African Human Rights Law Journal* 302, 304
[303] AEC Treaty, art 6(2)(f)(iv)
[304] AEC Treaty, art 14(2)
[305] Constitutive Act, art 5(c)
[306] Constitutive Act, art 17(1)
[307] PAP Protocol, art 11(1) and (2)
[308] PAP Protocol, art 11(3)-(7)
[309] PAP Protocol, art 11(8) and (9)

harmonisation of the laws of the state, it is possible that a common standard of laws can be designed to apply across Africa with respect to the protection of indigenous peoples' lands and their environment with the advent of the adverse impacts of climate change. Clearly, a scenario in which the law of one state guarantees the right to environment and another does not, underscores that the role of PAP in this regard is inevitable and necessary.

Importantly, the special role of PAP in relation to the above has been highlighted. PAP is expected to 'play a vital role in development of policy and legislative frameworks on climate change'.[310] In its meetings, it has noted that national legislation can play a critical role in ensuring that climate change is addressed.[311] The inability of states in Africa effectively to deal with climate change, as has been observed, is due largely to a weak 'legislative framework to stimulate climate change strategies'.[312] While calling for an audit of policies and a legislative framework for climate change, PAP notes the need for a wide-spread awareness about the reality of climate change and its effects.[313]

PAP can be strengthened in the agenda relating to climate change through some of its key committees. The ten committees, as established under the PAP Rules,[314] include the Committee on Rural Economy, Agriculture, Natural Resources and Environment, the Committee on Monetary and Financial Affairs, the Committee on Trade, Customs and Immigration Matters, and the Committee on Co-operation, International Relations and Conflict Resolutions. Other permanent committees are the Committee on Transport, Industry, Communications, Energy, Science and Technology, the Committee on Health, Labour and Social Affairs, the Committee on Education, Culture, Tourism and Human Resources, the Committee on Gender, Family, Youth and People with Disability, the Committee on Justice and Human Rights, and the Committee on Rules, Privileges and Discipline.[315] The PAP Rules welcome petitions from 'any citizen of a Member State and any natural or legal person residing or having its registered office in a

[310]T Chagutah 'PAP is fully behind the common African position on climate change' interview conducted' http://www.za.boell.org/web/cop17-785.html (accessed 10 January 2014)
[311] 'PAP debates reports on land grabbing, climate change, and the situation in Libya and Tunisia' http://www.pan-africanparliament.org/News.aspx?ID=910 (accessed 9 January 2014)
[312] As above
[313] As above
[314] Dinokopila (n 302 above) 308
[315] Pan African Parliament Rules of Procedures , rule 22

Member State' either individually or in collaboration with other associations. The petitions must fall within the field of activity of the African Union and directly affect the petitioners.[316]

At least some of the foregoing mechanisms have been used in relation to climate change. Of the committees set up the by PAP Rules, the Committee on Rural Economy, Agriculture, Natural Resources and Environment is particularly linked to climate change. The specific functions of the Committee are to consider an increase in the common regional and continental policies in the agricultural sector and help the PAP in harmonising policies for rural and agricultural development.[317] The Committee also promotes the development policy and the implementation of programmes relating to natural resources and the environment.[318] Indicating that climate change is crucial to the mandate of the Committee, it passed a resolution in 2011 which recognises climate change as a major threat to society. Through the resolution, the Committee came to a decision to engage politicians and the executive together at the national and regional levels with the view to concretising the African position. Other decisions include building awareness about climate change, promoting and participating in harmonising legislation dealing with climate change and supporting and encouraging local initiatives on climate change.[319]

Parliamentarians potentially play a crucial role in the promotion of environmental governance, particularly in advancing its laws and policies at the national level.[320] Hence, the engagement in indigenous peoples' issues by the PAP at the regional level can make an invaluable contribution to shaping the practices at the regional and domestic levels. First, considering that it is the fundamental role of CAHOSCC to negotiate instruments,[321] the efforts of the PAP at the regional level may serve as a platform for the incorporation of indigenous peoples' issues in the negotiation of agreements and as an avenue to urge governments to ensure that their interests are safeguarded in appropriate environmental agreements.[322]

[316] Pan African Parliament Rules of Procedures, rule 72 generally
[317] Pan African Parliament Rules of Procedures, rule 26 (1)(a) & (b)
[318] Pan African Parliament Rules of Procedures, rule 26(1)(c)
[319] Pan African Parliament 'Resolutions and recommendations of the Permanent Committee on Rural Economy, Agriculture, Natural Resources and Environment' (May 2011)
[320] African Union 'The role of parliamentarians in development and implementation of multilateral environmental agreements (MEA) in Africa: A sourcebook for parliamentarian in Africa on MEAs' (July 2012) 1 (AU Sourcebook)
[321] AU Sourcebook (n 320 above) 11
[322] AU Sourcebook (n 320 above) 12

Second, the PAP links national parliaments and keeps them informed of its activities.[323] Therefore, it can influence the functioning of national parliaments in matters affecting the protection of indigenous peoples. At the national level, parliamentarians are responsible for policy oversight.[324] Hence, activities of the PAP can motivate the parliamentarians to embark upon appropriate measures for the protection of the rights of indigenous peoples to their lands in the formulation and enforcement of compliance with environmental legislation. This may necessitate the creation of committees which summon government departments or officials to provide reports on the protection of indigenous peoples land in implementing environmental agreements. As they are also responsible for budgetary allocations for several development programmes,[325] the parliamentarians can call for budget oversight with the situation of indigenous peoples as the focus. Through this role, parliamentarians at the national level are able to review the benefits to indigenous peoples in the utilisation of funds by the executive in relation to adaptation and mitigation and thus provide an incentive for effective implementation of these measures at the domestic level. Also, the procedure under the PAP Rules for petitions, can be used by indigenous peoples' groups to raise in a deliberative forum issues pertaining to their affairs.

6.3.7 Peace and Security Council

The Peace and Security Council was established pursuant to the Protocol on the Establishment of Peace and Security Council (PSC Protocol) of 2002.[326] The PSC Protocol provides for a continental architecture for peace and security based on five structures: the Peace and Security Council, the Continental Early Warning System (CEWS), the African Standby Force (ASF), the Peace Fund and the Panel of the Wise (POW).[327] The principal objectives of the PSC to promote peace, security and stability, to anticipate and prevent conflicts, to encourage and realise peace building and post conflict reconstruction, to harmonise continental policy in that regard as well

[323] Pan African Parliament Rules of Procedures, rule 77(3)
[324] AU Sourcebook (n 320 above) 1
[325] AU Sourcebook (n 320 above) 14
[326] Protocol on the Establishment of Peace and Security Council (PSC Protocol) adopted on 10 July 2002, and entered into force on 26 December 2003
[327] LM Fisher *et al* 'African peace and security architecture' A report commissioned by the African Union's Peace and Security Department and subsequently adopted by the 3rd meeting of the Chief Executives and Senior Officials of the AU, RECs and RMs on the Implementation of the MoU on Co-operation in the Area of Peace and Security, held from 4-10 November, Zanzibar, Tanzania

as to promote democratic practices[328] are significant to human rights. Aimed at assisting with conflict anticipation and prevention, the CEWS consists of an observation and monitoring centre and observation monitoring units which seek to generate and process data on conflict anticipation and prevention.[329] Although not yet operational, the African Standby Force exists to support peace missions and interventions,[330] and the Peace Fund allows for financial resources to support operational activities related to peace.[331] The POW plays an advisory role and undertakes necessary actions to support the PSC efforts on issues relating to the maintenance of peace, security and stability in Africa.[332] The modalities of the POW allow its chairperson to include in its agenda, proposals on issues of the promotion and maintenance of peace, security and stability in Africa.[333] Such proposals can be received from any member of the Panel, the Council and the Chairperson of the Commission, as well as from the PAP, the Commission and civil society groups in the context of their respective contributions to the promotion and maintenance of peace, security and stability.[334]

At least in its functioning, the PSC carries out issues relating to the protection of rights and ensures that the right to a healthy environment is not left out. This function is well evidenced, particularly in its reference to the environment and sustainable development as being within its objectives. For instance, according to article 3(a) of the PSC Protocol, the Peace and Security Council is established to 'promote peace, security and stability in Africa' so as to protect and preserve 'African people and their environment' and ensure the 'creation of conditions conducive to sustainable development'.[335] When this is read together with article 3(b) which focuses on the prevention of conflicts, one can state that, considering the possibility of resulting in conflict, the adverse impacts of climate change raise issues falling within the scope of the PSC objectives.

[328] PSC Protocol, art 3
[329] PSC Protocol, art 12
[330] PSC Protocol, art 13
[331] PSC Protocol, art 15
[332] PSC Protocol, art 11; AO Jegede 'The African Union peace and security architecture: Can the panel of the wise make a difference? '(2009) 9 *African Human Rights Law Journal* 419
[333] Modalities of the Panel of the Wise, adopted by the Peace and Security Council at its 100th meeting held on 12 November 2007, para IV(8) (Modalities of the POW)
[334] Jegede (n 332 above) 419
[335] PSC Protocol, art 3(a)

The above viewpoint is supported by the subsequent instrument, the Solemn Declaration on a Common African Defence and Security Policy (CADSP).[336] The CADSP is a proactive instrument based on the notion of human security rather than the narrow approach which perceives security solely as state security.[337] It defines the notion of security as embodying 'protection against natural disasters, as well as ecological and environmental degradation'[338]and mentions 'environmental degradation' as a security threat.[339] This signifies, in accommodating the environment within its scope of operation, that the PSC Protocol sets the stage for the recognition of the delicate relationship between conflicts, environmental degradation, and climate change. Buttressing the position that climate change falls within the scope of the PSC, through its decision of 2012, the PSC at its 37th meeting drew the attention of states in Africa to the reality of climate change, noting that it is impossible to achieve a vision of a peaceful Africa without addressing climate change.[340] Hence, it urges states to strengthen co-operation in dealing with transnational challenges such as climate change impact in consideration of its transboundary nature.[341]

The foregoing shows that activities relating to climate change are not incompatible with the focus of the mechanisms established under the PSC Protocol. Potentially, the PSC activities are relevant to indigenous peoples. For instance, environmental degradation may lead to displacement and occasion conflict.[342] Where conflicts arise or are anticipated due to the adverse impacts of climate change and involving indigenous peoples' lands, they fall within the remit of PSC. Also, there is nothing exempting such matters from being included in the agenda of the POW, based on its modalities and considering, in operationalising its process, that the POW is

[336] Solemn Declaration on a Common African Defence and Security Policy (CADSP) http://www.africa---union.org/News_Events/2ND%20EX%20ASSEMBLY/Declaration%20on%20a%20Comm.Af%20Def%20Sec.pdf (accessed 13 February 2014)
[337] AO Jegede 'Beyond prospects: Strengthening the panel of the wise in the AU peace and security architecture' (2012) 1 *Journal of African Union Studies* 63
[338] CADSP, para 6
[339] CADSP, para 6
[340] Peace and Security Council 'Report of the Chairperson of the Commission on the Partnership between the African Union and the United Nations on Peace and Security: Towards greater strategic and political coherence' 307th meeting, Addis Ababa, Ethiopia (9 January 2012) PSC/PR/2.(CCCVII) Solemn Declaration on a Common African Defence and Security Policy. http://www.africa-union.org/News_Events/2ND%20EX%20ASSEMBLY/Declaration%20on%20a%20Comm.Af%20Def%20Sec.pdf (accessed 13 February 2014)
[341] As above
[342] DA Mwiturubani & Jo-Ansie Van Wyk (eds) *Climate change and natural resources conflicts in Africa* (2010)

open to representation from NGOs,[343] it is possible to expect the agenda of climate change and its intersection with conflict to feature in the functioning of the POW.

In all, the emerging institutions and activities relating to the climate change regulatory framework at the regional level may contribute to addressing the gap created in the domestic climate change regulatory framework in relation to the protection of the land tenure and use of indigenous peoples. However, unless these programmes and institutions are linked to the established human rights structure of the African Union, the contributions of the institutions and programmes, at best, will remain haphazard and uncoordinated. This fact brings to the fore the need to discuss the potential role of the established regional human rights structure not only in addressing the regulatory gap at the national level, but in strengthening the regional climate change regulatory framework to protect protecting indigenous peoples' land tenure and use in Africa.

6.4 Potentials in regional human rights mechanisms with focus on the Commission

Within the African Union, some writers have argued the need for a specialised institution to coherently to address climate change issues on the continent.[344] However, as long as climate change raises a human rights issue, even if established, such a specialised institution cannot dispense with the potentials and relevance of the African human rights system in addressing climate change impacts on indigenous peoples' land use and tenure. However, it should be noted, generally, that the mechanisms within the African human rights system to address human rights violations are still evolving. Established pursuant to article 30 of the African Charter to safeguard the realisation of rights is the Commission. It is complemented by the subsequently created African Court on Human and Peoples' Rights (African Court), which was established by article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol to the Charter).[345]

[343] Modalities of the POW
[344] JF Jarso 'Africa and the climate change agenda: Hurdles and prospects in sustaining the outcomes of the seventh African Development Forum' (2011) 11 *Sustainable Development Law and Policy* 38, 43; Jo-Ansie van Wyk 'The African Union's response to climate change and climate security' in DA Mwiturubani & Jo-Ansie van Wyk (eds) *Climate change and natural resources conflicts in Africa* (2009) Monograph 3-23 19
[345] 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in 1998/ and entered into force on 25 January 2004

The establishment of the African Court strengthens the protective mandate of the Commission in that, whereas the decisions of the latter are recommendatory in nature, the decisions of the African Court enjoy a binding force.[346] Pursuant to the creation of the African Court there has been a further development towards its merger with the African Court of Justice under a new mechanism referred to as the African Court of Justice and Human Rights.[347]

The focus of this analysis, however, is on the Commission in consideration of the relevance of its mechanisms in applying human rights as a response to an inadequate climate change regulatory framework. First, it has peculiar processes which other mechanisms do not have, such as state reporting, and other aspects of its promotional mandate. Second, the decision of its quasi-judicial body may link with and influence the emerging jurisprudence of the African Court and the African Court of Justice and Human Rights when it commences operation. Last, considering its suite of processes, as shall manifest soon, it can fit into other regional climate change institutions, programmes and initiatives.

Article 45 of the African Charter provides for the functions of the Commission. These functions can be broadly categorised as promotional, protective, interpretive and Assembly-mandated as listed under subsections 1, 2, 3 and 4 of article 45.[348] This section demonstrates the potential in the promotional, protective, interpretive and assembly-mandated functions of the Commission to address the gap in the climate change regulatory framework on indigenous peoples' land tenure and use in Africa.

[346] M Hansungule 'African Courts and the African Commission on Human and Peoples Rights' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 233-217; see Protocol on the Statute of the African Court of Justice and Human Rights (2008) in C Heyns & M Killander (eds) *Compendium of Key Human Rights Documents of the African Union* 4th ed (2010) once it enters into force, it will replace the 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the 2003 (Protocol on the African Court of Justice) ; on trend and the implication of the creation of these institutions within the African human rights system, see generally Viljoen (n 1 above) 448-466

[347] 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998/2004)' ; a further development emerged at the Assembly of the Union 23rd ordinary session , 26-27 June 2014, Malabo, Equatorial Guinea. At the session, the AU Assembly adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. The new Protocol creates in the African Court on Human and Peoples' Rights three sections: a General Affairs Section, a Human and Peoples'Rights Section and an International Criminal Law Section, see 'Decision on the Draft Legal Instruments-Doc. Assembly/AU/8(XXIII)' Assembly/AU/Dec.529(XXIII)

[348] The promotional and protective mandates, as provided for under art 45(1) & (2) of the African Charter have dominated the attention of leading literature on the subject, with little or no attention on art 45(3) and (4) dealing with interpretive and tasks that may be entrusted by the Assembly (Assembly entrusted tasks), see for instance, Viljoen (n 1 above) 300-390

6.4.1 Promotional functions

As article 45(1)(a), (b), and (c) of the African Charter reflects, the promotional functions of the Commission entail a range of activities performed through state reporting, special mechanisms, promotional visits, resolutions, seminars and conferences, publications and dissemination of information, the relationship with NGOs and national human rights institutions.[349] Each of these activities offers an opportunity to address the gap in the climate change regulatory framework in relation to the protection of indigenous peoples' land use and tenure.

6.4.1.1 State reporting

Regarded as the 'core' of the Commission's promotional mandate,[350] state reporting aims to review at the regional level the extent to which states have complied in their territory with their obligations under the Charter. Hence, as Viljoen explains, this serves the dual purposes of 'introspection' and 'inspection'.[351] State reporting serves the purpose of introspection in that it allows the state to 'take the stock of its achievements and failures in making the guarantees under the Charter a reality'.[352] The inspection aspect of state reporting comes into play given that it takes place before an independent or external body which is able to engage the state in an objective dialogue in relation to the delivery of obligations under the African Charter.[353] According to article 62 of the African Charter, each party to the Charter is enjoined to file a state report every two years on the legislative or other measures taken to realise the rights guaranteed under the African Charter. States do not display the general practice of submitting the report on the due date.[354] Nevertheless, it can serve as a useful tool for addressing human rights issues arising from the adverse impacts of climate change on vulnerable populations, such as indigenous peoples in Africa. Particularly, this can be achieved, if the exercise is not treated as a mere formalism but conceived by states as a mechanism which can assist in generating solutions or best practices on policy gaps on climate change and effects on vulnerable groups.

[349] Viljoen (n 1above) 349
[350] As above
[351] Viljoen (n 1 above) 350
[352] As above
[353] As above
[354] Viljoen (n 1above) 355

In terms of introspection, each state in Africa can be required to include trends on climate change as part of the issues reported on and indicate particularly, its impacts on vulnerable population, such as indigenous peoples. To realise this goal, states can include organisations and institutions which focus on climate or environmental related issues, as well as indigenous peoples, in the compilation of the report. Also, when documenting the realities of the adverse effects of climate change, states may be required to formulate what human rights are being threatened by climate change and steps taken as safeguard measures. Once this is done, the inspection of the report by the Commission offers the state and other participants in the process the opportunity not only to share their challenges, but, more importantly to invite concrete comments as well as concluding remarks on how these challenges can be addressed. When the concluding remarks eventually are made public, they will serve the purpose of empowering civil society to request and demand accountability of state for commitments to indigenous peoples in the face of climate change challenge. Publicity around state reporting may be helpful in attracting global attention to the plight of indigenous peoples in the context of climate change.

Guidelines on state reporting can require government to indicate the particular climate funds arrangements whether at international or regional levels, in which it is participating. It can also require the inclusion of the extent to which indigenous peoples' land tenure and use are safeguarded in terms of compensation and benefit-sharing. In doing so, the Commission will be strengthening the mandate of the ClimDev programmes and its key input areas, namely the ACPC, the CCDU and the ClimDev Special funds which require consultation with and participation by stakeholders, including vulnerable group representatives in their various functioning, particularly in relation to the implementation of climate-change related projects.[355]

6.4.1.2 Special mechanisms

In practice, the Commission has developed special mechanisms which greatly complement its promotional role in engaging with states for the realisation of human rights in Africa.[356] These are the Special Rapporteur and Working Groups. While there is no express provision in the

[355] EAC, AUC & AfDB Document (n 201 above) 23
[356] Viljoen (n 1 above) 369

Charter which serves as a legal basis for these mechanisms, the Commission has adopted a progressive approach to create space for these mechanisms in operationalizing its mandate.[357]

1. Special rapporteurs

Dating back to 1994, the Commission has established the post of a Special Rapporteur to address a number of substantive provisions of human rights under the African Charter.[358] As a mark of its endorsement of the relevance of these mechanisms in the African human rights system, guidelines have been adopted for their functioning.[359] Examples of Special Rapporteurs established thus far include the 'Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution in Africa, the Special Rapporteur on Prisons and Conditions of Detention in Africa, Special Rapporteur on the Rights of Women in Africa, the Special Rapporteur on Human Rights Defender in Africa, the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons in Africa, and the Special Rapporteur on Freedom of Expression in Africa.[360]

So far, none has been appointed in relation to environmental protection, let alone climate change. Two reasons can be conjectured for this lack. One reason, perhaps, lies in the conception that climate change is an emerging phenomenon with consequences perceived as not tangible enough or on par with the established basis for appointing a Special Rapporteur. The peculiar validity of this reasoning is visible, for instance, in the sense that it is easier to conceive the emotive and logical necessity for a Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution in Africa on account that there is immediate and visible evidence of human loss and the harm done to victims when people are extra-judicially executed or illegally detained in prisons.

Another possible reason for this lack is that climate change has engaged less attention among NGOs with observer status before the Commission. When special rapporteurs are established, it is often due to consistent advocacy by NGOs which pique interest in a particular issue at the regional level. For instance, such a role of NGOs is crucial in the creation of a Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution in Africa, a Special Rapporteur on

[357] Viljoen (n 1 above) 371; J Harrington 'Special Rapporteurs of the African Commission on Human and Peoples' Rights'(2001) 1 *African Human Rights Law Journal* 247
[358] Viljoen (n 1 above) 371
[359] Viljoen (n 1 above) 371; Guidelines adopted in the 17th Annual Report, para 33
[360] For the establishment and mandate of these Rapporteurs, see generally, African Commission on Human and Peoples' Rights 'Special Mechanisms' http://www.achpr.org/mechanisms/ (accessed 25 June 2013)

Prisons and Conditions of Detention in Africa, a Special Rapporteur on Prisons and Conditions of Detention in Africa and a Special Rapporteur on the Rights of Women in Africa. It has been reported that the establishment of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution in Africa was proposed by Amnesty International in 1993, an NGO which has maintained an observer status with the Commission since 1988.[361]

Also, the initiative to create the position for the Special Rapporteur on Prisons and Conditions of Detention in Africa came from Penal Reform International (PRI),[362] and NGOs such as Women in Law and Development in Africa (WILDAF), consistently advocated for the establishment of the Special Rapporteur on the Rights of Women in Africa.[363] However, even if present, such dedicated activities are not yet visible in relation to environmental protection, despite the fact that NGOs, such as SERAC, with a special interest in environmental rights enjoy observer status with the Commission. Certainly, too, it has not crystalised into the establishment of a special rapporteur on a climate-related violation of rights, in spite of the emerging link of human rights and the reported adverse impacts of climate change.

Establishing a new special rapporteur for this purpose may be desirable, but its non-existence should not deter meaningful engagement with the subject by regional human rights mechanisms. There is potential in the mandate of the existing special rapporteurs that offers a platform for generating information on the plight of indigenous populations in the light of the climate change challenge which can be achieved if climate change is mainstreamed into the existing mandates of special rapporteurs. For instance, the mandate of the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons in Africa,[364] includes for it to 'act upon information', to undertake fact finding missions to refugee and IDP camps, to assist states in developing an appropriate legal and policy framework, to raise awareness about the plight of these vulnerable groups and promote the implementation of the relevant standards.[365] This mandate can accommodate climate-related displacement or migration of indigenous peoples, more so as

[361] Viljoen (n 1 above) 371; Harrington (n 357 above) 251
[362] Viljoen (n 1 above); F Viljoen 'The Special Rapporteur on prisons and conditions of detention in Africa: Achievements and possibilities' (2003) 27 *Human Rights Quarterly* 125
[363] Viljoen (n 1 above) 375
[364] Viljoen (n 1 above) 376
[365] As above

researches have shown that an environmental crisis may underlie internal displacement and result in migration beyond national boundaries.[366]

This possibility is indeed reinforced by the Kampala Convention. Article 5(4) of the Kampala Convention, for instance, enjoins state parties to take 'measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change'**.** Hence, adding a dimension of climate change to the tasks of the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons in Africa will help to bring out the special circumstances of peoples experiencing climate crisis. It will assist the government, perhaps in formulating an appropriate legal response that may help to safeguard the human rights of such vulnerable group in the light of the climate change challenge.

Also, climate change can be accommodated in the activities of the Special Rapporteur on the Rights of Women in Africa as the office holder embarks on visits and reports on the situation of women. The special circumstances of women in the light of climate change can be useful in gathering evidence to tackle the gender effects of climate change. Additionally, it seems that there is nothing in the mandate of the Special Rapporteur on Human Rights Defender in Africa that is inconsistent with the inclusion of environmental rights activists who face challenges while advocating environmental cause. This inclusion may serve the useful purpose of encouraging such individual or organisations to sustain the few voices being raised in connection with issues such as gas flaring, and environmental pollution in Africa that have implications for global warming and climate change.[367]

The activities of AU institutions and initiatives with a climate specific mandate, such as the CAHOSCC and AMCEN, can benefit from the findings of special rapporteurs, particularly the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons in Africa, if, for instance, these are focused on climate- induced displacement, as is allowed under article 4(5) of the Kampala Convention. The findings of the Special Rapporteur can enrich the mandate of CAHOSCC which, despite its potential, is yet to reflect in its activities the specific vulnerability of indigenous peoples and the need for the special protection of their land rights. Also, the

[366] K Warner 'Climate change induced displacement: Adaptation policy in the context of the UNFCCC Climate Negotiation' (2011) Legal and Protection Policy Research Series 1-19
[367] ED Oruonye 'Multinational oil corporations in Sub Sahara Africa: An assessment of the impacts of globalisation'(2012) 2 *International Journal of Humanities & Social Science* 152

findings of the Special Rapporteur, if linked with AMCEN, can assist the latter in generating vital information for promoting awareness on the impact of climate change on indigenous peoples' lands, not only as an environmental but as a human rights concern. Since they do not share a similar line of reporting, the benefit can indeed be mutual. In serving as an important source of information for the Special Rapporteur, the activities of CAHOSCC and AMCEN can help the former fulfil its mandate of assisting states in developing an appropriate legal and policy framework, and raise awareness about the plight of indigenous peoples displaced by the climate impact of climate change on their land.

2. Working groups

The Commission also has established a number of working groups that can be useful to addressing the challenges of indigenous peoples in the face of the adverse impacts of climate change. A distinguishing feature of the mandate of working groups, unlike that of the Special Rapporteur, is that, it is more exploratory and research-related, focusing on emerging issues or matters.[368] Since 2000 when the Working Group dealing with the rights of 'indigenous or ethnic communities in Africa' was established, there have been no less than seven working groups.[369] These include the Working Group on Economic, Social and Cultural Rights in Africa,[370] and the Working Group on Extractive Industries, Environment and Human Rights Violations.[371]

Climate change and related issues have featured particularly in the activities of the Working Group on the Rights of Indigenous or Ethnic Communities in Africa as is evident from its visits to states including the DRC,[372] Rwanda,[373] and Kenya.[374] During its visit to Kenya, the Working Group reported that environmental degradation and deforestation are the result of poor land use. According to the Working Group, over the years the government of Kenya has discouraged

[368] Viljoen (n 1 above) 377
[369] 'Special Mechanisms' http://www.achpr.org/mechanisms/ (accessed 26 June 2013)
[370] 'The Working Group on Economic, Social and Cultural Rights', established by the African Commission on Human and Peoples' Rights with the adoption of Resolution 73 at the 36th ordinary session held in Dakar, Senegal from 23 November - 7 December 2004
[371] 'The Working Group on Extractive Industries, Environment and Human Rights Violations', established by the African Commission on Human and Peoples' Rights with the adoption of Resolution 148 at the 46th Ordinary Session held in Banjul, The Gambia, 11-25 November 2009
[372] 'Report of the Country visit of the Working Group on Indigenous Populations/Communities to the Republic of Congo', 15-24 March, 2010, 37
[373] 'Report of the Working Group on Indigenous Populations/Communities Mission to the Republic of Rwanda', 1-5 December 2008, adopted by the Commission at its 47th ordinary session, 12-26 May 2010, 30
[374] 'Report of the Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya',1-19 March 2010, adopted by the Commission at its 50th ordinary session, 24 October - 5 November 201, 37

pastoralism or hunting and gathering as a viable way of life and, instead, has been pressurising indigenous peoples to become sedentary farmers.[375] In fact, as the Working Group documented, it is the argument of indigenous peoples that 'had pastoralism and hunting-gathering been recognised as viable livelihood systems in the traditional sector, such a situation would not have prevailed.'[376]

Arguably, the foregoing demonstrates that the activities of the working group are an important channel to investigate and document the conditions of indigenous peoples facing the adverse impacts of climate change. Hence, the possibility of including climate change and indigenous peoples in the agenda of working groups cannot be ignored. For instance, it is not impossible to include the issue of climate change in the mandate of working groups, such as the Working Group on Economic, Social and Cultural Rights. In implementing its mandate to undertake 'studies and research on specific social, economic and cultural rights', the working group, for instance, may explore the implications of climate change on the realisation of the social economic and cultural rights of indigenous peoples particularly in the context of their land tenure and use. In doing so, it may also come up with helpful policies to ensure the realisation of the rights of vulnerable groups living under the reality of climate change.

Similarly, the mandate of the Working Group on Extractive Industries, Environment and Human Rights Violations (Working Group on extractive industries) 'to undertake research on the violations of human and peoples' rights by non-state actors in Africa',[377] is relevant to climate change in the sense that activities in relation to extractive industry, particularly oil and gas, are linked to climate change.[378] Hence, the Working Group on extractive industries offers an opportunity to promote the implementation of sustainable projects under these initiatives and present human rights concerns arising in the process. Although the focus of the Working Group in the meantime has being on minerals such as extraction of precious stones, it has made its first

[375] As above
[376] As above
[377] As above
[378] R Ako & O Oluduro 'Bureaucratic rhetoric of climate change in Nigeria: International aspiration versus local realities' in F Maes *et al* (eds) *Biodiversity and climate change: Linkages at international, national and local levels* (2013) 3-31; AO Jegede 'Trouble in paradise: Prosecution of climate change related laws in Nigeria' in J Gerardu *et al* (eds) *Compliance strategies to deliver climate benefits* 50-53

visit to Zambia to study Quantum Copper Mining under Kalumbila project in January 2014.[379] That the Working Group on extractive industries can contribute to the protection of vulnerable groups, such as indigenous peoples facing the adverse impacts of climate change is reflected in the 2014 resolution passed by the Commission which requires it to investigate the impact of climate change on human rights in Africa, expressing its conviction that such a study will 'contribute to the development of effective human rights-based measures and solutions' [380]

The mandates of the Working Group on Indigenous Communities/Populations in Africa and Working Group on Extractive Industries, Environment and Human Rights Violations are particularly important to the activities of AU institutions and initiatives with a climate-specific mandate, such as the ACPC, CCDU, CDSF, AUC, PAP and the PSC. The ACPC focuses on generating and sharing information on adaptation and its finances as well as offering support in documenting the 'loss and damage' from climate change. There is a possible link here with the mandate of the Working Group on Indigenous Communities/Populations in Africa which is required, to study the 'well-being' of indigenous communities as well as formulate appropriate recommendation for monitoring and protecting their rights.[381] The Working Group can request that the situation of indigenous peoples be specially documented in the 'loss and damage' focus of ACPC and promote proposals from indigenous peoples' representatives to access funding under the CDSF. Also, in the interest of indigenous peoples inhabiting drought-stricken areas, the findings of the Working Group in relation to indigenous peoples facing the adverse impacts of climate change can motivate the CCDU to protect indigenous peoples' land rights while integrating adaptation and mitigation measures with activities relating to climate change and desertification.[382]

Since the AUC, through the DREA, seeks to protect the environment and ensure sustainable management of the environment and natural resources, it is in alignment with the mandate of the Working Group on Extractive Industries, Environment and Human Rights Violations. The mandate of the Working Group includes research into the violation of rights by non-state actors

[379] Discussion with Professor Michelo Hansungule, Expert Member, Working Group on Extractive Industries, Environment and Human Rights Violations, on 5 August 2014
[380] African Commission on Human and Peoples' Rights '271: Resolution on Climate Change in Africa', adopted at the 55th ordinary session of the African Commission on Human and Peoples' Rights held in Luanda, Angola, 28 April-12 May 2014
[381] 'Working Group on Indigenous Populations/Communities in Africa' http://www.achpr.org/mechanisms/indigenous-populations/(accessed 25 April 2014)
[382] ClimDev Africa Report (n 220 above) 18

and their liability. It also aims to research issues relating to peoples' rights to freely dispose of their wealth and natural resources and to a general satisfactory environment favourable to their development. It is further expected to gather, receive and exchange information from all relevant sources in relation to its mandate. The DREA will be a vital source of information for the Working Group in its activities in relation to the protection of the environment. This interaction will be of benefit to indigenous peoples in that people's right to freely dispose their wealth is linked to indigenous peoples' rights to their land.[383] Also, data generated by the AUC through the AMSED on the environment can assist the Working Group on Indigenous Communities/Populations in Africa in its mandate to protect the rights of indigenous peoples.[384]

The Working Group on Indigenous Communities/Populations in Africa can also influence the activities of the PAP and the PSC relating to climate change because both institutions, generally, are linked to the activities of the Commission to which the working group is accountable. Article 19 of the PSC Protocol requires co-operation between the Commission and the PSC and urges the former to bring to the notice of the latter any information relevant to the realisation of its mandate. Since, on any matter before it, the PAP can invite experts and officials of the Union,[385] the possibility cannot be ruled out, consisting of experts, that the Working Group can assist in shaping the direction of the PAP debate on matters relating to the welfare of indigenous peoples in a climate change context.

6.4.1.3 'Promotional visits', seminars and conferences', 'publication and information dissemination'

Embarked upon by commissioners, visits are an important anchor for the other 'promotional activities' of the Commission.[386] Through visits, commissioners are able to sensitise high ranking officials about the importance of the African Charter, to persuade them to ratify outstanding treaties and to urge them to submit state reports and to comply with resolutions.[387] In an atmosphere where political leadership in Africa considers climate change as largely traceable to

[383] *Endorois* case (n 46 above) where the indigenous peoples alleged a violation of their property rights in the context of property right
[384] Working Group on Extractive Industries, Environment and Human Rights Violations http://www.achpr.org/mechanisms/extractive-industries/ (accessed 25 June 2013)
[385] Pan African Parliament Rules of Procedures, rule 38(1)(g)
[386] Viljoen (n 1 above) 379
[387] As above

the development pattern historically chosen by the developed states,[388] promotional visits can be helpful. They can engage in sensitising states regarding the reality of climate change and in awakening political leadership to the importance of embarking on eco-friendly development in implementing climate-related projects at their own level.

These actions are necessary, considering that in different parts of Africa, particularly where exploration takes place, it seldom occurs with a conscious regard for the protection of the environment. In Nigeria, for instance, the environmental degradation which has resulted from the exploration of oil in Nigeria by Shell in collaboration with the Nigerian National Petroleum Company has been a subject of decision by the Commission.[389] Hence, promotional visits can be helpful in drawing the attention of government to the plight of indigenous peoples who live in such areas as forests which are impacted by climate response activities. They are also significant in challenging activities that can worsen the condition of the climate. Additionally, they are useful in urging state parties, which have yet not done so, to reflect on the need to guarantee the right to a healthy environment under the African Charter in their bill of rights. In turn, it will strengthen the activities of advocacy groups, both as whistle blowers and litigants, in relation to actions that aggravate the climate and generally threaten the rights of indigenous populations.

The agendas of the Commission and activity reports contain several references to its aspiration of hosting seminars on a variety of topics.[390] More than 'talk shops', as Viljoen observes, workshops and seminars are often organised by an NGO along with the Commission as 'nominal co-organiser'.[391] Examples of such workshops and seminars include seminars on refugees and contemporary forms of slavery, and socio-economic rights. The seminars spearheaded the process leading to the adoption of 'a general comment' on socio-economic rights and guidelines on state reporting pertaining to these rights.[392] In collaboration with NGOs which focus on environmental rights and indigenous peoples in Africa, workshops and seminars, for instance, can engage in further elaboration of article 24 of the African Charter on the right to the environment. This may lead to the adoption of a general comment on the right to a healthy

[388] This is reiterated in key environmental instruments of climate change such as the UNFCCC, preamble
[389] *Ogoniland* case (n 57 above)
[390] Viljoen (n 1 above) 382
[391] As above
[392] Viljoen (n 1 above) 382; S Khoza ' Statement on social, economic and cultural rights' (2005) 5 *African Human Rights Law Journal* 182; and 'Promoting economic social and cultural rights in Africa: The African Commission holds a seminar in Pretoria' (2004) 4 *African Human Rights Law Journal* 334

environment and its implication for climate change. Workshops and seminars are useful as a tool to generate appropriate guidelines on state reporting pertaining to the rights to a healthy environment.

'Publication and Information Dissemination' (PID) as a promotional activity has the aim of educating and ensuring greater visibility for the promotional mandate of the Commission.[393] It is achieved through information supplied on its functioning website and the distribution of information through electronic means to NGOs enjoying observer status with the Commission.[394] There is the possibility through PID, that a lot can be realised in addressing the vulnerability of populations to the adverse impacts of climate change. First, PID is useful in convincing NGOs about the African position on a number of climate-specific issues in the continuing international negotiation. Also, through this channel, the necessary input of a critical community dealing with indigenous peoples' challenges can be fed into future negotiation of climate change as they relate to Africa.

The activities of the Commission under this heading are an effective platform for bringing at the regional level all the stakeholders at the regional level working on climate change and human rights. Through promotional visits, the Commission, when invited to do so, can acquaint itself with first-hand information on issues relating to the adverse impacts of climate change as they affect indigenous peoples. Its conferences and seminars can be effective in bringing together representatives of institutions and intiatives such as the AMCEN, CAHOSCC, PSC, PAP, ClimDev programme, NEPAD, AUC, ACPC, CCDU and CDSF to mainstream the protection of indigenous peoples land rights and, indeed, human rights in their climate-related activities. This process can be enhanced through publications on the subject.

6.4.1.4 NGOs and national human rights institutions

Since 1988, the Commission has been granting consultative status to NGOs, the number of which has now grown to 455.[395] The participation of NGOs has been critical in the growth and consolidation of the Commission.[396] According to Viljoen, they have participated in the drafting

[393] Viljoen (n 1 above) 383
[394] Viljoen (n 1 above) 382
[395] 'NGO with Observer Status' http://www.achpr.org/network/ngo/by-name/ (accessed 26 June 2013)
[396] Viljoen (n 1 above) 383

of the African Charter and the development of communication procedures, have drawn attention to human rights problems, proposed resolutions, facilitated missions and lobbied government to comply with obligations.[397] It is difficult to investigate the mandate of 455 NGOs for the purpose of an environmental audit, but, if the name of an organisation is anything to run with, only 5 representing less than one per cent of these NGOs have 'environment'[398] or related words such as 'land',[399] and 'forestry'[400] in their name. In so far as a name offers an insight into the mandate of an NGO, it means that few of these organisations with observer status have a specific mandate on environmental protection which leaves much to be desired in the light of the increasing vulnerability of Africa to the impact of climate change.

The paucity of organisations with observer status which have an interest in the protection of the environment will affect the level of engagement of states on presenting their reports. It will undermine a range of activities including the bringing of climate-related issues to the attention of the Commission, the proposal of relevant resolutions, and the lobbying of government to comply with obligations with regard to environmental issues as they relate to climate change. Conversely, an increasing presence of NGOs with an environmental mandate will offer vulnerable populations, such as indigenous peoples, some hope that the delicate connection between climate change and their human rights will be highlighted and discussed at an independent forum at which government is likely to be named and shamed for non-compliance with its obligations.

Considering their affiliate status with the Commission,[401] the national human rights institutions (NHR1s) are required to assist the Commission 'in the promotion and protection of human rights at national level'.[402] The affiliate status entitles the NHRIs to be invited, be present at and to participate 'without voting rights' in the Commission sessions.[403] If properly constituted as

[397] Viljoen (n 1 above) 384
[398] 'Cameroon Environmental Protection Association' http://www.achpr.org/network/ngo/362/ (accessed 26 June 2013); 'Citizens for a Better Environment' http://www.achpr.org/network/ngo/365/ (accessed 26 June 2013)
[399] 'Arid Lands Institute' http://www.achpr.org/network/ngo/399/ (accessed 26 June 2013)
[400] 'Forest Peoples Programme' http://www.achpr.org/network/ngo/347/(accessed 26 June 2013);
'Institute of Wildlife, Forestry and Human Development Studies' http://www.achpr.org/network/ngo/371/ (accessed 26 June 2013)
[401] 'Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions on Africa', adopted at the Commission's 24th session, Banjul, the Gambia, 22-31 October 1998, para 4(a)
[402] As above
[403] Viljoen (n 1 above) 389

'protectors' and not 'pretenders',[404] the NHRIs can offer an objective report before the Commission on the vulnerability of populations to the adverse impacts of climate change. Also, at the national level, particularly in African states where environmental protection belongs in the fundamental objectives section, the NHRIs consistently can draw the attention of states to the link between environmental degradation and climate change and urge legislative reform to accommodate such a link.

On the issue of indigenous peoples facing adverse climate impacts, the Commission can utilise the NHRI reports to inform the activities of the PSC, require member states to cooperate in giving early warning information.[405] Such information, in so far as it relates to climate impact, will complement PSC activities on climate change and can be useful in averting conflict which may emerge due to the impact of climate change or the implementation of response projects. Directly or through the influence of the Commission, the NHRI can also constitute a vital source of information on a similar subject to PAP in its activities, particularly when invited to the debate before the PAP.[406]

6.4.1.5 Resolutions

In elaborating on the substantive provisions of the African Charter, resolutions play a similar role to that of the 'General Comments' adopted by UN human rights treaty bodies.[407] Resolutions inform the obligations of states as well as the promotional and protective mandates of the Commission. Resolutions of the Commission can be thematic dealing with a specific issue in view.They can also be directed against states where reports of human rights abuse are rampant.[408] In 2009, with the adoption of Resolution 153, titled 'Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa',[409] the Commission demonstrated how this normative tool can be used to elaborate the link between climate change and human rights.

[404] Human Rights Watch 'Protectors or pretenders- Government Human Rights Commission in Africa'
[405] PSC Protocol, art 12 (6)
[406] Pan African Parliament Rules of Procedures, rule 38(1)(g)
[407] Viljoen (n 1 above) 379
[408] Viljoen (n 1 above) 380
[409] African Commission of Human and Peoples' Rights, ACHPR/Res153(XLVI)09: Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, November 25, 2009 (Resolution 153)

In that Resolution, the Commission expressed the concern that human rights standards are lacking in 'various draft texts of the conventions under negotiation' and that this lack could jeopardise 'the life, physical integrity and livelihood of the most vulnerable members of society notably isolated indigenous and local communities, women, and other vulnerable social groups'.[410] According to that resolution:

> African regional standards for the protection of the environment, management of natural resources and human rights are consistent with provisions of the Convention on Biological Diversity.'

Arguably, based on this position, it can be stated that the Commission appears to have set the stage for the application of human rights to climate change in the region. The reference to the 'African regional standards' for the protection of human rights and the environment presupposes that there exists the prospect at the regional level to address the plight of a population or an individual facing the impact of climate change. Reinforcing the position that the reference to human rights in this Resolution is far from being casual, the Commission went further in making significant decisions. Among others, it urged the Assembly of Heads of State and Government of the African Union (AU) to ensure:

> that human rights standard safeguards, such as the principle of free, prior and informed consent, be included into any adopted legal text on climate change as preventive measures against forced relocation, unfair dispossession of properties, loss of livelihoods and similar human rights violations… (2) that special measure of protection for vulnerable groups such as children, women, the elderly, indigenous communities and victims of natural disasters and conflicts are included in any international agreement or instruments on climate change.[411]

With the adoption of Resolution 127 which requires the Working Group on Extractive Industries to carry out an in-depth investigation into the impact of climate change on human rights,[412] there is little doubt that the Commission takes climate change to be a serious issue in Africa. However, these resolutions, particularly Resolution 153, could have been more clearly articulated by taking into consideration the existing work in other AU institutions on this matter. For instance, there is no reference to the joint report of the United Nations Economic and Social Council Economic Commission for Africa and the African Union Commission on climate change and

[410] Resolution 153 (n 409 above) preamble
[411] As above
[412] n 409 above

development.[413] Similarly, it makes no reference to the AU Declaration on Climate Change and Development of 2007[414] and the decision made by the AU Assembly (AU Decision) earlier on climate change and development.[415] Yet, the two instruments respectively imply the human rights focus of the Commission in calling for co-operation between regional institutions in climate change matters and their integration with 'national decision-making so as to reduce its negative effects on resources, livelihoods and the wider economy'.[416] Where it speaks to and addresses the activities of other institutions in the region, such as AMCEN, ACPC, CAHOSCC, PSC, PAP, ClimDevelopment programme, NEPAD, AUC, ACPC, CCDU and CDSF, resolutions can be useful in calling upon these entities to mainstream human rights and thereby serve as an effective means of advocacy in drawing their attention to the plight of indigenous peoples due to climate- related impacts.

6.4.2 Protective mandate

The protective mandate of the Commission is exercisable through the consideration of inter-state and individual communications. Generally, such communications are based on allegations about violations of rights under the African Charter, but may not necessarily be limited to it in consideration of the fact that the African Charter allows the Commission to draw inspiration from international law and the provisions of other human rights instruments.[417] Provided admissibility criteria are fulfilled, communications alleging violations of the human rights of populations in Africa resulting from climate-related wrongs, therefore, may be brought before the Commission and, where the appropriate conditions are fulfilled, the African Court.

Even in relation to states that do not make article 34(6) declaration under the Protocol to the Charter allowing direct access,[418] the potential of the African Court to complement the protective function of the Commission cannot be overstated. Indirect recourse can be made to the African

[413] United Nations Economic and Social Council Economic Commission for Africa & African Union Commission 'Report on Climate Change and Development in Africa' E/ECA/COE/29/5 AU/CAMEF/EXP/5/(V) 2 March 2010
[414] 'Declaration on Climate Change and Development in Africa' Assembly/AU/Decl.4 (VIII) the 8th Ordinary Session of our Assembly in Addis Ababa, from 29-30 January 2007 (AU Declaration on climate change)
[415] 'Decision on Climate Change and Development in Africa', adopted by the 13th ordinary session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009, (AU Decision on climate change) para 2
[416] AU Declaration on climate change (n 414 above) para 7; AU Decision on climate change (n 415 above) para 2
[417] African Charter, art 60
[418] Article 34(6) provides that 'at the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration'.

Court through the Commission if respondent states are parties to the Court Protocol and matters arise after its coming into effect.[419] With climate change featuring in the function of regional courts elsewhere, notably, the European Court of Human Rights (ECHR), it is not a misplaced optimism to expect that the African Court will advance the protective mandate of the Commission in relation to indigenous peoples whose ways of life are challenged by climate change.

In *Chagos Islanders v the United Kingdom,*[420] the applicants' case before the ECHR was that their removal without compensation from the Island and the prohibition of their return are in violation of article 3 of the European Convention on Human Rights and Fundamental Freedoms dealing with prohibition of torture.[421] An argument made by government was that the displacement of the islanders was inevitable due to adverse impact of climate change in the area.[422] Regrettably, in rejecting the claim of the applicants, the Court did not pronounce on this issue, or refer to it in its analysis. However, at least, the case shows that climate change is featuring before regional courts. Also, in *Hatton and others v the United Kingdom,*[423]although the claim before the ECHR was not climate-related, as a basis for its decision, the dissenting view of the Court refers to the Kyoto Protocol and to the fact that environmental pollution is a 'supra-national' issue beyond state boundaries.[424]

While the above cases do not directly deal with indigenous peoples or expressly determine climate change issues, they offer a basis for concluding that if an argument connected with climate change can be made before the ECHR, it is possible on behalf of the indigenous peoples under the protective function of the Commission and of course, the African Court.

[419] see Viljoen (n 1 above) 460, where the author advances the constraint in fulfilling these conditions as one of the reasons responsible for the dearth of cases before the African Court
[420] *Chagos Islanders v the United Kingdom* ECHR (Application no. 35622/04) decision of 11 December 2012 (*Chagos Islanders* case)
[421] see European Convention on Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221; *Chagos Islanders* case (n 420 above) para 32
[422] *Chagos Islanders* case (n 420 above) para 24-26
[423] *Hatton and others v the United Kingdom* ECHR (Application no. 36022/97), Grand Chamber, judgement of 8 July 2003 (*Hatton* case)
[424] *Hatton* case (n 423 above), see Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner, 41

6.4.2.1 Inter-state communications

Article 69 of the African Charter provides that a state party alleging that another member state has infringed the rights guaranteed under the African Charter may submit the matter to the Commission after an unsuccessful attempt to resolve it bilaterally or through amicable settlement procedure.[425] Inter-state communications on climate-related wrongs may arise, for instance, where cross-border pollution arising within one state affects the populations in another. This may or may not be traceable to an inadequate regulatory framework of the state in which where such pollution originates.

How a policy decision in one state or states may affect the rights of indigenous populations in another can be inferred from the facts of *Association pour la sauvegarde de la paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia*.[426] In that case, following the unconstitutional change of government in Burundi, the governments of Tanzania, Kenya, Uganda, Rwanda, the DRC, Ethiopia, and Zambia adopted a resolution the purport of which imposed an embargo on Burundi. It was the case of the complainant that the embargo violates articles 4, 17(1) and 22 of the African Charter, in that it prevented the importation of essential goods, such as fuel, and the exportation of tea and coffee, which are the country's only sources of revenue. The complainant further alleged that the embargo is in contravention of articles 3(1), (2) and (3) of the 'OAU Charter' which respectively guarantee sovereign equality of states, non-interference in its internal affairs and respect for the territorial integrity of member states.[427] In dismissing the case, the Commission noted that economic sanctions and embargoes, in so far as they are not excessive and disproportionate, are legitimate interventions in international law and such interference with internal affairs is legitimate.[428]

This is a matter where no case was made for environmental damage, let alone, a climate-related impact in relation to indigenous peoples, but, at least, the case suggests that an excessive and disproportionate act that gives rise to a violation of rights in another state may be considered as a breach of relevant provisions of the African Charter. As Bulto argues, the position of the

[425] African Charter, arts 47-50, 51-53
[426] Communication 157/96, *Association Pour La Sauvegarde De La Paix Au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia* (*Burundi* case)
[427] *Burundi* case (n 426 above) para 4
[428] *Burundi* case (n 426 above) paras 76-78

Commission in that matter has significance for its jurisprudence on the extraterritoriality of human rights in that it shows the Commission was willing to find states responsible for disproportionate actions which violate the rights of populations in foreign states.[429] This logic may in fact apply in the context of a climate change project where a non-state actor in one state is responsible for a human rights violation in another state.[430]

6.4.2.2 Individual communications

The provisions of articles 55 to 57 of the African Charter, particularly in relation to the mandate of the Commission to consider 'communications other than those of state parties', have been correctly interpreted as including complaints brought by individuals.[431] As discussed earlier, climate change implicates a range of human rights which are guaranteed under the African Charter and are enforceable as shown in the jurisprudence of the Commission on individually-lodged communications. Considering the possibilities they offer, individual communications are a potential tool for climate-related human rights alleged violations before the Commission.

One possibility, unlike most domestic jurisdictions in which only a 'victim' or person affected by a violation can sue, is that individual communications before the Commission do not require one to be a victim.[432] In relation to climate change and its effect, the deviation from this requirement means a lot to communities which may have become too powerless to institute actions by themselves. Also, it is to the advantage of individuals or peoples who may have been silenced and prevented from raising their voices against the activities which negatively impact on their lifestyle.

Another possibility, whereas exhaustion of local remedy is required as a rule,[433] is that the admissibility practice of the Commission can excuse this requirement if remedies are not available, effective or adequate. A remedy is unavailable if it cannot be used without hindrance, ineffective if it offers no prospect of success and inadequate if it cannot redress an alleged

[429] TS Bulto 'Towards rights-duties congruence: Extraterritorial application of the human right to water in the African human rights system' (2011) 29 *Netherlands Quarterly Human Rights* 21
[430] S Bulto 'Public duties for private wrongs: Regulation of multinationals (African Commission on Human and Peoples' Rights' in M Gibney & W Vandenhole (eds) *Litigating transnational human rights obligations: Alternative judgment* (2014) 239-260
[431] SA Yeshanew *The justiciability of economic, social and cultural rights in the African Regional System* (2011) 153; CA Odinkalu 'The individual complaints procedure of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 359, 372-374
[432] Viljoen (n 1 above) 304
[433] Viljoen (n 1 above) 316

wrong.[434] In situations where national laws generally do not recognise the identity of indigenous peoples or guarantee the right to environment, but criminalise the activities of indigenous peoples in relation to their land resources,[435] individual communications offer complainants an opportunity to have a cause heard and make their cause visible before regional public opinion far from legislative and political suppression at home. This situation, indeed, is well documented by the *Endorois* case, in which following the denial of justice to indigenous peoples in Kenya, the Endorois took their matter to the Commission which found in their favour violation of rights guaranteed under the African Charter.[436]

6.4.3 Interpretive functions

The interpretation of every provision of the Charter may be fulfilled during the consideration of inter-states and individual communications by the Commission, it does not end there. In line with article 45(3) of the African Charter, the functions of the Commission in relation to the interpretation of provisions under the African Charter may extend to the degree that no complaint has emerged. This has been demonstrated in the process of negotiating the UNDRIP when the Commission gave an advisory opinion on the application of UNDRIP in Africa.[437] Along similar lines, the discussions that are taking place under the UNFCCC have implications for the work of the Commission in that they affect the realisation of human rights in Africa, as has been shown. Hence, on climate change issues, it should be possible for an advisory opinion to be sought by an NGO enjoying observer status at the AU, at least on the extent of the extra-territorial obligations of states in relation to article 24 of the African Charter.

6.4.4 Assembly-entrusted tasks

According to article 45(4) of the African Charter, the Commission may perform 'any other tasks which may be entrusted to it by the Assembly of Heads of State and Government'. As the 'supreme organ' of the AU,[438] the AU Assembly of Heads of State and Government (AU

[434] Viljoen (n 1 above) 317; Communication 147/95 and 149/96, *Sir Dawda K. Jawara v The Gambia* (13th Activity Report: 1999-2000) paras 31-38
[435] *Ogoniland* case (n 57 above) para 41
[436] *Endorois* case (n 46 above)
[437] Advisory Opinion of the Africa Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights at its 41st ordinary session held in May 2007 in Accra, Ghana
[438] Viljoen (n 1 above) 171

Assembly) is involved in championing the common position of Africa in climate change negotiations.[439] Also, it engages in the functioning of CAHOSCC and AMCEN, as earlier mentioned.

As an organ of the AU with a human rights mandate,[440] the AU Assembly, in line with the above provision, can require the Commission to set in motion the process of harmonising the activities of other institutions and initiatives within the AU which have climate change on their agenda. This directive is crucial for the protection of the indigenous peoples' lands in the light of the climate change challenge. That it is necessary is discernible from Resolution 153 of 2009, underscoring the need to study the impact of climate change on human rights in Africa.[441] Through the resolution, the Commission called upon the Assembly 'to take all necessary measures to ensure that the Commission is included in the African Union's negotiating team on climate change'.[442] This is not yet operationalized. However, it can be argued, if invited, that the participation of the Commission will pass for an Assembly-mandated task which will offer the Commission an important opportunity to introduce a human rights dimension into the climate change discourse and, more importantly, begin the all-important process of harmonising the climate-related activities of AMCEN and CAHOSCC with the Commission mandate on human rights protection and promotion.

6.5 Conclusion

The chapter set out to argue, in the absence of adequate protection of indigenous peoples' lands in the national climate change regulatory framework, that resorting to regional human rights instruments and institutions is useful for the protection of indigenous peoples land tenure and use in Africa. The chapter anchors this arguement by three major reasons. The first reasons is the inconsistency of the existing climate change regulatory framework at the national level with states' obligations on the realisation of rights under the human rights instruments at the regional level. The application of human rights to climate change may be problematic in terms of the issues of causation and its transboundary nature, but, the fact remains that under the regional

[439] Committee of African Heads of State and Government on Climate Change (CAHOSCC) meeting' http://www.nepad.org/climatechangeandsustainabledevelopment/news/2570/committee-african-heads-state-and-government-climat (accessed 26 June 2013)
[440] Viljoen (n 1 above)
[441] Resolution 153 (n 409 above)
[442] Resolution 153 (n 409 above)

instruments, states remain the duty bearers and indigenous peoples are rights holders. Hence, obligations and rights exist within key regional human rights instruments of relevance to climate change and indigenous peoples, that is, the African Charter, Kampala Convention and Conservation Convention. Under these instruments, states have obligations to respect, protect, fulfil and promote the rights of indigenous peoples facing the adverse impacts of climate change on their land. In addition to infringing the obligations of state, failure to put in place adequate legislation at the national level negatively affects a range of land-related rights of indigenous peoples. These are namely the rights to property, participation, food, water, adequate housing, a healthy environment, peace, and self-determination which are set out under regional human rights instruments.

The second reason is that the emerging climate change regulatory activities at the regional level have the potential to protect indigenous peoples' land rights at the regional level. In demonstration of this proposition, key institutions and initiatives are discussed. These institutions and initiatives are the Committee of African Heads of State and Government on Climate Change (CAHOSCC), the African Ministerial Conference on the Environment (AMCEN), the ClimDev-Africa Programme which operates through the three channels of the African Climate Policy Centre (ACPC), Climate Change and Desertification Unit (CCDU) and the ClimDev Special Fund (CDSF). Other institutions and initiatives are the African Union Commission (AUS), New Partnership for African Development (NEPAD), the Pan-African Parliament and the Peace and Security Council (PSC).

As the foregoing emerging institutions and initiatives are not yet well-coordinated and often haphazard in their approach, and generally not specifically directed at indigenous peoples in Africa, the chapter explores the potential in the functioning of the Commission to address the gap. The chapter examines and demonstrates how the promotional, protective, interpretive and assembly-entrusted activities of the Commission can be engaged in addressing the inadequacy in the climate change regulatory framework in relation to the protection of indigenous peoples land rights at the national level. Through state reporting, special mechanisms of special rapporteurs and working groups, promotional visits, resolutions, seminars and conferences, publications and dissemination of information, and the relationship with NGOs and national human rights institutions, the promotional function of the Commission offers opportunities to address the gap

in the national climate change regulatory framework in relation to the protection of indigenous peoples' lands.

The protective mandate of the Commission which operates in the form of inter-state and individual communications can be useful in addressing complaints stemming from climate change and related actions. Transboundary issues such as pollution can be challenged through the mechanism of inter-state communication while indigenous peoples can use the means of individual communication to challenge the adverse impact of climate change and related actions which threaten the realisation of their land rights. Since the decisions of the Commission are recommendatory in nature, upon the fulfilment of appropriate conditions, the possibilities in both the individual and inter-state communication mechanisms can be strengthened through recourse to the African Court which is empowered to make binding decisions. Through its interpretive function, the Commission can also shed light on vital provisions which have significance for climate change such as extra-territorial obligations relating to the article 24 of the African Charter. Assembly-entrusted activities of the Commission may include the commencement of a process of harmonising the activities of other institutions and initiatives within the AU which have climate change on their agenda. Examples of such institutions and initiatives which can complement other promotional functions of the Commission include, as ealier mentioned, the CAHOSCC, AMCEN, the ClimDev-Africa Programme and its operating channels of ACPC, CCDU and CDSF, the AUS, NEPAD, the Pan-African Parliament and the PSC.

What emerges from this analysis is that regional human rights instruments and mechanisms can be engaged in addressing the gap in the national climate change regulatory framework on the protection of indigenous peoples' lands in Africa.

Chapter 7

Conclusion and Recommendations

7.1 Conclusion

Increasing warming of the earth due to human activity has resulted in climate change with significant negative impacts on society. Generally, sectors which are prone to the adverse impacts of climate change include water resources, food security, natural resource management and biodiversity, human health, settlements and infrastructure. Considering the limited ecologically damaging footprint of their activities, indigenous peoples contribute least to climate change. Yet, their lifestyle is largely dependent on land and its resources and they are most seriously affected by climate change. Despite this reality, it is uncertain whether the climate change regulatory framework governing the response measures to the adverse effects of climate change adequately safeguard the land tenure and use of indigenous peoples in Africa. In investigating the human rights implications of this uncertainty, the thesis posed this question: Does the climate change regulatory framework adequately safeguard indigenous peoples' land rights in Africa, and if not, how can human rights concept be employed to address the inadequacy? In answering this main question, five specific questions are raised and answered in the thesis. The conclusion on each of the questions is presented below.

7.1.1 Link between human rights and climate change

The thesis sets the stage for its investigation by examining the link between human rights and climate change and, particularly, whether the inadequacy or otherwise of the climate change regulatory framework can be assessed from a human rights perspective. Following an application of human rights in a discourse lens, the thesis answer is in the affirmative. There is a basis for considering climate change as a purely environmental concern, however, human rights can justifiably apply as a conceptual tool for assessing climate change regulatory framework considering the human source of and human vulnerability to climate change. The vulnerability

of indigenous peoples in the face of climate change distinguishes human rights as a tool in examining the climate change regulatory framework.

In particular, the principles of universality and inalienability, interdependency and inter-relatedness, non-discrimination and equality, participation and accountability, arguably, are useful in examining the adequacy or otherwise of the climate change regulatory framework. Rarely is there a state which is not a Party to one human rights instrument or the other which is relevant to the protection of indigenous peoples. Where a climate change framework fails to ensure the protection of indigenous peoples, it questions the universality and inalienability of human rights. The principles of interdependency and inter-relatedness are crucial in that the centrality of land to the worldview of indigenous peoples has implications for socio-economic and political rights which should deserve considerable attention in a climate change regulatory framework. Equity and non-discrimination are key principles of human rights which are crucial as standards for a climate change regulatory framework which aims at implementing climate change response projects involving the land of indigenous peoples. The need for a climate change regulatory framework to allow the participation of indigenous peoples in its response projects and afford them access to grievance mechanism where issues can be raised and remedies can be obtained is a further justification of human rights as a standard of assessment.

In addition, the intersection of human rights and the protection of the environment is a potential basis for assessing the climate change regulatory framework through a human rights lens. This intersection features in procedural and existing rights, as well as the substantive right to a safe and healthy environment, which can be used not only to realise human rights but to attain the goal of environmental protection. Hence, it is reasonable to expect a climate change regulatory framework to further and not undermine human rights of indigenous peoples. Also, as the study shows, the possibility that environmental law principles, mainly, inter-generational and intra-generational notions of equity can become binding when viewed from a human rights perspective is an additional ground that strengthens the suitability of human rights as a tool of analysis of a climate change regulatory framework in relation to indigenous peoples' land rights.

7.1.2 Indigenous peoples' land rights and the adverse effects of climate change

Having justified human rights as an applicable tool of assessment, the study unpacks the main focus or reason for analysing a climate change regulatory framework, that is, the notion of the land rights of indigenous peoples and how these are negatively affected by climate change. The study shows that land rights of indigenous peoples are defined by peculiar use and tenure structure. The use to which indigenous peoples put their land, largely, is for subsistence purposes including fishing, hunting, the gathering of forest products and pastoralism. The use is of great significance to their physical, cultural and spiritual survival as well as sustaining their environment. The subsistence use of land by indigenous peoples, as the study shows, is recognised in key instruments under the international environmental law and human rights. These instruments contain provisions that endorse the subsistence use of land by indigenous peoples as important to their cultural integrity and to environmental protection. Notably, in respect of key environmental law instruments, principle 2 of the Rio Declaration acknowledges the access of indigenous peoples to their land as important to their survival. Article 10(c) of the Convention on Biodiversity associates the cultural practices of communities, such as indigenous peoples, as consistent with conservation or sustainable use of land. This point is further emphasised in the Addis Ababa Principles and Guidelines on Sustainable Use of Biodiversity of 2004 (Addis Ababa Principles) which support the need to respect the stewardship of indigenous peoples arising from their use and management of land and resources.

Furthermore, in combating desertification, article 10(2)(f) of the United Nations Convention on Combating Dessertification (UNCCD) reiterates the commitment of states to stakeholders, including pastoralists, who can shed light on the value and sustainable use of land. Paragraph 6(e) of the World Summit on Sustainable Development (WSSDPI) notes that the access of indigenous peoples to use of land and resources is important for their cultural, economic and physical well-being. Similarly reinforcing the subsistence use of land of indigenous peoples and its cultural as well as environmental significance is the 'African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources'. Specifically, article 16 of the model legislation recognises the collective rights of groups, such as indigenous peoples, as the legitimate custodians and users of their biological resources.

The subsistence land-use of indigenous peoples is well-recognised in a number of international human rights instruments and reporting mechanisms. For instance, it is inherent in article 1(2) of the ICCPR that guarantees the right of every person to own means of subsistence. The thinking, as shown in the thesis, is founded on other human rights instruments, including the ILO Convention 169 of 1989 and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted in 2007. The ILO Convention 169 highlights the cultural and environmental significance of indigenous peoples' subsistence relationship with land. The UNDRIP links indigenous peoples' cultural, spiritual, physical survival and environmental conservation to their control and use of traditional land. The relationship between the land use of indigenous peoples and a sustainable environment is underscored in the functioning of global mechanisms such as the Special Rapporteurs on Indigenous Peoples, the United Nations Permanent Forum on Indigenous Issues (UNPFII) and at the regional level. In Africa, the African Commission's Working Group of Experts on Indigenous Populations/Communities (Working Group) notes that when dispossessed of land and resources, indigenous peoples will be unable to cope with environmental uncertainty. Similarly, case-law from national and regional mechanisms highlights the cultural and environmental significance of indigenous peoples' land use.

In addition to their subsistence land use, another significant aspect of indigenous peoples' land rights is their unique tenure system. Generally, ownership of indigenous peoples' lands is collective and informal in nature, although individual ownership is not necessarily forbidden. In addition to signifying that the control and use of land is managed in accordance with the laws and institutions of indigenous peoples, collective ownership and use of land connotes that communities are generally allowed to use land and not to alienate or transfer it by sale. This feature of ownership is articulated in various provisions in indigenous peoples' land rights regime, including article 13(1) of ILO Convention 169 which calls for protection by states of the 'collective aspects' of indigenous peoples' relationship with land. This appeal is further reinforced by a range of provisions, such as articles 25, 26 and 27 of the UNDRIP, which generally define the special relationship of indigenous peoples with land. It is equally supported by a body of national case-law which has reinforced the collective notion of indigenous peoples' ownership of land.

However, in contrast with the foregoing, under international law the doctrines of 'discovery' and *terra nullius* have had a different influence on the land use and tenure of indigenous peoples. The doctrines of 'discovery' and *terra nullius* serve as legal justification for the expropriation of lands by European powers in the regions of the world, including Asia, the Americas, Pacific Islands, and Africa during the 16th to 20th centuries. These doctrines undermine the notion of indigenous peoples' land use and tenure and have been employed to dispossess indigenous peoples of their land through a combination of factors, including laws which remain in existence in post-independence Africa.

The adverse impacts of climate change and response measures feature in and exacerbate the existing subordination of indigenous peoples' land tenure and use in the continuum of international law as generally formalised in legislation and practice by states in Africa. As has been shown, unsustainable large-scale agriculture, mining and logging as well as road building, for which indigenous peoples' lands is expropriated, contribute to climate change. These projects, along with activities associated with climate change response measures, gain support from international law doctrines as formalised in the legal framework of states in Africa and further the subordination of land use and tenure of indigenous peoples. Also, climate change affects indigenous peoples by rendering the land still in their possession non-viable for their traditional use for survival.

7.1.3 Extent of protection of indigenous peoples' lands in the international climate change regulatory framework

In response to the adverse effects of climate change, global efforts have developed into the international climate change regulatory framework consisting of instruments and decisions of critical institutions under the aegis of the United Nations Framework Convention on Climate Change, namely, the Conference of Parties (COP), Meeting of the Parties (MOP), the Intergovernmental Panel of Climate Change (IPCC), Subsidiary Body for Scientific and Technological Advice (SBSTA), Subsidiary Body for Implementation, Ad-hoc Working Group on Long Term Cooperative Action Under the Convention, and Ad-hoc Working Group on Further Commitment for Annex 1 Parties Under the Kyoto Protocol. The protection of the land use and tenure of indigenous peoples which features as a component in the international climate

change regulatory framework, as has been demonstrated in the study, has a limited value owing to notions, namely, 'sovereignty', 'country driven' and 'national legislation' which are emphasised at that level.

The COP and MOP mainly involve heads of government or designated officials in negotiation process, and their practice allows observer status to bodies, including NGOs, to participate at the meetings. Organisations such as the Forest Peoples Programme, Indigenous and Tribal Peoples of the Tropical Forests International Alliance and the Indigenous Peoples of Africa Co-ordinating Committee (IPACC) have made contributions through their press releases on the need to integrate the land tenure system of indigenous peoples into climate negotiation. Issues affecting indigenous peoples, particularly participation and benefit-sharing, are similarly discussed at the Subsidiary Body for Scientific and Technological Advice (SBSTA), the Subsidiary Body for Implementation (SBI) and Ad-hoc Working Group on Long Term Cooperative Action Under the Convention, even though such discussions have not significantly influenced the decisions of the Conference of Parties (COP).

Similar findings are evident from the analysis of the key international instruments governing the response measures on climate change, namely, adaptation and mitigation. In relation to adaptation, there is evidence which shows that indigenous peoples' land use and tenure are items on the agenda of the regulatory framework of funds for adaptation, mainly the Adaptation Fund (AF), the Least Developed Countries Fund (LDCF), the Special Climate Change Fund (SCCF), and Green Climate Fund (GCF). This is true of the Global Environment Facility that manages the funds under the LDCF and SCCF, the Adaptation Fund Board which manages the AF and the GCF Board in charge of the GCF. Generally, it means that indigenous peoples should be able to participate through their representatives or coordination as a group, in the affairs of these mechanisms and influence decisions affecting their land tenure and use.

In the funds under the management of GEF, existing instruments include the GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards (GEF SESS), the GEF Policy on Public Involvement in GEF Projects (GEF Minimum Standard Policy), as well as the Principles and Guidelines for Engagement with Indigenous Peoples (GEF Principles and Guidelines). Provisions in these instruments urge respect for the land use and tenure system of

indigenous peoples. The GEF SESS recommends the use of Free Prior Informed Consent (FPIC) as well as criteria such as resettlement, physical cultural resources as well as accountability and grievance, in relation to programmes affecting indigenous peoples. Equally, the Rules of Procedures of the Adaptation Fund (AF Rules of Procedures) allow for the representatives of national or international governmental or NGO to serve and observe discussions. The Strategic Priorities, Policies and Guidelines of the Adaptation Fund (Strategic Guidelines) urge attention to be given to the vulnerability of populations which, arguably, includes indigenous peoples.

As a climate mitigation strategy, there are international instruments governing the Reducing Emissions from Deforestation and Forest Degradation (REDD+) inititiative. The REDD+ entails not only efforts focusing on reducing deforestation and forest degradation, but it aims to incentivise conservation, the sustainable management of forests and the enhancement of forests as stock of carbons in developing countries. The initiative is implemented through the UN-REDD National programme in states in Nigeria, Zambia and Tanzania. The regulatory framework under the aegis of UN-REDD National programme makes provision for the protection of indigenous peoples' land tenure and use. Also, the UN-REDD programme is governed by a policy board with a Secretariat and an Administrative Agent, known as the Multi-Partner Trust Fund Office (MPTF). As the most influential organ of the UN-REDD programme, the Board features the chair of the United Nations Permanent Forum on Indigenous Peoples (UNPFIP) as a full member.

Particularly, instruments developed at the international level in relation to REDD+ include the Cancun Safeguards which call for respect for the knowledge and rights of indigenous peoples as enshrined under the UNDRIP. Other documents developed in response or along with the Cancun Safeguards similarly deal with a range of issues relevant to the protection of indigenous peoples in the context of REDD+. These documents are the Social Principles Risk Assessment Tool, Social and Environmental Principles and Criteria, Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities, and the UN-REDD Guidelines on Free, Prior and Informed Consent. Essentially, there are different aspects of these documents which support respect for indigenous peoples' land tenure and use, as well as the related issues of participation, carbon rights and benefit-sharing, and access to remedy in the implementation of REDD+ mitigation process.

Notwithstanding the foregoing measures of protection in the international climate change regulatory framework relating to adaptation and the mitigation measures, there are notions emphasised at the level of the international climate change framework which may legitimise or justify the weak protection of indigenous peoples' land tenure and use at the national level. These are the notions of 'sovereignty,' 'country-driven' and 'national legislation'. The principle of sovereignty has been a recurring feature of international environmental law instruments since the Stockholm Declaration to the United Nations Framework Convention on Climate Change (UNFCCC). According to the UNFCCC, for instance, the State has the sovereign right to exploit its own resources in accordance with its environmental and developmental policies. Furthermore, key decisions and safeguards resulting from the international climate change framework on adaptation and mitigation measures require respect for the recognition of the sovereignty of states. However, the downside to this provision is that it offers a basis to legitimise in a national climate change framework the non-protection of indigenous peoples' land tenure and use.

Closely linked to the notion of 'sovereignty', the notion of 'country driven' constitutes another potential significant limitation to the emerging protection of indigenous peoples under the international climate regulatory framework. As discernible from the decisions which feature in relation to climate change response measures; the notion of 'country driven' signifies that states participating in measures should take the leadership in the implementation processes. In itself, this is not harmful as article 4(1)(b) of the UNFCCC and article 10(b)(ii) of the Kyoto Protocol, respectively, require states to formulate adaptation and mitigation programmes. In respect of adaptation, the notion of 'country driven' is emphasised in various decisions of the COP, including COP 8, COP 9 and COP 10 which endorse guidelines on a national adaptation plan of action (NAPA). With regard to mitigation, the concept of 'country driven' is discernible from paragraph 1 of the Appendix 1(c) of the Cancun Agreements dealing with activities on REDD+. A country-driven approach is emphasised in the decision of COP 16 dealing with the system to provide information on compliance with safeguards and the template of the UN-REDD and FCPF for the Readiness Preparation Proposal (R-PP). Similar to the notion of 'sovereignty', the notion of 'country driven' favours state control of climate change response processes and not control, let alone ownership of processes, by indigenous peoples.

Also, the international climate regulatory framework defers to 'national legislation' in the implementation of the response measures aimed at addressing the adverse impacts of climate change. This is despite the recommendation from some states on the need for a legal regime that conforms to international standards. Deferral to national legislation in the operationalising of international standards is highlighted in emerging decisions of the COP. It is evident in paragraph 2 of Appendix 1 of the Cancun Agreements, and in the preamble to the COP 17 decision dealing with a safeguard compliance information system. This situation is further strengthened in the decisions of other organs under the aegis of the UNFCCC, such as the SBSTA and Ad-hoc Working Group on Long Term Cooperative Action, which stress that participation of states in REDD+ should be voluntary bearing in mind national circumstances. In all, the notions of 'sovereignty', 'country-driven' and 'national legislation' may serve as a legal platform setting the stage for a domestic order which undermines the protection of indigenous peoples' land rights.

7.1.4 National climate change regulatory frameworks and indigenous peoples' lands

The trend that the emphasis on notions of 'sovereignty', 'country-driven' and 'national legislation' at the international level can limit the protection of indigenous peoples' lands in a national climate change regulatory framework is demonstrated through the examination of the domestic climate change regulatory framework in three African states, namely Zambia, Tanzania and Nigeria. In respect to adaptation, as required under the decisions at the international level, these three states have filed a national adaptation plan of action (NAPA) or a National Communication as the case may be in order to enable them to access adaptation funds. With respect to Tanzania, NAPA documentation does not specifically identify nor address the adverse impacts of climate change on indigenous peoples. Rather, it seeks funds and support to implement approaches including zero grazing and relocation of people which, in addition to criminalising the acts of pastoralist indigenous peoples, are inconsistent with the rights of indigenous peoples under international human rights law. In relation to Nigeria, findings reveal that communities generally affected by the impact of climate change are not mentioned and the National Communication filed by Nigeria does not capture the special circumstances, such as oil spillages and despoilation of the environment, which continue to challenge the adaptation possibilities of communities, particularly in the Niger Delta region or the pastoralists in the

North, whose lifestyle are threatened by the adverse impacts of climate change. In the Republic of Zambia, NAPA does not attend to issues such as protection of tenure, direct access to funds which are critical to forest-dependent communities.

Generally, the implications of the foregoing development in relation to adaptation are threefold. They raise doubts about the protection of the land tenure and use, as well as participation, of indigenous peoples in the processes associated with the response mechanism. Second, in failing to include critical issues, the adequacy of the content of documentation relating to adaptation appears compromised. Third, inadequate documentation makes the access to funds under different regimes and their application to address the adaptive challenges of indigenous peoples highly unlikely.

In relation to the mitigation measure of REDD+, global efforts are at phase 1 of the programme that aims at the period 2011-2015 to assist countries to develop and to implement their REDD+ strategies efficiently, effectively and equitably. Phase 1 is the readiness stage of the programme; other phases are known respectively as results-based and incentive rewarding phases. Tanzania, Zambia and Nigeria are undergoing phase 1: Tanzania is at more advanced stage of implementation. In the thesis, it is demonstrated that the domestic climate regulatory framework on REDD+ does not adequately reflect the requirements under the international standard of protection emerging from the UN-REDD programme. Despite the preparation of these states for REDD+, there is inadequate protection of indigenous peoples' land tenure and use in the existing domestic regulatory framework projected for the implementation of REDD+.

In Tanzania, institutions established pursuant to the international climate change regulatory framework for the implementation of REDD+ are the National REDD+ Task Force (NRTF), National Climate Change Steering Committee (NCCSC), and the National Climate Change Technical Committee (NCCTC). The challenge facing these institutions lies in their composition. These institutions are largely composed of government officials with inadequate representation of indigenous peoples. Scanty representation of indigenous peoples casts serious doubt on the suitability of these institutions to address the concerns of indigenous peoples pertaining to land. Similarly, the regulatory framework being formulated to govern REDD+ in Tanzania leaves much to be desired with regard to the effectiveness of the process. The regulatory framework

refers to policies and legislation listed under the Tanzania National Strategy and National Safeguards. The framework for implementing REDD+ in the National Strategy of 2013 in the Tanzania (Mainland) and Zanzibar are the National Environmental Policy, National Forest Policy, National Water Policy, National Energy Policy, and National Human Settlements Development Policy. For Zanzibar, key policies are the National Forest Policy, Environmental Policy, Agricultural Sector Policy, Tourism Policy, National Land Policy, and Energy Policy.

Also, the National Strategy of 2013 lists a range of legislation as critical to the implementation of REDD+: the Environmental Management Act (2004), the Forest Act (2002), the Beekeeping Act (2002), the Wildlife Conservation Act (2009), the Land Act (1999) and Village Land Act (1999) for Tanzania Mainland, Fisheries Act (2010) and Forest Resources Conservation and Management Act of Zanzibar (1996). The analysis of the regulatory environment in Tanzania, reveals that there is substantial non-reflection of international safeguards for REDD+ initiative, suggesting inadequate protection of indigenous peoples' land use and tenure under this framework.

A similar conclusion is reached in respect of Zambia, based on the regulatory framework being formulated as listed in its National Joint Programme (NJP) and the REDD+ preparedness documents. Steps taken thus far in terms of the emerging readiness regulatory framework in Zambia do not adequately safeguard indigenous peoples' land tenure and use. The existing structure for the management and coordination of REDD+ consists of a REDD Coordination Unit (RCU), Secretariat, REDD+ Steering Committee and Joint Steering Committee of the Environment and Natural Resources Management and Mainstreaming Programme (ENRMMP). Exempting the limited space given to the representatives of NGOs, House of Chiefs and CBOs, these institutions, in terms of their composition, are largely dominated by representatives of governmental agencies.

The domestic instruments in relation to REDD+ in Zambia are particularly discernible from the NJP and legal preparedness documents. These are the Vision 2030, National Environmental Action Plan, National Policy on Environment, Forestry Policy, Zambia Forest Action Plan, National Agricultural Policy, Irrigation Policy and Strategy, National Biodiversity Strategy and Action Plan, National Energy Policy, and National Water Policy. Largely, these instruments

predate the REDD+ process and offer limited provisions in relation to the protection of indigenous peoples. This is also the case with the Constitution of Zambia, the Lands Act of 1995, the Lands Acquisition Act (LAC) of 1970, Water Resources Management Act of 2011 Town and Country Planning (Amendment) Act, Mines and Minerals Development Act of Zambia Forests Act.

Participating in REDD+ activities since 2011, Nigeria has prepared a REDD+ Readiness Proposal (R-PP) and submitted a National Programme Document (NPD) to the UN-REDD Policy Board. The NPD sets out the regulatory framework to achieve REDD+ Readiness in Nigeria, using the Cross-River State as a model. The institutional structure for the REDD+ programme in Nigeria is in two tiers, namely the national and state levels. At the national level, the framework includes the Federal Ministry of Environment (FME) and parastatals, the National Forestry Development Committee (NFDC), and the National Council on Environment. Also, in existence are the Special Climate Change Unit (SCCU), which is vested with mandates including negotiation, planning, policy, education and carbon finance, and the National Climate Change Committee (NCCC) which was established in April 2013. Furthermore, there are the National Advisory Council on REDD+, the National REDD+ Subcommittee, the National Climate Change Technical Committee, the National REDD+ Secretariat, the UN-REDD Nigeria Programme Steering Committee and National Stakeholder Platform for REDD+. However, as argued in the thesis, these institutions predominantly are composed of government agencies and staff.

The regime at state level in Cross River State (CRS) mainly reflects what exists at the national level and portrays an arrangement whereby state agencies largely dominate the institutional architecture for the implementation of REDD+ activities. Confirming this summation are the CRS Forest Commission and a REDD+ Unit. Some hope exists in terms of the participation of the forest-dependent communities within the CRS Stakeholder Forum on REDD+ that was established in 2010, but is weakened by the provision of the R-PP denying the existence of indigenous peoples in Nigeria. It raises doubt about the possibility that forest-dependent communities may be accommodated in the functioning of the forum. In relation to the applicable instruments, there are the National Forestry Policy, the National Policy on Environment, Land Use Act, National Environmental Standards and Regulations Enforcement Agency (NESREA)

Act, and the Law on the Management and Sustainable Use of the Forest Resources of Cross River State. There are helpful provisions in these policies and laws in relation to REDD+ activities in Nigeria, but generally, these policies and laws do not safeguard the land tenure and use of indigenous peoples and, therefore, are inadequate for their protection in respect of mitigation activities.

In all, the climate change regulatory framework at the national level is inadequate in terms of the protection it offers indigenous peoples' land tenure and use. This has implications for indigenous peoples' participation, carbon rights and benefit-sharing and their access to grievance mechanisms and remedies. The institutions established under the aegis of the climate regulatory framework are not adequately inclusive of indigenous peoples. The provisions on carbon rights and benefits sharing are unclear in terms of who owns what title and arrangement for a benefit-sharing. Also, the operationalisation of REDD+ remains largely dependent on a formal dispute resolution mechanism. Similarly, the existing regulatory framework does not accommodate indigenous peoples' customs and institutions of dispute resolution in the implementation of REDD+, as has been demonstrated.

7.1.5 Indigenous peoples' lands and inadequate climate change regulatory frameworks: Human rights as regional response

In light of the inadequate protection, particularly at the domestic level, the last research question which the study examines is how human rights can be explored as a regional response in addressing the inadequacy of national climate regulatory framework in relation to the adverse impacts of climate change on indigenous peoples' land use and tenure in Africa. In responding to this question, the study acknowledges that recourse to a regional solution may be imperfect but, at least, is useful for standard-setting and oversight. It then framed three arguments as legal bases for resorting to regional human rights to address inadequacy at the domestic level. The first justification is the inconsistency of an inadequate national regulatory framework with the human rights obligations of states which equally constitutes a threat to a range of human rights under regional human rights law instruments. The second response is that the emerging regulatory framework on climate change at the regional level has the potential to link with regional human rights mechanisms. Finally, the regional human rights mechanism, particularly, the Commission,

has the mandate and approach which in addition to being functional on their own can complement the emerging regional climate regulatory framework in protecting indigenous peoples' land tenure and use in Africa.

In order to demonstrate that failure by states to formulate an adequate or effective climate regulatory framework is antithetical to their obligations and, thereby, constitutes a threat to a range of land-related rights of indigenous peoples, the study identifies key instruments with human rights provisions and obligations relating to climate change: the African Charter on Human and Peoples' Rights (African Charter), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) and the African Convention on the Conservation of Nature and Natural Resources (Revised version). Four layers of obligation, namely the obligation to respect, protect, promote and fulfill human rights are laid down in the *Ogoniland* case by the Commission. In addition to the African Charter, the quartet obligations is discernible from articles 4(3), (5) and 3(h) of the Kampala Convention and, generally, from article IV of the Conservation Convention. The inadequate formulation of a regulatory framework for the protection of indigenous peoples' land use and tenure at the national level is in breach of these obligations as recognised under the instruments. By extension, as the study shows, this inadequacy constitutes a threat to a range of land-related rights of indigenous peoples, mainly, the rights to property, participation, food, water, adequate housing, a healthy environment, peace and self-determination.

The second argument on which the resort to regional human rights application is based is the potential in the emerging climate regulatory framework for linkage with human rights. Predominantly, institutions and initiatives under the aegis of the emerging climate change regulatory framework are the Committee of African Heads of State and Government on Climate Change (CAHOSCC), the African Ministerial Conference on the Environment (AMCEN) and the ClimDev-Africa Programme which operates through the three channels of African Climate Policy Centre (ACPC), Climate Change and Desertification Unit (CCDU) and ClimDev Special Fund (CDSF). Other institutions and initiatives with climate change on their agenda are the African Union Commission (AUS), New Partnership for African Development (NEPAD), Pan-African Parliament (PAP) and the Peace and Security Council (PSC).

The participation of African states in the process that led to the adoption of the UNDRIP logically requires that the CAHOSCC should serve as a platform in furthering the protection of indigenous peoples' land tenure and use in the face of the adverse impacts of climate change. AMCEN efforts at building consensus and encouraging participation have a human rights significance, and therefore, are useful for the protection of indigenous peoples' land tenure and use. Key channels in the functioning of the ClimDev-Africa Programme, which engage in activities of relevance to the protection of the human rights of indigenous peoples, are the ACPC, Climate Change and CCDU and CDSF. Activities, such as the prevention of land degradation and dessertification which the AUC carries out under the Multilateral Environmental Agreements (MEA) through the African Monitoring of Environment for Sustainable Development (AMESD) may assist indigenous peoples in respect of dessertification. Through its Climate Change Fund and the African Peer Review Mechanism (APRM), it is possible for NEPAD to engage with indigenous peoples and their land issues. A similar potential exists within the PAP and the PSC as critical organs of the African Union (AU). In its interaction with law makers at the national level, the PAP can awaken the attention of law makers to formulate an appropriate framework to address the issues of indigenous peoples and the focus of the PSC on the centrality of the environment and sustainable development to peace and security is relevant in addressing conflict due to competition over scarce environmental resources which, with the advent of climate change, will involve the land of indigenous peoples.

Finally, the regional human rights mechanism, particularly the Commission, has a mandate and an approach which distinguishes it as capable of functioning on its own and being linked with the emerging regional climate regulatory framework in protecting the land use and tenure of indigenous peoples in Africa. This possibility is demonstrable through the promotional, protective, interpretive and assembly-mandated functions of the Commission. In relation to promotional functions, activities performed through state reporting, special mechanisms, promotional visits, resolutions, seminars and conferences, publications and dissemination of information, relationship with NGOs and national human rights institutions (NHRI) have the potentials of rights protection and can be linked with the emerging regional climate change regulatory framework. For instance, Guidelines on state reporting can call for information on the implementation of climate-related activities and the extent to which indigenous peoples are safeguarded in terms of compensation and benefit-sharing and will complement the potential in

the mandate of the ClimDev programmes and its key input areas, namely the ACPC, the CCDU and the ClimDev Special funds.

The Special Rapporteurs and Working Groups are useful mechanisms of the Commission that can be engaged for the purpose of promoting the protection of indigenous peoples' land tenure and use. Even though there is neither a Special Rapporteur nor Working Group focusing specifically on climate change and human rights, the issue, particularly in relation to indigenous peoples can be addressed in the mandate of the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons in Africa, the Special Rapporteur on the Rights of Women in Africa, and the Special Rapporteur on Human Rights Defender in Africa. It will also be a suitable area for the Working Group dealing with the rights of indigenous or ethnic communities in Africa, Working Group on Economic, Social and Cultural Rights in Africa, and the Working Group on Extractive Industries, Environment and Human Rights Violations. In their functioning, particularly that of the Working Group dealing with the rights of indigenous or ethnic communities in Africa, complementary efforts are possible together with AU institutions and initiatives such as the ACPC, CCDU, CDSF, AUC, PAP and the PSC. Importantly, these mechanisms can suggest and motivate the inclusion of the situation of indigenous peoples in the 'loss and damage' focus of ACPC, and encourage proposals by indigenous peoples to access funding under the CDSF, provide information to strengthen the activities of the PAP and the PSC relating to climate change, as well as exert pressure for coherence of the regulatory framework at domestic level with international standards on the protection of indigenous peoples' land tenure and use.

Through its promotional activities, including visits, conferences and seminars, the Commission can sensitise political leadership on the human rights dimension to climate change. It can use the opportunity to motivate mainstreaming the protection of indigenous peoples in the activities of institutions and initiatives such as the AMCEN, CAHOSCC, PSC, PAP, ClimDevelopment programme, NEPAD, AUC, ACPC, CCDU and CDSF in relation to climate change. It can engage and require the NHRIs to offer an objective report before the Commission on the vulnerability of populations to the impact of climate change and provide information in support of the early warning activities of the PSC in relation to climate change as well as enrich the debate at the PAP. If focused on the activities of other institutions such as AMCEN, ACPC,

CAHOSCC, PSC, PAP, ClimDevelopment programme, NEPAD, AUC, ACPC, CCDU and CDSF, resolutions by the Commission can increase the complementarity of the human rights mechanisms and the emerging regional climate regulatory framework in fostering a solution to the plight of indigenous peoples facing the adverse impacts of climate change.

The protective mandate of the Commission is of vital importance, particularly given the situation in Africa where national laws of states generally do not recognise the identity of indigenous peoples nor guarantee the right to environment, but criminalise the activities of indigenous peoples in relation to their land resources. The progressive jurisprudence of the Commission in the *Ogoniland* and *Endorois* cases offers an optimism that, as complainants, indigenous peoples can have their cause heard on a platform far from the legislative and political suppression at home. The protective mandate of the Commission can be strengthened by the African Court provided that the necessary conditions are met. Importantly, the possibility that argument in relation to climate change can be made at that level is reinforced by the emerging jurisprudence from elsewhere, notably the ECHR, which makes references to climate change and climate related instruments in the *Chagos Islanders* and *Hatton* cases. Also, through its interpretive function, an advisory opinion can be sought and provided on grey areas of human rights and climate change, such as the extra-territorial obligations of states in relation to article 24 of the African Charter. Moreover, when invited by the AU Assembly to do so, the Commission can set in motion the process of harmonising the activities of other institutions and initiatives within the AU which have climate change on their agenda.

Notwithstanding the foregoing potential opportunities, changes at all levels of the regulatory framework will contribute to the effective protection of indigenous peoples' land tenure and use in the light of the adverse impacts of climate change in Africa.

7.2 Recommendations

In the context of adverse impacts of climate change, reforms are necessary at the international, national and in fact regional climate regulatory framework for the protection of indigenous peoples' land tenure and use in Africa.

7.2.1 International level

As part of the future negotiation of instruments in relation to climate change at the international level, there is need to rethink the notions of 'sovereignty', 'national legislation' and 'country driven' so as more adequately to protect indigenous peoples facing the adverse impacts of climate change. It is not disputed that these notions are useful as a shield by developing countries, including African states, in making a case for climate justice calling for the differential treatment of developed states and developing states in several areas, including climate change accountability and response measures. However, the extent to which the notions should be allowed to shape future instruments on climate change requires rethinking by climate negotiators. This is beacause while states, particularly in Africa, may jealously guard their notion of sovereignty, it is hollow to indigenous peoples at the domestic level whose options and choices in relation to the protection of land use and tenure are limited, if at all, in the light of adverse climate change effects.

Hence, in the negotiations for a new treaty, it is proposed that the notion of 'sovereignty' should conceptually shift toward a 'human-centred' perspective which protects vulnerable groups such as indigenous peoples instead of the notion of state centred sovereignty which continues to retain its presence in the negotiation of international climate change instruments. This proposed approach should emphasise the rights of indigenous peoples as human rights and regard the protection of their land use and tenure as critical in the formulation of an appropriate regulatory framework and implementation at the national level.

Also, an outcome of the above approach should be reflected in the normative content of future instruments on climate change at international level dealing with sovereignty over natural resources. As it stands, much emphasis is placed on state sovereignty over natural resources in the pillar conventions on climate change, that is, the UNFCCC and the Kyoto Protocol. There is no reference to indigenous peoples, let alone the relevance and centrality of the protection of their land tenure and use, in the realisation of the overall objectives of the UNFCCC and the Kyoto Protocol. This lack is an unjustifiable departure from previous instruments negotiated on the environment. Principle 22 of the Rio Declaration recognises that indigenous peoples have a vital role in the management of the environment because of their knowledge and traditional

practices. Section 10 of Agenda 21, another Rio instrument, calls for the inclusion of appropriate traditional and indigenous land-use practices, such as pastoralism, in the sustainable management of environment. At least these provisions acknowledge that indigenous peoples are partners in the process of environmental protection. Accordingly, future international instruments on climate change and response measures should emphasise the security of indigenous peoples' tenure as a core requirement for the approval and implementation of projects relating to adaptation to and mitigation of climate change.

Finally, rethinking the notion of state centred sovereignty should result in a new interpretation of the principle of 'common but differentiated responsibility' which, thus far, has been advanced to exclude developing states from obligations under the pillar instruments on climate change. No doubt, this understanding may be legitimate, given the historical responsibility of the developed countries of the world for the current state of the climate. However, in future instruments, the meaning of 'common but differentiated responsibility' should be understood differently in the context of indigenous peoples. It should be understood in the lens of indigenous peoples' sovereignty as connoting the protection of indigenous peoples' land tenure and use in consideration of the fact that disproportionately they face the adverse impacts of climate change.

The notion of 'country driven', a recurring phrase in the international climate change regulatory framework on adaptation and mitigation, is not supported by appropriate standard-setting and institutional checks at the international level. For instance, a lack of clear provision on issues such as the definition of carbon rights, benefit-sharing, land tenure systems and access to grievance mechanisms and remedies, reflects the manner in which this notion plays out in African states. It indicates that it is a cover for avoiding the formulation of a clear climate change regulatory framework which respects the rights of indigenous peoples. In the absence of clear guidance from the international level of negotiation, the idea of 'country driven' signifies that states can elect to act as they please, adopting a different position on issues relating to indigenous peoples land tenure and use.

Indeed, it is difficult to imagine that adequate protection of indigenous peoples' land tenure and use is possible without addressing these issues at the level of the international climate regulatory framework. International negotiation of REDD+ should agree on a definition of carbon rights

and benefit-sharing as well as prioritise in that definition the interests of stakeholders such as indigenous peoples whose land is at the heart of project implementation. Similarly, it is necessary, at the very least, that guidelines be developed, even if the implementation of projects will remain 'country driven'. A grievance mechanism for the implementation of projects such as REDD+ should be designed and be open to claims by indigenous peoples in relation to land tenure and use, and should recognise their traditional institutions and customs in proof of landholding in the process of dispute resolution. Such a mechanism should have the power to halt projects which are inconsistent with indigenous peoples' land use and tenure, participation and benefit-sharing. It should further be able to prescribe the steps for ensuring compliance.

Generally, there should be model guidelines for states on compliance with safeguards in adaptation and mitigation projects. For instance, in the case of projects such as REDD+, guidelines should aim at eliciting responses to questions in relation to the status of indigenous peoples whose land is involved in implementation of REDD+ projects. Such guidelines may require states to indicate the groups identified as indigenous peoples, indicate the consistency of a national framework law, policies and strategies for the implementation of projects with the UNDRIP. Also, guidelines should require states to set out mechanisms to ensure the protection of the land tenure and use of indigenous peoples, as well as the appropriate remedies that can be approached to address grievances. The guidelines should further require information on the consistency of a domestic legal order with the international standard on carbon rights and benefit-sharing, as well as steps taken to ensure the participation of indigenous peoples and indicate the groups consulted in drafting information on compliance with the safeguards. It should require that legislative and practical steps be taken to ensure the enjoyment by indigenous peoples of the rights on a non-discriminatory basis.

Closely related to the above is the notion of 'national legislation' which should equally be qualified at the international level in order to safeguard indigenous peoples' land tenure and use. Guidelines on adaptation and mitigation measures should require states to indicate legislative reforms carried out in relation to property rights that accommodate indigenous peoples' conception of land tenure and use in the light of the climate change challenge. Also, states should be required to indicate practical measures taken to ensure the realisation, at the very least,

of all the land related rights of indigenous peoples in the context of implementing projects relating to climate change.

7.2.2 National level

Ultimately, the national climate regulatory frameworks are the most relevant channel in responding to the adverse impacts of climate change and implementing climate response projects. To protect the land tenure and use of indigenous peoples in that context, an appropriate national regulatory framework should reflect international best practices. However, as has been shown, nothing significant has changed in the key laws for the protection of land tenure as states prepare for the implementation of climate change responses. The constitution, land and forestry laws remain the same, generally vesting ownership of land in the states to hold in trust and empowering the government to expropriate land on the grounds of public policy. This is reflected in the general findings made on land tenure and use by states such as Zambia, Tanzania and Nigeria, which have insignificant provisions for the protection of indigenous peoples' land rights. This failure is detrimental to indigenous peoples as the pressure to expropriate land will heighten in implementing climate change response measures because the existing regulatory framework will only afford the legal leverage for government to take over lands with or without compensation. Hence, there is need for a complete overhauling of the domestic regulatory framework.

Either of two approaches can be recommended to tackle this situation: a stand-alone or a long route approach. The stand-alone approach will require the harmonisation of the provisions of national laws into one basic instrument to govern adaptation and mitigation programmes and initiatives in relation to the protection of indigenous peoples' land tenure and use. The aim of such law will be to give effect to the rights of indigenous peoples as enunciated in the decisions made at the international level to which participating states are committed and to the UNDRIP. The resulting domestic instrument will define the grey areas in relation to issues affecting indigenous peoples such as carbon rights and benefit-sharing, and participation. It will also contain a 'primacy provision' which can operate to render void the provisions of other laws incompatible with its content.

The long route will require a sort of 'indigenous land use and tenure audit' for all the separately existing laws and policies. It means that existing laws will be overhauled to recognise the landholding and use pattern of indigenous peoples. Each of the laws can be reformed to accommodate respect for the land rights of indigenous peoples as well as their traditional institutions in addressing matters of dispute. Where acquisition is inevitable on the ground of public interest, it should accommodate benefit-sharing, transparency of acquisition process, and respect for free prior and informed consent. It should indicate steps and approaches to receiving compensation and indicate measures to ensure that indigenous peoples can enjoy access to land after expropriation. Laws which particularly curtail the title of indigenous peoples such as the Land Acquisition Act in Zambia and the Land Use Act in Nigeria, should be qualified in their application to exclude measures undermining the rights of indigenous peoples in climate-related activities.

Whichever approach is preferred, what is certain is that human rights are a valid basis for provoking change at the domestic level. There should be no regulatory platform at the domestic level allowing countries to do as they wish in the context of adverse impacts of climate change. Also, there is the need to address the present scenario where insitutional and oversight mechanisms generally are populated by government agencies and staff. A climate specific instrument or 'indigenous land use and tenure audit' should produce as its outcome a new statutory body referred to as the Climate Response Measures Commission (CRMC). In composition, the proposed CRMC should largely comprise indigenous peoples groups and representatives to provide oversight on the implementation of climate programmes and initiatives. This institution will differ from existing mode of governmental committees in which indigenous peoples enjoy little or no control. The proposed CRMC will shift existing paradigm as it will avail indigenous peoples' groups or their representatives of a platform to take the lead in the promotion of transparent and accountable governance in project implementation.

7.2.3 Regional level

The transnational nature of climate change makes intervention at the regional level inevitable. Also, without regional intervention, states with indigenous peoples may elect to deal with their plight as it suits their political purposes. Issues, such as continental desertification, pollution and

the presentation of a coordinated position in international climate negotiation, as already is being done, are best addressed and articulated at the regional level. The UNFCCC supports such regional measures. Similarly, as previously observed, a regional human rights system can serve as a safety net for indigenous peoples whose claims for protection in the context of the adverse impacts of climate change and response mechanisms may be denied at the domestic level, due to a want of political will on the part of the State. Ultimately, regional human rights can help to prevent different treatment of indigenous peoples across the states in which they can be found in Africa.

However, as has been demonstrated, despite the potential and the link to human rights in climate-related activities at the regional level under the AU system with human rights, this is yet concretely to be reflected in the functioning of its human rights mechanisms or be understood as an official approach in climate negotiation. Accordingly, in relation to the protection of indigenous peoples facing the adverse impacts of climate change, two levels of interaction are inevitable at the regional level.

The first interaction is necessary between climate change related institutions and initiatives with human rights mechanisms. As demonstrated in chapter six of this study, this is possible at least for synergy purpose. It is useful in that it will prevent the duplication of effort when institutions across the AU have insight into one another activities relating to climate change. It serves a complementary advantage as a shortcoming in the approach of one institution or initiative can be attended to by the approach of another institution. For instance, the activities of the African Working Group on Indigenous Populations in relation to climate change may positively shape the direction of programmes conducted under the Clim-Dev. Hence, a synergy can be set in motion by the AU Assembly requesting the Commission to take the lead, by setting up a cross institutional committee composed of a representative of each of the institutions and initiatives that have climate change in their agenda in order to harmonise programmes on climate change and human rights. Without a doubt, the presence of the members of the Working Group on such committee will make unavoidable the protection of indigenous peoples land tenure and use, which will, recurringly, feature.

The second interaction can take the shape of an official policy statement on the protection of indigenous peoples in the light of climate change impacts. In line with their respective mandates, the AMCEN and the Commission can initiate such policy in the AU Assembly for formulation. A regional policy addressing the adverse impacts of climate change on indigenous peoples' land use and tenure is critical as a response to the realities confronting indigenous peoples. The proposed regional policy may embody detailed normative and institutional safeguards. The normative policy content should include the provision that given the reality of adverse impacts of climate change on indigenous peoples' land use and tenure, and its centrality to successful implementation of climate response measures, states shall respect, fulfil and protect the land use and tenure of indigenous peoples in Africa. The policy should particularly emphasise the commitment by states in Africa to the UNDRIP and its use as a framework in developing national legislation which ensures the access to and protection of the land tenure system of the indigenous peoples. In their dealings with indigenous peoples, such commitments should operate as an enforceable contract and form the basis for engagement on their terms in climate-related matters including benefit and incentive sharing associated with the implementation of adaptation and mitigation measures at the national level. Such a policy direction should commit to observance of the UNDRIP by internal and external stakeholders in implementing climate-related measures which implicate the land use and tenure of indigenous peoples in Africa.

Regarding the institutional component of the policy, this should include a specific role for the AMCEN and the Commission. The AMCEN should commit itself to the role of advocating and ensuring that a model climate-related legislative framework is put in place at the national level to accommodate the norms in relation to indigenous peoples' land use and tenure. With a view to increasing awareness and generating information and a solution to issues, the Commission can include in its guide on state reporting a component on the experiences of indigenous peoples in the context of the adverse impacts of climate change. Also, the policy should indicate, through its Working Group, that mission visits will be used to engage national institutions on the situation of indigenous peoples in the light of climate change challenges and that resources will be committed toward addressing their peculiar situation at the national level. These approaches are necessary in order to align the regional stand on human rights and climate change with the discussions at the Human Rights Council and the position of indigenous peoples which, for long, have called for consideration of the adverse impacts of climate change and response measures on

their land and resources as a human rights challenge. More importantly, the two levels of interactions can encourage required response and actions at the national level, where it matters most to indigenous peoples.

It may be argued that the general lack of political will among leaders in Africa to recognise the identity of indigenous peoples will continue to prevent these leaders from formulating appropriate measures for their protection, notwithstanding the adverse effects of climate change at the national level. However, with time, this approach will change as regional protection is complemented by appropriate pressure at the international level. For instance, it can be required at the level of the international climate regulatory framework that compliance with prescription in relation to indigenous peoples' land tenure and use is a pre-condition for the participation of states in projects and access to funds. This measure is likely to inspire a change in approach in the long run. In all, human rights can inform the necessary reform of the international, national and regional climate regulatory frameworks for the protection of indigenous peoples' land use and tenure in the light of the climate change challenge in Africa.

List of cases

National level

AG Abia and others v AG Federation and others (2005) SC 121 & 216

Attorney General v Lohay Akonaay and Joseph Lohay (1995) TLR 80

Alexkor Ltd and another v Richtersveld Community and others 2004 5 SA 460 (CC)

Amodu Tijani v Secretary, Southern Nigeria (1921) 2 AC 399

Attorney-General v Ngati Apa (2003) 2 NZLR 643

Bridget Mutwale v Professional Services Limited (1984) ZR 72 (SC)

Bund für Umwelt und Naturschutz Deutschland e and others v the Federal Republic of Germany (2006) VG 10 A 215.04

City of Sherrill v Oneida Indian Nation of New York 544 US (2005)

Delgamuukw v British Columbia (1997) 3 SCR 1010

Francis Kemei, David Sitienei and others v The Attorney General , the PC Rift Valley Province, Rift Valley Provincial Forest Officer, District Commissioner Nakuru (1999) Miscellaneous Civil Application No.128

Gbemre v Shell Petroleum Dev. Co. Nigeria Ltd and others (2005) AHRLR 151 (NgHC 2005)

Island of Palmas case (*Netherlands, USA*) 4 April 1928 Vol II 829-871

Johnson v M'Intosh, 21 US 543 (1823)

Juan Antonio Oposa et al., v the Honorable Fulgencio S. Factoran, Jr., in his capacity as the Secretary of the Department of Environment and Natural Resources, and the Honorable Eriberto U. Rosario, Presiding Judge of the RTC, Makati, Branch 66 (*Minor Oposa* case) http://www.elaw.org/node/1343, (accessed 11 September 2012)

KIP Barhaugh and others v State of Montana (2011) US 11-0258

*Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (*2011) 55 CELR (3d) 165

Mabo v Queensland (No 2) (1992) 175 CLR 1, 107 ALR 1

National Agricultural and Food Corporation v Mulbadaw Village Council & others (1985) TLR 88

Peoples' Union for Civil Liberties v Union of India (2001) SC 196

R v Sparrow (1990) 70 DLR (4th) 385

Re Southern Rhodesia (1919) AC 211

Sesana and others v Attorney General (BW 2006) 665 ILDC

Tsilhqot'in Nation v British Columbia (2007) BCSC 1700

Zambia Community Based National Resource Management Forum and 5 others v Attorney General and I other (2014) HP/A/006

Western Australia v Ward (2002) 213 CLR 1

Regional level

Chagos Islanders v the United Kingdom ECHR (Application no 35622/04) decision of 11 December 2012

Communication 276/03, *Centre for Minority Rights Development* (Kenya) *and Minority Rights Group (on behalf of Endorois Welfare Council)* 27th Activity Report: Jun 2009-Nov 2009

Communications 279/03, 290/05 (joined), *Sudan Human Rights Organisation and another v Sudan* (2009) AHRLR 75 (ACHPR 2009) 28th Activity Report

Communication 266/03, *Gunme and others v Cameroon* (2009) AHRLR 9 (ACHPR) (26th Activity Report)

Communication 75/92, *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1005) 8th Annual Activity Report

Hatton and others v the United Kingdom ECHR (Application no 36022/97), Grand Chamber, judgement of 8 July 2003

Indigenous Cmty. Yakye Axa v Paraguay IACHR (17 June 2005) Ser C 146

Indigenous Community of Awas Tingni v Nicaragua IACHR (31 August 2001) Ser C 79

Inter-American Court Communidad Yanomami v Brazil, Inter- American Commission on Human Rights, IAm Comm of HR (5 March 1985) Res.12/85, Case 7615

Lopez-Ostra v Spain ECHR (9 December1994) Ser A, No. 303C

Marcel Claude Reyes et al v Chile, Inter-American Commission on Human Rights, IAm Comm of HR (2003) OEA/Ser.L/V/II.118 Doc. 70 rev. 2

Maya Indigenous Cmty. of the Toledo Dist. v Belize, Inter- American Commission on Human Rights, IAm Comm of HR (12 October 2004) EA/Ser.L/V/II.122 doc. 5 rev.

*Öneryıldız v Turkey (*2004) EHRR 48939/99

Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations resulting from global warming caused by acts and omissions of the united states on behalf of all Inuit of the Arctic Regions of the United States and Canada http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf (accessed 13 December 2013

Powell and Rayner v United Kingdom ECHR (21 February 1990) Ser A 172

Saramaka People v Suriname IACHR (28 November 2007) Ser A 172

Social and Economic Rights Action Centre (SERAC) and another v Nigeria (2001) AHRLR 60

Tatar v Romania (2009) EHRR 67021/01

Global level

Case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen Denmark v Norway* (14 June 1993) ICJ Report 78

Case Concerning the Gabcikovo-Nagymaros Project Hungary v Slovakia (25 September1997) ICJ Report 7

Communication 167/1984, *HRC Chief Bernard Ominayak and the Lubicon Lake Band v Canada*, UNHR Committee (10 May 1990) UN Doc CCPR/C/38/D/167/1984

Communication No. 547/1992, *Apirana Mahuika et al v New Zealand*, UNHR Committee (27 October 2000), UN Doc (CCPR/C/70/D/547 (1993)

New Zealand v France ICJ (22 September 1995) (1995) ICJ Reports

Pulp Mills on the River Uruguay ICJ 20 April 2010 http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=135 (accessed 29 October 2012)

UK v Albania ICJ (9 April 1949) ICJ Report 1

Western Sahara Advisory Opinion ICJ (16 October 1975) 1CJ Reports 61

List of instruments

Legislation and Treaties

National instruments

Constitution of the Federal Republic of Nigeria, 1999

Federal National Park Service Act, Cap N65, LFN, 2004

Federal Republic of Nigeria Endangered Species (Control of International Trade and Traffic) Act, LFN, 2004

Federal Republic of Nigeria National Environmental Standards and Regulations Enforcement Agency Act, 2007

Federal Republic of Nigeria Urban and Regional Planning Act, Cap N138, LFN, 2004

Federal Republic of Nigeria Animal Disease (Control) Act, Cap A17, LFN, 2004

Federal Republic of Nigeria Animal Diseases (Control) Act, 2004

Federal Republic of Nigeria Associated Gas Re-injection Act, Cap A25, LFN, 2004

Federal Republic of Nigeria Bees (Import Control and Management) Act, LFN, 2004

Federal Republic of Nigeria Draft National Forestry Act, 2006

Federal Republic of Nigeria Gaming Machines (Prohibition) Act, Cap G1, LFN, 2004

Federal Republic of Nigeria Harmful Waste (Special Criminal Provisions) Act, Cap H1, LFN, 2004

Federal Republic of Nigeria Harmful Waste (Special Criminal Provisions) Act, Cap H1,2004

Federal Republic of Nigeria Hides and Skin Act, Cap H3, LFN, 2004

Federal Republic of Nigeria Land (Title Vesting, etc.) Act, LFN, 2004

Federal Republic of Nigeria Land Use (Validation of Certain Laws, etc) Act, Cap L6, LFN 2004

Federal Republic of Nigeria Land Use Act, L5, LFN, 2004

Federal Republic of Nigeria Law on the Management and Sustainable Use of the Forest Resources of Cross River State, 2010

Federal Republic of Nigeria Minerals and Mining Act, LFN, 2004

Federal Republic of Nigeria National Atomic Energy Commission Act, Cap N91, LFN, 2004

Federal Republic of Nigeria National Crop Varieties and Livestock Breeds (Regulation) Act,

LFN, 2004

Federal Republic of Nigeria National Safety and Radiation Protection Act, Cap N142, LFN, 2004

Federal Republic of Nigeria National Water Resources Institute Act, Cap W2, LFN, 2004

Federal Republic of Nigeria Oil in Navigable Waters Act, Cap. 06 LFN, 2004

Federal Republic of Nigeria Oil in Navigable Waters Regulations, L.N 101, 1968

Federal Republic of Nigeria Oil Pipelines Act, Cap. 07, LFN, 2004

Federal Republic of Nigeria Petroleum (Drilling & Production) Regulations, L.N. 69, 1967

Federal Republic of Nigeria Petroleum Act, Cap. P10 LFN, 2004

Federal Republic of Nigeria Petroleum Regulations, L.N 71, 1967

Federal Republic of Nigeria Territorial Waters Act, Cap T5, LFN, 2004

Federal Republic of Nigeria Associated Gas Re-injection (continued flaring of Gas) Regulation LFN, 2004

Federal Republic of Nigeria Water Resources Act, Cap W2, LFN, 2004

Federal Republic of Nigeria Quarantine Act, 2004

Republic of Zambia Constitution, 1996

Republic of Zambia Environmental Management Act, 2011

Republic of Zambia Forests Act, 1999

Republic of Zambia Lands Act, Cap 184, 1995

Republic of Zambia Lands Acquisition Act,1970

Republic of Zambia Mines and minerals Development Act, 2008

Republic of Zambia National Heritage Conservation Commission Act, 1989

Republic of Zambia Wildlife Act, 1998

Republic of Zambia Town and Country Planning (Amendment) Act,1997

Republic of Zambia Water Resources Management Act, 2011

The Forest Resources Conservation and Management Act Zanzibar,1996

United Republic of Tanzania Beekeeping Act, 2002

United Republic of Tanzania Environmental Management Act, 2004

United Republic of Tanzania Forest Act, 2002

United Republic of Tanzania Land Acquisition Act,1967

United Republic of Tanzania The Land Act, 1999

United Republic of Tanzania Village Land Act, 1999

United Republic of Tanzania Wildlife Conservation Act, 2009

Regional instruments

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 14 November 1988

AfDB Climate for Development in Africa: Instrument for the Establishment of the ClimDev-Africa Special Fund (Administered by the African Development Bank)

African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

African Convention on the Conservation of Nature and Natural Resources (Revised version) 2003

African Convention on the Conservation of Nature and Natural Resources, OAU Doc CAB/LEG/24.1, 15 September 1968

African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources (OAU Model Law) Algeria, 2000

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted by the Special Summit of the Union held in Kampala, Uganda, 23 October 2009

American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123

Constitutive Act of the African Union adopted in Lome Togo on 11 July 2000 and entered into force on 26 May 2001

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221

European Convention on Human Rights as amended by Protocols Nos. 11 and 14 http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf (accessed 18 April 2012)

Model law on access to information for Africa, prepared by the African Commission on Human and Peoples' Rights http://www.achpr.org/files/news/2013/04/d84/model_law.pdf (accessed 25 May 2014)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in 1998/ and entered into force on 25 January 2004

Protocol on the Establishment of Peace and Security Council (PSC Protocol), adopted on 10 July 2002, entered into force on 26 December 2003

Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament, adopted in Sirte, Libya, on 2 March 2001, and entered into force 14 December 2003

Protocol on Environmental Protection to the Antarctic Treaty' (Madrid Protocol) http://sedac.ciesin.columbia.edu/entri/texts/antarctic.treaty.protocol.1991.html (accessed 15 October 2012)

Global instruments

Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), 72, entered into force, 5 September 1991

Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference at its 17th session, Paris, 16 November 1972 http://unesdoc.unesco.org/images/0013/001398/139839e.pdf (accessed 18 March 2013)

Convention concerning Indigenous and Tribal Peoples in Independent Countries Convention: C169, adopted 27 June 1989 at Geneva

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) done at Aarhus, Denmark, on 25 June 1998

Convention on Biological Diversity, opened for signature June 5, 1992, 1760 U.N.T.S. 143, 151, entered into force 29 December 1993

Convention on Environmental Impact Assessment in a Transboundary Context done at Espoo (Finland) on 25 February 1991

Covenant of the League of Nations, adopted in Paris on 29 April 1919 http://www.austlii.edu.au/au/other/dfat/treaties/1920/1.html (accessed 24 March 2013)

General Act of the Conference of Berlin Concerning the Congo, signed at Berlin, 26 February 1885

http://www.internationalcriminallaw.org/International_Crimes/Crimes%20Against%20Humanity/Slavery/GenAct_Berlin_InReCongo1909.pdf (accessed 25 March 2013)

Indigenous and Tribal Populations Conventions: l957 No. 107, adopted by the International Labour Conference at its 40th session at Geneva on 26 June 1957

International Convention on the Elimination of All Forms of Racial Discrimination, adopted by General Assembly Resolution 2106 (XX) of 21 December 1965

International Convention for the regulation of whaling, 1946 http://www.iwcoffice.org/cache/downloads/1r2jdhu5xtuswws0ocw04wgcw/convention.pdf (accessed 28 October 2012)

International Covenant on Civil and Political Rights , adopted 16 December 1966, entered into force 23 March 1976

International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976

Montreal Protocol on Substances that Deplete the Ozone Layer 1987 (amended: London, 27-9 June 1990; Nairobi, 19-21 June 1991

Treaty Establishing the African Economic Community adopted in Abuja , Nigeria, 1991 and entered into force in 1994

UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, adopted at its 5th session, A/AC.241/27, on 17 June 1994

UN Framework Convention on Climate Change (UNFCCC), ILM 851, 1992

UN Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998), entered into force 16 February 2005

United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, opened for signature 14 October 1994, 1954 U.N.T.S. 108, 117, entered into force 26 December 1996

Decisions, Declarations, General Comments and Resolutions

Regional level

AfDB 'Establishment of the ClimDev-Africa Special Fund' Resolution B/BG/2010/14, adopted at the 1st sitting of the 45th annual meeting of the African Development Bank, on 27 May 2010 http://www.afdb.org/fileadmin/uploads/afdb/Documents/Boards-Documents/2010%20Annual%20Meetings%20%20-%20Official%20Record%20-%20Package%20-%20English.pdf (accessed 13 February 2014)

African Commission of Human and Peoples' Rights, Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, ACHPR/Res153 (XLVI) 09, 25 November 2009

African Commission of Human and Peoples' Rights '73: Resolution on Economic, Social and Cultural Rights in Africa', adopted at the 36th ordinary session held in Dakar, Senegal from 23 November -7 December 2004

African Commission of Human and Peoples' Rights '148: Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa', adopted at 46th ordinary session held in Banjul, The Gambia from 11-25 November 2009

African Commission on Human and Peoples' Rights '271: Resolution on Climate Change in Africa', adopted at the 55th ordinary session of the African Commission on Human and Peoples' Rights held in Luanda, Angola, from 28 April-12 May 2014

African Union 'Decision on the African Union Accession to the United Nations Convention to Combat Desertification' (UNCCD), Doc.EX.CL/512(XV) Add.3, adopted by the 13th ordinary session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

Decision on Climate Change and Development in Africa, adopted by the 13th ordinary session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

Decision on the African Common Position on Climate Change' adopted by the 15th ordinary session of the Executive Council in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 1 July 2009 Doc. EX.CL/525(XV)

Decision on the African Union Accession to the United Nations Convention to Combat Desertification (UNCCD) Assembly/AU/Dec.255(XIII), adopted by the 13th ordinary session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009 Doc.EX.CL/512(XV) Add.3

Decision on the African Common Position on Climate Change AUDoc. Assembly/AU/8(XII) Add.6

Decision on the Coordination of the Committee of African Heads of State and Government on Climate Change (CAHOSCC) and Africa's Preparation for COP 19/CMP 9 Doc. Assembly/AU/6(XX)

Decision on the Draft Legal Instruments, adopted the Assembly of the Union 23rd ordinary session, 26-27 June 2014, Malabo, Equatorial Guinea, Assembly/AU/Dec.529(XXIII)

Decision on the implementation of the decision on the African Common Position on Climate Change EX.CL/Dec.500 (XV)

Decision on the Warsaw Climate Change Conference and Africa's Preparation for the 20th Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 20 / CMP 10)' Assembly/AU/Dec.514 (XXII)

Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) ANNEX 1 endorsed by the inaugural Summit of the African Union in Durban South Africa , July 2002

Declaration on Climate Change and Development in Africa' Assembly/AU/Decl.4 (VIII) the 8th ordinary session of our Assembly in Addis Ababa, 29-30 January 2007

Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd session, 23 October 2002 http://www.achpr.org/sessions/32nd/resolutions/62/ (accessed 15 October 2012)

Gaborone Declaration on Climate Change and Africa's Development (Gaborone Declaration) http://www.unep.org/roa/amcen/Amcen_Events/5th_ss/Docs/K1353541%20%20Gaborone%20Declaration%20by%20the%205th%20Special%20session%20of%20AMCEN%20-%20Final%2022102013%20EN.pdf (accessed 10 April 2014)

'Human rights and climate change in the Americas', Resolution adopted at the 4th plenary session, held on 3 June 2008, AG/RES. 2429 (XXXVIII-O/08)

Indigenous peoples' right to adequate housing' United Nations Housing Rights Programme

Report No. 7 OHCHR (2005)

Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development

Modalities of the Panel of the Wise, adopted by the Peace and Security Council at its 100th meeting held on 12 November 2007

Resolution on Climate Change and Human Rights and the Need to Study its Impact in Africa, 25 November 2009, ACHPR/Res153 (XLVI) 09

Resolution on Granting Observer [Affiliate] Status to National Human Rights Institutions on Africa, adopted at the Commission's 24th session, Banjul, the Gambia, 22-31 October 1998

Resolution to modify the Declaration of Principles on Freedom of Expression to include Access to Information and Request for a Commemorative Day on Freedom of Information, adopted at the African Commission on Human and Peoples' Rights, at its 50th ordinary session held in Banjul, The Gambia, 18 April-2 May 2012

Resolution of Working Group One on Progress in implementation of the non-legally binding instrument on all types of forests (Item 3), Regional and subregional inputs (Item 4), Forests and economic development (Item 5), and Enhanced co-operation (Item 8) as adopted by UNFF on Saturday 20 April 2013

Solemn Declaration on a Common African Defence and Security Policy (CADSP) http://www.africa-union.org/News_Events/2ND%20EX%20ASSEMBLY/Declaration%20on%20a%20Comm.Af%20Def%20Sec.pdf (accessed 13 February 2014)

Global level

Agenda 21, adopted at the United Nations Conference on Environment and Development, at Rio de Janeiro from 3-14 June 1992

Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation 12 December 2003 UN Doc E/C.12/1/Add.94

Concluding Observations of the Human Rights Committee, Brazil, 1 December 2005, UN Doc CCPR/C/BRA/CO/2

Concluding Observations of the Human Rights Committee, Canada, 20 April 2006, UN Doc

CCPR/C/CAN/CO/5

Concluding Observations on Cameroon, Committee on the Rights of the Child CRC/C/CMR/CO/2 53rd session 11-29 January 2010

Concluding Observations on Nigeria, Committee on the Rights of the Child, Nigeria, 54th session, RC/C/NGA/CO/3-4 25 May-11 June 2010

Concluding Observations on Rwanda, Human Rights Committee 95th session CCPR/C/RWA/CO/3 7 May 2009 New York, 15 March-3 April 2009

Concluding Observations on Canada, Committee on the Elimination of Racial Discrimination 25 May 2007, CERD/C/CAN/CO/18

Concluding Observations on Rwanda, Committee on the Elimination of Racial Discrimination 78th session CERD/C/RWA/CO/13-17, 14 February-11 March 2011

Concluding Observations on Surimane, Committee on the Elimination of Racial Discrimination 12 March 2004, CERD/C/64/CO/9

Concluding Observations on Sweden, Committee on the Elimination of Racial Discrimination 10 May 2004, CERD/C/64/CO/

Declaration of Principles on Equality, 2008 http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf (accessed 13 February 2013)

Draft Principles on Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex I (1994) http://www1.umn.edu/humanrts/instree/1994-dec.htm (accessed 16 June 2013)

Economic and Social Council 'Report on the 4th session of Intergovernmental Forum on Forest', ECOSOC Resolution/2000/35

Decision 5/CP.17 'National adaptation plan' Decision 5/CP.17/2011, FCCC/CP/2011/9/Add.1

Outcome of the United Nations Conference on Sustainable Development (Rio+20) 'The future we want', Resolution adopted by the General Assembly, A/RES/66/288

Programme of Action for the Second International Decade of the World's Indigenous People', Resolution adopted by the General Assembly on 16 December 2005 UN General Assembly, Resolution 60/142 60/142

UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The right to adequate housing (Art 11(1) of the Covenant), E/1992/23, 13 December 1991

UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The right to adequate food, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 20th Sess., 14–20, U.N. Doc. E/C.12/1999/5, 1999

UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The right to education (Art 13 of the Covenant), E/C.12/1999/10, 8 December 1999,

UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The right to the highest attainable standard of health, E/C.12/2000/4, 2000

UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The right to water (Arts 11 and 12 of the Covenant), E/C.12/2002/11, 20 January 2003

UN Committee on the Elimination of Racial Discrimination General Recommendations XXIII (51) concerning indigenous peoples, adopted at the 1235th meeting, UN Doc CERD/C/51/Misc.13/Rev.4, 18 August 1997

UN Declaration of Rights of the Indigenous Peoples, adopted by United Nations Resolution 61/295, at 107th plenary meetings,13 September, 2007

UNFCCC CP 'Buenos Aires programme of work on adaptation and response measures', FCCC/CP/2004/10/Add.1, Decision 1/CP.10/2004

UNFCCC CP 'Copenhagen Accord', FCCC/CP/2009/11/Add.1, Decision 2/CP.15/2009

UNFCCC CP 'Funding under the Kyoto Protocol' FCCC/CP/2001/13/Add.1, 8th plenary meeting, 10 November 2001, Decision 10/CP.7/2001

UNFCCC CP 'Further guidance to an entity entrusted with the operation of the financial mechanism of the Convention, for the operation of the Special Climate Change Fund', FCCC/CP/2006/5/Add.1, Decision 1/CP.12/ 2006

UNFCCC CP 'Guidance to an entity entrusted with the operation of the financial mechanism of the Convention, for the operation of the least developed countries fund', 21 January 2002, FCCC/CP/2001/13/Add.4, Decision 27/CP.7/2002

UNFCCC CP 'Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emission levels and forest reference levels as referred to in decision 1/CP.16', FCCC/CP/2011/9/Add.2, Decision 12/CP.17/2011

UNFCCC CP 'Guidelines for the preparation of national adaptation programmes of action'

FCCC/CP/2001/13/Add.4, Decision 28/CP.7/2001

UNFCCC CP 'Implementation of Article 4, paragraphs 8 and 9, of the Convention (decision 3/CP.3 and Article 2, paragraph 3, and Article 3, paragraph 14, of the Kyoto Protocol)' FCCC/CP/2001/13/Add.1, Decision 5/CP.7/2001

UNFCCC CP 'Initial guidance on policies, programme priorities and eligibility criteria to the operating entity or entities of the financial mechanism', 10th plenary meeting, 7 April 1995, FCCC/CP/1995/7/Add.1, Decision 11/CP.1/1995

UNFCCC CP 'Launching the Green Climate Fund, Annex Governing instrument for the Green Climate Fund' FCCC/CP/2011/9/Add.1, Decision 3/CP.17/2011

UNFCCC CP 'Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries' FCCC/CP/2009/11/Add.1, Decision 4/CP.15/2009

UNFCCC CP 'National Adaptation Plan' FCCC/CP/2011/9/Add.1, Decision 5/CP.17/2011

UNFCCC CP 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention' FCCC/CP/2011/9/Add.1, Decision 2/CP.17/2011

UNFCCC CP 'Procedures and mechanisms relating to compliance under the Kyoto Protocol,' FCCC/CP/2001/13/Add.3, Decision 24/CP.7/2001

UNFCCC CP 'Reducing emissions from deforestation in developing countries: approaches to stimulate action' FCCC/CP/2007/6/Add.1, Decision 2/CP.13

UNFCCC CP 'Report of the Green Climate Fund to the Conference of the Parties and guidance to the Green Climate Fund', 9th plenary meeting, 8 December 2012, FCCC/CP/2012/8/Add.1, Decision 6/CP.18/2012

UNFCCC CP 'Review of the guidelines for the preparation of national adaptation programmes of action' FCCC/CP/2002/7/Add.1, Decision 9/CP.8/2002

UNFCCC CP 'Review of the guidelines for the preparation of national adaptation programmes of action' FCCC/CP/2003/6/Add.1, Decision 8/CP.9/ 2003

UNFCCC CP 'The Berlin Mandate: Review of the adequacy of Article 4, paragraph 2 (a) and (b), of the Convention, including proposals related to a protocol and decisions on follow-up' FCCC/CP/1995/7/Add.1, Decision 1/CP.1/1995

UNFCCC CP 'The Cancun Agreements: Outcome of the work of the Ad-hoc Working Group

on Long-term Cooperative Action under the Convention' FCCC/CP/2010/7/Add.1, Decision 1/CP.16/2010

UNFCCC KP CMP 'Adaptation Fund' FCCC/KP/CMP/2008/11/Add.2, Decision 1/CMP.4/2008

UNFCCC KP CMP 'Adaptation Fund' Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 4th session, held in Poznan from 1 to 12 December 2008 Addendum, FCCC/KP/CMP/2008/11/Add.2, Decision 1/CMP.4/2008

UNFCCC KP CMP 'Adaptation Fund' in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 3rd session, held in Bali, FCCC/KP/CMP/2007/9/Add.1, 14 March 2008 from 3-15 December 2007, Decision 1/CMP.3/2007

UNFCCC KP CMP 'Adaptation Fund' Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 2nd session, held at Nairobi from 6-17 November 2006 Annex I to this document, FCCC/KP/CMP/2006/10/Add.1, Decision 5/CMP.2

UNFCCC KP CMP 'Annex: Definitions, modalities, rules and guidelines relating to land use, land-use change and forestry activities under the Kyoto Protocol' FCCC/KP/CMP/2005/8/Add.3, Decision 16/CMP.1/2005

UNFCCC KP CMP 'Guidance relating to the clean development mechanism' FCCC/KP/CMP/2012/13/Add.2 , Decision 5/CMP.8/2012

UNFCCC KP CMP 'Initial guidance to an entity entrusted with the operation of the financial system of the Convention, for the operation of the Adaptation Fund', 9th plenary meeting, 9-10 December 2005 in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 1st session, held at Montreal from 28 November-10 December 2005, FCCC/KP/CMP/2005/8/Add.4, Decision 28/CMP.1/2005

UNFCCC KP CMP 'Initial review of the Adaptation Fund', 9th plenary meeting, 7 December 2012, 'FCCC/KP/CMP/2012/13/Add.2, Decision 4/CMP.8/2012

UNFCCC 'Report of the Green Climate Fund to the Conference of the Parties and guidance to the Green Climate Fund' FCCC/CP/2012/8/Add.1, 9th plenary meeting, 8 December 2012, Decision 6/CP.18/2012

UNGA Res. 43/53 'Protection of global climate for present and future generations of mankind' ,70th plenary meeting, 6 December 1988

UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in public affairs and the right to vote), The right to participate in public affairs, voting rights and the right of equal access to public service, CCPR/C/21/Rev.1/Add.7, 12 July 1996

UN Human Rights Committee (HRC), CCPR General Comment No. 31 [80] Nature of the general legal obligation imposed on State Parties to the Covenant CCPR/C/21/Rev.1/Add.13, 26 May 2004

UN Human Rights Committee (HRC) CCPR General Comment No. 34, Article 19, Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011

UN Human Rights Committee (HRC), CCPR General Comment No.23: 'The rights of minorities' (Art 27) UN Doc CCPR/C/21/Rev.1/Add.5, 1994

UN Human Rights Committee (HRC) General Comment No.12, Article 1, Right to self determination, 21st session, UN Doc HRI/GEN/1/Rev.1, 1984

UN Human Rights Council Res. 7/23 'Human rights and climate change' U.N. Doc. A/HRC/7/78, 14 July 2008

UN Human Rights Council Res 18/22 'Human rights and climate change'A/HRC/RES/18/22, 2011

UN Human Rights Council Res 10/4 'Human rights and climate change', 41st meeting A/HRC/RES10/4, 25 March 2009

UN Human Rights Council Res 26 'Human rights and climate change' A/HRC/26/L.33, 23 June 2014

UN Human Rights Council Res 19 'Human rights and the environment' A/HRC/19/L.J, 15 March 2012

UN Human Rights Council Resolutions on the right to adequate housing, UNHRC Res. 6/27, U.N. Doc. A/HRC/6/22, 14 April 2008

Universal Declaration on Human Rights, UNGA Res 217 A(III), adopted 10 December 1948

Vienna Declaration and Programme of Action, UN doc.A/CONF.157/23, adopted at World Conference on Human Rights in Vienna 1993

Non-governmental

Charter of the Indigenous and Tribal Peoples of the Tropical Forests Statement of the

International Alliance of the Indigenous and Tribal Peoples of the Tropical Forests, Penang, Malaysia, 15 February 1992

Declaration of the African Indigenous Peoples' Summit on Climate Change', Nakuru, Kenya (2009)

Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights http://oppenheimer.mcgill.ca/IMG/pdf/Maastricht_20ETO_20Principleiples_20-_20FINAL.pdf (accessed 15 October 2012)

Milan Declaration of the Sixth International Indigenous Peoples Forum on Climate Change , COP 9, UNFCCC, Milan, Italy, 29-30 November 2003

Inter-governmental

'Environmental co-operation in Africa: Cairo programme for African co-operation', Resolution adopted by the Conference at its 1st session UNEP/AEC. 1/2 Annex I

Kampala Declaration on the Environment for Development http://gridnairobi.unep.org/chm/roa/AMCEN/Declaration%20Kampala%204-5%20July%202002.pdf (accessed 26 June 2013)

Nairobi Declaration on the African Process for Combating Climate Change (Nairobi Declaration) http://www.unep.org/roa/Amcen/Amcen_Events/3rd_ss/Docs/nairobi-Decration-2009.pdf (accessed 18 April 2014)

Recommendations of the Executive Board of the clean development mechanism on possible changes to the modalities and procedures of the clean development mechanism FCCC/SBI/2013/INF.1 22 April 2013

Regional technical co-operation on the environment in Africa: The African Ministerial Conference on the Environment', Resolution adopted by the Conference at its 2nd session, UNEP/AEC.2/3 Annex I

'The African Ministerial Conference on the Environment', Resolutions adopted by the Conference at its 3rd session UNEP/AMCEN. 3/2 Annex I

Guidelines, Policies and Regulations

National

Federal Republic of Nigeria National Environmental (Construction Sector) Regulation, 2011

Federal Republic of Nigeria National Effluent Limitation Regulations, Special Instrument No 8, 1991

Federal Republic of Nigeria National Environment (Chemical, Pharmaceutical, Soap and Detergent Manufacturing Industries) 2009

Federal Republic of Nigeria National Environment (Electrical/ Electronic Sector) Regulations, 2011

Federal Republic of Nigeria National Environment (Textile, Wearing Apparel, Leather and Footwear Industries) Regulation, 2009

Federal Republic of Nigeria National Environmental (Access to Genetic Resources and Benefit-Sharing) Regulations, 2009

Federal Republic of Nigeria National Environmental (Base Metals, Iron and Steel Manufacturing/ Recycling Industries Sector) Regulations, 2011

Federal Republic of Nigeria National Environmental (coastal and Marine Area Protection) Regulations, 2011

Federal Republic of Nigeria National Environmental (Control of Bush, Forest Fire and Open Burning) Regulations, 2011

Federal Republic of Nigeria National Environmental (Control of Vehicular Emissions from Petrol and Diesel Engines) Regulations, 2011

Federal Republic of Nigeria National Environmental (Food, Beverages and Tobacco Sector) Regulations, 2009

Federal Republic of Nigeria National Environmental (Mining and Processing of Coal, Ores and Industrial Minerals) Regulations, 2009

Federal Republic of Nigeria National Environmental (Noise, Standards and Control) Regulations, 2009

Federal Republic of Nigeria National Environmental (Non-Metalic Mineral Manufacturing Industries Sector) Regulations, 2011

Federal Republic of Nigeria National Environmental (Ozone Layer Protection) Regulations,

2009

Federal Republic of Nigeria National Environmental (Permitting and Licensing System) Regulations, 2009

Federal Republic of Nigeria National Environmental (Protection of Endangered Species in International Trade) Regulations, 2011

Federal Republic of Nigeria National Environmental (Sanitation and Wastes Control) Regulations, 2009

Federal Republic of Nigeria National Environmental (Soil Erosion and Flood Control) Regulations, 2011

Federal Republic of Nigeria National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations, 2011

Federal Republic of Nigeria National Environmental (Surface and Groundwater Quality Control) Regulations, 2011

Federal Republic of Nigeria National Environmental Protection (Effluent Limitation) Regulations, 1991

Federal Republic of Nigeria National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations, 1991

Federal Republic of Nigeria National Forestry Policy, 1988

Federal Republic of Nigeria National Policy on the Environment,1988

Federal Republic of Nigeria National Environmental (Domestic and Industries Plastic, Rubber and Foam Sector) Regulations, 2011

Federal Republic of Nigeria National Policy on Environment, Act 42, 1988

National Environmental Policy for Zanzibar, 1992

Republic of Zambia 'Vision 2030 A prosperous Middle-income Nation by 2030'

Republic of Zambia Forestry Policy, 1998

Republic of Zambia Forest Action Plan (ZFAP) 1995

Republic of Zambia Irrigation Policy and Strategy, 2004

Republic of Zambia National Adaptation Plan of Action, 2007

Republic of Zambia National Agricultural Policy, 1995

Republic of Zambia National Biodiversity Strategy and Action Plan,1999

Republic of Zambia National Energy Policy, 2008

Republic of Zambia National Environmental Action Plan, 1994

Republic of Zambia National Forest Policy, 2009

Republic of Zambia National Policy on Environment, 2007

Republic of Zambia National Water Policy, 1994

United Republic of Tanzania Agricultural Sector Policy, 2002

United Republic of Tanzania Environmental Policy, 1992

United Republic of Tanzania National Energy Policy, 2009

United Republic of Tanzania National Environmental Policy, 1997

United Republic of Tanzania National Forestry Policy, 1995

United Republic of Tanzania National Human Settlements Development Policy, 2000

United Republic of Tanzania National Land Policy,1997

United Republic of Tanzania National Water Policy, 2002

United Republic of Tanzania National Energy Policy, 2009

United Republic of Tanzania National Forest Policy, 1998

United Republic of Tanzania National Human Settlements Development Policy, 2000

United Republic of Tanzania National Land Policy, 1995

United Republic of Tanzania 'National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+)' December 2010 (Tanzania National Strategy 1st Draft)

United Republic of Tanzania 'National Strategy for Reduced Emissions from Deforestation and Forest Degradation'March 2013

United Republic of Tanzania National Water Policy, 2002

United Republic of Tanzania Tanzania REDD+ Social and Environmental Safeguards, June 2013

United Republic of Tanzania Tourism Policy, 2004

United Republic of Tanzania 'National Adaptation Programme of Action' January 2007

Zanzibar Agriculture Policy, 2002

Zanzibar Tourism Policy, 2005

Regional

Advisory Opinion of the African Commission on Human and Peoples' Rights on the United

Nations Declaration on the Rights of Indigenous Peoples', adopted by the African Commission on Human and Peoples' Rights at its 41st ordinary session, Accra, Ghana, May 2007

European Union Land Policy Guidelines, 2004

Pan African Parliament Rules of Procedures (Midrand) 2004

Global

Annex III Non-Legally Binding Authoritative Statement of Principles for a global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests

Annex I- Rules of procedure of the Adaptation Fund Board' and 'Annex IV- Strategic Priorities, Policies and Guidelines of the Adaptation Fund', 9th plenary meeting, 12 December 2008

Appendix 1 'Methodological Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries' FCCC/CP/2009/11/Add.1, Decision 4/CP.15/2009

Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, A/C.2/62/L.5

Non-governmental

Addis Ababa Principles and Guidelines for the Sustainable use of Biodiversity, 2004 http://www.cites.org/eng/res/13/addis-gdl-en.pdf (accessed 23 March 2013)

Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities, adopted at COP-7 (Kuala Lumpur, February 9-20 2004) Decision VII/16/2004

Tiohtiá:ke Declaration at International Indigenous Peoples Forum on Climate Change

Statement to the State Parties of the COP 11/MOP 1 of the United Nations Framework Convention on Climate Change

Inter-governmental

Adaptation Fund Board 'Guidance document for project and programme proponents to better prepare a request for funding', approved in the 17th meeting of the Board, Bonn, 15-16 March 2012, AFB/PPRC.8/4, Decision B.17/7/2012

Adaptation Fund 'Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund'

AfDB 'Framework Document for the Establishment of the ClimDev-Africa Special Fund' African Development Bank, October 2009

African Union and NEPAD 'New Partnership for Africa's Development (NEPAD) Action Plan of the Environment Initiative', October 2003

APRM 'Objectives, standards, criteria and indicators for the African Peer Review Mechanism' NEPAD/HSGIC-03-2003/APRM/Guidelines/OSCI/9, March 2003

EAC, AUC & AfDB Revised ClimDev-Africa Framework Programme Document, 2012

ECA & AUC 'ClimDev Special Fund Operational Procedures Manual', December 2011

FAO 'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security' FAO, Rome, 2012

FAO 'Environmental impact assessment: Guidelines for FAO field projects' FAO, Rome, 2012

Forest Carbon Partnership (FCP) and UN-REDD Programme 'Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities (revision of March 25th version) April 20, 2012

Green Climate Fund 'Green Climate Fund Business Model Framework: Access Modalities' Annex I: Draft decision of the Board (d) GCF/B.04/05, 11 June 2013

Guidelines for the NEPAD Climate Change Fund http://www.nepad.org/sites/default/files/Guidelines%20for%20Applicants%20%28NEPAD%20Climate%20Change%20Fund%29.pdf (accessed 13 February 2014)

Guidelines for the Use of the Early Warning and Urgent Action Procedure, advanced

unedited version, adopted by the Committee on the Elimination of Racial Discrimination, August 2007

NEPAD 'Guidelines for the NEPAD Climate Change Fund' http://www.nepad.org/sites/default/files/Guidelines%20for%20Applicants%20%28NEPAD%20Climate%20Change%20Fund%29.pdf (accessed 13 February 2014)

The GEF 'GEF Principles and Guidelines for Engagement with Indigenous Peoples' http://www.thegef.org/gef/sites/thegef.org/files/publication/GEF%20IP%20Part%201%20Guidelines_r7.pdf (accessed 13 July 2013)

The GEF ' GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards' Council Document GEF/C.41/10/Rev.1, November 18, 2011

The GEF 'Policy on Public Involvement in GEF Projects' GEF/PL/SD/01, 13 August 2012

UN Development Group Guidelines on Indigenous Peoples Issues' February 2008 <www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf> (accessed 20 May 2013)

UN-REDD Programme and Chatham House 'Guidance for the Provision of Information on REDD+ Governance' June 2011

UN-REDD Programme 'Operational Guidance: Engagement of Indigenous Peoples and Other Forest-Dependent Communities' Working Document - June 25, 2009

UN-REDD Programme 'Guidelines on Free, Prior and Informed Consent' January 2013

UN-REDD Programme 'Social & Environmental Principles and Criteria', version 1' UN-REDD/PB6/2011/IV/1

UN-REDD Programme 'Social and Environmental Principles and Criteria' version 3 Draft for Consultation (SEPC Version 3)

UN-REDD Programme 'Social and Environmental Principles and Criteria', 8th Policy Board meeting, Asunción, 25-26 March 2012

UN-REDD Programme 'Social Principles Risk Assessment Tools' (SPRAT) Version: October 2010

World Bank 'OP 4.10 - Indigenous Peoples'

World Bank 'Land policy for growth and poverty reduction' 2003

Bibliography

Books

Acquah, P, Torheim, S & Njenga, E (2006) *History of the African Ministerial Conference on the Environment 1985-2005* AMCEN & UNEP: Nairobi

African Union (2012) *The role of parliamentarians in development and implementation of multilateral environmental agreements* (MEA) *in Africa: A sourcebook for parliamentarian in Africa on MEAs* African Union: Adisababa

Anaya, SJ (2004) *Indigenous peoples in international law* 2nd ed Oxford University Press: New York

Anderson, P (2011) *Prior, and informed consent in REDD+* RECOFTC and GIZ: Eschborn

Anton, DK & Shelton, DL (2011) *Environmental protection and human rights* Cambridge University Press: Cambridge

Bals, CH, Harmeling, S & Windfuhr, M (2008) *Climate change, food security and the right to adequate food* Diakonie Katastrophenhilfe, Germanwatch,Brot für die Welt: Stuttgart

Barume, AK (2000) *Heading towards extinction? Indigenous rights in Africa: The case of the Twa of the Kahuzi–Biega National Park, Democratic Republic of Congo* Forest Peoples Programme and IWGIA: Copenhagen

Barume, AK (2010) *Land rights of indigenous peoples in Africa: With special focus on central, eastern, and southern Africa* IWGIA: Copenhagen

Black's Law Dictionary (1999) Seventh edition West Group: Minnesota

Bromley, DW & Cernea, MM (1989) *The management of common property natural resources: Some conceptual and operational fallacies* The World Bank: Washington, D.C.

Brown, O & Crawford, A (2008) *Assessing the security implications of climate change for West Africa' country case studies of Ghana and Burkina Faso* IISD: Winnipeg

Brownlie, 1 (2008) *Principles of public International law* 7th ed Oxford University Press: Oxford

Bryant, RL & Bailey, S (1997) *Third world political ecology* Routledge: London

Carsson, R (2012) *Silent spring* 50th ed Houghton Mifflin: New York

Cassese, A (1986) *International law in a divided World* Clarendon Press: Oxford

Catton, W (1982) *Overshoot: The ecological basis of revolutionary change* Illini Book Edition: Illinios

Centre for International Environmental Law (2014) *Know your rights related to REDD+: A guide for indigenous and local community leaders* Centre for International Environmental Law: Washington, D.C.

Colchester, M (2003) *Salvaging nature: Indigenous peoples, protected areas and biodiversity conservation* World Rainforest Movement and Forest Peoples Programme: Moreton-in-Marsh

Cotula, L & Mayers, J (2009) *Tenure in REDD Start-point or afterthought?* IIED: London

Desmet, E (2011) *Indigenous rights entwined in nature conservation* Intersentia: Antwerp

Dugard, J (2012) *International law: A South African perspective* 2nd ed Juta: Cape Town

Elias, TO (1956) *The nature of African customary law* Manchester University Press: Manchester

Farham, Y & Depledge, J (2004) *The international climate change regime: A guide to rules, institutions and procedures* Cambridge University Press: Cambridge

Fauchald, OK, Xi, W & Hunter, D (2011) *Yearbook of International Environmental Law 2009* Oxford University Press: Oxford

Gilbert, J (2006) *Indigenous peoples' land rights under international law: From victims to actors* Transnational Publishers: Ardsley

Gore, A (2006) *An inconvenient truth: The planetary emergency of global warming and what we can do about it* Rodale: New York

Greenpeace (2013) *Dealing in doubt: The climate denial machine v climate science* Greenpeace: Washington, D.C.

Gregersen, H *et al* (2010) *Does the opportunity cost approach indicate the real cost of REDD+? Rights and realities of paying for REDD+* Rights and Resources Initiative: Washington, D.C.

Griffiths, T & Martone F (2009) *Seeing 'REDD'? Forests, climate change mitigation and the rights of indigenous peoples and local communities* Forest Peoples Programme: Moreton-in-Marsh

Griffiths, T 'Seeing 'RED'? (2007) *Avoided deforestation' and the rights of indigenous peoples and local communities* Forest Peoples Programme: Moreton-in-Marsh

Haritz, M (2011) *An incovenient deliberation: The precautionary principles's contribution to the*

uncertainties surrounding climate change liability Kluwer Law International: Alphen aan den Rijn

Hausermann, J (1998) *A human rights approach to development* Department for International Development of the UK Government: London

Hinsley, FH (1986) *Sovereignty* 2nd ed Cambridge University Press: Cambridge

Hodgson, DL (2011) *Being Maasai, becoming indigenous: Post colonial politics in a neoliberal world* Indiana University Press: Indianapolis

Humphreys, D (2006) *Logjam: Deforestation and the crisis of global governance* Earthscan: London

Ife, J (2009) *Human rights from below: Achieving rights through community development* Cambridge University Press: Cambridge

Indigenous Bar Association (2011) *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An introductory handbook* Indigenous Bar Association: Winnipeg

Ingold, T (2000) *The perception of the environment: Essays on livelihood, dwelling and skill* Routledge: London

International Council on Human Rights Policy (2008) *Climate change and human rights: A rough guide* International Council on Human Rights Policy: Versoix

IWGIA (2011) *The world indigenous report* IWGIA: Copenhagen

Jan, S & Byg, A (2007) *Indigenous peoples and climate change* Tyndall Centre for Climate Change Research: Oxford

Joseph, S (2011) *Blame it on the WTO? A human rights critique* Oxford University Press: Oxford

Keck, ME & Sikkink, K (1998) *Activists beyond borders: Advocacy networks in international politics* Cornell University Press: Cornell

Kenyatta, J (1979) *Facing mount Kenya: The tribal life of the Gikuyu* Heineman: Nairobi

Kill, J *et al* (2010) *Trading carbon: How it works and why it is controversial* FERN: Brussel

Klotz, A & Lynch, CM (2007) *Strategies for research in constructivist international relations* ME Sharpe: New York

Kokwe, M (2012) *Forest management practices with potential for REDD+ in Zambia* NIRAS: Lusaka

Krasner, SD (1999) *Sovereignty: Organised hypocrisy* Princeton University Press: Princeton

Lynch, OJ & Alcorn, JB (1993) *Tenurial rights and community based conservation* Liz Claiborne Art Ortenberg Foundation: New York

Mahomed, A, *et al* (2009) *Understanding land tenure law: Commentary and legislation* Juta: Cape Town

McHugh, PG (2011) *The modern jurisprudence of tribal land rights* Oxford University Press: Oxford

McInerney-Lankford, S, Darrow, M & Rajamani, L (2011) *Human rights and climate change: A review of the international legal dimensions* World Bank: Washington, D.C.

Mckibben, B (2003) *The end of nature: Humanity, climate change and the natural world* Random House: New York

Merry, SE (2006) *Human rights and gender violence: Translating international law into local justice* (2006) University of Chicago Press: London

McLean, KG (2010) *Advanced guards: Climate change impacts, adaptation, mitigation and indigenous peoples- A compendium of case studies* UNUS-IAS: Darwin

Miller, RJ *et al* (2010) *Discovering indigenous peoples' lands: The doctrine of discovery in the English colonies* Oxford University Press: Oxford

Miller, RJ (2006) *Native America, discovered and conquered* Praeger: Westport

Milton, K (2003) *Loving nature: Towards an ecology of emotion* Routledge: London

Mutua, M (2002) *Human rights: A political and cultural critique* University of Pennsylvania Press: Philadelphia

Nanda, S & Warms, LR (2014) *Cultural Anthropology* 11th ed Wadworth Cencage Learning: Belmont

Ndahinda, FM (2011) *Indigenousness in Africa:A contested legal framework for empowerment of marginalised communities* Asser Press: The Hague

Nowak, M (2005) *UN Covenant on Civil and Political Rights:CCPR Commentary* 2nd ed Kehlam Rhein: Engel

O'Sullivan, R (2011) *Creation and evolution of adaptation funds* WWF: Washington, D.C.

Oluduro O (2014) *Oil exploitation and human rights violations in Nigeria's oil producing communities* Cambridge: Intersentia

Omeje, K (2006) *High stakes and stakeholders: Oil conflict and security in Nigeria*

Ashgate: Hampshire

Orellana, MA, Kothari, M & Chaudhry, S (2010)'Climate change in the work of the Committee on Economic, Social and Cultural Rights' (2010) Office of the Friedrich-Ebert-Stiftung:Geneva

Pachauri, PK & Reisinger, A (2007) *IPCC synthesis report: Climate change 2007 Contribution of Working Groups I, II, and III to the 4th Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press: Cambridge

Pakenham, T (1991) *The scramble for Africa: White Man's Conquest of the Dark Continent from 1876 to 1912* Avon Books: New York

Perrez, FX (2000)'Cooperative sovereignty: From independence to interdependency in the structure of international environmental law' Kluwer Law International: Alphen aan den Rijn

Peskett, L & Brodnig, G (2011) *Carbon rights in REDD+: Exploring the implications for poor and vulnerable people* World Bank & REDD Net: Washington, D.C.

Rajamani, L & Maljean-Dubois, S (2011) I*mplementation of international environmental law* Martinus Nijhoff: Leiden

Rights and Resources Initiative (2014) *What future reform? Progress and slowdown in forest tenure reform since 2002* Rights and Resources Initiative: Washington, D.C.

Rist, G (2009) *The history of development: From western origins to global faith* Zed Books: London

Robertson, LG (2007) *Conquest by law: How the discovery of America dispossessed indigenous peoples of their lands* Oxford University Press: Oxford

Sands, P *et al* (2012) *Principles of international environmental law* 3rd ed Cambridge University Press: Cambridge

Sarelin, A (2012) *Exploring the role and transformative potential of human rights in development practice and food security: A case study of Malawi* Åbo Akademi University Press: Åbo

Schapera, I (1994) A *handbook of Tswana law and custom* Lit Verlag: Hamburg

Shue, S (1980) *Basic rights: Subsistence, affluence, and U.S. Foreign Policy* 2 ed Princeton University Press: New Jersey

Skogly, S (2006) *Beyond national borders: States' human rights obligations in international*

co-operation Intersentia: Oxford

Smith, A (2000) *The wealth of nations* Oxford University Press: Oxford

Stammers, N (2009) *Human rights and social movements* Pluto Press: London

Stern, N (2006) *The economics of climate change* Cambridge University Press: Cambridge

Suzman, J (2001) *Regional assessment of the status of the San in Southern Africa* Legal Assistance Centre: Windhoek

Takacs, D (2009) *Forest carbon: Law + property rights* Conservation International: Arlington

Taylor, I (2005) *NEPAD: Toward Africa's Development or another false start?* Lynne Rienner Publishers: Boulder

Thornberry, P (2002) *Indigenous peoples and human rights* Manchester University Press: Manchester

Tladi, D (2007) *Sustainable development in International law: An analysis of key enviro-economic instruments* Pretoria University Law Press: Pretoria

Toulmin, C (2009) *Climate change in Africa* Zed Books: London

United States Agency for International Development (2002) *Nature,wealth and power:emerging practice for revitalizing rural Africa* USAID: Washington, D.C.

Unpublished: Elvarsdóttir, HS 'Climate change and human rights: The implications that climate change has on the human rights of the Inupiat in Barrow, Alaska' Unpublished dissertation, University of Akureyri, 2010

Unpublished: Heinämäki, L 'The right to be a part of nature: Indigenous peoples and the environment' Unpublished dissertation, University of Lapland, 2010

Unpublished: Siangulube, FS 'Local vegetation use and traditional conservation practices in the Zambian rural community: Implications on forest stability' Unpublished thesis, Swedish Biodiversity Centre, 2007

Unpublished: Tung-Chieh Jansen, W 'Intergenerational and intragenerational equity and tran boundary movements of radioactive wastes' Unpublished dissertation, McGill University, Montreal, 2002

Unpublished: Wachira, GM 'Vindicating indigenous peoples' rights in Kenya' Unpublished LLD thesis, University of Pretoria, 2008

UN-REDD Programme 'UN-REDD Programme Handbook for National Programmes and Other National-Level Activities' UN-REDD: Geneva

VeneKlasen, L *et al* (2004) *Rights-based approaches and beyond: Challenges of linking rights and participation* (2004) Institute of Development Studies: Brighton

Viljoen, F (2012) *International human rights law in Africa* 2nd ed Oxford University Press: Oxford

Watson, RT *et al* (2001) *Climate Change: Synthesis report: A contribution of Working Groups I, II, III to the 3rd Assessment Report of the Intergovernmental Panel on Climate Change'* Cambridge University Press: Cambridge

Watson, RT, Zinyowera, MC & Moss, RH (1996) *Impacts, adaptations and mitigation of climate change: Scientific-Technical Analyses* (1996) Contribution of Working Group II to IPCC SAR Cambridge University Press: Cambridge

Weiss, EB (1989) *In fairness to future generations: International law, common patrimony and intergenerational equity* Transnational Publishers: Michigan

Westra, L (2008) *Environmenal justice and the rights of unborn and future generations* Earthscan: London

Whelan, DJ (2010) *Indivisible human rights: A history* University of Pennsylvania Press: Pennsylvania

Wilson, E (2006) *Nature revealed: Selected writings 1949–2006* John Hopkin University Press: Maryland

Wilson, MH (1961) *Reaction to conquest: Effects of contact with Europeans on the Pondo of South Africa* Oxford University Press: Oxford

Wold, C, Hunter, D & Powers, M (2009) *Climate change and the law* LexisNexis: Massachusett

Woods, K (2010) *Human rights and environmental sustainability* Edward Edgar: Cheltenham

World Bank (2004) *Sustaining forests: A development strategy* World Bank: Washington, D.C.

World Commission on Environment and Development (WCED) *Our common future* (1987) WCED

World Development Report (2010) *Development and climate change* World Bank: Washington, D.C.

Yeager, R & Miller, NN (1986) *Wildlife, wild death: Land use and survival in Eastern Africa* State University of New York Press: Albany

Yeshanew, SA (2011) *The justiciability of economic, social and cultural rights in the African Regional System* Akademi University Press: Åbo

Chapter in Books

Abate, RS & Kronk, EA 'Commonality among unique indigenous communities: An introduction to climate change and its impacts on indigenous peoples' in Abate, RS & Kronk EA (eds) (2013) *Climate change and indigenous peoples: The search for legal remedies* Edward Elgar Publishing: Cheltenham 3-18

Adams, W 'Nature and the colonial mind' in Adams, W & Mulligan, M (eds) (2003) *Decolonizing nature: Strategies for conservation in a post-colonial era* Earthscan Publications: London 16-50

Adelman, S 'Rethinking human rights: The impact of climate change on the dominant discourse' in Humphreys, S (ed) (2010) *Human rights and climate change* Cambridge University Press: Cambridge 159-180

Ako, R & Oluduro, O 'Bureaucratic rhetoric of climate change in Nigeria: International aspiration versus local realities' in Maes, F *et al* (eds) (2013) *Biodiversity and climate change: Linkages at international, national and local levels* Edward Edgar Publisher: Cheltenham 3-31

Alagappa, M 'Energy and the environment in Asia-Pacific: Regional co-operation and market governance' in Chasek, PS (ed) (2000) *The global environment in the twenty-first century: Prospects for international co-operation* The United Nations University Press: Tokyo 255-270

Albert, IO 'Climate change and conflict management in Nigeria' in Egbewole, WO, Etudaiye, MA & Olatunji, OA (eds) (2011) *Law and climate change in Nigeria* University of Ilorin: Ilorin 176-193

Alfreðsson, G 'Human rights and indigenous rights' in Loukacheva, N (ed) (2010) *Polar law textbook* Nordic Council of Ministers: Copenhagen 147-170

Alfreðsson, G 'Minorities, indigenous and tribal peoples, and peoples: Definitions of terms as a matter of international law' in Ghanea, N & Xanthaki, A (eds) (2005) *Minorities, peoples and self-determination: Essays in honour of Patrick Thornberry* Brill Publishers: Leiden 163-172

Alfreðsson, G 'Indigenous peoples and autonomy' in Suksi, M (ed) (1998) *Autonomy: Applications and implications* Kluwer Law International: The Hague 125–137

Allali, A *et al* 'Africa' in McCarthy, JJ *et al* (eds) (2001) *Impacts, adaptation and vulnerability*

Contribution of Working Group II to IPCC TAR, Cambridge University Press: Cambridge 491-531

Allot, AN & Cotran, E 'A background paper on restatement of laws in Africa: The need, value and methods of such restatement' in University of Ife Institute of African Studies (ed) (1971) *Integration of customary and modern legal systems in Africa* Africana Publishers & University of Ife Press: Ile Ife 17-41

Amin, S 'The challenge of globalisation: Delinking' in South Centre (Independent Commission of the South on Development Issues) (1993) *Facing the challenge: Responses to the Report of the South Commission*, Zed Books: London 132-138

Anaya, SJ 'The evolution of the concept of indigenous peoples and its contemporary dimensions' in Dersso, SA (ed) (2010) *Perspectives on the rights of minorities and indigenous peoples in Africa'* Pretoria University Law Press: Pretoria 23-42

Anderson, MR 'Human rights approaches to environmental protection: An Overview' in A Boyle, A & Anderson, MR (eds) (1998) *Human rights approaches to environmental protection* Clarendon Press: Oxford 1-23

Baede, APM, Ahlonsou, E, Ding, Y & Schimel, D 'The climate system: An overview' in Houghton, JT *et al* (eds) (2001) *Climate change 2001: The scientific basis contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press: Cambridge 87-98

Banda, JL 'Romancing customary tenure: Challenges and prospects for the neo-liberal suitor' in Fenrich, J, Galizzi, P & Higgins, TE (eds) (2011) *The future of customary law* Cambridge University Press: Cambridge 312-335

Barume, AK 'Responding to the concerns of the African States' in Charters, C & Stavenhagen, R (eds) (2009) *Making the Declaration work: The United Nations Declaration on the Rights of Indigenous Peoples* IWGIA: Copenhagen 170-182

Baxi, U 'Politics of reading human rights: Inclusion and exclusion of human rights' in Meckled-Garcia, S & Cali, B (eds) (2006) *The legalisation of human rights: Multidisciplinary perspectives on human rights and human rights law* Routledge: New York 182-200

Bennet, T 'official' vs 'living' customary law: dilemmas of description and recognition' in Claassens, A & Cousins, B (eds) (2009) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* UCT Press: Cape Town 138-153

Biebuyck, D 'Systemes de tenure fonciere et problemes fonciers au Congo' in Biebuyck, D (ed) (1963) *African agrarian systems* Oxford University Press: Oxford 83–100

Birdsall, N & Lawrence, RZ 'Deep integration and trade agreements: good for developing countries?' in Kaul, I, Grunberg, I & Stern, MA (eds) (1999) *Global public goods: International co-operation in the 21st Century* Office of Development Studies (ODS), Bureau for Development Policy (BDP), United Nations Development Programme (UNDP) 128–151

Boaventua de Sousa, S & Rodriguez-Garavito, CA 'Law, politics, and the Subaltern in counter-hegemonic globalisation' in Boaventua de Sousa, S & Rodriguez-Garavito, CA (eds) (2005) *Law, and globalization from below: Towards a cosmopolitan legality* Cambridge University Press: Cambridge 1-26

Bodansky, D & Rajamani, L 'The evolution and governance architecture of the climate change regime' in Sprinz, D & Luterbacher, U (eds) (2013) *International relations and global climate change* MIT Press: London 1-45

Bodansky, D 'International law and the design of a climate change regime' in Luterbacher, U & Sprinz, DF (eds) (2001) *International relations and global climate change* The MIT Press: Cambridge 201-220

Bojosi, KN 'The African Commission Working Group of Experts on the Rights of the Indigenous Communities/Populations: Some reflections on its work so far' in Dersso, S (ed) (2010) *Perspectives on the rights of minorities and indigenous peoples in Africa* Pretoria University Law Press: Pretoria 95-137

Bojosi, KN 'Towards an effective right of indigenous minorities to political participation in Africa' in S Dersso (ed) (2010) *Perspectives on the rights of minorities and indigenous peoples in Africa* Pretoria University Law Press: Pretoria 281-296

Boko, MI *et al* 'Africa' in Parry, ML *et al* (eds) (2007) *Climate change, impacts, adaptation and vulnerability', Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press: Cambridge 433-467

Bowman, M 'The nature, development and philosophical foundations of the biodiversity concept in international law' in Bowman, M & Redgwell, C (eds) (1996) *International law and the conservation of biological diversity* Kluwer Law International: London 5-32

Boyle, A & Freestone, D 'Introduction' in Boyle, A & Freestone, D (eds) (1999) *International law and sustainable development: Past achievements and future challenges* Oxford University Press: Oxford 1-18

Bruce, J & Migot-Adholla, S 'Introduction: Are the indigenous African tenure systems insecure' in Bruce, J & Migot-Adholla, S (eds) (1994) *Searching for land tenure security in Africa* The World Bank: Washington, D.C. 1-13

Bruce, JP, Lee, H & Haites, EF (eds) (1995) *Economic and social dimensions of climate change Contribution of Working Group III to IPCC SAR*, Cambridge University Press: Cambridge 1-444

Bulto, S 'Public duties for private wrongs: Regulation of multinationals (African Commission on Human and Peoples' Rights' in Gibney, M & Vandenhole, W (eds) (2014) *Litigating transnational human rights obligations: Alternative judgment* Routledge: New York 239-260

Chanock, M 'Paradigms, policies and property: A review of the customary law of land tenure' in Roberts, R & Mann, K (eds) (1991) *Land in colonial Africa* Heinemann Press: Portsmouth 61-84

Chennells, R 'The Khomani San of South Africa' in Nelson, J & Hossack, L (eds) (2003) *From principles to practice: Indigenous peoples and protected areas in Africa* Forest Peoples Programme: Moreton-in-Marsh 269-293

Chouchery, SR 'Common but differentiated responsibility in international environmental law from Stockholm to Rio' in Ginther, K *et al* (eds) (1995) *Sustainable development and good governance* Brill: Leiden 322-342

Colson, E 'The impact of the colonial period on the definition of land rights' in Turner, V (ed) (1971) *Colonialism in Africa, 1870–1960* Cambridge University Press: Cambridge 193-215

Conca, K 'Old states in new bottles? The hybridization of authority in global environmental governance' in Barry, J & Eckersley, R (eds) (2005) *The state and the global ecological crisis* Massachusetts Institute of Technology Press: Cambridge 181-206

Confalonieri, U *et al* 'Human health' in Parry, ML *et al* (eds) (2007) *Impacts, adaptation and vulnerability Contribution of Working Group II to IPCC AR4*, Cambridge University Press: Cambridge 391-431

Cousins, B 'Tenure and common property resources in Africa' in Toulmin, C & Quan, J (eds) (2000) *Evolving land rights, policy and tenure in Africa Tenure and property* IIED: London 151-180

Cousins, B 'Characterising 'communal' tenure: Nested systems and flexible boundaries' in Claassens, A & Cousins, B (eds) (2009) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* UCT Press: Cape Town 109-137

Cowan, JK, Marie-Benedicte, D & Wilson, RA 'Introduction' in Cowan, JK, Marie-Benedicte, D & Wilson, RA (eds) (2001) *Culture and rights: An anthropological perspectives* Cambridge University Press: Cambridge 1-26

Crippa, LA 'REDD+: Its potential to melt glacial resistance to recognise human rights and indigenous peoples' rights at the World Bank' in Abate, RS & Kronk EA (eds) (2013) *Climate change and indigenous peoples: The search for legal remedies* Edward Elgar Publishing: Cheltenham 123-150

Daes, E 'Principal problems regarding indigenous land rights and recent endeavours to resolve them' in Eide, A, Th. Möller, J & Ziemele, I (eds) (2011) *Making peoples heard-Essay on human rights in honour of Gudmundur Alfreðsson* Martinus Nijhoff Publishers: Leiden 463-484

Daniels, C 'Indigenous rights in Namibia' in Hitchcock, R & Vinding, D (eds) (2004) *Indigenous peoples' rights in Southern Africa* IWGIA: Copenhagen 44-62

De Groot, RS *et al* 'Natural terrestial ecosystems' in McG. Tegart, WJ, Sheldon, GW & Griffiths, DC (eds) (1990) *Climate change: The IPCC impact assessment* Report prepared for IPCC by Working Group II FAR, Australian Government Publishing Service: Camberra 3.1- 3.44

Dialla, AC 'The dawn of constitutionalism in Nigeria' in Mbondeyi, M & Ojienda, T (eds) (2013) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa* Pretoria University Law Press: Pretoria 135-162

Donelly, J 'International human rights law: Universal, relative, or relatively universal' in Baderin, MA & Ssenyonjo, M (eds) (2010) *International human rights law: Six decades after the UDHR and beyond* Ashgate: Aldershot 31-48

Dunnof, JL 'Levels of environmental governance' in Bodansky, D, Brunnée, J & Hey, E (eds)

(2007) *The Oxford handbook of international environmental law* Oxford University Press: Oxford 85-106

Edmondson, E 'The Intergovernmental Panel on Climate Change: Beyond monitoring' in Gleeson, B & Low, N (eds) (2001) *Governing for the environment: Global patterns, ethics and democracy* Palgrave Publishers: Hampshire 44-60

Eide, A 'Prevention of discrimination, protection of minorities and the rights of indigenous peoples: Challenges and choices' in Eide, A, Th. Möller, J & Ziemele, I (eds) (2011) *Making peoples heard-Essay on human rights in honour of Gudmundur Alfreðsson* Martinus Nijhoff Publishers: Leiden 387-408

Elliot, L & Breslin, S 'Researching comparative regional environmental governance : Causes, cases and consequences' in Elliot, L & Breslin, S (eds) (2011) *Comparative environmental regionalism* Routledge: New York 1-18

Falk, R 'Sovereignty and human dignity: The search for reconciliation' in Deng, FM and Lyons, T (eds) (1998) *African reckoning: A quest for good governance* The Brookings Institution: Washington, D.C 12-36

Fischlin, A *et al* 'Ecosystems, their properties, goods, and services' in Parry, ML *et al* (eds) (2007) *Impacts, adaptation and vulnerability* Contribution of Working Group II to IPCC AR4, Cambridge University Press: Cambridge 211-272

Freestone, D & Hey, E 'Origins and development of the precautionary principle' in Freestone, D & Hey, E (eds) (1996) *The precautionary principle and international law: The challenges of implementation* Kluwer Law International: The Hague 3-18

Gale, F 'A cooling climate for negotiations: Intergovernmentalism and its limits' in Cadman, T (ed) (2013) *Climate change and global policy regime: Towards institutional legitimacy* Palgrave Macmillan: Hampshire 32-47

German, LA *et al* 'Forest governance and decentralisation in Africa: Linking local, regional and global dialogues' in German, LA, Karsenty, A & Tiani, A (eds) (2010) *Governing Africa's forest in a globalised world* Earthscan: London 1-20

Gilbert, J & Couillard, G 'International law and land rights in Africa: The shift from states' territorial possessions to indigenous peoples' ownership rights' in Home, R (ed) (2011) *Essays in African land law* Pretoria University Law Press: Pretoria 47-68

Gilbert, J 'Custodians of the land: Indigenous peoples, human rights and cultural integrity' in M

Langfield *et al* (eds) (2010) *Cultural diversity, heritage and human rights Intersections in theory and practice. Key issues in cultural heritage* Routledge: New York 31-44

Gouritin, A 'Potential liability of European states under the ECHR for failure to take appropriate measures with a view to adaptation to climate change' in Faure, M & Peeters, M (eds) (2011) *Climate change liability* Edward Elgar Publishing Limited: Cheltenham 134-152

Gray, K & Gray, SF 'The idea of property in land' in Bright, S & Dewar, JK (eds) (1998) *Land Law: Themes and perspectives* Oxford University Press: Oxford 15-51

Hansungule, M 'African Courts and the African Commission on Human and Peoples Rights' in Bosl, A & Diescho, J (eds) (2009) *Human rights in Africa: Legal perspectives on their protection and promotion* Macmillian Education Namibia: Windhoek 232-271

Hansungule, M 'Minority protection in the African system of human rights' in Eide, A, Th. Möller, J & Ziemele, I (eds) (2011) *Making peoples heard-Essay on human rights in honour of Gudmundur Alfreðsson* Martinus Nijhoff Publishers: Leiden 409-424

Hanse, J & Pasternack, S'Local climate change law and multi-level governance in North America' in Richardson, BJ (ed) (2012) *Local climate change law: Environmental regulation in cities and other localities* Edward Elgar Publication: Cheltenham 69-104

Haritz, M 'Liability with and liability from the precautionary principle in climate change cases' in Faure, M & Peeters, M (eds) (2011) *Climate change liability* Edward Elgar Publishing Limited: Cheltenham 15-32

Hinz, MO & Ruppel, OC 'Legal protection of biodiversity in Namibia' in Hinz, MO & Ruppel, OC (eds) (2008) *Biodiversity and the ancestors: Challenges to customary and environmental law* UNEP & Biota: Windhoek 3-59

Hitchcock, R & Vinding, D 'Indigenous peoples' rights in Southern Africa: An introduction' in Hitchcock, R & Vinding, D (ed) (2004) *Indigenous peoples rights in Southern Africa* IWGIA: Copenhagen 8-21

Humphreys, S 'Introduction: Human rights and climate change' in Humphreys, S (ed) (2010) *Human rights and climate change* Cambridge University Press: Cambridge 1-34

IPCC 'Summary for policymakers' in Stocker, TF *et al* (eds) (2013)*The physical science basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press: Cambridge 1-27

Jegede, AO 'Trouble in paradise: Prosecution of climate change related laws in Nigeria' in

Gerardu, J *et al* (eds) (2013) *Compliance strategies to deliver climate benefits* International Network for Environmental Compliance and Enforcement: Washington, D.C. 50-53

Jo-Ansie van Wyk 'The African Unions response to climate change and climate security' in Mwiturubani, DA & van Wyk, J (eds.) (2009) *Climate change and natural resources conflicts in Africa* (2009) Monograph 3-23

Karr, JR 'Ecological integrity: An essential ingredient for human's long term success' in Westra, L, Bosselmann, K & Soskolne, C (eds) (2011) *Globalisation and ecological integrity in science and international law* Cambridge Scholars Publishing: Newscastle 8-25

Kidd, C & Kenrick, J 'The forest peoples of Africa: Land rights in context' in Forest Peoples Programme (March 2009) *Land rights and the forest peoples of Africa* Forest Peoples Programme: Moreton-in-Marsh 4-25

Kiss, A 'An introductory note on a human right to environment' inWeiss, EB (ed) (1992) *Environmental change and international law: New challenges and dimensions* United Nations University Press: Tokyo199-204

Klein, RJT 'Inter-relationships between adaptation and mitigation' in Parry, ML *et al* (eds) (2007) *Climate Change: Impacts, adaptation and vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press: Cambridge 745-777

Koita, TMW 'Land allocation and the protection of biodiversity: A case study of Mbunza' in Hinz, MO & Ruppel, OC (eds) (2008) *Biodiversity and the ancestors: Challenges to customary and environmental Law* UNEP & Biota: Windhoek 65-87

Kupfer, D & Karimanzira, R 'Agriculture, forestry and other human activities' in Working Group III *The IPCC response strategies* (1990) IPCC FAR, World Meteorological Organisations/ United Nations Environment Programme 77-122

Le Treut, H *et al* 'Historical overview of climate change' in S Solomon *et al* (eds) (2007)*The physical science basis: Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press: Cambridge 95-127

Liverman, DM 'Vulnerability to global environmental change' in Kasperson, RE *et al* (eds)

(1990) *Understanding global environmental change: The contributions of risk analysis and management* Earth Transformed Programme: Clark University 27–44

MacAuslan, J 'Only the name of the country changes: The diaspora of European land law in Commonwealth Africa' in Toulmin, C & Quan, J (eds) (2000) *Evolving land rights, policy and tenure in Africa* IIED: London 75-95

Mackay, F 'Indigenous peoples' rights and the UN Committee on the Elimination of Racial Discrimination' in Dersso, S (ed) (2010) *Perspectives on the rights of minorities and indigenous peoples in Africa* Pretoria University Law Press: Pretoria 155-202

Mann, K & Roberts, R 'Introduction: Law in colonial Africa' in Mann, K & Roberts, R (eds) (1990) *Law in colonial Africa* Heineman: Portsmouth 1-58

Maripe, B 'Development and the balancing of interests in environmental law: The case of Botswana' in Faure, M & du Plessis, W (eds) (2011)*The Balancing of interests in environmental law in Africa* Pretoria University Law Press: Pretoria 49-74

McKean, MA 'Common property: What is it, what is it good for, and what makes it work?' in Gibson, C, McKean, MA & Ostrom, E (eds) (2000) *People and forests: Communities institutions, and governance* Massachusetts Institute of Technology Press: Cambridge 27-56

Melillo, JM *et al* (eds) (2014) *Climate change impacts in the United States: The third national climate assessment* US Global Change Research Programme: Washington, D.C

Mwebaza, R 'Climate change and the international human rights framework in Africa' in Mwebaza, R & Kotze, LJ (eds) (2009) *Environmental governance and climate change in Africa: Legal perspectives* Institute for Security Studies 227-253

Mwiturubani, DA & Van Wyk , J (eds) (2010) *Climate change and natural resources conflicts in Africa* Institute for Security Studies

Nel, A & Sharife, K 'East African trees and the green resource curse' in Bond, P *et al* (eds) (2012) *The CDM in Africa Cannot Deliver the Money* A report by the University of KwaZulu Natal Centre for Civil Society (SA) and Dartmouth College Climate Justice Research Project (USA)

Nelson, F 'Introduction: The politics of natural resource governance in Africa' in Nelson, F (ed) (2010) *Community conservation and contested land: The politics of national resource governance in Africa* Earthscan: London 3-31

Nelson, J 'Sub-Saharan Africa' in Colchester, M (ed) (2001) *A survey of indigenous land tenure* (December 2001), a report for the land tenure service of the Food and Agriculture Organisation, Forest Peoples Programme: Moreton-in-Marsh 52-62

Newman, AG 'Africa and the United Nations Declaration on the Rights of the Indigenous Peoples' in Dersso, S (ed) (2010) *Perspectives on the rights of minorities and indigenous peoples in Africa* Pretoria University Law Press: Pretoria 141-154

Njoh, AJ 'Indigenous peoples and ancestral lands: Implications of the Bakweri's case in Cameroon' in Home, R (ed) (2011) *Essays in African land law* Pretoria University Law Press: Pretoria 69-90

Oba, AA 'The future of customary law in Africa' in Fenrich, J, Galizzi, P & Higgins, TE (eds) (2011) *The future of customary law* Cambridge University Press: Cambridge 58-82

Ogunsanya, M & Popoola, SO 'Intervention in the conflict between the Yoruba Farmers and Fulani herdsmen in Oke-Ogun, Oyo State' in Albert, IO (ed) (2001) *Building peace, advancing democracy: Experience with third party interventions in Nigeria's conflicts* PETRAF/John Archers Publishers: Ibadan 86-100

Okoth-Ogendo, HWO 'Nature of land rights under indigenous law in Africa' in Claassens, A & Cousins, B (eds) (2009) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* UCT Press: Cape Town 95-108

Omorogbe, Y 'The legal framework for public participation in decision-making on mining and energy development in Nigeria: Giving voice to the voiceless' in Zillman, D *et al* (eds) (2000) *Human rights in national resources development* Oxford University Press: Oxford 557-558

Osofsky HM 'Suburban climate change efforts in Minnesota: Implications for multi-level mitigation strategies' in Richardson, BJ (ed) (2012) *Local climate change law: Environmental regulation in cities and other localities* Edward Elgar Publication: Cheltenham 105-133

Pallemaerts, M 'International environmental law: From Stockholm to Rio- Back to the future?' in Sands, P (ed) (1993) *Greening international law* Earthscan: London 8-12

Pasternack, S 'Local climate change law and multi-level governance in North America' in Richardson, BJ (ed) (2012) *Local climate change law: Environmental regulation in cities and other localities* Edward Elgar Publication: Cheltenham 69-104

Potter, J 'Customary land tenure' in Sub-Saharan Africa today: Meanings and contexts' in Huggins, C & Clover, J (eds) 2005 *From the Ground Up: Land rights, conflict and peace in Sub-Saharan Africa* Institute for Security Studies & the African Centre for Technology Studies 55-75

Peter, N 'Taking accountability into account: The debate so far' in Newell, P & Wheeler, J (eds) (2006) *Rights, resources and the politics of accountability* Zed Books: London 37-58

Posey, DA 'Interpreting and applying the "reality" of indigenous concepts: what is necessary to learn from the Natives' in Redford, KH & Padoch, C (eds) (1992) *Conservation of Neotropical Forests: working from traditional resource use* New York: Columbia University Press 21–34

Richardon, BJ 'Local climate change law: Introduction' in Richardson, BJ (ed) (2012) *Local climate change law: Environmental regulation in cities and other localities* Edward Elgar Publication: Cheltenham 3-28

Riedel, E, Giacca, G & Golay, C 'The development of economic, social and cultural rights in international law' in Riedel, E, Giacca, G & Golay, C (eds) (2014) *Economic social and cultural rights in international law: Contemporary issues and challenges* Oxford University Press: Oxford 3-50

Redgwell, C 'National implementation' in Bodansky, D, Brunnée, J &Hey, E (eds) (2007) *The Oxford handbook of international environmental law* Oxford University Press: Oxford 922-946

Robison, M 'Foreword' in Humphreys, S (ed) (2010) *Human rights and climate change* Cambridge University Press: Cambridge xvii

Robledo, C, Blaser, J & Byrne, S 'Climate change: What are its implications for forest governance' in German, LA, Karsenty, A & Tiani, A (eds) (2010) *Governing Africa's forest in a globalised world* Earthscan: London 354-76

Romero, J 'Adaptation to climate change: Findings from the IPCC TAR' in Robledo, C, Kanninen, M & Pedroni, L (eds) (2005) *Tropical forests and adaptation to climate change: In search of synergies* CIFOR: Bogor Barat 5-14

Sachs, W 'Climate change and human rights' in The Pontifical Academy of Sciences (ed) (2006) *Interaction between global change and human health* Scripta Varia: Vatican city 349-368

Sands, P 'International law in the field of sustainable development: Emerging legal principle' in

Lang, W (ed) (1999) *Sustainable development and international law* Oxford University Press: Oxford 53-66

Saris, AP 'Environmental and human rights impacts of trade liberalization: A case study in Batam Island, Indonesia' in Zarsky, L (ed) (2002) *Human rights and the environment: Conflicts and norms in a globalising world* Earthscan: London 123-146

Scheinin, M 'Characteristics of human rights norms' in Krause, C & Scheinin, M (eds) (2009) *International protection of human rights: A textbook* Åbo Akademi University: Åbo 19-37

Schneider, SH *et al* 'Assessing key vulnerabilities and the risk from climate change' in Parry, MK *et al* (eds) (2007) *Climate Change 2007: Impacts, adaptation and vulnerability, Contribution of the Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press: Cambridge 779-810

Sena, K 'REDD and indigenous peoples' rights in Africa' in IWGIA (2009) *REDD and indigenous peoples* Indigenous Affairs 10-20

Seymour, FJ 'Conservation, displacement, and compensation' in Cernea, MM & Mathur, HM (eds) (2008) *Can compensation prevent impoverishment? Reforming resettlement through investments and benefit-sharing* Oxford University Press: Oxford 286-306

Sims, REH *et al* '2007: Energy supply' in Metz , B *et al* (eds) (2007) *Climate change 2007: Mitigation. contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* Cambridge University Press: Cambridge 253-322

Ssenyonjo, M 'Strengthening the African regional human rights system' in Ssenyonjo, M (ed) (2011)*The African regional human rights system: 30 Years after the African Charter on Human and Peoples' Rights* Martinus Nijhoff Publishers: Leiden 455-480

Sterba, JB 'A bio-centric defence of environmental integrity' in Pinentel, D, Westra, L & Noss, RF (eds) (2000) *Ecological integrity: Integrating environment, conservation and* health Island Press: Washington, D.C 335-350

Swepston, L & Alfreðsson, G 'The rights of indigenous peoples and the contribution by Erica

Daes' in Alfreðsson, GS & Stavropoulou, M (eds) (2000) *Justice pending: Indigenous peoples and other good causes: Essays in honour of Erica-Irene Daes* Martinus Nijhoff: Leiden 70-78

Trenberth, KE, Houghton, JT & Meira Filho, LG 'The climate system: An overview' in Houghton, JT *et al* (eds) (1995) *The science of climate change: Contribution of WGI to the Second Assessment Report* Cambridge University Press: Cambridge 55-63

Ulfstein, G & Werksman, J 'The Kyoto compliance system: Towards hard enforcement' in Stooke, OS, Hovi, J & Ulfstein, G *Implementing the climate regime: International compliance* (eds) (2005) Earthscan: London 39-62

Van Schaik, CP, Terborgh, J & Dugelby, B 'The silent crisis: The state of rain forest nature preserves' in Kramer, R, van Schalk, C & Johnson, J (eds) (1997) *Last stand: Protected areas and the defence of tropical biodiversity* Oxford University Press: New York 64-89

Viljoen, F 'Reflections on the legal protection of indigenous peoples rights in Africa' in Dersso, S (ed) (2010) *Perspectives on the rights of minorities and indigenous peoples in Africa* Pretoria University Law Press: Pretoria 75-94

Wachira, GM 'Indigenous peoples' rights to land and natural resources' in Dersso, S (ed) (2010) *Perspectives on the rights of minorities and indigenous peoples in Africa* Pretoria University Law Press: Pretoria 297-348

Watson, RT *et al* 'Greenhouse gases and aerosols' in Houghton, JT, Jenkins, GJ & Ephraums, JJ (eds) (1990) *Scientific assessment of climate change* Cambridge University Press: Cambridge 1-40

Weiss, TL & Reyes, JD 'Breaking the cycle of violence: Understanding the links between environment, migration and conflict in the greater horn of Africa' in Dahre, UJ (ed) (2009) *Horn of Africa and peace*: *The role of the environment,* A report of the 8th Annual Conference on the Horn of Africa, Lund, Sweden, 7-9 August, 2009, 97-108

Woodburn, J 'Minimal politics: The political organisation of the Hadza of North Tanzania' in Shack, WA & Cohen, PS (eds) (1979) *Politics in leadership* Clarendon Press: Oxford 244-266

Woodiwiss, A 'The law cannot be enough: Human rights and limits of legalism' in Meckled-Garcia, S & Cali, B (eds) (2006) *The legalisation of human rights: Multidisciplinary perspectives on human rights and human rights law* Routledge: New York 30-45

Woodliffe, J 'Biodiversity and indigenous peoples' in Bowman, M & Redgwell, C (eds) (1996) *International law and the conservation of biological diversity* Kluwer Law International: London 255-270

Woods, N 'The political economy of globalisation' in Woods, N (ed) (2000) *The political economy of globalisation* (2000) St Martin's Press: New York 1-19

Zeleza, PT 'Introduction: The struggle for human rights in Africa' in Zeleza, PT & McConnaughay, PJ (eds) (2004) *Human rights, the rule of law and development in Africa* University of Pennsylvania Press: Philadelphia 1-19

Journal Articles

Ajani, EN *et al* 'Indigenous knowledge as a strategy for climate change adaptation among farmers in Sub-saharan Africa: Implications for policy'(2013) 2 *Asian Journal of Agricultural Extension, Economics & Sociology* 23

Adger, NW 'Vulnerability' (2006) 16 *Global Environmental Change* 268

Ako, RT 'Nigeria's Land Use Act: An anti-thesis to environmental justice' (2009) 53 *Journal of African Law* 289

Alfreðsson, G & Ovsiouk, A 'Human rights and the environment' (1991) 60 *Nordic Journal International Law* 19

Alfreðsson, G 'A frame an incomplete painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures' (2000) 7 *International Journal on Minority & Group Rights* 291

Allen, M 'Liability for climate change: Will it ever be possible to sue anyone for damaging the climate?' (2003) 421 *Commentary in Nature* 891

Allot, AN 'Towards the unification of laws in Africa' (1965) 14 *International Law & Comparative Law Quarterly* 366

Amech, EP 'Litigating right to healthy environment in Nigeria: An examination of the impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009 in ensuring access to justice for victims of environmental degradation (2010) 6 *Law, Environment & Development Journal* 320

Aminzadeh, SC 'A moral imperative: The human rights implications of climate change' (2007) 39 *Hastings International & Comparative Law Review* 231

Anaya, SJ & Grossman, C 'The case of Awas Tingni v Nicaragua: A new step in the international law of indigenous peoples' (2002) 19 *Arizona Journal of International & Comparative Law* 1

Anaya, SJ & Williams, RA Jr. 'The protection of indigenous peoples' rights over lands and natural resources under the Inter-American human rights system' (2001) 14 *Harvard Human Rights Journal* 33

Anaya, SJ 'Environmentalism, human rights and indigenous peoples: A tale of converging and diverging interests' (2000) 7 *Buffalo Environmental Law Journal* 7

Anaya, SJ 'Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: The more fundamental issue of what rights indigenous peoples have in lands and resources' (2005) 22 *Arizona Journal of International & Comparative Law* 7

Anaya, SJ 'Superpower attitudes toward indigenous peoples and group rights' (1999) 93 *Proceedings of the Annual Meeting American Society* 251

Asiema, J & Situma, FDP 'Indigenous peoples and the environment: The case of the pastoral Massai of Kenya' (1994) 5 *Colorado Journal of International Environmental Law & Policy* 150

Atapattu, S 'The public health impact of global environmental problems and the role of international law' (2004) 30 *American Journal of Law & Medicine* 283

Atapattu, S 'The right to a heathy life or the right to die polluted?: The emergence of a human right to a healthy environment under international law (2002) 16 *Tulane Environmental Law Journal* 65

Baker, SH 'Why the IFC's free, prior, and informed consent policy does not matter (yet) to indigenous communities affected by development projects' (2013) 30 *Wisconsin International Law Journal* 668

Bala, G *et al* 'Combined climate and carbon cycle effects of large scale deforestation' (2007) 104 *Proceedings of the National Academy of Sciences of the United States of America* 6550

Barkin, JS 'The counter-intuitive relationship between globalisation and climate change' (2003) 3 *Global Environmental Politics* 8

Barnett, J 'Security and climate change' (2003) 13 *Global Environmental Change* 7

Barresi, PA 'Beyond fairness to future generations: An intragenerational alternative to

intergenerational equity in the international environmental arena' (1997) 1 *Tulane Environmental Law Journal* 59

Barret, K 'The World Bank and UN-REDD: Big names and narrow focus' (2012) *Ecosystem Marketplace*

Berry, S 'Hegemony on a shoestring: Indirect rule and access to agricultural land' (1992) 62 *Africa* 327

Besteman, C 'Individualisation and the assault on customary tenure in Africa:Title registration programmes and the case of Somalia' (1994) 64 *Africa* 484

Biermann, F *et al* 'Navigating the anthropocene: The earth system governance project strategy paper' (2010) 2 *Current Opinion in Environmental Sustainability* 202

Blom, B, Sunderland, T & Murdiyarso, D 'Getting REDD to work locally: Lessons learned from integrated conservation and development projects' (2010) 13 *Environmental Science Policy* 164

Bodansky, D 'Customary (And not so customary) International Environmental Law' (1995) 105 *Indiana Journal of Legal Studies* 116

Bodansky, D 'Introduction: Climate change and human rights: Unpacking the issues' (2010) 38 *Georgia Journal of International & Comparative Law* 511

Bodansky, D 'The Copenhagen climate change conference: A post-mortem' (2010) 104 *The American Journal of International Law* 230

Bosselmann, K 'Losing the forest for the trees: environmental reductionism in the Law' (2010) 2 *Sustainability* 2424

Boyd, E, Gutierrez, M & Chang, M 'Small-scale forest carbon projects: Adapting CDM to low income communities' (2007) 17 *Global Environmental Change* 250

Boyle, A 'Developments in the international law of environmental impact assessments and their relation to the Espoo Convention' (2011) 20 *Review of European Community & International Environmental Law* 227

Boyle, A 'Human rights or environmental rights? A reassessment' (2007) 18 *Fordham Environmental Law Review* 471

Bratspies, RM 'The intersection of international human rights and domestic environmental regulation' (2010) 38 *Georgia Journal of International & Comparative Law* 649

Brown, O, Hammill, A & Mcleman, R 'Climate change as the 'new' security threat:

Implications for Africa' (2007) 83 *International Affairs* 1141

Brunnée, J 'The Kyoto Protocol: Testing ground for compliance theories?' (2003) 63 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 255

Brunner, R *et al* 'Back to its roots: REDD+ via the Copenhagen Accord' (Fall 2010) 1 *Reconsidering Development* 2

Buchan, B & Heath, M 'Savagery and civilization: From terra nullius to the "Tide of History" (2006) 6 *Ethnicities* 8

Buchanan, A 'The role of collective rights in the theory of indigenous peoples' rights'(1993) 3 *Transnational Law & Contemporary Problems* 93

Bulto, TS 'Towards rights-duties congruence: Extraterritorial application of the human right to water in the African human rights system' (2011) 29 *Netherlands Quarterly Human Rights* 1

Burgess, ND *et al* 'Getting ready for REDD+ in Tanzania: A case study of progress and challenges'(2010) 44 *Fauna & Flora International* 339

Cabre, M 'Issue linkages to climate change measured through NGO participation in UNFCCC' (2011) 11 *Global Environmental Politics* 10

Caney, S 'Climate change and the duties of the advantaged' (2009) 13 *Critical Review of International Social &Political Philosophy* 203

Caney, S 'Cosmopolitan justice, responsibility and global climate change' (2005) 18 *Leiden Journal of International Law* 747

Cernea, MM & Schmidt-Soltau, K 'Poverty risks and national parks: Policy issues in conservation and resettlement' (2006) 34 *World Development* 1808

Chapman, MS 'Climate change and the regional human rights systems' (2010) 10 *Sustainable Development Law & Policy* 37

Cobbah, J 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 314

Cohen, AP 'Culture as identity: An anthropologist's view' (1993) 24 *New Literary History* 195

Collier, P, Conway, G & Venables, T 'Climate change and Africa' (2008) 24 *Oxford Review of Economic Policy* 337

Connor, TS 'We are part of nature: Indigenous peoples' rights as a basis for environmental

protection in the Amazon Basin' (1994) 5 *Colombia Journal of International Environmental Law & Policy* 193

Constance, L *et al* 'Operationalizing social safeguards in REDD+: Actors, interests and ideas' (2012) 21 *Environmental Science & Policy* 63

Corbera, E & Schroeder, H 'Governing and implementing REDD+' (2011) 14 *Environmental Law & Policy* 89

Cousins, B 'Embeddedness' versus titling: African land tenure systems and the potential impacts of the communal land rights Act 11 of 2004' (2005) 16 *Stellenbosch Law Review* 492

Cullet, P 'Definition of an environmental right in a human rights context'(1995) 13 *Netherlands Quarterly of Human Rights* 25

D'Amato, A & Chopra, SK 'Whales: Their emerging right to life' (1991) 85 *American Journal of International Law* 21

Danon, S & Bettiati, D 'Reducing Emissions from Deforestation and Forest Degradation (REDD+): What is behind the idea and what is the role of UN-REDD and Forest Carbon Partnership Facility (FCPF)' (2012) *South-East European Forestry Review Paper* 95

De Schutter, O *et al* 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic Social and Cultural Rights'(2012) 34 *Human Rights Quarterly* 1084

Deere-Birkbeck, C 'Global governance in the context of climate change: The challenges of increasingly complex risk parameters' (2009) 85 *International Affairs* 1173

Deressa, TT *et al* 'Determinants of farmers' choice of adaptation methods to climate change in the Nile Basin of Ethiopia' (2009) 19 *Global Environmental Change* 248

Desgagné, R 'Integrating environmental values into the European Convention on Human Rights' (1995) 89 *American Journal of International Law* 263

Dinokopila, BR 'The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration' (2013) 13 *African Human Rights Law Journal* 302

Donelly, J 'Human rights: A new standard of civilisation' (1988) 74 *International Affairs* 1

Doubleday, NC 'Aboriginal subsistence whaling: The right of Inuit to hunt whales and

implications for international environmental law' (1989) 17 *Denver Journal of International Law & Policy* 373

Du Plessis, WJ 'African indigenous land rights in a private ownership paradigm' (2011) 14 *PER / PELJ* 261

Ebeku, K 'Oil and the Niger Delta people: The injustice of the Land Use Act' (2001) *CEPMLP Internet Journal* 9

Ehrlich, PR & Ehrlich, AH 'The population bomb revisited' (2009*)* 1 *Electronic Journal of Sustainable Development* 63

Eide, A 'Realisation of social and economic rights and the minimum threshold approach'(1989) 10 *Human Rights Law Journal* 35

Fagbohun, OA '19 Years After FEPA Act: What future for the new Environmental Enforcement Agency Act, 2007' (2007) 2 *Journal of Current Practice*

Fearnside, PM 'Saving tropical forests as a global warming countermeasure: An issue that divides the environmental movement (2001) 39 *Ecological Economics* 167

Fischer, B *et al* `Implementation and opportunity costs of reducng deforestation and forest degradation in Tanzania' (2011) 1 *Nature Climate Change* 161

Fitzmaurice, M 'The Kyoto Protocol compliance regime and treaty law' (2004) 8 *Singapore Year Book of International Law* 23

Fonta, WM, Ichoku, HE & Ayuk, E 'The distributional impacts of forest income on household welfare in rural Nigeria' (2011) 2 *Journal of Economics & Sustainable Development* 1

Fry, I 'Reducing emissions from deforestation and forest degradation: opportunities and pitfalls in developing a new legal regime.' (2008) 17 *RECIEL* 166

Fuentes, X 'International law making in the field of sustainable development: The unequal competition between development and the environment' (2002) 2 *International Environmental Agreements, Politics, Law & Economics* 125

Ganz, B 'Indigenous peoples and land tenure: An issue of human rights and environmental protection'(1997) 9 *Georgia International Environmental Law Review* 173

Gardner, RC 'Respecting sovereignty' (2011) 8 *Fordham Environmental Law Review* 133

Ginsburg, RB & Merritt, DJ 'Affirmative action: An international human rights dialogue' (1999) 21 *Cardozo Law Review* 253

Goklany, IM 'A climate policy for the short and medium term: Stabilization or adaptation?' (2005) 16 *Energy & Enviroment* 667

Gomez-Pompa, A & Kaus, A 'Taming the wilderness myth' (1992) 42 *Bioscience* 271

Green, JE 'Delegation and accountability in the Clean Development Mechanism: The new authority of non-state actors' (2008) 4 *Journal of International Law & International Relations* 21

Gundling, L 'What obligation does our generation owe to the next? An approach to global environmental responsibility: Our responsibility to future generations' (1990) 84 *American Journal of International Law* 207

Gupta, J 'Legal steps outside the Climate Convention: Litigation as a tool to address climate change' (2007) 16 *RECIEL* 76

Halsnæs, K & Shukla, Æ P 'Sustainable development as a framework for developing country participation in international climate change policies' (2008) 13 *Mitigation & Adaptation Strategy for Global Change* 105

Harrington, J 'Special Rapporteurs of the African Commission on Human and Peoples' Rights' (2001) 1 *African Human Rights Law Journal* 247

Hardin, G 'The tragedy of the commons' (1968) 162 *Science* 1243

Hart, D 'Is climate change a human rights issue?' (2012) 24 *Environmental Law & Management* 76

Henry, M *et al* 'Implementation of REDD+ in sub-Saharan Africa: state of knowledge, challenges and opportunities (2011) 16 *Environment & Development Economics* 381

Hettne, B 'Beyond the 'new' regionalism' (2005) 10 *New Political Economy* 543

Hinchman, LP 'The origin of human rights: A Hegelian perspective' (1984) 37 *Western Political Quarterly* 8

Hodkova, I 'Is there a right to a healthy environment in the International legal order?' (1992) 7 *Connecticut Journal of International Law* 65

Humphreys, D 'Forest negotiations at the United Nations: Explaining co-operation and discord' (2001) 3 *Forest Policy & Economics* 125

Humphreys, D 'The politics of 'Avoided Deforestation': Historical context and contemporary isssues (2008) 10 *International Forestry Review* 433

Imran, S, Alam, K & Beaumont, N 'Reinterpreting the definition of sustainable development

for a more ecocentric reorientation sustainable development' (2011) 22 *Sustainable Development* 1

Jacobs, RE 'Treading deep waters: Substantive law issues in Tuvalu's threat to sue the United States in the International Court of Justice' (2003) 14 *Pacific Rim Law & Policy Journal* 103

Jarso, JF 'Africa and the climate change agenda: Hurdles and prospects in sustaining the outcomes of the seventh African Development Forum' (2011) 11 *Sustainable Development Law & Policy* 38

Jaska, MF 'Putting the "Sustainable" back in sustainable development: Recognizing and enforcing' indigenous property rights as a pathway to global environmental sustainability' (2006) 21 *Journal of Environmental Law & Litigation* 157

Jegede, AO 'Beyond prospects: Strengthening the panel of the wise in the AU peace and security architecture '(2012) 1 *Journal of African Union Studies* 63

Jegede, AO 'The African Union peace and security architecture: Can the panel of the wise make a difference?' (2009) 9 *African Human Rights Law Journal* 419

Kamalu, OJ & Wokocha, CC 'Land resource inventory and ecological vulnerability: Assessment of Onne area in Rivers State, Nigeria' (2011) 3 *Journal of Environmental & Earth Sciences* 438

Kennedy, D 'The disciplines of international law and policy' (1999) 12 *Leiden Journal of International Law* 9

Kenrick, J & Lewis, J 'Indigenous peoples' rights and the politics of the term 'indigenous' (April 2004) 20 *Anthropology Today* 4

Keohane, RO 'The demand for international regimes' (1982) 36 *International Organisation* 325

Kheshgi, HS, Smith, SJ & Edmonds, JA 'Emissions and atmospheric CO2 stabilisation' (2005)10 *Mitigation & Adaptation Strategies for Global Change* 213

Khoza, S ' Statement on social, economic and cultural rights' (2005) 5 *African Human Rights Law Journal* 182

Khoza, S 'Promoting economic social and cultural rights in Africa: The African Commission holds a seminar in Pretoria' (2004) 4 *African Human Rights Law Journal* 334

Killander, M 'The African Peer Review Mechanism and human rights: The first reviews and the

way forward' (2008) 30 *Human Rights Quarterly* 41

Kingsbury, B 'Indigenous peoples' in international law: A constructivist approach to the Asian controversy' (1998) 92 *American Journal of International Law* 414

Knox, JH 'Linking human rights and climate change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 478

Koch, IE 'Dichotomies, trichotomies or waves of duties?'(2005) 5 *Human Rights Law Review* 81

Kowero, G 'Ideas on implementing REDD?' (2010) *African Forestry* 23

Kravchenko, S 'Procedural rights as a crucial tool to combat climate change' (2010) 38 *Georgia Journal of International & Comparative Law* 613

Kravchenko, S 'Right to carbon or right to life: Human rights approaches to climate change' (2008) 9 *Vermont Journal of Environmental law* 514

Kriegler, E *et al* 'Is atmospheric carbon dioxide removal a game changer for climate change mitigation?' (2013) 118 *Climatic Change* 45

Kugelmann, D 'The protection of minorities and indigenous peoples respecting cultural diversity' (2007) 11 *Max Planck Yearbook of United Nations Law* 233

Kuper, A 'The return of the native' (June 2003) 44 *Current Anthropology* 389

Kuwali, D 'From the West to the rest: Climate change as a challenge to human security in Africa' (2008) 17 *African Security Review* 20

Lemmer, JA 'Cleaning up development: EIA in two of the world's largest and most rapidly developing countries' (2007) 19 *Georgia International Environmental Law Review* 275

Limon, M 'Human rights and climate change: Constructing a case for political action' (2009) 33 *Harvard Environmental Law Review* 439

Lobell, DB *et al* 'Prioritizing climate change adaptation needs for food security in 2030' (2008) 319 *Science* 607

Maguire, R 'Foundations of international climate law: Objectives, principles and methods in climate change and the law' (2013) 21 *Ius Gentium: Comparative Perspectives on Law & Justice* 83

Marie-Benedecte, D 'What are human rights? Four schools of thought' (2010) 32 *Human Rights Quarterly* 1

Masera, O, Ceron, AD & Ordonez, A 'Forestry mitigation options for Mexico: finding

synergies between national sustainable development priorities and global concerns' (2001) 6 *Mitigation & Adaptation Strategies for Global Change* 291

McDermott, CL, Levin, K & Cashore, B 'Building the forest-climate bandwagon: REDD and the logic of problem amelioration' (2011) 11 *Global Environmental Politics* 85

McInerney-Lankford, S 'Climate change and human rights: An introduction to legal issues' (2009) 33 *Harvard Environmental Law Review* 431

McNeil, K 'Aboriginal rights in Canada: From title to land to territorial sovereignty' (1998) 5 *Tulsa Journal of Comparative & International Law* 253

Mendelsohn, K 'A Ricardian analysis of the impact of climate change on African cropland' (2008) 2 *African Journal of Agricultural & Resource Economics* 1

Meyfroidt, P & Lambin, EF 'Forest transition in Vietnam and displacement of deforestation abroad' (2009) 106 *Proceedings of the National Academy of Sciences of the United States* 16139

Milledge, SA 'Getting REDDy in Tanzania: Principles, preparations and perspectives' (2009) 24 *The Arc Journal* 2

Miller, RJ & LeSage, L 'The international law of discovery, indigenous peoples, and Chile' (2011) 89 *Nebraska Law Review* 819

Mutua, M 'Standard setting in human rights: Critique and prognosis' (2007) 29 *Human Rights Quarterly* 547

Neili, O 'The dark side of human rights' (2005) 81 *International Affairs* 427

Newman, DG 'Theorizing collective indigenous rights' (2007) 31 *American Indian Law Review* 273

Newman, DG 'Collective interests and collective rights' (2004) 49 *American Journal of Jurisprudence* 127

Ngidangb, SD 'Deconstruction and reconstruction of native customary land tenure' (2005) 43 *Southeast Asian Studies* 50

Norton, BG 'Environmental ethics and the rights of future generations' (1982) 4 *Environmental Ethics* 319

Odinkalu, CA 'The individual complaints procedure of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 359

Odysseos, L 'Governing dissent in the Central Kalahari Game Reserve: 'Development', governmentality, and subjectification amongst Botswana's bushmen' (2011) 8 *Globalizations* 439

Oni, SI & Oyewo, MA 'Gas flaring, transportation and sustainable energy development in the Niger-Delta'(2011) 33 *Journal of Human Ecology* 21

Oruonye, ED 'Multinational oil corporations in Sub Sahara Africa: An assessment of the impacts of globalisation'(2012) 2 *International Journal of Humanities & Social Science* 152

Osofsky, HM 'Is climate change "international"? Litigation's diagonal regulatory role' (2009) 49 *Virginia Journal of International Law* 585

Osofsky, HM 'Learning from environmental justice: A new model for international environmental rights' (2005) 24 *Stanford Environmental Law Journal* 72

Osofsky, HM 'The geography of climate change litigation: Implications for transnational regulatory governance' (2005) 83 *Washington University Law Quarterly* 1789

Osofsky, HM 'The Inuit petition as a bridge? Beyond dialectics of climate change and indigenous peoples' rights' (2007) 31 *American Indian Law Review* 675

Paavola, J & Adger, WN 'Fair adaptation to climate change' (2006) 56 *Ecological Economics* 594

Peart, N 'Human rights-based climate change litigation: A radical solution?' (2012) 24 *Environmental Law & Management* 77

Pielke, R, Prins, G & Rayner, S 'Climate change 2007: Lifting the taboo on adaptation' (February 2007) 445 *Nature* 597

Pollis, A 'Human rights and globalisation' (2004) 3 *Journal of Human Rights* 343

Posner, EA 'Climate change and international human rights litigation: A critical appraisal' (2007) 155 *University of Pennsylvania Law Review* (2007) 1925

Posner, EA & Sunstein, CR 'Climate change justice' (2008) 96 *The Georgetown Law Journal* 1565

Pratt, A 'Treaties vs. Terra Nullius: "Reconciliation," treaty-making and indigenous sovereignty in Australia and Canada' (2004) 3 *Indigenous Law Journal* 43

Rajamani, L 'The changing fortunes of differential treatment in the evolution of international environmental law' (2012) 88 *International Affairs* 605

Rajamani, L 'The principle of common but differentiated responsibility and the balance of commitments under the climate regime' (2000) 9 *Review of European Community & International Environmental Law* 120

Ramcharan, BG 'Individual, collective and group rights: History, theory, practice and contemporary evolution' (1993) 1 *International Law Journal on Group Rights* 27

Rest, A 'The Oposa decision: Implementing the principles of intergenerational equity and responsibility' (1994) 24 *Environmental Policy & Law* 314

Richardson, BJ 'Indigenous peoples, international law and sustainability'(2001) 10 *RECIEL* 1

Roberts, J *et al* 'Who ratifies environmental treaties and why? Institutionalism, structuralism and participation by 192 nations in 22 treaties' (2004) 4 *Global Environmental Politics* 22

Robinson, NA 'International trends in environmental impact assessment' (1992) 19 *Boston College Environmental Affairs Law Review* 591

Rodley, N 'Conceptual problems in the protection of minorities: International legal development' (1995) 17 *Human Rights Quarterly* 48

Sand, PH 'Sovereignty bounded: Public trusteeship for common pool resources' (2004) 4 *Global Environmental Politics* 63

Scholtz, W 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 1

Sedjo, R 'Local logging: Global effects' (1995) 93 *Journal of Forestry* 25

Seghezzo, L 'The five dimensions of sustainability' (2009) 18 *Environmental Politics* 539

Serengil, Y & Erden, H 'Report: Durban climate deal and LULUCF' (2012) 69 *International Journal of Environmental Studies* 169

Scharf, MP 'Earned 'sovereignty: Judicial underpinnings' (2003) 31 *Denver Journal of Law & Policy* 373

Shi-Ling H 'A realistic evaluation of climate change litigation through the lens of a hypothetical lawsuit' (2008) 79 *University of Colorado Law Review* 101

Shipton, P & Goheen, M 'Understanding African land-holding: Power, wealth, and meaning' (1992) 62 *Africa* 307

Sikor, T *et al* 'REDD-plus, forest people's rights and nested climate governance' (2010) 20 *Global Environmental Change* 423

Sinden, A 'Climate change and human rights' (2008) 27 *Journal of Land Resources & Environmental Law* 257

Slattery, B 'Understanding aboriginal rights' (1987) 66 *Canadian Bar Review* 727

Smouts, MC 'The issue of an international forest regime' (2008) 10 *International Forestry Review* 429

Solomon, S *et al* 'Irreversible climate change due to carbon dioxide emissions' (2009) 106 *Proceedings of the National Academy of Sciences of the United States of America* 1704

Sterio, M 'On the right to external self-determination: "Selfstans", secession and the great powers' rule'(2010) 19 *Minnesota Journal of International Law*1

Stone, CD 'Common but differentiated responsibilities in international law'(2004) 98 *The American Journal of International Law* 276

Streck, C & Scholz, S 'The role of forests in global climate change: whence we come and where we go' (2006) 82 *International Affairs* 861

Suagee, DB 'Human rights and the cultural heritage of Indian Tribes in the United States' (1999) 8 *International Journal of Cultural Property* 48

Supanich, GP 'The legal basis of intergenerational responsibility: An alternative view -The sense of intergenerational identity' (1992) 3 *Yearbook of International Environmental Law* 94

Sylvian, R 'Land, water and truth: San identity and global indeginism' (2002) 104 *American Anthropologist* 1074

Symonides, J 'The right to a clean, balanced and protected environment' (1992) 20 *International Journal Legal Information* 24

Tarayai, N 'The legal perspectives of the Maasai culture, customs, and traditions' (2004) 21 *Arizona Journal of International & Comparative Law* 206

Tesfagabir, K 'The state of functional immunity of international organisations and their officials and why it should be streamlined' (2011) 10 *Chinese Journal of International Law* 97

Thompson, MC, Baruah, M & Carr, EA 'Seeing REDD+ as a project of environmental governance' (2011) 14 *Environmental Science & Policy* 100

Tisdell, C 'Economic reform and openness in China: China's development policies in the last 30

years' (2009) 39 *Economic Analysis & Policy* 271

Ulfstein, G 'Indigenous peoples' right to land' (2004) 8 *Max Planck UNYB* 11

Van der Werf *et al* 'CO2 emissions from forest loss' (2009) 2 *Nature Geoscience* 737

Van Genugten, W 'Protection of indigenous peoples on the African continent: Concepts, position seeking, and the interaction of legal system' (2010) 104 *The American Journal of International Law* 29

Vermeulen, S & Cotula, L 'Over the heads of local people: Consultation, consent, and recompense in large-scale land deals for biofuels projects in Africa' (2010) 37 *Journal of Peasant Studies* 899

Viljoen, F 'The Special Rapporteur on prisons and conditions of detention in Africa: Achievements and possibilities' (2003) 27 *Human Rights Quarterly* 125

Vormedal, I 'The influence of business and industry NGOs in the negotiation of the Kyoto mechanisms: The case of carbon capture and storage in the CDM' (2008) 8 *Global Environmental Politics* 36

Vucetich, JA & Nelson, MP 'Sustainability: Virtuous or vulgar?' (2010) 60 *BioScience* 539

Watters, L 'Indigenous peoples and the environment: Convergence from a Nordic perspective' (2002) 20 *University of California Journal of Environmental Law & Policy* 237

Weiler, F 'Global climate change and leadership: The role of major players in finding solutions to common problems' (2010) 17 *Journal of International Affairs*

Weiss, EB 'Our rights and obligations to future generations for the environment' (1990) 84 *American Journal of International Law* 198

Weiss, EB 'The planetary trust: Conservation and intergenerational equity' (1984) 11 *Ecology Law Quarterly* 494

West, P & Brockington, D 'An anthropological perspective on some unexpected consequences of protected areas' (2006) 20 *Conservation Biology* 609

Wiener, JB 'Global environmental regulation: Instrument choice in legal context' (1999) 108 *Yale Law Journal* 677

Wiersma, LL 'Indigenous lands as cultural property: A new approach to indigenous land claims' (2005) 54 *Duke Law Journal* 1061

Wiessner, S 'The cultural rights of indigenous peoples: Achievements and continuing

challenges' (2011) 22 *The European Journal of International Law* 140

Wiessner, S 'Rights and status of indigenous peoples: A global comparative and international legal analysis' (1999) 12 *Harvard Human Rights Journal* 57

Wilcomb, W & Smith, H 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision' (2011) 11 *African Human Rights Law Journal* 422

Willem den Besten, J, Arts, B &Verkooijen, P 'The evolution of REDD+: An analysis of discursive institutional dynamics' (January 2014) 35 *Environmental Science & Policy* 40

Xanthaki, A 'Land rights of indigenous peoples in South-East Asia' (2003) 4 *Melbourne Journal of International Law*

Young, O 'International regimes: Toward a theory of institutions' (1986) 39 *World Politics* 104

Zerner, C 'Through a green lens: The construction of customary environmental law and community in Indonesia's Maluku Islands' (1994) 28 *Law and Society Review* 1079

Reports and papers

ACHPR & IWGIA 'Report of the African Commission's Working Group of Experts on Indigenous populations/communities', submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa', adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary, 2005

Adaptation Fund Board 'Report of the 21st meeting of the Adaptation Fund Board', Bonn, Germany, AFB/B.21/8/Rev.,13-4 July 2013

Adaptation Fund Board 'Report of the 20th meeting of the Adaptation Fund Board'Bonn, Germany, AFB/B.20/7, 4-5 April 2013

Adaptation Fund Board 'Report of the 17th meeting of the Adaptation Fund Board' AFB/B.17/6, 16 April 2012

AfDB 'Investing in Africa's future: The AfDB in the 21st Century Report of the High Level Panel' AfDB: Cote d'Ivoire, 2007

African Union & NEPAD 'New Partnership for Africa's Development (NEPAD) Action Plan of the Environment Initiative', October 2003

Alajarvi, P 'Forest management planning and inventory' (1996) ZFAP, MENR. Lusaka, Zambia

Analytical study on the relationship between human rights and the environment' A/HRC/19/34, 16 December 2011

Anaya, J 'Preliminary note on the situation of indigenous peoples in Botswana' A/HRC/12/34/Add.4 , 23 September 2009

Anaya, J 'The situation of indigenous peoples in the Republic of the Congo' A/HRC/18/35/Add.5, 11 July 2011

Anaya, J 'The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland' A/HRC/18/35/Add.2, 6 June, 2011

Bierbaum, R *et al* 'Confronting climate change : Avoiding the unmanageable and managing the unavoidable' Scientific Expert Group Report on Climate Change and Sustainable Development Prepared for the 15th session of the Commission on Sustainable Development http://www.whrc.org/news/pressroom/pdf/SEG_Report.pdf (accessed 4 July 2014)

Gorte, RW & Sheikh, PA 'Deforestation and climate change' CRS Report for Congress, March 2010

Bosquet, B & Aquino, AR 'Forest Carbon Partnership Facility: A framework for piloting activities to reduce emissions from deforestation and forest degradation' FCPF https://wbcarbonfinance.org/docs/FCPF_Booklet_English_version_2.pdf (accessed 13 May 2013

Caravani, A *et al* 'Climate Finance Thematic Briefing: Adaptation Finance' ODI & Heinrich Böll Stiftung North America, 2013

Centre for International Environmental 'Analysis of human rights language in the Cancun Agreements (UNFCCC 16th session of the Conference of the Parties)' Centre for International Environmental Law, 2011

Centre for International Environmental Law 'Human rights and climate change: Practical steps for implementation' Centre for International Environmental Law, 2009

Chidumayo, EN 'Development of reference emission levels for Zambia' Report prepared for FAO – Zambia, 2012

'Climate change, human rights and indigenous peoples' submission to the United Nations

High Commissioner on Human Rights by the International Indian Treaty Council http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Submissions.aspx (accessed 20 June 2014)

Cloutier, SW 'Remarks upon receiving the Canadian environment awards citation of a life time'Inuit Circumpolar Council, Canada, June 5 2006

Cobo, JRM 'Study of the problem of discrimination against indigenous populations' E/CN.4/SUB.2/1986/7/ADD.1-5, 1986

Combined initial, second and third periodic reports of the United Republic of Tanzania submitted to the International Covenant on Economic, Social and Cultural rights (UN doc E/C.12/TZA/1-3, 28 March 2011) at the occasion of the 48th session of the Committee on Economic Social and Cultural Rights' http://www.tanzaniapastoralist.org/uploads/1/0/2/7/10277102/shadow_report_iphg_tanzania49.pdf. (accessed 13 December 2013)

Constitutional Rights Project (CRP) 'Land, oil and human rights in Nigeria's delta region' CRP, 1999

Cousins, B 'Potential and pitfalls of 'communal' land tenure reform: Experience in Africa and implications for South Africa' paper for World Bank conference on *Land governance in support of the MDGs: Responding to new challenge*s, March 2009

Cousins, T & Hornby, D 'Leaping the fissures: Bridging the gap between paper and real practice in setting up common property institutions in land reform in South Africa' prepared for the CASS/PLAAS CBNRM Programme, 2nd annual regional meeting, *Legal aspects of governance of CBNRM*, October 2000

Daes, Erica-Irene 'Study on indigenous peoples and their relationship to land', final working paper by the Special Rapporteur to the Commission on Human Rights, UN Doc.E/CN.4/2/2001/21

De Chazournes, BL 'United Nations Framework Convention on Climate Change', United Nations Audiovisual Library of International Law http://legal.un.org/avl/ha/kpccc/kpccc.html (accessed 14 June 2014)

Draft enhanced conceptual framework Proposed framework for adaptation and mitigation

measures to combat climate change in Central Africa' Annex III of the 'Report of the Central African subregional meeting on climate change convened by the African Ministerial Conference on the Environment' AMCEN/CA/CC/1, 15-17 October 2009

Draft for Discussion Quick Start Actions and Establishment of the Multi-Donor Trust Fund for the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation (UN-REDD) in Developing Countries' 14 May 2008, 2 http://www.un-redd.org/Portals/15/documents/publications/UN-REDD_QuickStartActions.pdf/(accessed 18 November 2013)

Eastern Shawnee Tribe of Oklahoma, Confederated Tribes of the Grand Ronde Community of Oregon and others 'The doctrine of discovery: The international law of colonialism' Conference Room Paper 11th session of the U.N. Permanent Forum on Indigenous Issues, 7-18 May 2012

Economic Commission for Africa 'Ministerial Statement' Conference of African Ministers of Finance, Planning and Economic Development 40th session of the Commission', Addis Ababa, Ethiopia, E/ECA/COE/26/L6, 2-3 April 2007

Economic Commission for Africa 'Report on Climate for Development (ClimDev-Africa) in Africa Programme' 8th session of the Committee on Food Security and Sustainable Development and the regional implementation meeting for the 20th session of the Commission on Sustainable Development E/ECA/CFSSD/8/8, 13 November 2012

Eliasch Review 'Climate change: Financing global forests' UK Office of Climate Change, 2008

Fagbohun, L 'Mournful remedies, endless conflicts and inconsistencies in Nigeria's quest for environmental governance: Rethinking the legal possibilities for Sustainability' Nigerian Institute of Advanced Legal Studies, 2012

Fairhead, J 'Food Security in North and South Kivu (Zaire)' Final consultancy report for Oxfam, 1989

FAO 'Global forest resources assessment 2000: Main report' Rome: FAO, 2000

FAO 'Global Outlook Study For Africa. Sub-regional Report: Southern Africa' African Development Bank/European Commission/FAO Rome, 2005

Federal Government of Nigeria 'Nigeria's path to sustainable development through green economy: Country Report to the Rio+20 Summit', June 2012

Federal Republic of Nigeria 'Nigeria's 1st National Communication under the United Nations

Framework Convention on Climate Change', 2003

Federal Republic of Nigeria 'REDD+ Readiness Preparation Proposal (R-PP)' for consideration by Forest Carbon Partnership Facility (FCPF) &The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD), November 2013

Fisher, LM *et al* 'African peace and security architecture' A report commissioned by the African Union's Peace and Security Department and subsequently adopted by the 3rd meeting of the Chief Executives and Senior Officials of the AU, RECs and RMs on the Implementation of the MoU on Co-operation in the Area of Peace and Security, held from, Zanzibar, Tanzania, 4-10 November 2010

Forest Carbon Partnership Facility (FCPF) and The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) Readiness Preparation Proposal (R-PP) Version 6 Working Draft April 4, 2012

Frichner, TG 'Preliminary study of the impact on indigenous peoples of the international legal construct known as the doctrine of discovery' E/C.19/2010/13, 2010

'GEF-NGO Network Report to GEF Council' (1 July 2011-30 June 2012) GEF Council meeting, GEF/C.43/Inf.10, November 13-15, 2012

Hans–Martin F¨ussel 'Vulnerability in climate change research: A comprehensive conceptual framework' University of California International and Area Studies Breslauer Symposium Paper , 2005

Hansungule, M 'Indigenous peoples and minorities in Africa: Who are these people?' A paper prepared for the two-day Symposium on Indigenous Peoples and Minorities organised by the Kenyan National Commission on Human Rights at Holiday Inn, Nairobi, Kenya, 30-31 October, 2006

Hansungule, M 'Challenges to the effective legal protection of indigenous peoples in Central Africa' (On file with the author)

Hansungunle, M 'Dual land tenure in Zambia & implications' (unpublished) (on file with the author)

Helmut, J & Lambin, EF 'What drives tropical deforestation A meta-analysis of proximate

and underlying causes of deforestation based on subnational case study evidence' LUCC Report Series IV, 2001

Herbert, R & Gruzd, S 'The African Peer Review Mechanism:Lessons from the Pioneers' The South African Institute of International Affairs Jan Smuts House, Johannesburg, 2008

Human Rights and Equal Opportunities Commission, Australia 'Background paper: Human rights and climate change' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Australia_HR_Equal_Opportunity_Commission_HR_ClimateChange_4.pdf (accessed 8 April 2014)

Human Rights Watch 'Protectors or pretenders- Government Human Rights Commission in Africa' Human Rights Watch, 2001

ILO/ACHPR 'Nigeria: constitutional, legislative and administrative provisions concerning indigenous peoples', 2009

Independent Commission on International Humanitarian Issues 'Indigenous peoples: A global quest for justice' Independent Commission on International Humanitarian Issues, 1987

Intergovernmental Panel on Climate Change (IPCC) 'Impacts, adaptations and mitigation of climate change: Scientific-Technical Analyses' Contribution of Working Group II to IPCC SAR, 1995

International Development Law Organisation (IDLO), Food and Agriculture Organisation of the United Nations (FAO) 'Legal Preparedness for REDD+ in Zambia', November 2011

IPACC 'The doctrines of discovery, 'terra nullius' and the legal marginalisation of indigenous peoples in contemporary Africa', statement by the Indigenous Peoples of Africa Coordinating Committee to the 11th session of the UN Permanent Forum on Indigenous Issues, May, 2012

'IPCC 'Summary for policymakers land use, land-use change, and forestry' IPCC, 2000

IWGIA & IFAD 'Country Technical Notes on Indigenous Peoples' Issues: The United Republic of Tanzania, 2012

Kajembe, GC *et al* 'The Kilosa District REDD+ pilot project, Tanzania: A socioeconomic baseline survey' International Institute for Environment and Development (UK), 2013

Kalaba, FK, Quinn, CJ & Dougill, AJ 'Contribution of forest provisioning ecosystem services to

rural livelihoods in Copperbelt's Miombo woodlands, Zambia' December, 2012

Kalinda, T *et al* 'Use of Integrated Land Use Assessment (ILUA) data for forestry and agricultural policy review and analysis in Zambia', 2008

Kenya Land Commission Report Goverment printer Nairobi, 1933

Keohane, RO & Victor, DG 'The regime complex for climate change' The Harvard Project for International Climate Agreements, 2010

Kidd, C & Zaninka, P *Securing indigenous peoples' rights in conservation: A review of South-West Uganda* The Forest Peoples Programme, 2008

Kolmannskog, V 'Climate change, disaster, displacement and migration: Initial evidence from Africa' New Issues in Refugee Research, Research Paper No. 180, December 2009

Lee, R 'Indigenism and its discontents: Anthropology and the small peoples at the millennium', paper presented as the keynote address at the annual meeting of the American Ethnological Society, Tampa, March, 2000

Martinez, MA 'Human rights of indigenous peoples: Study on treaties, agreements and other constructive arrangements between States and indigenous populations' E/CN.4/Sub.2/1999/20, 22 June 1999

Martone, F & Rubis, J 'Indigenous peoples and the Green Climate Fund' A technical briefing for Indigenous Peoples, policymakers and support groups, Forest Peoples Programme & Indigenous Peoples' Network of Malaysia, August 2012

Matibini, P 'Access to justice and the rule of law'An Issue Paper Presented for the Commission on Legal Empowerment of the Poor' www.undp.org/legalempowerment/Zambia/27_3_Access_to_Justice.pdf. (accessed 24 October 2013)

Mbow, C, Skole, D & Moussa, D 'Challenges and prospects for REDD+ in Africa: Desk review of REDD+ implementation in Africa' GLP Report No.5 GLP-IPO Copenhagen, 2012

Milledge, S, Gelvas, I & Ahrends, A 'Forestry, governance and national development: Lessons learned from a logging boom in Southern Tanzania' TRAFFIC East/Southern Africa, 2007

Millennium Ecosystem Assessment (MEA), 2005

Miller, RJ & Ruru, J 'An indigenous lens into comparative law: The doctrine of discovery in

the United States and New Zealand' Legal Research Paper Series Paper No. 2, 2008

Ministry of Tourism, Environment and Natural Resources Forestry Department 'UN REDD Stakeholders' consultative meeting report, Mulungushi International Conference Centre, 29 September 2009

Morgera, E 'No need to reinvent the wheel for a human rights-based approach to tackling climate change: The contribution of international biodiversity law' University of Edinburgh School of Law Research Paper Series, 2012

Moritz von Normann 'Does a human rights-based approach to climate change lead to ecological justice?' delivered at Lund Conference on Earth System Governance *Towards a just and legitimate earth system governance: Addressing inequalities* April 18-20, 2012

NEPAD 'African Peer Review Mechanism Country Review: Report of the Republic of Rwanda' 2005

Nhemachena, C & Hassan, R 'Micro-level analysis of farmers' adaptation to climate change in Southern Africa' IFPRI Discussion Paper No. 00714, 2007

'Notes from R-PP CSO consultative meeting' Organised by UNDP/Federal Ministry of Environment, Abuja in Nigeria' 22 July, 2013

Nzeadibe, TC *et al* 'Farmers' perception of climate change governance and adaptation constraints in Niger Delta region of Nigeria' African Technology Policy Studies Network, Nairobi, 2011

'Oral Statement by Nord Sud XXI to the 5th ordinary session of the African Commission on Human and Peoples' Rights held at Banjul, the Gambia Item 7–WG on Extractive Industries and the Environment, 21 April 2012

Odu-Oji, G 'Seminar Presentation on Status of UN-REDD+ in Nigeria: Challenges and policy option' University of Ibadan, Ibadan, Center for Sustainable Development, August 2013

Okoth-Ogendo, HWO 'The tragic African commons: A century of expropriation, suppression and subversion', a keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1-4 August 2005

Olengurumwa, OPK '1990's Tanzania laws reforms and its impact on the pastoral land tenure' a paper prepared for Pastoral Week at Arusha, 14-16 February 2010

Open Society Foundation 'The New Partnership for Africa's Development (NEPAD) in plain

language: A resource for organisations' 2003

Oxfam 'Survival of the fittest: Pastoralism and climate change in East Africa' Oxfam, 2008

Oyebo, M, Bisong, F & Morakinyo T 'A preliminary assessment of the context for REDD in Nigeria', commissioned by the Federal Ministry of Environment, the Cross River State's Forestry Comission and UNDP, 2010

Peace and Security Council 'Report of the Chairperson of the Commission on the Partnership between the African Union and the United Nations on Peace and Security: Towards greater strategic and political coherence', 307th meeting, Addis Ababa, Ethiopia PSC/PR/2.(CCCVII), 9 January 2012

Quan, J & Dyer, N 'Climate change and land tenure: The implications of climate change for land tenure and land policy' Food and Agriculture Organisation of the United Nations, 2008

REDD+ SES 'REDD+ Social & Environmental Standards' Version 2, 10 September 2012

Report of the UN Special Rapporteur, Rodolfo Stavenhagen, Mission to the Philippines, UN Doc. E/CN.4/2003/90, Add. 3, 2003

Report of the Working Group on Indigenous Populations/Communities Mission to the Republic of Rwanda, 1-5 December 2008, adopted by the African Commission on Human and Peoples' Rights at its 47th ordinary session, 30, 12-26 May 2010

Report of the Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya, 1-19 March 2010, adopted by the African Commission on Human and Peoples' Rights at its 50th ordinary session, 24 October-5 November 2011

Report of the Country visit of the Working Group on Indigenous Populations/Communities to the Republic of Congo, 15-24 March, 2010

Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission at its 28th ordinary session, 2005

Report of the Central African sub regional meeting on climate change convened by the African Ministerial Conference on the Environment AMCEN/CA/CC/1, 15 October 2009

Report of the Eastern African sub regional meeting on climate change, jointly convened by the East African Community and the African Ministerial Conference on the Environment AMCEN/EAC/CC/1, 3 September 2009

Report of the North and Southern African sub regional meeting on climate change

AMCEN/NSA/CC/1, 19 April 2010

Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights' UN Document A/HRC/10/61, 15 January 2009

Report on Climate for Development (ClimDev-Africa) in Africa Programme E/ECA/CFSSD/8/8, 13 November 2012

Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992

Report of the Country visit of the Working Group on Indigenous Populations/Communities to the Republic of Congo, 15-24 March, 2010

Report on the impacts of climate change mitigation measures on indigenous peoples on their territories and lands E/C 19/2008/10 (Unedited version) 2008

Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, 2005

Report of the Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya',1-19 March 2010, adopted by the Commission at its 50th ordinary session, 24 October-5 November 2001

Report of the Working Group on Indigenous Populations/Communities Mission to the Republic of Rwanda', 1-5 December 2008, adopted by the Commission at its 47th ordinary session, 12-26 May 2010

Republic of Zambia 'National Programme Document' UN Collaborative Programme on Reducing Emissions from Deforestation in Developing Countries', 2010

Republic of Zambia 'Integrated Land Use Assessment (ILUA) II, Project Plan', 2010

Republic of Zambia 'Initial National Comunication under the United Nations Framework Convention on Climate Change', August 2002

Republic of Zambia 'National Adaptation Programme of Action on climate change' , September 2007

'Review synthesis of Nigeria R-PP', October and November 2013

Schade, J 'Human rights, climate change, and climate policies in Kenya: How climate variability and agrofuel expansion impact on the enjoyment of human in the Tana Delta',

Research Mission Report of a joint effort by COMCAD (Bielefeld University), FIAN Germany,

KYF and CEMIRIDE, 2011

Schalatek, L *et al* 'Climate finance thematic briefing: Adaptation finance' Overseas, 2012

Somare, MT 'Statement by Sir Michael T Somare, Prime Minister of Papua New Guinea' 2005

Stavenhagen, R 'Report of the special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, mission to the Philippines' U.N.Doc.E/CN.4/2003/90/Add.3, 2003

Streck, C & O'Sullivan, R 'Legal tools for the ENCOFOR Programme' 2007

Tanzania Natural Resource Forum 'Community-Based Natural Resource Management Stocktaking Exercise in Tanzania' Tanzania Natural Resource Forum, 2013

Tanzania 'REDD readiness progress fact sheet' March, 2012

Tebtebba Foundation 'Indigenous peoples, forests & REDD Plus: State of forests, policy environment & ways forward' Tebtebba Foundation, 2010

The New Partnership for Africa's Development 'The African Peer Review Mechanism Base Document', 2003

The Norwegian Forum for Environment and Development 'Beyond formalisation land rights agenda for Norwegian development and foreign policy' The Norwegian Forum for Environment and Development, 2007

The World Bank 'World Development Report 2006: Equity and development' World Bank, 2006

UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries National Joint Programme Document 'Independent Technical Review: Zambia', 2010

UNDP and Overseas Development Institute (ODI) 'Direct Access to Climate Finance: Experiences and lessons learned' Discussion Paper, UNDP, 2011

UN Economic and Social Council 'Report on Climate for Development (ClimDev-Africa) in Africa Programme' E/ECA/CFSSD/8/8 19-21 November 2012

UN Economic and Social Council Economic Commission for Africa & African Union Commission 'Report on Climate Change and Development in Africa' E/ECA/COE/29/5 AU/CAMEF/EXP/5/(V) 2 March 2010

UN Economic and Social Council 'Report on Climate for Development (ClimDev-Africa) in Africa Programme' E/ECA/CFSSD/8/8

UNFCCC AWGLCA 'Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan Submissions from intergovernmental organisations' 4th session Poznan, FCCC/AWGLCA/2008/MISC.6/Add.2, 1-10 December 2008

UNFCCC AWGLCA 'Paper no. 1: Bangladesh, Cameroon, Central African Republic, Congo, Costa Rica, Côte d'Ivoire, Democratic Republic of the Congo, Dominica, Dominican Republic, Fiji, Gabon, Ghana, Guyana, Honduras, Kenya, Pakistan, Panama, Papua New Guinea, Sierra Leone, Solomon Islands, Suriname and Uganda' Fifteenth session Bonn, FCCC/AWGLCA/2012/MISC.3, 15–24 May 2012

UNFCCC AWGLCA 'Paper No. 1: Belize, Central African, Costa Rica, Dominician Republic, Democratic Republic of the Congo, Ecuador, Equatorial Guinea, Honduras, Ghana, Guyana, Kenya, Madagascar, Nepal, Nicaragua, Panama, Papua New Guinea, Singapore, Solomon Islands , Thailand, Uganda, United Republic of Tanzania, Vanuatu and Vietnam' Ad-hoc Working Group on Long Term Cooperative Action 4th session FCCC/AWGLCA/2009/MISC.1/Add.4, 2009

UNFCCC AWGLCA 'Paper No. 2: International Labour Organisation Submission to be considered in the update of the Assembly Document (Bali Action Plan) to the AWG-LCA' Poznan, FCCC/AWGLCA/2008/MISC.6/Add.2, 6 December 2008,

UNFCCC AWGLCA `Paper No. 3: China China's Submission on the Modalities and Procedures for Financing the Results-Based REDD-plus Actions' FCCC/AWGLCA/2012/MISC.3, 2012

UNFCCC AWGLCA 'Paper No. 4: International Union for the Conservation of Nature on behalf of the International Union for the Conservation of Nature, the Nature Conservancy, WWF, Conservation International, Birdlife International, Indigenous People of Africa Co-ordinating Committee, Practical Action, Wild Foundation, Wildlife Conservation Society, Fauna and Flora International and Wetlands International Ecosystem-based adaptation: An approach for building resilience and reducing risk for local communities and ecosystems' FCCC/AWGLCA/2008/MISC.6/Add.2, 2008

UNFCCC AWGLCA 'Submission from Burundi, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Rwanda, Sao Tome and Principe' 50th session Bonn, FCCC/AWGLCA/2012/MISC.3/Add.2, 15-24 May 2012

UNFCCC CP 'Paper No. 2: Mexico Submission' FCCC/SBSTA/2009/MISC.1, 2009

UNFCCC CP 'Report of the Conference of the Parties on its 13th session', Bali Addendum . Part Two. Action Taken by the Conference of Parties at its 13th session FCCC/CP/2007/6/Add.1, 3-15 December 2007

UNFCCC CP 'Submission by the Governments of Papua New Guinea and Costa Rica 'Reducing emissions from deforestation in developing countries: Approaches to stimulate action" to the provisional agenda of the Conference of the Parties at its eleventh session' FCCC/CP/2005/MISC.1 3-4, 2005

UNFCCC KP CMP 'Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its 8th session' held in Doha, FCCC/KP/CMP/2012/13/Add.2, 26 November-8 December 2012

UNFCCC SBI 'Recommendations of the Executive Board of the clean development mechanism on possible changes to the modalities and procedures of the clean development mechanism' FCCC/SBI/2013/INF.1, 2013

UNFCCC SBI 'Report on the workshop on the review of the modalities and procedures of the clean development mechanism' FCCC/SBI/2013/INF.6 , 2013

UNFCCC SBI 'Views on possible changes to the modalities and procedures of the clean development mechanism' 38th session Bonn, 3-14 June 2013

UNFCCC SBSTA 'Paper No. 8: Gabon on behalf of Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equitorial Guinea and Gabon' FCCC/SBSTA/2006/MISC.5 , 2006

UNFCCC SBSTA 'Paper No. 1: Czech Republic on behalf of the European Community and its member states' 13th session Bonn, FCCC/SBSTA/2009/MISC.1, 10 June 2009

UNFCCC SBSTA 'Paper No. 2: Ecuador 'FCCC/SBSTA/2009/MISC.1, 10 June 2009

UNFCCC SBSTA 'Paper No. 3 Tuvalu', 30th session Bonn, Item 5 of the provisional agenda Reducing emissions from deforestation in developing countries: Approaches to stimulate action Issues relating to indigenous people and local communities for the development and application of methodologies FCCC/SBSTA/2009/MISC.1, 10 June 2009

UNFCCC SBSTA 'Paper No. 4: Panama Submission' FCCC/SBSTA/2009/MISC.1, 2009

UNFCCC SBSTA 'Paper No. 6: United Nations Forum on Forests' 26th session

Bonn, Views on the range of topics and other relevant information relating to reducing emissions from deforestation in developing countries Submissions from intergovernmental organisations, FCCC/SBSTA/2007/MISC.3, 7-18 May 2007

UNFCCC SBSTA 'Reducing Emissions from Deforestation in developing countries: Approaches to Stimulate Action' FCCC/SBSTA/2006/MISC.5, 2006

UNFCCC SBSTA 'Reducing emissions from deforestation in developing countries: Approaches to stimulate action Views on issues related to further steps under the Convention related to reducing emissions from deforestation in developing countries: approaches to stimulate action' FCCC/SBSTA/2007/MISC.14/Add.3, 2007

UNFCCC SBSTA 'Reducing emissions from deforestation in developing countries: approaches to stimulate action Issues relating to indigenous people and local communities for the development and application of methodologies' Item 5 of the provisional agenda, 30th session Bonn, 10 June, FCCC/SBSTA/2009/MISC.1, 2009

UNFCCC SBSTA 'Reducing emissions from deforestation in developing countries: approaches to stimulate action Views on outstanding methodological issues related to policy approaches and positive incentives to reduce emissions from deforestation and forest degradation in developing countries' 'Item 5 of the provisional agenda, 28th session Bonn, FCCC/SBSTA/2008/MISC.4/Add.1, 4-13 June 2008

UNFCCC SBSTA 'Report of the Subsidiary Body for Scientific and Technological Advice on its 29th session' held in Poznan from, FCCC/SBSTA/2008/13, 1-10 December 2008

UNFCCC SBSTA 'Report on the second workshop on reducing emissions from deforestation in developing countries, Note by the secretariat' FCCC/SBSTA/2007/3, 2007

UNFCCC SBSTA 'Submission from the United States of America Potential Additional Guidance on Informing How All Safeguards Are Being Addressed and Respected' 36th session Bonn, FCCC/SBSTA/2012/MISC.9, 14–25 May 2012

UNFCCC SBSTA 'Submision from Tuvalu' 27th session Bali, Views on issues related to further steps under the Convention related to reducing emissions from deforestation in developing countries: approaches to stimulate action FCCC/SBSTA/2007/MISC.14, 3-11 December 2007

UNFCCC SBSTA 'Submission from Belize, Bolivia, Cameroon, Central African Republic,

Congo, Costa Rica, Democratic Republic of the Congo, Dominican Republic, Equatorial guinea, Gabon, Ghana, Guatemala, Guyana, Honduras, Kenya, Lesotho, Liberia, Madagascar, Panama, Papua New Guinea, Singapore, Solomon Islands, Thailand, Uganda and Vanuatu' FCCC/SBSTA/2007/MISC.14, 2007

UNFCCC SBSTA 'Views on outstanding methodological issues related to policy approaches and positive incentives to reduce emissions from deforestation and forest degradation in developing countries, 28th session Bonn, FCCC/SBSTA/2008/MISC.4/Add.1, 4-13 June 2008

UNFCCC SBSTA 'Views on the range of topics and other relevant information relating to Reducing Emissions from Deforestation in developing countries' FCCC/SBSTA/2007/ MISC.2, 2007

UN Human Rights Council 'Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights', A/HRC/10/61, 15 January 2009

UN Human Rights Council, Universal Periodic Review Report of the Working Group on the Universal Periodic Review, Nigeria, 11th session, A/HRC/11/26, 5 October 2009

UN Human Rights Council, Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, Botswana, 10th session, A/HRC/10/69, 13 January 2009

UN Human Rights Council 'Analytical study on the relationship between human rights and the environment' A/HRC/19/34, 16 December 2011

UN Permanent Forum on Indigenous Issues (UNPFII) 'Study on shifting cultivation and the socio-cultural integrity of indigenous peoples' E/C.19/2012/8, 2012

UN-REDD Programme 'Handbook for National Programmes and Other National-Level Activities', 2012

UN-REDD Programme 'National Programme Document – Zambia' UN-REDD/PB4/4ci/ENG, 17-19 March 2010

UN-REDD Programme National Programme Document- Nigeria' UN-REDD Programme 7th Policy Board meeting, Berlin, Germany UN-REDD/PB7/2011/8, 13-14 October 2011

UN-REDD Programme 'Report of the 6th Policy Board meeting', Da Lat,Viet Nam, 21-22 March 2011

UN-REDD Programme 'Report of the UN-REDD Programme 5th Policy Board meeting',

Washington, D.C., USA , 4-5 November 2010

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities 'Study of the problems of discrimination against indigenous population', UN ESCOR, UN Doc E/CN4 Sub2 1986/7/Adds 1-4, 1986

UN Subcommission on Prevention of Discrimination and Protection of Minorities 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities' 568, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.78.XIV.1, 1979

United Nations Development Programme 'Attacking poverty while improving the environment initiative' UNDP, 1999

United Nations Educational, Scientific and Cultural Organisation (UNESCO) 'The United Nations World Water Development Report 3: Water in a changing world' UNESCO, 2009

United Nations Framework Convention on Climate Change Subsidiary Body for Scientific and Technological Advice 'Paper No. 3: Bolivia Agenda Item 6: Reducing Emissions from Deforestation in Developing Countries: Approaches to Stimulate Action', 24th session Bonn, Item 6 of the provisional agenda' FCCC/SBSTA/2006/MISC.5, 18–26 May 2006

United Republic of Tanzania 'Final Draft: Forest Carbon Partnership Facility (FCPF) and Readiness Preparation Proposal (R-PP)',15 June 2010

United Republic of Tanzania 'National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+), 2nd Draft, June 2012

UN-REDD 'Legal and institutional foundations for the national implementation of REDD: Lessons from early experience in developing and developed countries', 2009

UN-REDD Programme 'Stakeholder sensitization meeting report', Chrismar Hotel Lusaka 7th May 2009

UN-REDD Programme 'Demande de décision intersession du Conseil d'orientation concernant le prolongement sans frais additionnel du programme national de la Papua Nouvelle Guinée (PNG)', 8 Octobre 2013

UN-REDD Programme 'National Programme Document – Zambia' UN-REDD/PB4/4ci/ENG, 17-19 March 2010

UN-REDD Programme 'National Programme Document- Nigeria' UN-REDD/PB7/2011/8, 2011

UN-REDD Programme 'Report on the UN-REDD Mission to Zambia 28-29 September 2009' 6 November 2009

UN-REDD Programme 'The UN-REDD Programme Strategy 2011-2015'

UN-REDD Programme 'What are the ecosystem-derived benefits of REDD+ and why do they matter?', 1 October 2010

UN-REDD Programme 'Handbook for National Programmes and Other National-Level Activities', 2012

USAID 'Tenure and indigenous peoples: The importance of self-determination, territory, and rights to land and other natural resources property rights and resource governance' *Briefing Paper*, 2012

Verhelst, T 'Safeguarding African customary law: Judicial and legislative processes for its adaptation and integration' Universit of California Los Angeles Ocassional Paper No.7, 1968

Vinya, R *et al* 'Preliminary Study on the Drivers of Deforestation and Potential for REDD+ in Zambia.' A consultancy report prepared for the Forestry Department and FAO under the national UN-REDD+ Programme Ministry of Lands & Natural Resources. Lusaka, Zambia, 2012

Walker, SM 'The future of human rights impact assessments of trade agreements' (2009) 35 School of Human Rights Research Series 1-39

Warner, K 'Climate change induced displacement: Adaptation policy in the context of the UNFCCC Climate Negotiation' (2011) Legal and Protection Policy Research Series 1-19

World Development Report Development and climate change, 2010

World Summit on Sustainable Development (WSSD) Johannesburg, South Africa A/CONF.199/L.6/Rev.2

World Summit on Sustainable Development Plan of Implementation (WSSDPI) Advance unedited text 4, September 2002

Zambia Climate Change Network 'Contexturizing REDD+ in the global climate change regime: A CSO perspective' presented at the UN-REDD Orientation Workshop Crestra Golf View Hotel Lusaka, 27-29 June 2011

Newsletters/ Newspaper Article

Beaumont, P 'Kenya's herdsmen are facing extinction as global warming destroys their lands' *The Observer* November 12, 2006

De Schutter, O 'Climate change is a human rights issue - and that's how we can solve it' *The Guardian* April 24 2012

Durning, AT 'Guardians of the land: Indigenous peoples and the health of the earth' *World Watcher Paper* 1992 112

'Getting serious about the new realities of global climate change' *Bulletin of the Atomic Scientists* 2013 69(4)

Hansen, J 'Defusing the global warming time bomb' *Scientific American Magazine* March 2004

Herold, M *et al* 'A step-wise framework for setting REDD+ forest reference emission levels and forest reference levels' *Infobriefs* No. 52, April 2012

'Hunger Threatens Kiteto's Akiye' *The Guardian* February 26-March 3, 2012

Johannes, RE 'Did indigenous conservation ethics exist?' *SPC Traditional Marine Resource Management and Knowledge Information Bulletin* 14 October 2002

Mbow, C 'Could carbon buy food? The stakes of mitigation versus adaptation to climate change in African Countries' 5 *GLP News Letter* 2009 20-23

Pearce, F 'World lays odds on global catastrophe' *New Science* April 8 1995 4

Reid, H & Huq, S 'How we are set to cope with the impacts' *International Institute of Environment and Development* 2007

Stiglitz, JE 'Conservation: Analysis' *The Independent* 2005

'Whales are people, too' *The Economist* 25 February 2012

Woodke, J 'The impact of climate change on nomadic people' *Footsteps* 2007 70

Online resources

'A complaint mechanism for REDD+', a report from the Center for International Environmental Law and Rainforest Foundation Norway (May 2011) http://www.ciel.org/Publications/REDD+_ComplaintMech_May11.pdf (accessed 13 May 2012)

'About UNEP' http://www.unep.org/About/ (accessed 18 October 2013)

Adaptation funds 'Environmental and social safeguards, readiness and more' the AFB's 21st meeting https://www.adaptation-fund.org/media/environmental-and-social-safeguards-readiness-and-more-afbs-21st-meeting (accessed 3 June 2014)

Ad hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) http://unfccc.int/bodies/body/6431.php (accessed 13 April 2014)

AfDB 'Operationalising the Green Climate Fund: Enabling African Access' (October, 2012) http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Operationalising%20the%20Green%20Climate%20Fund-Enabling%20African%20Access.pdf (accessed 11 July 2014)

Afifi, T *et al* 'Climate change, vulnerability and human mobility: Perspectives of refugees from the East and Horn of Africa' United Nations University Institute for Environment and Human Security, Report No. 1, June 2012 <www.reliefweb.int/sites/reliefweb.int/files/resources/East%20and%20Horn%20of%20Africa_final_web.pdf> (accessed 15 October 2013)

'Africa demands compo for climate chaos' http://www.abc.net.au/news/2009-08-25/africa-demands-compo-for-climate-chaos/1404220 (accessed 18 April 2014)

'African Commission on Human & Peoples' Rights 'Special Mechanisms' http://www.achpr.org/mechanisms/ (accessed 25 June 2013)

'African monitoring of the environment for sustainable development' http://www.eumetsat.int/website/home/AboutUs/InternationalCo-operation/Africa/AfricanMonitoringoftheEnvironmentforSustainableDevelopmentAMESD/index.html (accessed 13 February 2014)

'Agrofuels and the myth of the marginal lands' A briefing by The Gaia Foundation, Biofuelwatch, the African Biodiversity Network, Salva La Selva, Watch Indonesia and EcoNexus (September 2008) www.cbd.int/doc/biofuel/Econexus%20Briefing%20AgrofuelsMarginalMyth.pdf (accessed 24 May 2013)

'AMCEN at a glance' http://www.unep.org/roa/amcen/About_AMCEN/default.asp (accessed 26 June 2013)

'AMCEN role' http://www.unep.org/roa/amcen/About_AMCEN/default2.asp (accessed 26 June 2013)

Appendix L 'Overview of the Global Environment Facility and the World Bank's Roles' http://www.oecd.org/derec/49682113.pdf (accessed 15 October 2013) 84-92

APRM 'Member countries' http://aprm-au.org/aprm-map (accessed 22 May 2014)

APRM 'Mission' http://aprm-au.org/mission (accessed 22 May 2014)

'Arid Lands Institute' http://www.achpr.org/network/ngo/399/ (accessed 26 June 2013)

AU-EU Partnership 'Achievements and milestones' http://www.africa-eu-partnership.org/areas-co-operation/climate-change/achievements-and-milestones (accessed 26 February 2014)

'Australian Government submission to the Office of the High Commissioner for the Human Rights on the Relationship between climate change and human rights' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Australia.pdf (accessed 18 October 2012)

Barnett, J *et al* 'Human security' IPCC WGII AR5 (28 October 2013) http://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-Chap12_FGDall.pdf (accessed 14 May 2014)

CCBA 'About CCBA' http://www.climate-standards.org/about-ccba/(accessed 18 October 2012

'Committee of African Heads of State and Government on Climate Change meeting' http://www.nepad.org/climatechangeandsustainabledevelopment/news/2570/committee-african-heads-state-and-government-climat (accessed 26 June 2013)

'Cameroon Environmental Protection Association'http://www.achpr.org/network/ngo/362/ (accessed 26 June 2013)

Cechvala, S 'Rainfall & migration: Somali-Kenyan conflict' (December 2011 - ICE Case Number 256) <www1.american.edu/ted/ICE/somalia-rainfall.html> (accessed 9 November 2013)

Centre for Human Rights (CHR) 'Kenya' http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Kenya.pdf (accessed 15 March 2013)

Centre for Human Rights 'Nigeria' <www1.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/Report/The%20History%20And%20Social%20Organisation%20Of%20The%20Pastoral%20Fulbe%20Society.doc.> (accessed 28 October 2013)

Centre for International Environmental Law 'REDD legal issues: Indigenous peoples and

local communities'
http://www.conservation.org/Documents/Joint_Climate_Policy_Positions/Indigenous_Peoples_Local_Communities_REDDplus_English.pdf (accessed 23 March 2012)

Chagutah, T 'PAP is fully behind the common African position on climate change' interview conducted' http://www.za.boell.org/web/cop17-785.html (accessed 10 January 2014)

'Citizens for a Better Environment' http://www.achpr.org/network/ngo/365/ (accessed 26 June 2013)

'Civil society organisations proposes recommendations for the national REDD strategy' – http://www.tnrf.org/node/21152 (accessed 25 December 2013)

'Climate Change and Desertification Unit' http://www.climdev-africa.org/Climate-Change-and-Desertification-Unit (accessed 26 March 2014)

'Climate change and national resource management NEPAD thematic areas' http://www.nepad.org/thematic-area (accessed 10 February 2014)

'Climate change, forest conservation and indigenous peoples rights' submission by Global Forest People
http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Global_Forest_Coalition_Indigenous_Peoples_ClimateChange.pdf (accessed 26 October 2013)

Department of Rural Economy and Agriculture (DREA) http://rea.au.int/en/about (accessed 13 February 2014)

De Schutter, O 'Economic, Social and Cultural Rights as Human Rights: An Introduction' CRIDHO Working Paper 2013/2 6
http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO-WP2013-2 ODeSchutterESCRights.pdf (accessed 19 January 2014)

Diaz, EC 'Climate change, forest conservation and indigenous peoples rights' Briefing paper http://www.cbd.int/doc/external/cop-09/gfc-climate-en.doc. (accessed 20 December 2013)

'Don't sale forests, groups urge Nigerian governments' Appendix xiv to Nigeria http://www.illegal-logging.info/content/dont-sell-forests-groups-urge-nigerian-govts (accessed 4 July 2014)

Environmental Rights Action (ERA)/ Friends of the Earth (FOE) 'Report of forum on red &

forest-dependent communities' http://www.redd-monitor.org/2011/04/15/a-wolf-in-sheeps-clothing-redd-questioned-in-cross-river-state-nigeria/ (accessed 4 July 2014)

'Ethiopia: African delegates accuse Meles Zenawi of shortchanging Africa' http://nazret.com/blog/index.php/2009/12/16/ethiopia_african_delegates_accuse_meles_(accessed 18 January 2014)

'Ethiopia: the changing climate in Gamo highlands' - Video Report http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=11105:ethiopia-the-changing-climate-in-gamo-highlands-video-report&catid=68:videos-and-movies&Itemid=96 (accessed 20 September 2011)

'Expected impacts of climate change vulnerability and adaptation assessments in Zimbabwe' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Zimbabwe.pdf (accessed 18 October 2012)

Federal Ministry of Environment 'Nigeria Climate Change Unit' http://www.climatechange.gov.ng/ (accessed 18 December 2013)

Federal Ministry of Environment 'What we do' http://www.climatechange.gov.ng/index.php/the-special-climate-change-unit/what-we-do (accessed 18 December 2013)

Forest Carbon Partnership Facility 'Capacity building programme for forest-dependent people on REDD+' www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/Program_Description_English_11-15-09_updated.pdf (accessed 25 October 2013)

Forest country information <www.fao.org/forestry/country/en/> (accessed 21 June 2013)

Forest Peoples 'International Indigenous Peoples' Forum on Climate Change (IIPFCC) intervention for the AWG-KP Bonn, Wednesday, 24 May 2012 http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/ad-hoc-working-group-kyoto-protocol-awg-kp-intervention.pdf (accessed 17 December 2013)

Forest Peoples 'International Indigenous Peoples' Forum on Climate Change AWG-KP Opening Intervention' Tuesday, November, 29, 2011-Durban/COP17 http://www.forestpeoples.org/topics/un-framework-convention-climate-change-unfccc/publication/2011/international-indigenous-peoples (accessed 17 December 2013)

'Forest Peoples Programme' http://www.achpr.org/network/ngo/347/(accessed 26 June 2013)

'FPP submission to UNFCCC SBSTA', February 2009 http://unfccc.int/resource/docs/2009/smsn/ngo/104.pdf (accessed 18 October 2013)

'Global Indigenous Peoples' consultation on reducing emissions from deforestation and forest degradation (REDD)' http://archive.unu.edu/climate/activities/indigenousPeople_REDDConsultation.html (accessed 18 October 2013)

'Government of Canada Response to request for information by the Office of the High Commissioner for Human Rights concerning a request in Human Rights Council Resolution 7/23 for a detailed analytical study of the relationship between climate change and human rights' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Canada.pdf (accessed 18 October 2012)

'Great Green Wall for Sahara and Sahel: Combat desertification, improving food security and climate change adaptation (29/09/2011)' http://eeas.europa.eu/delegations/african_union/press_corner/all_news/news/2011/20110929_01_en.htm (accessed 13 February 2014)

Greenpeace Briefing 'Human rights and the climate crisis: Acting today to prevent tragedy tomorrow http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Greenpeace_HR_ClimateCrisis.pdf (accessed 27 October 2012)

Greenpeace 'Deforestation and climate change' www.greenpeace.org.uk/forests/climate-change (accessed 22 March 2013)

Griffiths, T 'Help or hindrance? The global environment facility, biodiversity conservation, and indigenous peoples' (2010) http://www.culturalsurvival.org/publications/cultural-survival-quarterly/none/help-or-hindrance-global-environment-facility-biodiver (accessed 2 June 2014)

'Human Rights Council Resolution 7/23 (Human rights and climate change)' (UK Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/UK.pdf (accessed 18 October 2012)

IFAD 'Land tenure security and poverty reduction'

http://www.ifad.org/pub/factsheet/land/e.pdf (accessed 5 March 2013)

'Institute of Wildlife, Forestry and Human Development Studies' http://www.achpr.org/network/ngo/371/ (accessed 26 June 2013)

Indigenous Peoples of Africa Coordinating Committee (IPACC) 'West Africa' http://www.ipacc.org.za/eng/regional_westafrica.asp (accessed 15 September 2011)

International Financial Cooporation : Performance Standard 7 – V2 Indigenous Peoples http://www.ifc.org/wps/wcm/connect/388fbd0049800ab4abcafb336b93d75f/Phase3_PS7_Clean_Highlights.pdf?MOD=AJPERES (accessed 20 December 2013)

International Fund for Agricultural Development 'Indigenous grants' http:// ww.ifad.org/english/indigenous/grants/index.htm (accessed 25 October 2013)

International Institute for Sustainable Development (IISD) 'Climate change in three Maghreb countries Special Report on Selected Side Events at UNFCCC COP-7' (2001) IISD http://www.iisd.ca/climate/cop7/enbots/pdf/enbots0204e.pdf (accessed 15 December 2013)

International Law of Association 'Rights of Indigenous Peoples Committee of the International Law Association' (2010) Interim Report for the Hague Conference, http://www.ila-hq.org/download.cfm/docid/9E2AEDE9-BB41-42BA-9999F0359E79F62D (accessed 12 February 2014)

IPACC Recommendations to UNFCCC COP 17, Durban , South Africa, 28-1 December 2011 http://www.ipacc.org.za/uploads/docs/IPACCFlyer2011.pdf (accessed 24 January 2014)

IPCC 'Organisation' http://www.ipcc.ch/organisation/organisation.shtml (accessed 12 May 2014)

'IPF/IFF Proposals for Action' http://www.un.org/esa/forests/pdf/ipf-iff-proposalsforaction.pdf (accessed 20 November 2013)

IWGIA 'Tanzania' http://www.iwgia.org/regions/africa/tanzania (accessed 18 December 2013)

Kallio-koski, K 'The first REDD+ Orientation Workshop was recently held in Zambia with the goal to enhance understanding of the REDD+ mechanism and the challenges for its design in Zambia' http://www.unredd.org/Newsletter21/Zambia_REDD_workshop/tabid/54808/Default.aspx (accessed 18 May 2014)

Katzenstein, PJ 'After the global crises: What next for regionalism?' Scarman House, University

of Warwick 16–18 Sep1999 http://www2.warwick.ac.uk/fac/soc/csgr/events/conferences/1999_conferences/3rdannual conference/papers/bowles.pdf (accessed 19 April 2014)

Kyoto Protocol 'Status of ratification' http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (accessed 18 November 2013)

Laltaika, E 'REDD+ implementation and the rights of indigenous peoples in Tanzania' presented at the University of Colorado at Boulder (CU Boulder) May 3rd, 2013 https://www.academia.edu/3476775/_REDD_Implementation_and_the_rights_of_indigenous_peoples_in_Tanzania_Presented_at_the_University_of_Colorado_at_Boulder_CU_Boulder_May_3rd_2013 (accessed 20 June 2014)

'Letter from Ariel E Dulitzky, Assistant Executive Sectary, Organisation of American States, to Paul Crowley, Legal Rep' (Nov. 16, 2006) http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf.(accessed 27 October 2012)

Lewis, J 'Forest people or village people: Whose voice will be heard?' delivered at the Annual International African Studies Conference,University of Edinburgh, 24-25 May 2000 https://www.academia.edu/5105643/Forest_People_or_Village_People._May_2000 (accessed 30 May 2014)

Lobulu, B 'Dispossession and land tenure in Tanzania: What hope from the courts?' https://www.culturalsurvival.org/publications/cultural-survival-quarterly/tanzania/dispossession-and-land-tenure-tanzania-what-hope-c(accessed 30 May 2014)

Locke, J 'The works of John Locke', vol 4 (Economic Writings and Two Treatises of Goverment) [1691] http://oll.libertyfund.org/titles/763M (accessed 10 May 2013)

Lüdert, J 'Nature(s) revisited: Identities and indigenous peoples' http://www.anth.ubc.ca/fileadmin/user_upload/anso/anso_student_assoc/Jan_Ludert_2009_10_grad_conference_presentation.pdf (accessed 3 March 2013)

'Migration and climate change' <www.iom.int/cms/envmig> (accessed 18 March 2013)

Miller, RJ 'Doctrine of discovery'Bloghttp://unpfip.blogspot.com/2011/07/robert-j-miller-doctrine-of-discovery.html (accessed 28 March 2013)

Mulvagh, L 'The impact of commercial logging and forest policy on indigenous peoples in the Democratic Republic of Congo' <www.iwgia.org/iwgia_files_publications_files/IA_4-06_Dem_Rep_Congo.pdf > (accessed 28 May 2013)

Muyungi, R `Climate change adaptation fund: A unique and key financing mechanism for adaptation needs in developing countries http://unfccc.int/press/news_room/newsletter/guest_column/items/4477.php (accessed 13 November 2013)

Mwebaza, R 'Is climate change creating more environmental refugees than war in Africa?' (3 August 2010) http://www.issafrica.org/iss-today/is-climate-change-creating-more-environmental-refugees-than-war-in-africa> (accessed on 1 November 2013)

Nako, M 'Chad fines China's CNPC unit $1.2 billion for environmental damage' http://www.reuters.com/article/2014/03/21/us-chad-cnpc-fine-idUSBREA2K1NB20140321 (accessed 21 March 2014)

National Environmental Standards and Regulations Enforcement Agency 'Laws and regulations' http://www.nesrea.gov.ng/regulations/index.php (accessed 20 January 2014)

'NEPAD' http://www.nepad.org/climatechangeandsustainabledevelopment (accessed 13 February 2014)

NEPAD 'Climate Change Fund' http://www.nepad.org/climatechangeandsustainabledevelopment/climate-change-fund (accessed 13 February 2014)

'Nigeria inaugurates Inter-ministerial committee on national framework for application of climate services' http://www.gfcs-climate.org/content/nigeria-inaugurates-inter-ministerial-committee-national-framework-application-climate (accessed 18 December 2013)

'Nigeria: Demographic and health survey' (2008) http://www.population.gov.ng/images/Nigeria%20DHS%202008%20Final%20Report.pdf. (accessed 13 October 2013)

'Observations by the United States of America on the relationship between climate change and human rights' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/USA.pdf (accessed 8 April 2012)

OHCHR 'The right to adequate housing' Fact Sheet No. 21/Rev http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf (accessed 19 June 2014)

OHCHR 'International human rights law' http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx (accessed 19 January 2014)

OHCHR 'Minorities under international law' http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx (assessed 3 July 2014)

OHCHR 'Seminar to address the adverse impacts of climate change on the full enjoyment of human rights' 23-24 February 2012, Palais des Nations, Salle XII – Geneva, Switzerland http://www.ohchr.org/Documents/Issues/ClimateChange/ClimateChangeSeminarAgenda2012.pdf (accessed 20 October 2012)

'Online Dictionary' http://www.thefreedictionary.com/policy (accessed 14 April 2014)

Oxfam International 'Climate wrongs and human rights: Putting people at the heart of climate-change policy' (2008) Executive Summary http://www.oxfam.org/sites/www.oxfam.org/files/bp117-climate-wrongs-human-rights-summary-0809.pdf. (accessed 14 October 2012)

'PAP debates reports on land grabbing, climate change, and the situation in Libya and Tunisia' http://www.pan-africanparliament.org/News.aspx?ID=910 (accessed 9 January 2014)

Partington, G 'Thoughts on terra nullius' http://www.samuelgriffith.org.au/papers/html/volume19/v19chap11.html (accessed 8 March 2014)

Political Records 'Address by President Obasanjo on the transfer of Bakassi' http://politicalrecords.blogspot.com/2013/05/address-by-president-obasanjo-on.html (accessed 20 May 2014)

Potter, J 'Customary land tenure in Sub-Saharan Africa today: Meanings and contexts' http://www.issafrica.org/pubs/Books/GroundUp/2Customary.pdf (accessed 30 March 2013) 56

'President Kikwete at COP 19: The situation is tough and challenging' 21 November 2013

http://pages.au.int/cop19/events/president-kikwete-cop-19-situation-tough-and-challenging (accessed 18 January 2014)

'Project Design Document Form (CDM PDD) - Version 03' http://cdm.unfccc.int/filestorage/u/q/6UQ72R4GL19SC0EPOJFZAT83NXHDYB.pdf/PDD_Kanji_121220.pdf?t=V1l8bjBzNnJofDDA0TH8Clb1e-j1CW2RGt3r (accessed 10 March 2014)

'Rain Forest Deforestation' <www.factsanddetails.com/world.php?itemid=1299&catid=52&subcatid=329> (accessed 28 March 2013)

REDD in Zambia' http://theredddesk.org/countries/zambia (accessed 25 December 2013)

REDD Monitor 'A wolf in sheep's clothing: REDD questioned in Cross River State, Nigeria' http://www.redd-monitor.org/2011/04/15/a-wolf-in-sheeps-clothing-redd-questioned-in-cross-river-state-nigeria/ (accessed 23 June 2014)

Republic of Tanzania 'Population and housing census brief results' http://www.nbs.go.tz/sensa/index.html (accessed 14 January 2014)

Robinson, M 'Climate change and justice' (December 11, 2006) delivered at Barbara Ward Lecture at Chatham House http://ebookbrowse.com/barbara-ward-lecture-12-11-06-final-pdf-d22367010 (accessed 17 October 2012)

'Second Annual Conference on Climate Change and Development in Africa - Outcome Statement Climate Change and Development in Africa (CCDA-II)' Addis Ababa, Ethiopia 19-20 October 2012 http://www.uneca.org/publications/second-annual-conference-climate-change-and-development-africa-outcome-statement (accessed 26 June 2013)

Sheekh, NM *et al* 'Kenya's neglected IDPs: Internal displacement and vulnerability of pastoralist communities in Northern Kenya' (Institute for Security Studies Situation Report, 8 October 2012) <www.issafrica.org/uploads/SitRep2012_8Oct.pdf> (accessed 8 November 2013)

Shelton, D 'Human rights and the environment: Jurisprudence of human rights bodies' http://www2.ohchr.org/english/issues/environment/environ/bp2.htm (accessed18 October 2013)

'Shifting sands: climate change in the Kalahari'

http://journals.worldnomads.com/shrummer16/story/52708/South-Africa/Shifting-Sands-Climate-Change-in-the-Kalahari (accessed 15 December 2012)

'Special Mechanisms' http://www.achpr.org/mechanisms/ (accessed 26 June 2013)

'Submission by Institute for Agriculture and Trade Policy (IATP) - Institute for Policy Studies (IPS) -Third World Network

Submission of Mali to OHCHR Study 'Human Rights and Climate Change' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Mali.pdf (accessed 18 October 2012)

'Submission of the Climate Action Network International' 15 February 2009 http://unfccc.int/resource/docs/2009/smsn/ngo/098.pdf (accessed 18 October 2013)

'Submission to the OHCHR regarding human rights and climate change by Friends of the Earth Australia, the Australian Climate Justice Programme and Climate Action Network Australia' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Friends_of_the_Earth_Australia_CANA_ACJP.pdf (accessed 15 October 2012)

'Submission to the United Nations Framework Convention on Climate Change regarding Views on issues relating to Indigenous Peoples and local communities for the development and application of methodologies for Reducing Emissions from Deforestation and Forest Degradation in Developing Countries by The Nature Conservancy' http://unfccc.int/resource/docs/2009/smsn/ngo/099.pdf (accessed 18 October 2013)

Suckling, K 'An icon for climate change: The polar bear' (2007) http://indiancountrytodaymedianetwork.com/ictarchives/2007/01/04/suckling-an-icon-for-climate-change-the-polar-bear-90193 (accessed 20 June 2013)

Tahir, G *et al* (2005) 'Improving the quality of nomadic education in Nigeria, Association for the Development of Education in Africa (ADEA) 2005' http://www.ADEAnet.org (accessed 25 December 2011)

'Tanzanian Civil Society Comments on R-PP'- pdf.wri.org/rpp_country_table_tanzania.pdf (accessed 25 December 2013)

The Asia Pacific Forum of National Human Rights Institutions 'Human rights and the environment' http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Asia_Pacific_Foru

m_of_NHRIs_1_HR_and_Environment_ACJ_Report_Recommendations.pdf (accessed 8 April 2012)

'The Commission' http://www.au.int/en/commission (accessed 13 February 2014)

The EC-ACP Capacity Building Programme on Multilateral Environmental Agreements-The Africa Hub-African Union Commission Training of African Negotiators file:///C:/Users/User/Downloads/MEAs%20Write%20up%20for%20MEAs%20and%20DREA%20Websites%20%2014-9-11.pdf (accessed 10 February 2014)

The GEF 'Civil Society' http://www.thegef.org/gef/csos (accessed 15 October 2013)

The GEF 'GEF Administered Trust Fund' http://www.thegef.org/gef/trust_funds (accessed 16 November 2013)

The GEF 'GEF Assembly meetings and documents' http://www.thegef.org/gef/council_meetings/assembly (accessed 13 November 2013)

The GEF 'GEF Secretariat' http://www.thegef.org/gef/Secretariat (accessed 13 November 2013)

The GEF 'The Scientific and Technical Advisory Panel (STAP)' http://www.thegef.org/gef/STAP (accessed 13 November 2013)

'The Government of Finland replies to the questionnaire to member states prepared by the Office of the High Commissioner for Human Rights, pursuant to Human Rights Council Resolution 7/23 on human rights and climate change' (Finland Submission) http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Finland.pdf (accessed 18 October 2012)

'The human rights based approach to development co-operation: Towards a common understanding among UN Agencies' http://www.undg.org/archive_docs/6959The_Human_Rights_Based_Approach_to_Development_Co-operation_Towards_a_Common_Understanding_among_UN.pdf (accessed 18 October 2013)

'The Multi-Partner Trust Fund Office` http://mptf.undp.org/overview/office/what#mission (accessed 18 October 2013)

'The New Partnership for Africa's Development' (NEPAD) http://www.nepad.org (accessed 13 February 2014)

'Third Annual Conference on Climate Change and Development in Africa(CCDA-III)' 2013

http://rea.au.int/en/content/third-annual-conference-climate-change-and-development-africaccda-iii (accessed 26 March 2014)

'The Special Climate Change Fund' http://unfccc.int/co-operation_and_support/financial_mechanism/special_climate_change_fund/items/3657.php (accessed 16 November 2013)

Thorsen, DE and Lie, A 'What is neoliberalism?' http://folk.uio.no/daget/neoliberalism.pdf (accessed 14 July 2014)

UNEP 'The relationship between indigenous peoples and forests' http://www.unep.org/vitalforest/Report/VFG-03-The-relationship-between-indigenous-people-and-forests.pdf (accessed 10 March 2013)

UNFCCC 'Status of ratification of the Convention' http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php (accessed 10 November 2013)

UNFCCC 'Green Climate Fund' http://unfccc.int/co-operation_and_support/financial_mechanism/green_climate_fund/items/5869.php (accessed 10 January 2014)

Ulfstein, G & Werksman, J 'The Kyoto compliance system: Towards hard enforcement' http://folk.uio.no/geiru/TheKyotoComplianceSystem.pdf (accessed 24 October 2011

UNPFII 'The effects of climate change on indigenous peoples' http://www.un.org/esa/socdev/unpfii/en/climate_change.html (accessed 15 December 2013)

UN-REDD Programme 'Frequently asked questions (FAQs) and answers about REDD+' http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx (accessed 18 October 2012)

UN-REDD Programme 'Partner countries' http://www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx(accessed 18 October 2013)

UN-REDD-Programme'Policy Board Composition' http://www.un-redd.org/PolicyBoard/tabid/102628/Default.aspx.

USLEGAL 'Online legal definition' http://definitions.uslegal.com/s/strategy/(accessed 18

November 2013)

WaterOrg 'Africa' http://water.org/water-crisis/water-facts/water/ (accessed 20 July 2014)

Weiss, EB 'Intergenerational equity and the rights of future generations' http://biblio.juridicas.unam.mx/libros/4/1985/11.pdf (accessed 31 May 2014)

'What is land tenure?' http://www.fao.org/docrep/005/Y4307E/y4307e05.htm (accessed 13 August 2013)

Williams, RC 'The African Commission "Endorois Case": Toward a global doctrine of customary tenure?' http://terra0nullius.wordpress.com/2010/02/17/the-african-commission-endorois-case-toward-a-global-doctrine-of-customary-tenure/ (accessed 23 March 2012)

Working Group on Extractive Industries, Environment and Human Rights Violations http://www.achpr.org/mechanisms/extractive-industries/ (accessed 25 June 2013)

World Directory of Minorities 'Zambia overview' http://www.minorityrights.org/?lid=3922&tmpl=printpage (accessed 10 November 2013)

World Rainforest Movement 'Dams struggles against the modern dinosaurs' <www.wrm.org.uy/deforestation/dams/texten.pdf> (accessed 27 May 2013)

World Rainforest Movement 'Mangrove destruction by Oil in Niger Delta' (2011) <www.wrm.org.uy/articles-from-the-wrm-bulletin/section1/mangrove-destruction-by-oil-in-niger-delta/> (accessed 27 July 2013)

World Rainforest Movement 'Nigeria: Gas flaring - Major contributor to climate change and human rights abuses' <www.wrm.org.uy/bulletin/136/Nigeria.html> (accessed 2 May 2013)

World Rainforest Movement 'What are underlying causes of deforestation?' <www.wrm.org.uy/deforestation/indirect.html> (accessed 18 June 2013)

Xu, B 'China's environmental crisis' http://www.cfr.org/china/chinas-environmental-crisis/p12608 (accessed 20 April 2014)

'Zambia 2010 census population and housing' http://www.zamstats.gov.zm/report/Census/2010/2010%20Summary%20Census%20Wall%20Chart%20-%20Zambia.pdf (accessed 18 November 2013)

'Zambia: The REDD desk' http://theredddesk.org/countries/zambia (accessed 18 May 2013)