The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications

Ademola Oluborode Jegede
LLD, LLM (UP), LLB (Ife) BL
Department of Public and International Law, University of Venda, South Africa

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FOREWORD

In recent years, the importance of a human rights perspective on environmental protection has become increasingly clear. One sign of the rising level of attention to the intersection of human rights and the environment is the March 2012 decision by the United Nations Human Rights Council, the principal UN human rights body, to appoint an 'independent expert' to study and report on human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

I had the honor of being appointed as the first independent expert a few months later. In that role, I held consultations in every region of the world, researched (with the help of many attorneys working on a *pro bono* basis) virtually every decision and statement by international human rights bodies on environmental matters, and received input from many stakeholders. In a series of public reports to the Council, I explained how human rights bodies around the world have applied existing human rights to environmental issues and thereby created a rapidly evolving jurisprudence of environmental human rights law. In 2015, the Council appointed me to a second three-year term, as the first Special Rapporteur on human rights and the environment. The main conclusion of my mandate has been that human rights and environmental protection are inextricably interlinked. A healthy environment is necessary for the enjoyment of a vast range of human rights, including rights to life, health, property, food, water, housing, development, and self-determination. Indeed, many countries have recognized a free-standing human right to a healthy environment as a way of expressing this relationship. Conversely, the exercise of human rights, including rights of free expression and association, the right to information, and the right of public participation in governmental decision-making, is necessary to ensure that the concerns of those who are most affected by environmental harm are taken into account. Respect for human rights helps to safeguard a healthy environment, and a healthy environment enables the enjoyment of human rights.

A human rights perspective is particularly important in bringing attention to the rights of those who are marginalized and vulnerable. Among the most vulnerable are indigenous peoples, whose reliance on the environment makes them especially susceptible to environmental harm. To protect their human rights, it is necessary to protect the natural resources on which they depend from exploitation and degradation, including from the effects of climate change.

Mary Robinson, the former United Nations High Commissioner for Human Rights, has called climate change the greatest threat to human rights in the twenty-first century. As average global temperatures rise, so do climate-related disasters such as extreme weather events, heat waves, rising sea levels, and drought, which bring illness, injury, death, and displacement in their wake. The greater the increase in temperature, the greater the foreseeable harm to human rights. The most vulnerable, including indigenous peoples, will suffer the most. The grave threats

posed by climate change to the full enjoyment of human rights are now well-established at the global level, but much more needs to be done to study and explain its effects on the human rights of particular communities in particular regions. Here is where this new book by Professor Ademola Oluborode Jegede excels. He has a clear understanding of the applicable human rights norms and of the international climate regime, and he brings this understanding to bear on the particular situation of indigenous communities in Africa. He has conducted extensive research into case studies in Tanzania, Zambia, and Nigeria. His analysis is rigorous and thorough, and his conclusions and recommendations are persuasive.

In particular, governments should take very seriously his warnings that the regulatory framework established by the international climate regime, especially in relation to REDD, does not adequately protect indigenous peoples' rights to land tenure and use. States do not check their human rights obligations at the door when they undertake actions to address climate change. Protecting forests is critical to combatting climate change, but it must be done in ways that respect and protect the rights of those who have long depended on those forests.

In the Paris Agreement adopted by States in December 2015, the signatories agreed that the 'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.'

This language marks the recognition by the international community that human rights should be taken into account in all actions addressing climate change. This is an important and necessary step – but it is only a first step. Now comes the hard work of implementing this commitment as well as the other commitments in the Paris Agreement. Taking human rights into account requires careful study of the effects of climate change on vulnerable communities, and of how their rights can and should be employed to assist in the long struggle against climate change that is now underway. Professor Jegede's exemplary work helps to demonstrate how such studies should proceed. Even more important, to all the stakeholders working in this important area, it provides a useful basis for more effective national and international policies to protect the human rights of those who are most vulnerable to climate change.

John H. Knox
United Nations Special Rapporteur on human rights and the environment
Geneva, Switzerland

ACKNOWLEDGMENTS

If I have been successful in writing this book, it is 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! Of course, I am thankful to the people who did not leave me alone to my struggle. They are many, but I single out Professor Michelo Hansungule, for his fatherly direction and recommendations, from the conception to the delivery of the book, urging me that my focus is not misplaced: my goal is possible, yes it is achievable! Of no less importance to me in the race is Professor Frans Viljoen, the pleasant director of the Centre for Human Rights, University of Pretoria; thank you for igniting the fire, empassioning my hope and drive, and approving me for research interactions and opportunities. My appreciation also goes to Professor Magnus Killander for his contributions and comments, and Tshepo Madlingozi, the critical but caring 'Shepherd' of this book. Each and every one of you put your wisdom and understanding within my reach, I am humbled and grateful.

The book would not have been possible without assistance from other sources. I received much help from research visits to Abo Akademi, Finland and the Centre for International Environmental Law (CIEL), the United States of America. I gained a lot from consultation meetings in relation to human rights and climate change in different fora, particularly in Geneva, Switzerland with Professor John Knox, the United Nations Independent Expert on Human Rights and the Environment and later, the United Nations Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment. I recognise that these opportunities guided me to what I needed to know on a broad subject in necessarily short visits. Much encouragement, I am thankful, was given to me by Dean Annette Lansink, School of Law, University of Venda, Thohoyandou, who kindly ensured the appropriate academic environment that I enjoyed in making this book a reality. I am touched and full of appreciation to Lizette Hermann and Yolanda Booyzen of the Centre for Human Rights for their assistance with the layout, design and other technical details required for the publication of the book.

I hope it will be understood, and very well too, if I extend my deepest gratitude to my children, Toluwani, Oluwatoni, Temiloluwa and Oluwataayo for their understanding on this journey; and finally, for her love, faith and encouragement over the past ten years, my sweet angel, Bolaji. Surely, I have incurred incalculable debts, sweetheart, to you and the children. I can only ask that you remain strong with me in the hope and belief that rewards will come. Yes! Somehow for the better, the faithful one has promised, sweetheart, the climate will change!

DEDICATION

Bolaji (BJ), your sacrifice is much!

LIST OF ABBREVIATIONS

AA	Administrative Agent
ACJP	Australian Climate Justice Programme
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
BDP	Bureau for Development Policy
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
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
ERA	Environmental Rights Action

EU	European Union
FAO	Food and Agricultural Organisation
FCPF	Forest Carbon Partnership Facility
FIELD	Foundation for International Environmental Law and Development
FOE	Friends of the Earth
FPIC	Free Prior Informed Consent
FR	Forest Reserves
FRIN	Forestry Research Institute of Nigeria
GCF	Green Climate Fund
GEF	Global Environment Facility
GEFTD	Global Environment Facility Trust Fund
HRC	Human Rights Committee
IACHR	Inter-American Court of Human Rights
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
IDLO	International Development Law Organisation
IDP	Internally Displaced Persons
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IGAD	Intergovernmental Authority on Development
IIED	International Institute for Environment and Development
IIPFCC	International Indigenous Peoples Forum on Climate Change
IISD	International Institute for Sustainable Development
IITC	International Indian Treaty Council
ILO	International Labour Organisation
ILUA	Integrated Land Use Assessment
IMO	International Maritime Organisation
IOC	Indian Ocean Commission
IPAF	Indigenous Peoples Assistance Facility
IPACC	Indigenous Peoples of Africa Coordinating Committee
IPCC	Intergovernmental Panel on Climate Change
IPFP	Indigenous Peoples Focal Points
IUCN	International Union for Conservation of Nature
IWGIA	International Work Group for Indigenous Affairs
JSWG	Joint Secretariat Working Group
KP	Kyoto Protocol
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
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
NPD	National Programme Document
NRTF	National REDD+ Task Force
NTFP	Non-timber Forest Products
ODI	Overseas Development Institute
OHCHR	Office of the High Commissioner on Human Rights
PAP	Pan-African Parliament
PFM	Participatory Forest Management
PMO	Prime Minister's Office
POW	Panel of the Wise
PRI	Penal Reform International
PS	Permanent Secretaries
PSC	Peace and Security Council
RCU	REDD Coordination Unit
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
SBSTA	Subsidiary Body for Scientific and Technological Advice
SCCF	Special Climate Change Fund
SEPC	Social and Environmental Principles and Criteria
SPRAT	Social Principles Risk Assessment Tools
STAP	Scientific and Technical Advisory Panel
TAP	Technical Advisory Panel
TC	Transitional Committee
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
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework on Climate Change Convention
UNFF	United Nations Forum on Forests

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
WMO	World Meteorological Organisation

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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)

UK v Albania ICJ (9 April 1949) ICJ Report 1

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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

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Federal Republic of Nigeria Land Use Act, L5, LFN, 2004

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Federal Republic of Nigeria Minerals and Mining Act, LFN, 2004

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Republic of Zambia Mines and minerals Development Act, 2008
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United Republic of Tanzania Environmental Management Act, 2004
United Republic of Tanzania Forest Act, 2002
United Republic of Tanzania Land Acquisition Act,1967
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United Republic of Tanzania Village Land Act, 1999
United Republic of Tanzania Wildlife Conservation Act, 2009

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African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986

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African Convention on the Conservation of Nature and Natural Resources, OAU Doc CAB/LEG/24.1, 15 September 1968

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American Convention on Human Rights, 1144 UNTS 123, 22 November 1969

Constitutive Act of the African Union adopted in Lome Togo on 11 July 2000 and entered into force on 26 May 2001

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European Convention on Human Rights as amended by Protocols Nos 11 and 14 http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C90 14916D7A/0/CONVENTION_ENG_WEB.pdf (accessed 12 November 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

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Treaty Establishing the African Economic Community adopted in Abuja , Nigeria, 1991 and entered into force in 1994

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Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference at its 17th session, Paris 16 November 1972

Convention concerning Indigenous and Tribal Peoples in Independent Countries Convention: C169, adopted at Geneva 27 June 1989

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark 25 June 1998

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CHAPTER 1 INTRODUCTION

1 Background

This book employs a human rights framework to engage with the protection of indigenous peoples' lands in the context of adverse climate change in Africa. It responds to the question: Does the climate change regulatory framework adequately safeguard indigenous peoples' land rights in Africa, and if not, how can the human rights framework be employed to address the inadequacy? The book analyses regulatory frameworks relating to climate change at international, regional and national levels, as they affect indigenous peoples' lands in Africa.[1] It demonstrates how a climate change regulatory framework, especially at the national level, can offer inadequate protection to indigenous peoples' land tenure and use, a development that can negatively affect the realisation of their rights. The book then explores how the regional human rights framework in Africa can be employed to address the inadequacy.

The evidence of the reality of climate change and its negative effects is increasing.[2] 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'.[3] Echoing and strengthening the findings of the IPCC, a Report released by

1 The development at the sub-regional level is left out of this book because events at that level are still fluid and nothing concrete has emerged so far in the form of regulatory framework.

2 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).

3 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

the United States Global Change Research Programme notes that the warming of the planet is 'unambiguous' and is primarily driven by human activities.[4] Human activities which put pressure on the global environment, historically, are associated with a range of factors, including the emergence of fossil fuel burning technology to support industry, automobiles, construction and other energy demands[5] connected with the economic development path of developed nations in the North,[6] and their over-consumption or 'way of life'.[7] Recently, they have been linked to the pursuit of a similar development path by developing nations that has come with large-scale agriculture, mining, construction and logging.[8] This trend is 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,[9] and its adverse impacts world over.[10]

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

'Protection of global climate for present and future generations of mankind' UNGA 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).

4 Developed by a team of more than 300 experts and extensively reviewed by the public and institutions including the National Academy of Sciences, the report is the most comprehensive contribution by a state to the debate on climate change, see JM Melillo (eds) *Climate change impacts in the United States: The 3rd national climate assessment* (2014) 7.

5 Gore (n 2 above) 23-37; F Pearce 'World lays odds on global catastrophe' (8 April 1995) *New Science* 4.

6 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.

7 B Mckibben *The end of nature: Humanity, climate change and the natural world* (2003).

8 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; HJ Geist & 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.

9 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.

10 n 8 above.

conditions.[11] However, there will be more negative than positive consequences from climate change for Africa,[12] despite the fact that the continent contributes little to its cause.[13] In general terms, 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.[14] However, in Africa, as elsewhere, even though indigenous peoples have contributed least to climate change, they will be adversely affected by its impacts.[15] This is not surprising considering that their collective cultural and physical survival depends on land and its natural resources,[16] which are now increasingly being affected by climate change.[17]

While the adverse effects of climate change are not peculiar to indigenous peoples, a lifestyle intricately linked to land makes their case a priority.[18] 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.[19] Hence, this book argues that the regulatory framework at international, national and regional levels in response to the adverse impacts of climate change does not adequately safeguard indigenous peoples' lands in Africa.[20] It develops how a human rights framework can be engaged at the regional level to address the challenge. An assessment of the climate change regulatory framework in relation to the protection of indigenous peoples, however, is challenging, given the fluid and contested nature of the concept of indigenous peoples and other overlapping features about the climate change rule-making process which do not lend themselves to a straight forward analysis.

11 Collier et al (n 2 above).
12 As above.
13 Collier et al (n 2 above) 337; AfDB *Investing in Africa's future* (2008) 45.
14 MI Boko et al 'Africa' in ML Parry et al (eds) *Climate change, impacts, adaptation and vulnerability: Contribution of Working Group II to the 4th Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 433-467.
15 '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); see also N Stern *The economics of climate change* (2006) 95.
16 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: Essays 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) para 18 (Daes Study).
17 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.
18 Abate & Kronk (n 17 above).
19 For a detailed discussion of impacts of climate change on indigenous peoples' lands, see Chap 3.
20 For a detailed discussion of the gap at the international and national levels in relation to protection of indigenous peoples' lands, see Chaps 5 and 6.

Hence, certain preliminary clarifications are necessary as a background to this book.

1.1 Intersecting terms? Indigenous peoples, forest-dependent peoples and local populations

The concept of 'indigenous peoples' opens up a debate about who these peoples really are.[21] It also opens up a discussion about their rights regime, which, according to Swepston and Alfreðsson, has for long existed in flux.[22] 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'.[23] 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.[24] Thus, the meaning of this notion as well as the identity of these people merit some consideration.

In some jurisdictions, the term 'indigenous peoples' emerged from 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'.[25] In that historical context, 'indigenous peoples' are the original inhabitants of territories which today are under the domination of 'descendants of European settler populations' in south and central America.[26] This understanding, however, is questioned by experiences in Africa and Asia where the notion of first peoples' and settlers' dichotomy generally lacks historical basis,[27] with particular reference to Africa, as there is no independent state of Africa still being ruled or dominated by 'descendants of European settler populations'. Therefore, it is not surprising that the African Commission's

21 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 Report) para 379; also see M Hansungule 'Indigenous peoples and minorities in Africa: Who are these people?' (2006) 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).

22 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.

23 A Kuper 'The return of the native' (June 2003) 44 *Current Anthropology* 389.

24 J Kenrick & J Lewis 'Indigenous peoples' rights and the politics of the term "indigenous"' (April 2004) 20 *Anthropology Today.*

25 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.

26 P Thornberry *Indigenous peoples and human rights* (2002) 33-60.

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

Working Group on Indigenous Populations/Communities (Working Group) has adopted an approach which focuses on the following criteria:

> Self-definition 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 has a fundamental importance for their collective physical and cultural survival as peoples ... 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.[28]

From the above, self-identification, avowed distinct difference, and 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.[29] The foregoing criteria are also emphasised in the indigenous peoples' rights regime as exemplified by the International Labour Organisation (ILO) Convention 169[30] and later the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[31]

However, the requirements laid down by the Working Group are not fool proof. There are scholars who are suspicious of the application of the notion of 'indigenous peoples' in the context of Africa. For instance, Bojosi argues that the application of the concept is a product of a 'long enduring external mission to have the concept of indigenous peoples ... applied to certain pre-determined peoples in Africa'.[32] Viljoen faults 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 and suffer marginalisation in

28 '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.

29 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.

30 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 emphasises centrality of land to their subsistence and survival.

31 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.

32 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.

degrees.[33] Other authors call for broader application of the concept because a strict application of the requirements of 'attachment to the use of land' along with an informal title of land tenure to indigenous peoples will exclude poor or rural Africans who do not fit into 'indigenous peoples' criteria, but are dependent on informally held land.[34] Equally, there are viewpoints arguing for the need to move away from protecting land rights based on a formal finding that a community is 'indigenous'.[35] 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.[36] Finally, along a 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.[37] In all, the 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.

The foregoing viewpoints, however, must not be accepted uncritically in the context of climate change. For instance, self-identification by some groups as indigenous peoples in Africa negates Bojosi's argument that the concept is imposed on Africa.[38] Surely, the argument that the minority regime, instead of an indigenous peoples' platform can address claims of groups is unhelpful in that it may divert political attention away from core issues that are pertinent to the claims of this population such as 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 as defined by the United Nations Declaration on the Rights of Persons Belonging to

33 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' LLD dissertation, University of Pretoria, 2008 30.

34 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 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.

35 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).

36 As above.

37 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.

38 For instance the Khoi-San group in South Africa have always described themselves as first nation; see Working Group Report (n 28 above) 92.

National or Ethnic, Religious and Linguistic Minorities (UNRPM),[39] is of limited relevance to indigenous peoples. Aside largely from recognising individual rights, the UNRPM does not specifically recognise claims relating to lands which are at the heart of an indigenous peoples' rights regime.[40] Additionally, the minority platform is conceptually problematic as it focuses on numerical inferiority.[41] 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 in another state as refugees or asylum seekers.[42] As has also been argued, it can be employed in addressing the situations of persons who are discriminated against on other grounds, such as gender, disability or sexual orientation.[43] To be sure, while the concerns of indigenous peoples may overlap with the above grounds,[44] 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,[45] a trend which as shall be subsequently be shown may be exacerbated by climate change.[46]

The arguments that most populations are agrarian and connected to the use of land, and that there should be a wider application of the concept of indigenous peoples to accommodate poor or local populations whose way of life is dependent on informally held land in Africa appear helpful, but, require caution. The reason is that it suggests what can be termed an 'inclusive approach' towards the construction and use of the term 'indigenous peoples' which finds support, for instance, in the jurisprudence from the Inter-American human rights system. In *Saramaka v Suriname*,[47] the state contested the claim of the Saramaka people on the ground that they are not an indigenous people 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:

39 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted in New York 18 December 1992 (GA resolution 47/135).

40 S Wiessner 'Rights and status of indigenous peoples: A global comparative and international legal analysis' (1999) 12 *Harvard Human Rights Journal* 57 98.

41 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, UN Doc E/CN.4/Sub.2/384/Rev1, UN Sales No E.78.XIV.1 (1979).

42 D Kugelmann 'The protection of minorities and indigenous peoples respecting cultural diversity' (2007) 11 *Max Planck Yearbook of United Nations Law* 233 238.

43 OHCHR 'Minorities under international law' http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx (accessed 3 July 2015).

44 Kugelmann (n 42 above) 236.

45 Hodgson (n 28 above) 25.

46 See Chap 3.

47 *Saramaka People v Suriname* IACHR (28 November 2007) Ser C 172.

> 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 … 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.[48]

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 submission of one of the applicants during the public hearing which stressed that:

> The 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.[49]

Based on the above case, one may argue that there is a logical basis for the application of an inclusive approach in that it would make it possible for groups which share indigenous peoples' cultural relationship with land to benefit from indigenous peoples' regime of rights particularly, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[50] even if they are not indigenous.

However, as earlier mentioned, while the foregoing position may appear pragmatic, it must be treated with caution, particularly with the advent of climate change and related consequences. There are reasons for this viewpoint. Foremost is that the inclusion of indigenous peoples into 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. Unlike indigenous peoples, the issue of cultural attachment to ancestral land hardly arises in the case of agrarian community because their movement for subsistence farming is an acceptable means of adapting to climate change.[51] The argument calling for emphasis on marginalisation rather than the 'indigenousness' of

48 *Saramaka* (n 47 above) see generally paras 78-86.
49 *Saramaka* (n 47 above) para 82.
50 United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007, arts 25, 26 and 27 generally define the special relationship of indigenous peoples with lands; see also United Nations, Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) (Entered into force on 5 September 1991), arts 13(1) and 17(3).
51 V Jese et al 'Farming adaptations to the impacts of climate change and extreme events in Pacific Island Countries: Case study of Bellona Atoll, Solomon Islands' in WG Canpat & WP Isaac (eds) *Impacts of climate change on food security in Small Island Developing States* (2015) 186.

populations, may encourage a differential treatment of 'indigenous populations', allowing one state in Africa to ignore or delay the claims to lands by indigenous peoples which are recognised and embraced elsewhere. For instance, on one hand, such a differential approach will justify the behaviour of South Africa which guarantees under article 25(7) of its 1996 Constitution, the right of a person or community dispossessed of property after 19 June 1913 either to restitution of that property or to equitable redress.[52]Although the provision makes no reference to indigenous peoples and is contested on the ground that the set date excludes the claims of other communities whose dispossession took place earlier in history,[53] the Constitutional Court has interpreted article 25(7) to grant the claim of Nama people to land.[54] Measures to further extend relief to dispossession prior to the period before the cut off date to cover the claims of Khoi-San has been a subject matter of public and political interaction in South Africa.[55] On the other hand, the differential approach will sadly validate Rwanda's position that the Batwa are not indigenous but only a vulnerable minority group, rendering their claim to land and resources a non-issue for political engagement[56] This difference in approach signifies that each state can unilaterally decide whether the political space can tolerate the concept of indigenous peoples for the purpose of protection of collective land rights in its country or not. Such a political choice is neither a true reflection nor the intended consequence of an indigenous peoples' rights regime.[57]

Besides, the use of an inclusive approach may indeed 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

52 Constitution of the Republic of South Africa, 1996.

53 Parliament of the Republic of South Africa 'Bill seeks new ways to revive old claims' http://www.parliament.gov.za/Multimedia/InSession/2013/october-november/In Session_Magazine_October_November_2013/files/assets/basic-html/page9.html (accessed 23 April 2016).

54 *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC); *Bhe & others v Khayelitsha Magistrate & others* 2005 (1) SA 580 (CC) paras 58-62.

55 P Dube 'Plan to extend cut-off date for land claims is unconstitutional' http://www.cfcr.org.za/index.php/docs-articles?download=555:plan-to-extend-cut-off-date-for-land-claims-is-unconstitutional (accessed 23 April 2016).

56 See NEPAD African Peer Review Mechanism *Country Review Report of the Republic of Rwanda*' (2005) para 153, which finds that such an approach largely aims at assimilating the Batwas into the mainstream culture of the state of Rwanda.

57 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 28 above) 93.

resources. That this is not yet the case is evident in climate change negotiations which continue 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.[58] 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 despite the fact that their activities are the 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 book, 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, as it would be shown later an indigenous peoples' platform, considering its associated rights regime, can address their peculiar claims for justice 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.[59] This book employs the concept of 'indigenous peoples' to mean pastoralists and hunters and gatherers as identified by the criteria laid down in the Working Group Report,[60] but also, it bears in mind the critical importance of situations facing other communities in Africa in the context of a changing climate.

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.

58 EA Posner & CR Sunstein 'Climate change justice' (2008) 96 *The Georgetown Law Journal* 1565.

59 On 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 Chap 6.

60 n 28 above.

Climate change refers to the long term weather condition of a region and its pattern of change over time. It is triggered by 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] The interference of human activities has brought about an increase in the greenhouse effect leading to global warming and change in climate condition.[63] As indicated earlier, such activities include the emergence of fossil fuel burning technology to support industry, automobiles, construction and other energy demands connected with economic development in the form of large-scale agriculture, mining, construction and logging.[64]

However, it should be noted that, for long, the reality of climate change 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]

The protection of indigenous peoples' lands is closely linked to their environment. As Alfreðsson and Ovsiouk contend, the environmental concerns of indigenous peoples are linked to their land and the natural

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 3 above); Le Treut et al (n 9 above).

62 As above.

63 J Hansen 'Defusing the global warming time bomb' *Scientific American Magazine* March 2004 71.

64 Gore (n 2 above) 23-37

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 3 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 and climate change' Resolution 7/23 of 28 March 2008, UN 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 UNGA Res 43/53 (n 3 above).

resources, on the one hand and their 'identities, lifestyles and cultures on the other hand'.[67] This position is not surprising in that the definition of indigenous peoples' lands is indeed linked to their environment. According to article 13(2) of ILO Convention 169, the term 'lands' includes 'the concept of territories, which covers the total environment of the areas inhabited by indigenous peoples'. Indigenous peoples' lands is not only connected with the fulfilment or violation of their rights to property,[68] life, liberty and personal security,[69] subsistence,[70] food security,[71] health,[72] spirituality,[73] and cultural survival,[74] it is connected to their right to a safe and healthy environment.[75] In particular, the UNDRIP highlights the environmental significance of indigenous peoples' lands. Article 29 of UNDRIP links indigenous peoples' cultural, spiritual, physical survival and environmental conservation to their control and use of traditional land by guaranteeing their right to the conservation and protection of their environment and the centrality of their stewardship for that purpose.

For the purposes of this book, the intersection of environment, forests and indigenous peoples' lands 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.[76] While the relationship of this with climate change will be examined more closely later in the book,[77] 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

67 G Alfreðsson & A Ovsiouk 'Human rights and the environment' (1991) 60 *Nordic Journal International Law* 19.

68 *Saramaka* (n 47 above) para 95; *Indigenous Community Yakye Axa v Paraguay* IACHR (17 June 2005)Ser C 146 para 143.

69 *Inter-American Court Communidad Yanomami v Brazil* Case 7615, Decision of 5 March 1985.

70 *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.

71 United Nations 'The right to food' A/60/350, 12 September 2005, 8-21 which stresses the centrality of land to food security of indigenous peoples www.un.org/en/ecosoc/docs/pdfs/summary%2020land%20and%20vulnerable%20people%202%20june.pdf (accessed 25 March 2012).

72 *Yanomami* (n 69 above).

73 *Sesana & others v Attorney General* High Court Judgment, ILDC 665, BW 2006, para 117, where the Court held that there is 'a deeply spiritual relationship between indigenous peoples and their land'.

74 E-I Daes 'Principal problems regarding indigenous land rights and recent endeavours to resolve them' in A Eide, J Möller & I Ziemele (eds) *Making peoples heard: Essays on human rights in honour of Gudmundur Alfreðsson* (2011) 465.

75 OHCHR *Indigenous peoples' right to adequate housing* Report 7 (2005) 9.

76 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).

77 See Chap 3.

consumption of crude oil and coal account for 77 per cent of fossil fuel carbon dioxide emissions into the atmosphere.[78] 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.[79] 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 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.[80]

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.[81] The clearance of forests, or deforestation, is associated with human activities, including agriculture, mining, and logging.[82] By contrast, when forests are restored, they remove carbon from the atmosphere.[83] This thus signifies that the existence or non-existence of a forest can add to the problem of climate change, or constitute a means of mitigating it.[84] Indigenous peoples' lands is further 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

78 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).

79 C Streck & S Scholz 'The role of forests in global climate change: Whence we come and where we go' (2006) 82 *International Affairs* 861.

80 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).

81 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 8 above); Helmut & Lambin (n 8 above).

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

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

84 Streck & Scholz (n 79 above).

occupy which put beyond question the reality of the adverse impacts of climate change on their land.[85] 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.[86]

Considering the centrality of land and its resources to the lifestyle of indigenous peoples, as negotiations continue on the subject of climate change, the protection of their lands, inclusive of the forest resources and environment, will be crucial in the discussion of the adverse impacts of climate change and the regulatory framework in response.[87]

1.3 Intersecting governance: Defining a climate change regulatory framework

Since it is a key focus of this book, it is necessary to explain what is meant by a 'climate change regulatory framework'. The use of 'climate change regulatory framework' is preferred due to the nature of international instruments on climate change which are incapable of being strictly classified as 'laws' or 'policies'. These instruments emerge in the context of an intersecting governance, hence, before the justification is provided for the use of climate change regulatory framework, it is important to understand the meaning of governance.

Scholars use the word 'governance' in relation to the environmental field interchangeably with phrases such as 'architecture', and 'regime'. According to Le Preste, 'governance' connotes either 'architecture' or 'regime' and refers to:

85 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 a similar point about the environment of the Inuit in Alaska.

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

87 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; 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).

> 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.[88]

Governance has also been explained as entailing the institutions, norms, mechanisms and decision-making procedures.[89] 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.[90] 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.[91] This structure, in the view of den Besten et al, may be shaped by various actors and groups with which it interacts in negotiation.[92] What is certain is that all the definitions agree that governance is made up of rules and institutions,[93] 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.[94]

However, it is neither certain nor appropriate whether to refer to all the instruments emanating from climate governance as strictly as a set of laws or policies. Some scholars largely reflect an uncritical reference to all instruments emanating from climate change governance as 'law',[95] others

88 Cited in MC Smouts 'The issue of an international forest regime' (2008) 10 *International Forestry Review* 429.

89 F Biermann et al 'Navigating the anthropocene: The earth system governance project strategy paper' (2010) 2 *Current Opinion in Environmental Sustainability* 202.

90 C Deere-Birkbeck 'Global governance in the context of climate change: The challenges of increasingly complex risk parameters' (2009) 85 *International Affairs* 1173.

91 MC Thompson et al 'Seeing REDD+ as a project of environmental governance' (2011) 14 *Environmental Science & Policy* 100.

92 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.

93 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.

94 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.

95 See Wold et al (n 2 above).

show a preference for usage of 'policy'.[96] There is merit and confusion in both approaches. With reference to the blanket usage of the term 'law', to begin with, it is important to note the definition of a law. The term 'law' literally connotes a detailed legislative process and judicial enforcement in courts.[97]

Based on the above definition, the use of 'law' to refer to instruments such as the UNFCCC, the Kyoto Protocol and Paris Agreement,[98] appear in order. The reason is that these instruments are a product of negotiation by states and in so far as they fall under the category of general and particular conventions (treaties) created by the consent of states under international law,[99] according to the principle of *pacta sunt servanda*, they have the binding effect of law on their state parties.[100] The position is further reinforced by the fact that where parties consent in writing to it, the UNFCCC, the Kyoto Protocol and Paris Agreement allow for recourse to the International Court of Justice or arbitration for resolution of disputes in relation to the interpretation and application of their provisions,[101] a possibility which supports the argument that the provisions of the instruments are judicially enforceable.

However, the use of 'laws' to refer to all instruments in the climate change governance can be faulted. There are decisions and guidelines from yearly meetings of the implementing bodies of the UNFCCC, Kyoto Protocol and Paris Agreement such as the Conference of Parties (COP)/ Meeting of Parties (MOP),[102] as well as reports from organs such as the Subsidiary Body for Implementation (SBI)[103] and the Subsidiary Body for Scientific and Technological Advice (SBSTA) which may not qualify as 'a

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 D Kennedy 'The disciplines of international law and policy' (1999) 12 *Leiden Journal of International Law* 9.

98 Paris Agreement under the United Nations Framework Convention on Climate Change 2015, adopted by Conference of the Parties, 21st Session Paris, 30 November-11 December 2015FCCC/CP/2015/L.9/Rev.1.

99 UN *Statute of the International Court of Justice* 18 April 1946 art 38(1).

100 UN *Vienna Convention on the Law of Treaties* 23 May 1969, United Nations, Treaty Series, vol 1155, 331, art 26(1).

101 UNFCCC, art 14 (1) and (2); Kyoto Protocol, art 19; Paris Agreement, art 24; a regional economic integration organisation can also make a declaration conferring jurisdiction on the ICJ, based on article 14(2) of the UNFCCC.

102 The COP is established pursuant to art 7 of the UNFCCC while the MOP is established by virtue of art 13 of the Kyoto Protocol ; these institutions are the highest decision making bodies, see 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) 213.

103 UNFCCC, art 10; the SBI reviews policy aspects of national reports and help the COP in evaluating summative effects of implementation measure, see Bodansky (n 102 above) 201.

set of laws' in the literal usage of the word.[104] While these instruments qualify as important sources of international law,[105] arguably, they are not judicially enforceable in that the jurisdiction of the ICJ under the aegis of UNFCCC and Kyoto Protocol only apply to disputes in relation to the interpretation and application of their provisions. The question then is what is the legal status of such instruments? For the fact that they are designed to influence state conduct in the course of time, the instruments only satisfy the definition of a 'policy', as a plan of action adopted by political decision makers.[106] Generally, such instruments are not enforceable.[107] However, one cannot because of the status of these instruments from the implementing and subsidiary organs under climate change governance, simply refer to all instruments under the international climate change governance as a set of policies. Such a conclusion flies in the face of the judicially enforceable nature of the provisions of the UNFCCC, the Kyoto Protocol and the Paris Agreement.What is fair as a conclusion is that, the choice and use of the term 'law' or 'policy' are not mutually exclusive, both can validly be accommodated as belonging to the emerging framework of instruments set to govern global efforts at finding a solution to climate change.

Consequently, it is in the light of the foregoing that the term 'regulatory framework' is preferred and used in this book 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 Black's Law Dictionary, a regulation is 'the act or process of controlling by rule or restricton', or 'a rule or order, having legal force'.[108] It further defines a 'rule' as a 'standard or principle, a general norm mandating or guiding conduct or action in a given type of situation',[109] and an 'order' as 'a common direction or instruction' or 'a written direction or command delivered by a court or judge'.[110] Since an important feature of 'policies' lies in its non-binding nature, the definition of a 'regulation' accommodates instruments such as, 'decisions', 'guidelines' and other documents which, though proceed under the aegis of UNFCCC, may necessarily not have binding force of a law. The use of 'regulation' also connotes a sense of 'legal' or 'judicial' force, through its

104 UNFCCC art 9; the SBSTA is created to provide expeditious information and advise on scientific and technological matters relating to the UNFCCC, see 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).

105 H Strydom 'International law making as an attribute of state sovereignty' in H Strydom (ed) *International law* (2016) 63 98.

106 J Hattingh *Governmental Relations: A South African perspective* (1998) 55.

107 J Cloete *Public administration and management: New constitutional dispensation* (1994) 94.

108 Black's Law Dictionary 7th ed (1999) 1289.

109 Black's Law Dictionary (n 108 above) 1330.

110 Black's Law Dictionary (n 108 above) 1123.

link with a 'rule' and 'order', which aims to 'control' and 'restrict' conduct, hence, the argument can be made that the word 'regulation' embodies instruments with binding effect in different 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.[111] 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'.[112] The approach in the climate change negotiation adopts an environmental governance structure which 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.[113] 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.[114] Adopting this classification and the term 'climate change regulatory framework' is preferred in the book in that 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 and the diverse legal nature of instruments. It also serves as a platform to assess at the regional level how a human rights framework can be employed in protection of indigenous peoples' lands where there is gap in regulatory framework dealing with adverse effects of climate change.

2 Methodology

In examining the extent of protection available to indigenous peoples' lands under different levels of the climate change regulatory framework, this book employs human rights framework as an analytical and prescriptive tool. As an analytical tool, it is used to reveal the gap in the

111 JL Dunnof 'Levels of environmental governance' in D Bodansky et al (eds) *The Oxford handbook of international environmental law* (2007) 87.
112 As above.
113 UNFCCC, Preamble, arts 4(1), 6(a) & (b).
114 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.

climate change regulatory framework, particularly at the domestic level, using Tanzania, Zambia and Nigeria as case studies in Africa. As a prescriptive tool, it is engaged as a legal response to the gap in the climate change regulatory framework. The analysis and arguments in the book are validated by interactions in stakeholders' fora relating to climate change held in Cape Town, South Africa, the United States, Namibia and Geneva, Switzerland.[115]

2.1 A human rights framework as a tool of analysis

The core principles which constitute a human rights framework are mainly universality and indivisibility, interdependency and inter-relatedness, non-discrimination and equality, participation, as well as accountability in relation to rights. These principles, which are more discussed in details in Chapter 2 are useful in assessing climate change regulatory framework in relation to indigenous peoples' land rights in Africa. The primary sources of a human rights framework are discernible from provisions on individual and collective rights versus governments' obligations in human rights instruments in the form of Declaration, Covenants and Conventions established under the aegis of the United Nations (UN) and the African Union (AU). Under the aegis of the UN, the basis for a human rights framework as discussed and applied in this book is found in the Universal Declaration of Human Rights,[116] International Covenant on Civil and Political Rights (ICCPR),[117] International Covenant on Economic and Social Cultural Rights (ICESCR),[118] ILO Convention 107,[119] ILO Convention 169[120] and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[121]

115 '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.

116 Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in Paris on 10 December 1948, General Assembly Resolution 217 A (III).

117 International Covenant on Civil and Political Rights (ICCPR), Dec 16, 1966, 9 UNTS 1.

118 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.

119 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).

120 Convention Concerning Indigenous and Tribal Peoples in Independent Countries, entered into force 5 September 1991 (ILO Convention 169).

121 United Nations Declaration on the Rights of Indigenous Peoples, adopted at 107th plenary meeting 13 September 2007 (UNDRIP).

Under the AU, instruments underlying a human rights framework are mainly the African Charter on Human and Peoples' Rights (African Charter),[122] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),[123] and the African Convention on the Conservation of Nature and Natural Resources (Revised version).[124] Since its adoption on 27 June 1981, all 54 states in Africa, except South Sudan, have ratified the African Charter.[125]Arguably its wide ratification makes it the most effective at the regional level as a standard of assessing the protection of indigenous peoples' land rights in the context of adverse effects of climate change. Generally, the Charter recognises individual and collective rights. In relation to collective rights, in addition to providing in article 24 for the right to a satisfactory environment, other collective rights in the African Charter include the rights to existence and self-determination,[126] free disposal of wealth and natural resources,[127] economic, social and cultural development,[128] and national and international peace.[129] 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,[130] and the 'establishment and improvement of appropriate national institutions' with a view to protecting rights.[131] 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. 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.[132]

The Kampala Convention is a regional instrument that specifically aims at protecting and assisting persons displaced internally in Africa. It

122 African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force 21 October 1986 (African Charter).

123 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.

124 The African Convention on the Conservation of Nature and Natural Resources (Revised version) (Conservation Convention 2003).

125 '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.

126 African Charter, art 20.

127 African Charter, art 21.

128 African Charter, art 22.

129 African Charter, art 23.

130 African Charter, art 1.

131 African Charter, art 26.

132 On implied rights, see Viljoen *International human rights law in Africa* (2012) 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.

accommodates human rights principles and provisions. By virtue of article 20(1) which requires that the provisions of the African Charter that safeguard human rights should be used in interpreting the Convention. In addition to highlighting that the 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. 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.[133] The Conservation Convention, is an improvement upon its antecedent, the African Convention on the Conservation of Nature and Natural Resources.[134] 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.[135] 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'.[136] This provision can be interpreted as distinguishing the Conservation Convention from other human rights treaties, such as the African Charter.[137] 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.[138] 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.[139] In all, these principles along with human rights provisions versus states' obligations under the above instruments constitute the human rights framework engaged as a tool of analysis in the book. In utilising the framework, where applicable, regard is given to the explanation and interpretation offered in General Comments and case law of monitoring bodies created under the treaties at the UN level and mechanisms created at the regional level in Africa.

133 Kampala Convention, art 20(3).
134 African Convention on the Conservation of Nature and Natural Resources, Algeria on 15 September 1968 OAU Doc CAB/LEG/24.1.
135 F Viljoen (n 132 above) 270.
136 As above.
137 As above.
138 As above.
139 As above.

2.2 A human rights framework as a prescriptive tool

Besides using human rights framework as a tool of analysis, it is equally engaged as a prescriptive tool to respond legally to the gap in climate change regulatory framework. In following the approach, the book projects the discourse school of thought which views human rights 'as a work in progress'.[140] The reason is that the application of a human rights framework to climate change is problematic in terms of the issues of causation and its transboundary nature, hence, it is not enough to construe an adequate response simply in an individual or collective rights versus government obligations lens. Key human rights instruments forming part of the human rights framework exclude the accountability of non-state actors before regional and international human rights accountability mechanisms, despite their increasing relevance in the causation of and response to climate change. For instance, non-state actors are not only involved in the combustion of fossil fuel,[141] they are also involved in climate change mitigation measures on indigenous peoples' lands.[142]

These developments challenge the traditional horizontal understanding of human rights as a contract between a state and its citizens and more importantly, call for a dynamic approach toward the accountability for human rights. Responding to these developments, arguably, is impossible except by a regulatory framework which engages human rights framework in a discourse lens. Consequently, in arguing and prescribing regional human rights regimes as a legal response to the protection of indigenous peoples' lands in the context of adverse climate change impact in Africa, the book engages a human rights framework in a dynamic manner that involves obligations of states and other stakeholders.

2.3 Case studies for analysis

Selecting legal frameworks in relation to climate change which are symptomatic of the general trend in all states in Africa is problematic but necessary. All states in Africa experience adverse effects of climate change and face adaptation challenges, however, the fact that climate response projects, particularly the mitigation measure of REDD+ under the UN-REDD Programme do not take place in all the states of Africa excludes some states which are not under the programme. 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

140 For a discussion of the discourse school of thought, see Chap 2.

141 R Bratspies 'The intersection of international human rights and domestic environmental regulation' (2010) 38 *Georgia Journal of International & Comparative Law* 649 652.

142 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.

(DRC), Nigeria, Tanzania and Zambia.[143] Nigeria, Tanzania and 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 indigenous populations.

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. 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 selected states have the presence of indigenous peoples.[144] However the fact that the focus is on the climate change regulatory framework suggests that the outcome of analysis can also be useful in guiding the approach in these states and generally, other states in Africa which also face the challenge of climate change and are involved in climate change response projects.

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.[145] The incidence and intensity of drought and attendant limited access to natural resources, have increased the vulnerability of indigenous peoples.[146] 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.[147] 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.[148] Tanzania voted in support of UNDRIP.[149] As a result

143 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 2015).

144 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 2015) affirming that Tanzania is home to more than 70 000 Maasai and other indigenous groups including the Barbaig, Akie, Taturu and Hadzabe 9, 19.

145 IWGIA 'Tanzania' http://www.iwgia.org/regions/africa/tanzania (accessed 18 December 2015).

146 IWGIA 'Country technical notes on indigenous peoples' issues: The United Republic of Tanzania' (2012) (IWGIA Report on Tanzania) 15.

147 The Guardian 'Hunger threatens Kiteto's Akiye' 26 February -3March 2012.

148 IWGIA Report on Tanzania (n 146 above) 15.

149 OHCHR 'Declaration on the rights of indigenous peoples' http://www.ohchr.org/en/Issues/IPeoples/Pages/Declaration.aspx (accessed 18 January 2014).

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 per cent of the total land area while in Zanzibar, forest vegetation covers about 63 908 ha.[150] To the local and forest-dependent communities, forests serve subsistence purpose that provides valuable source of food.[151] Declining resources are a factor in the 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.[152]

Zambia is a multi-cultural and ethnic country consisting of groups such as the Bemba, Tonga, Lozi, Ngoni, Chewa, Kaonde and Luvale.[153] Communities linked with an indigenous status include the Nkoya and Tonga communities who are noted for traditional conservative lifestyles and practices around reserves including the Mwekera Forest Reserve and Katanino Joint Forest Reserve.[154] Communities also include the Lamba people who have traditionally lived in the Copperbelt Miombo woodlands.[155] As a result of change in climate, seasonal droughts, occasional dry spells, intense rainfall, heat waves, high temperatures in valleys, floods, changes in growing seasons, delayed onset of rainy seasons and shortened growing periods are being experienced in these communities.[156] Climate change is threatening food security.[157] Drought and floods are adversely affecting vulnerable communities who depend on rain-fed agriculture for their livelihoods.[158] The vegetation comprises forests and grasslands with a majority of its forest plantations at the Copperbelt Province providing habitation for wildlife and their habitats outside the forest areas.[159] With an approximately 49 468 000 ha

150 United Republic of Tanzania 'National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+)' (December 2010) 30 (Tanzania National Strategy).
151 As above.
152 GC Kajembe et al 'The Kilosa district REDD+ pilot project, Tanzania: A socioeconomic baseline survey' (2013) International Institute for Environment and Development (UK) 20.
153 Discussion with Professor Michelo Hansungule, Expert Member, Working Group on Extractive Industries, Environment and Human Rights Violations, on 4 August 2014; also see World Directory of Minorities 'Zambia Overview' http://www.minorityrights.org/?lid=3922&tmpl=printpage (accessed 10 November 2013).
154 As above; also see FS Siangulube 'Local vegetation use and traditional conservation practices in the Zambian rural community: Implications on forest stability' thesis submitted to the International Master Programme at the Swedish Biodiversity Centre, 2007 1-10.
155 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.
156 Republic of Zambia *National adaptation programme of action on climate change* (September 2007) (Zambia NAPA) 19.
157 As above.
158 Zambia NAPA (n 156 above) 37.
159 Republic of Zambia *Initial national comunication under the United Nations Framework Convention on Climate Change* (August 2002) (Zambia Initial National Communication) 2.

amounting to 67 per cent of land surface covered by forests, Zambia is one of the most forested countries in Africa.[160] With deforestation at a growing rate of approximately 1,5 per cent per annum, Zambia is ranked as one of the countries with the highest rates of deforestation in the world.[161] Zambia voted in support of UNDRIP.[162]

Nigeria has over 250 ethnic groups, the most numerous of which are Yoruba, Igbo, and Hausa/Fulani, whose languages, according to article 55 of the 1999 Constitution are the official languages of the national assembly. Groups that have been identified as indigenous peoples include the Ogoni and the Ijaw in the Southern part and Fulani pastoralist communities in the Northern part of Nigeria.[163] Heightened drought and desertification in the North is affecting the lifestyle of the pastoralist groups including the Shuwa, Koyam, Badawi, Dark Buzza and Buduma,[164] who are mostly found in the arid and semi arid parts of Northern Nigeria. Increasing desertification due to climate variability is contraining movement of the herdsmen who are constantly locked in violent conflicts with local farmers across Nigeria.[165] In relation to forest-dependent communities in the Southern part of Nigeria, forest products are being adversely affected due to a 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 livelihood depends on income generated from forest products.[166] These communities are important because largely what is left as tropical forest Nigeria is found in CRS.[167] At 1991, the total forest cover of CRS was 7920 sq km, which accounted for 34,3 per cent of the land area of CRS.[168] With the

160 R Vinya et al 'Preliminary study on the drivers of deforestation and potential for REDD+ in Zambia' (2012) 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).

161 M Henry et al 'Implementation of REDD+ in sub-Saharan Africa: State of knowledge, challenges and opportunities' (2011) 16 *Environment & Development Economics* 381.

162 OHCHR (n 149 above).

163 ILO/ACHPR 'Nigeria: Constitutional, legislative and administrative provisions concerning indigenous peoples' (2009) 1-5.

164 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).

165 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).

166 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.

167 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).

168 Nigeria preliminary assessment (n 167 above) 11.

deforestation rate at 3,7 per cent, one of the highest in Africa, the forest sector is generally susceptible to adverse effects of climate change.[169] Nigeria did not vote in support of the UNDRIP.[170]

3 Limitations

This book has a qualified scope. The first limitation is that while every part of the world will experience different measure of adverse effects of climate change, the focus is on Africa where, according to scientific findings, there is evidence of serious vulnerability to climate change.[171] Even then, Africa is a vast continent with diverse peoples who will not record similar variation of climate change and its impacts.[172] Climate change will also affect everyone, especially, those experiencing different shades of vulnerability owing to 'gender, age, indigenous or minority status, or disability'.[173] The focus 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.[174] The concept of indigenous peoples' lands should deservedly refer to dispossessed lands as well as that within their possession. The book, however, addresses the climate change regulatory framework in relation only to the land still within the possession of the indigenous peoples.

Second, the book focuses majorly on the normative aspects of the climate change regulatory framework which are 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 book excludes the sub-regional level as a result of an absence of concrete development at that level capable of academic enquiry.[175] Also, while looking at the national climate change regulatory framework, it is impossible 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 aspects in assessing climate change regulatory framework which are not the focus of the book. Several of the climate

169 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).

170 OHCHR (n 149 above).

171 Collier et al (n 2 above); Boko et al (n 14 above).

172 Collier et al (n 2 above).

173 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.

174 UNDG Guidelines on indigenous peoples (n 15 above); Stern (n 15 above) 281.

175 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 mentioned in Chap 6.

mitigation and adaptation initiatives such as the REDD+ and alternative energy projects are within the remit of agriculturists, forestry experts, and engineers.[176] The focus of the book is on the regulatory framework which is important because it is the basis on 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, other options for adaptation include technology transfer,[177] which, although important, are not the focus of this book. In discussing adaptation funds, the focus is on its regulatory framework. There are various measures, particularly on climate change mitigation which, although important, are outside the scope. 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.[178] The REDD+ intiative in Africa, which is selected as a climate change mitigation option, also has a market dimension which remains under negotiation.[179] 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 the book. While the REDD+ is being developed and supported by the UN-REDD National Programme, there are other multilateral initiatives supporting the REDD+ such as Forest Carbon Partnership Facility (FCPF) and the Forest Investment Programme (FIP), hosted by the World Bank.[180] There are overlaps. However, the book 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

176 As above.
177 See UNFCCC, arts 4(3), (7) and (8).
178 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).
179 For 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.
180 UN-REDD Programme 'FAQ' http://www.un-redd.org/FAQs/tabid/586/Default.aspx (accessed 12 May 2014).

in terms of the period covered by the book. Given that the field of climate change is rapidly evolving, new meetings are held every year by institutions such as the COP/MOP. Considering this evolving development, the research is generally limited to developments up to October 2014.

4 Synopsis

This book comprises seven chapters. While Chapter 1 sets out the introduction, highlighting the background including 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, Chapter 2 unpacks a human rights framework as a tool of analysis. Chapter 3 deals with the adverse effects of climate change on indigenous peoples in Africa. The chapter highlights indigenous peoples' perception of land use and tenure as key features of land rights as well as the link to the adverse impacts of climate change in Africa. Chapter 4 focuses on the international climate change regulatory framework in relation to indigenous peoples' lands, highlighting the emerging evidence on the extent of protection under the international climate regulatory framework for indigenous peoples' land tenure and use. It stresses that 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. In its Chapter 5, the book presents the extent to which the climate change regulatory framework at the national level offers protection to indigenous peoples' land tenure and use. It concludes that it does not adequately safeguard indigenous peoples' land tenure and use and related rights. Responding to the gap in the climate change regulatory framework in relation to indigenous peoples' lands, Chapter 6 demonstrates how 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. Chapter 7 deals with concluding remarks and recommendations.

CHAPTER 2 HUMAN RIGHTS AND CLIMATE CHANGE: CONCEPTUAL FRAMEWORK

1 Introduction

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 in 2009 by the United Nations Human Rights Council (UNHRC).[1] Climate change is linked to the meteorology field which is rooted in the physical sciences,[2] and has mostly developed under the aegis of the United Nations Framework Convention on Climate Change (UNFCCC) and its subsequent instruments namely, the Kyoto Protocol and Paris Agreement, which are built on environmental law approach of consensus and non adversarial approach.[3] Hence, it is controversial whether a human rights framework and not an environmental law framework is the appropriate conceptual basis for addressing adverse effects of climate change.[4] This chapter argues for a mutually reinforcing relationship between a human rights framework and environmental law principles as an approach to assessing the adequacy or otherwise of the climate change regulatory framework. The argument is based mainly on the relevance of a human rights framework and its intersection with environmental law protection. Following this introduction, section two examines the debate around whether climate change is an environmental or human rights concern. Section three unpacks the conceptual approach and features which

1 'Human rights and climate change' Human Rights Council Resolution 10/4, adopted at the 41st meeting, 25 March 2009 (Resolution 10/4).

2 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.

3 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.

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.

constitute human rights framework as employed in the book. Section four is the conclusion.

2 Climate change: An environmental or human rights concern?

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 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]

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 1 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' (15 January 2009) A/HRC/10/61 (OHCHR Report).

9 Human Rights Council 'Human rights and climate change' Res 7/23, UN 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 UNHRC '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) and 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

and national human rights institutions,[15] 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]

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 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

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 participants 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.

2.1 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

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).

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) para 4.

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]

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 merit scrutiny.

2.1.1 Complex global environmental problem

The negotiation and outcome of international climate change instruments are patterned around 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 are emanating 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

32 Canada Submission (n 20 above).
33 Finland Submission (n 23 above) para d.
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 http://unfccc.int/kyoto_protocol/items/2830.php (accessed 23 May 2013).
37 Bodansky & Rajamani (n 34 above) 4.
38 As above.

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 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,

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 and 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' (5 June 2006).

45 B Mckibben *The end of nature: Humanity, climate change and the natural world* (2003) 48; see also R Carsson *Silent spring* 50th ed (2012).

such as common but differentiated responsibilities,[46] participation[47] and vulnerability,[48] as shall be made manifest later in this 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.

2.1.2 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 'liberalism'. As a political

46 UNFCCC, Preamble.
47 UNFCCC, art 4(1)(i).
48 UNFCCC, Preamble and art 3(2).
49 UNFCCC, art 14(2).
50 'Procedures and mechanisms relating to compliance under the Kyoto Protocol' 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 & 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.

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 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

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/neo liberalism.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.

> techniques of production so as to spread their activities across 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 standards to enable multinationals to perform their operations, SAP encourages environmental spoilage.[68] Second, in encouraging the cutting down of public spending, it necessitates a drastic reduction of the budget for environmental protection. Finally, in relation to agriculture, in the interest of pursuing comparative advantage in the market place, subsistence

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.

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]

Environmental pollution is also significant to the contribution of globalisation to climate change. 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 the steel industry, arguing that the 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 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 platform of the UNFCCC are appropriate and effective for addressing climate change.

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.

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 Posner's position. First, economic activities have environmental effects material to climate change, but it 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, a human rights concept generally allows for the protection of the environment. For instance, most national constitutions that guarantee individual socio-economic rights assure the protection of the environment

74 EA Posner 'Climate change and international human rights litigation: A critical appraisal' (2007) 155 *University of Pennsylvania Law Review* 1925; 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).

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

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; see also 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.

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.

Posner's position that litigation in courts may generate bad policy decisions is difficult to understand.[87] 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 Posner's intention is to fault human rights litigation because it is capable 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. 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.

2.2.1 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 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 consequences 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]

87 Posner (n 74 above) 1931.
88 As above.
89 Mauritius Submission (n 25 above).
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 (n 45 above) 46.

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]

2.2.2 Human vulnerability to climate change

The notion of vulnerability has been widely defined in different contexts. According to Füssel, 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 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

92 M Robinson 'Foreword' in Humphreys (n 2 above); 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' *The Guardian* 24 April 2012 http://www.guardian.co.uk/environment/2012/apr/24/climate-change-human-rights-issue (accessed 15 June 2013).

94 H-M Füssel '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.

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 discussion 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 a 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's adverse impact 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

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.
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.

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 the 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 a 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 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

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).
113 'Human rights and climate change in the Americas' AG/RES. 2429 (XXXVIII-O/08), adopted at the 4th plenary session, held on 3 June 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 content 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); Knox (n 5 above).
117 Mali Submission (n 24 above).

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]

To sum up, as has been shown, climate change is considered as an environmental concern owing to its global nature as a challenge which is best addressed through cooperation and its interlink with activities which arguably ensure the realisation of human rights. However, the stronger argument is that the human source of climate change and vulnerability are valid reasons for involving a human rights framework as a response to adverse effects of climate change. It remains to describe what constitutes a human rights approach in this book.

3 Human rights as a conceptual framework: Which approach and what features?

There are different schools of thought underpinning the notion of human rights, arguably, this section argues that the discourse school of human rights is most suitable as a conceptual framework for assessing the adequacy or otherwise of the climate change regulatory framework in relation to adverse effects of climate change.

3.1 Human rights and schools of thought

After a review of human rights literature, Dembour identifies four schools of thought which have shaped the meaning of human rights as are understood today: the natural, deliberative, protest, and discourse

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) paras 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.

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 norms 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 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] The fourth school is the discourse school which contests the notion of rights universality and advocates that rights should be dynamic embodying cultural features.[138] Dembour argues that this group believes that a lack of

126 M-B 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 S Meckled-Garcia & B 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.
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 S Meckled-Garcia & B Cali (eds) *The legalisation of human rights: Multidisciplinary perspectives on human rights and human rights law* (2006) 182-200 184.
138 JK Cowan, M-B Dembour & RA Wilson 'Introduction' in JK Cowan, M-B Dembour & RA Wilson (eds) *Culture and rights: An anthropological perspectives* (2001) 1-26 11.

human rights answers to the ills of the world and that human rights exist only because people discuss them.[139] Dembour identifies Makau Mutua as a representative of scholars in this school and generally condemns the group as human rights 'nihilists'.[140] Dembour's view of this school is perhaps mistaken, at least with regard to Mutua.[141] 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 a human rights movement in that it seeks to foster diversity and difference but only as long as this is achieved within a 'liberal paradigm'.[142] Accordingly, in his view, there is a need to review human rights so that the ideal of diversity and difference can have its true meaning.[143] 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.[144]

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,[145] 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.[146] The understanding of indigenous peoples' rights is reflected in the evolvement of instruments aimed at protecting indigenous peoples, which culminated in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[147]

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

139 Dembour (n 126 above) 4.
140 Dembour (n 126 above) 6 & 10.
141 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.
142 M Mutua *Human rights: A political and cultural critique* (2002) 4.
143 Mutua (n 142 above) 3-4.
144 Ife (n 132 above) 200.
145 Mutua (n 142 above) 3-4.
146 B de Sousa Santos & CA Rodriguez-Garavito 'Law, politics, and the subaltern in counter-hegemonic globalisation' in B de Sousa Santos & CA Rodriguez-Garavito (eds) *Law, and globalization from below: Towards a cosmopolitan legality* (2005) 1-26.
147 United Nations Declaration of Rights of the Indigenous Peoples, adopted by United Nations Resolution 61/295, at 107th plenary meetings, 13 September 2007.

climate change phenomenon which includes different role players in its cause and effect.[148] For instance, non-state actors are not only involved in the combustion of fossil fuel,[149] they are also involved in climate change mitigation measures on indigenous peoples' lands.[150] 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.

Second, the discourse school, according to Ife, recognises the dynamic role of people in human rights protection and their realisation.[151] 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.[152] 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.[153]

Third, even if per Dembour, the discourse school views human rights as relevant only in so far as peoples 'talk about it',[154] it holds some significance for addressing the challenge posed by the climate change regulatory framework to indigenous peoples. As Amy Sinden argues,

148 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; Knox (n 5 above).

149 R Bratspies 'The intersection of international human rights and domestic environmental regulation' (2010) 38 *Georgia Journal of International & Comparative Law* 649 652.

150 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.

151 Ife (n 132 above) 76-77.

152 A Klotz & CM Lynch *Strategies for research in constructivist international relations* (2007) 1; Sarelin (n 141 above).

153 '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.

154 Dembour (n 126 above) 7.

human rights 'at least at rhetorical level' remain the best response of law for addressing the adverse impacts of climate change.[155] 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.[156] 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 indigenous peoples' lands. Beside adaptation funds, an example of such measures is the United Nations Reduced Emissions from Deforestation and forest Degradation (UN-REDD) programme.[157]A discourse understanding of human rights can help in bringing out the adequacy or otherwise of the regulatory framework associated 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,[158] international trade,[159] and climate change.[160] 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,

155 A Sinden 'Climate change and human rights' (2008) 27 *Journal of Land Resources & Environmental Law* 257.

156 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; Knox (n 5 above).

157 Centre for International Environmental Law *Know your rights related to REDD+: A guide for indigenous and local community leaders* (2014) 5; JW 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 Chaps 4 and 5 where the initiative is examined in detail.

158 Sarelin (n 141 above).

159 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.

160 M 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; Centre for International Environmental Law (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 156 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; Centre for International Environmental Law *Human rights and climate change: Practical steps for implementation* (2009); Aminzadeh (n 107 above).

participation and inclusion, and accountability.[161] 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.

3.2 Core human rights principles

Human rights entail certain core principles namely, universality and indivisibility, interdependency and inter-relatedness, non-discrimination and equality, participation, and accountability which shall be demonstrated as 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 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.[162]

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.[163] The notion of universality and inalienability, a core feature of the human rights

161 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 141 above) 109-134 on the realisation of right to food; Walker (n 159 above) 34-5 in relation to international trade; and in relation to climate change, Von Normann (n 160 above) and Schade (n 160 above) 9-10.

162 G Alfreðsson 'Human rights and indigenous rights' in N Loukacheva (ed) *Polar law textbook* (2010) 147.

163 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.

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 state 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.[164] The pillar covenant of human rights, namely the International Covenant on Civil and Political Rights (ICCPR),[165]and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[166] have 164 and 160 parties respectively.[167] The Convention on the Elimination of Racial Discrimination (CERD) has no less than 175 parties and is of significance to indigenous peoples.[168] Signatories to these instruments include states in Africa and, with the exception of China and United States in the case of the ICESCR, it includes most developed nations of the world which have or are pressured for commitments under the climate change regulatory framework.[169] 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.[170] As Alfreðsson has argued the provisions of a declaration such as UNDRIP may operate either in whole or in part as international

164 http://www2.ohchr.org/english/law/ (accessed 2 January 2013); see also McInerney-Lankford (n 148 above) 4.

165 International Covenant on Civil and Political Rights (ICCPR), Dec 16, 1966, 9 UNTS 171.

166 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.

167 McInerney-Lankford (n 156 above) 4.

168 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.

169 McInerney-Lankford (n 156 above) 4.

170 The 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 . Eleven states abstained from voting while 34 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 (this note) 141-154.

customary law, particularly with regard to equality, non-discrimination and the prohibition of torture.[171]

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.[172] 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)[173] and the African Commission on Human and Peoples' Rights (the Commission).[174] Issues in relation to indigenous peoples have featured in the General Comments of the CESCR,[175] and the HRC, at least in engaging states such as Rwanda.[176] The CERD has indeed noted that encroachment on indigenous peoples' lands or forced displacement can trigger the use of its early warning procedure.[177] It has equally featured the plight of indigenous peoples in its concluding remarks in relation to states such as Rwanda,[178] Canada,[179] Sweden,[180] and Suriname[181] in relation to land rights.[182]

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,[183] Nigeria[184] and

171 Alfreðsson (n 162 above) 149.
172 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.
173 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 (11-29 January 2010) CRC/C/CMR/CO/2.
174 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 168 above) 161.
175 United Nations General Comment 15 'The right to water, arts 11 and 12'.
176 Concluding Observations on Rwanda, Human Rights Committee 95th session (7 May 2009) CCPR/C/RWA/CO/3 para 22.
177 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.
178 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.
179 Concluding Observations on Canada, Committee on the Elimination of Racial Discrimination (25 May 2007) CERD/C/CAN/CO/18, para 22.
180 Concluding Observations on Sweden, Committee on the Elimination of Racial Discrimination (10 May 2004) CERD/C/64/CO/8, para 16.
181 Concluding Observations on Surimane, Committee on the Elimination of Racial Discrimination (12 March 2004) CERD/C/64/CO/9, para 14.
182 See generally on the activities of the CERD, Mackay (n 168 above).
183 Human Rights Council 11th Session Agenda item 6 'Universal Periodic Review Report of the Working Group on the Universal Periodic Review, Cameroon' (12 October 2009) A/HRC/11/21, para 46.
184 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 & 65.

Botswana.[185] Similarly, the agenda of mechanisms such as the Working Group of Indigenous Populations,[186] Permanent Forum on Indigenous Issues[187] and Special Rapporteur for Indigenous Peoples,[188] are known for issues relating to indigenous peoples. Arguably, the notion of the universality and inalienability of human rights is reflected in the functioning 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).[189] Indigenous peoples' rights have featured in the main procedures of the Commission, namely, state reporting and communication and resolutions/ guidelines.[190] In its concluding remarks on states such as Namibia,[191] South Africa,[192] Uganda,[193] Cameroon,[194] and the communication on Kenya,[195] the Commission focuses attention on different aspects of the impact of state activities on indigenous peoples' human rights.[196] Arguably, the widespread presence or availability of international norms

185 Human Rights Council, 10th Session 'Universal Periodic Review Report of the Working Group on the Universal Periodic Review, Botswana' (13 January 2009) A/ HRC/10/69, para 35.

186 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.

187 Established as an advisory body to ECOSOC, see, Viljoen (n 186 above) 80.

188 This was established in 2001 with the mandate to study issues impacting on the human rights of the indigenous peoples.

189 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.

190 Viljoen (n 186 above) 87.

191 Concluding Observations for the Report of Namibia, issued after examination at the 29th session.

192 'Conclusions and recommendations on the 1st Periodic Report of the Republic of South Africa' 38th session of the Commission (21 November-5 December 2005).

193 '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.

194 Concluding observations and recommendations on the 2nd Periodic Report of the Republic of Cameroon, 47th ordinary session (12-26 May 2010) 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.

195 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.

196 Viljoen (n 186 above) 88.

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.[197]

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 it 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.[198]

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 lands 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 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.[199]

197 See generally on the activities of the CERD, Mackay (n 168 above).

198 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.

199 Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), entered into force 5 September 1991 (ILO Convention 169) art 16(2).

Similar evidence on the interrelatedness and interdependency of rights to lands 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 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,[200] benefit-sharing,[201] participation,[202] access to justice,[203] and co-operation,[204] 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 lands 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:

> 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. In *Case Concerning the Gabcikovo-Nagymaros Project*,[205] 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

200 UNDRIP, arts 24 and 29.
201 UNDRIP, arts 10, 28 which provides for compensation; also arts 11(2) and 28(1) on restitution.
202 UNDRIP, arts 5, 18, 27 and 41.
203 UNDRIP, art 40.
204 UNDRIP, arts 38 and 39.
205 *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 (*Gabcikovo-Nagymaros Project* case).

> 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.[206]

These interrelated normative constructions of the rights to lands 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 indigenous peoples' lands in that there is a foreseeable set of overlapping and interconnected negative impacts touching areas including their welfare, livelihoods, social order, identity and culture.[207] 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 lands of indigenous peoples to such rights as the: rights to property;[208] life, liberty and personal security;[209] subsistence;[210] food security;[211] health;[212] spirituality;[213] and a safe and

206 *Gabcikovo-Nagymaros Project* case (n 205 above) 9-92 per Judge Weeremantry.

207 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; '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* 164 169; K Sena 'REDD and indigenous peoples' rights in Africa' IWGIA *REDD and indigenous peoples* (2009) Indigenous Affairs 10-20.

208 In a number of cases from the regional human rights system, particularly the Inter-American and African systems, the issues relating to indigenous peoples' right to land have been made while alleging a violation of the right to property, see *See Saramaka People v Suriname* IACHR (28 November 2007) Ser C 172, para 95; *Indigenous Community Yakye Axa v Paraguay* IACHR (17 June 2005) Ser C 146 para 143; *Maya Indigenous Community of the Toledo District v Belize,* Inter- American Commission on Human Rights, IAm Comm of HR (12 October 2004) EA/Ser.L/V/II.122 doc. 5 rev Case 12.053,; *Indigenous Community of Awas Tingni v Nicaragua* IACHR (31 August 2001) Ser C 79 para 148.

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

210 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.

211 *The right to food* A/60/350, 12 September 2005, 8-21 which stresses the centrality of land to food security of indigenous peoples www.un.org/en/ecosoc/docs/pdfs/summary%2020land%20and%20vulnerable%20people%202%20june.pdf (accessed 25 March 2012).

212 *Yanomami* (n 209 above).

213 *Sesana & others v Attorney General* High Court Judgment, ILDC 665 (BW 2006), where

healthy environment.[214] The main focus of this book 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.

3.2.3 Equity and non-discrimination

According to Swepston and Alfreðsson, the prohibition of discrimination is a crucial aspect of human rights law.[215] 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.[216] 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.[217] As the climate situation worsens, there is evidence that poorer nations, and the poor populations within these nations, will be worst affected.[218] Due to discrimination, indigenous peoples are marginalised and are often regarded as belonging to the 'poorest of the poor'.[219] A major manifestation and catalyst of discrimination and inequality 'has been the failure of state authorities to recognise customary indigenous forms of land possession and use'.[220]

the Court held that there is 'a deeply spiritual relationship between indigenous peoples and their land'.

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

215 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.

216 Sarelin (n 141 above) 112; The World Bank *World Development Report 2006: Equity and development* (2006) 27.

217 See Anderson (n 207 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 & 13.

218 Intergovernmental Panel on Climate Change *Climate change 2007: 4th Assessment Report* (Summary for Policy Maker) (2007) 8; McInerney-Lankford et al (n 156 above) 1.

219 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.

220 *Surimane* (n 208 above) para 235; and the concurring opinion of Judge Sergio Garcia Ramirez in the judgment on the merits and reparations in *Awas Tingni* (n 208 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'.

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,[221] benefit-sharing,[222] and the right of states to natural resources.[223] 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,[224] ICCPR,[225] ICESCR,[226] Declaration of Principles on Equality,[227] 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.[228]

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:

> 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

221 UNDRIP, arts 24 and 29.
222 UNDRIP, arts 10 and 28 which provide for compensation; also arts 11(2) and 28(1) on restitution.
223 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.
224 Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly in Paris on 10 December 1948, General Assembly Resolution 217 A (III).
225 ICCPR, arts 2(1), 3, 4(1) and 26.
226 ICESCR, arts 2(2) and (3).
227 Declaration of Principles on Equality (2008) http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf (accessed 10 November 2013) principle 5.
228 Mackay (n 168 above) 156; also see Forest Peoples' Programme 'Indigenous peoples and United Nations human rights treaty bodies: A compilation of treaty body jurisprudence 1993-2004' (5 September 2005) http://www.forestpeoples.org/topics/un-human-rights-system/publication/2010/indigenous-peoples-and-united-nations-human-rights--0 (accessed 31 May 2016).

> the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[229]

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.[230] In fact, according to the Working Group, 'the rampant discrimination towards indigenous peoples is a violation of the African Charter'.[231] Equity and non-discrimination as a human rights principle is useful in the context of safeguarding intergenerational and intra-generational equity.

Intergenerational equity

Intergenerational equity brings to the fore the responsibility of the human entity to protect the environment and not to destroy it.[232] This relationship, posits Weiss, imposes upon each generation certain planetary obligations to conserve the natural and cultural resource base for future generation.[233] 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 way that it does not restrict the options of future generations.[234] Second, one generation should pass the planet over to the other in no worse condition than it was given.[235] 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'.[236]

The principle of equity and non-discrimination converges with the notion of intergenerational equity as revealed in the thinking and claim of indigenous peoples on the sustainable use of their lands. Generally, indigenous peoples hold their lands not only for themselves but on behalf of future generations.[237] In equity terms, it connotes that if their lands

229 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.
230 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.
231 Working Group Report (n 230 above) 34.
232 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; see also P Sands et al *Principles of international environmental law* 3rd ed (2012).
233 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, EB Weiss *In fairness to future generations: International law, common patrimony and intergenerational equity* (1989).
234 EB Weiss 'Intergenerational equity and the rights of future generations'? http://biblio.juridicas.unam.mx/libros/4/1985/11.pdf (accessed 31 May 2014) 609.
235 As above.
236 As above.
237 UNDRIP, art 25.

become 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 indigenous knowledge system to the survival of their communities and the entire world.[238] 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.[239] 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.[240]

Whereas intergenerational equity is a concept widely recognised in environmental law instruments[241] 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 exist yet.[242] 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.[243] In Supanich's view, the human rights model is unsuitable in discussing intergenerational responsibility as it is uncertain that 'environmental rights' exist at all.[244] The third objection against Weiss's notion is that its conceptualising as 'group rights' negates the

238 Nakuru Declaration (n 153 above).

239 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).

240 Nakuru Declaration (n 153 above).

241 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; UNFCCC, Preamble & art 3(1); CBD, art 3.

242 JW Tung-Chieh 'Intergenerational and intragenerational equity and transboundary movements of radioactive wastes' 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, 2002 13-14, where the author presents these criticisms in the context of transboundary movements of radioactive wastes.

243 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.

244 Supanich (n 243 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

Western liberal political ideology and legal traditions of individual rights.[245]

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. First, the UNDRIP recognises the responsibility of indigenous peoples towards their lands 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.[246]

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.[247] 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,[248] the United Nations Charter,[249] and the ICCPR.[250] These instruments, according to Weiss, 'express a fundamental belief in the dignity of all

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.

245 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.

246 UNDRIP, art 25.

247 *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.

248 UDHR, Preamble.

249 United Nations Charter, Preamble.

250 ICCPR, Preamble.

members of the human family and an equality of rights, which extends in time as well as space'.[251]

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.[252] 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, a human rights construct can expand the 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.

Intra-generational equity

In international environmental law, the principle of intra-generational equity is reflected in the notion of 'common but differentiated responsibility'.[253] 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.[254] 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.[255] The principle of common but differentiated responsibility is a recurrent theme in key instruments of international environmental law.[256] In the context of climate change, the Preamble of the UNFCCC acknowledges that:

251 Weiss (n 234 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.

252 African Charter, art 24.

253 Tladi (n 86 above) 49; Fuentes (n 244 above) 122.

254 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.

255 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.

256 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'.

> [T]he 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.

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.[257] The obligation on the part of developing nations to cooperate is made conditional on the implementation of commitments by developed countries.[258] 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 the 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'.[259] 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.[260]

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'.[261] Additionally, Stone contends, shifting the focus on the wealth and technological

257 Kyoto Protocol, art 3.
258 UNFCCC, art 4(7).
259 Indigenous Peoples Climate Change Mitigation Report (n 207 above) para 17.
260 As above.
261 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.

superiority of 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 ancestors.[262] 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 ancestors 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 non-discrimination. The provision for affirmative action programmes requires the adoption of measures especially for the improvement in the wellbeing of generally deprived populations.[263] 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. 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.

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.[264] There are relevant norms on participation which the emerging climate change regulatory framework should embody. The absence of such principles will make it

262 Stone (n 261 above) 292.

263 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'.

264 *Human rights based approach principles* (n 161 above); Hausermann (n 161 above); L VeneKlasen et al 'Rights-based approaches and beyond: Challenges of linking rights and participation' IDS Working Paper 235 (December 2004) 5.

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 a basis for expecting the climate change regulatory framework to enable the involvement of indigenous peoples in the discussions pertaining to activities on their lands.

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.[265]

Article 21 of the UDHR provides that everyone has the right to take part in the governance of his or her country.[266] 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'.[267] It also provides for participation in terms of taking part in the conduct of public affairs and access to public service in a given country.[268] 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.[269] In its General Recommendation XXIII on the Rights of Indigenous Peoples, the CERD calls upon state parties:

> [T]o 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,[270] Inter-American Convention,[271] and the African Charter,[272] 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

265 Also see UNDRIP arts 5, 27 and 41.
266 UDHR, art 21.
267 ICCPR, art 25.
268 As above.
269 Human Rights Committee, General Comment 25 (1996), UN Doc CCPR/C/21/Rev.1/Add.7, para 5.
270 American Declaration, art 20.
271 Inter-American Convention, art 23.
272 African Charter, art 13.

otherwise of the climate change regulatory framework in relation to the protection of indigenous peoples in the light of climate change challenge.

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.[273]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.[274] Unlike international environmental law, in which duties or commitments are held horizontally, between state and state,[275] duties of states generally exist with regard to their citizens under international human rights law.[276] There are three levels of obligations, namely, to *respect*, to *protect*, and to *fulfil* human rights.[277] 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 lands.[278] 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.[279] Yet, the depredations of climate change primarily result from private economic activity, that is, operations mostly by non-

273 *Human rights based approach principles* (n 161 above); Hausermann (n 161 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.

274 O O'Neili 'The dark side of human rights' (2005) 81 *International Affairs* 427.

275 UNFCCC, art 3(1); Limon (n 4 above) 458; P Cullet 'Definition of an environmental right in a human rights context'(1995) 13 *Netherlands Quarterly of Human Rights* 25.

276 McInerney-Lankford et al (n 156 above).

277 IE Koch 'Dichotomies, trichotomies or waves of duties?'(2005) 5 *Human Rights Law Review* 81.

278 General Comment 31 [80] 'Nature of the General Legal Obligation Imposed on state parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.13 HRC (United Nations General Comment 31) paras 5-6.

279 RM Bratspies 'The intersection of international human rights and domestic environmental regulation' (2010) 38 *Georgia Journal of International & Comparative Law* 649.

state actors, which make the need for human rights application compelling.[280]

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.[281] 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.[282] However, there is emerging a reconstruction of the accountability regime to make extraterritorial application of human rights possible. In this regard, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights can be helpful in providing for extraterritorial obligations (ETOs).[283] 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:

> [R]efrain from interfering with the enjoyment of human rights in other countries; take measures to prevent third parties (eg 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.[284]

The application of human rights supports international co-operation to address the negative impacts of climate change on vulnerable populations.[285] It does not foreclose international co-operation, which, in itself, is extraterritorial in reach. As shall be argued later in the book, 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.[286] Hence, the accountability element of a human rights approach is a further justification for engaging

280 Bratspies (n 149 above) 652.
281 United Nations General Comment 31 para 7; S Skogly *Beyond national borders: States' human rights obligations in international co-operation* (2006) 60-61.
282 Inuit petition (n 153 above).
283 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).
284 OHCHR Report (n 8 above) para 86.
285 Knox (n 5 above) 494-95.
286 See Chap 6.

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.[287] 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.[288]

The element of accountability in human rights offers an added value to indigenous peoples' concerns in relation to their lands by providing grievance mechanisms where issues in relation to 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.[289] 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.[290] 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.[291]

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.[292] It does not allow for individual recourse to adversarial measures, even when it does not provide remedies for injured parties.[293] Rather, it follows the consensual nature of the compliance system under

287 United Nations Charter, a combined reading of arts 56 and 55 is arguably a basis for international co-operation in relation to human right.

288 C Wold, D Hunter & M Powers *Climate change and the law* (2009) 133.

289 McInerney-Lankford et al (n 156 above) 3.

290 'A complaint mechanism for REDD+' 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).

291 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 141 above)125.

292 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).

293 Aminzadeh (n 107 above) 259-60.

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.[294] This approach is not new. It is evidenced in such instruments as the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*,[295] the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),[296] and the 1989 *Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal*[297] (the Basel Convention). This approach reflects or explains the viewpoint argued by Bodansky, that international environmental law is more of a trade off involving different requirements for different countries.[298] 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 wrongdoing.[299]

Yet, such a preference for non-adversarial means of addressing climate change flies in the face of the adverse reality of climate change. As Aminzadeh points out, the path followed so far by the international community has been largely ineffective in addressing the mitigation of, and adaptation to climate change.[300] Perhaps, nothing reflects the unacceptability of this approach better than Mali's submission 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.[301]

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.[302] Arguably, it holds promise for vulnerable peoples, such as indigenous peoples, who, in any

294 J Brunnée 'The Kyoto Protocol: Testing ground for compliance theories?' (2003) 63 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 255-280.

295 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 (25 November 1992) UNEP/OzL.Pro.4/15; 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.

296 *Aarhus Convention* done at Aarhus, Denmark, 25 June 1998.

297 *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 22 March 1989, entered into force 5 May 1992, 28 ILM 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 292 above).

298 Bodansky (n 4 above).

299 Fitzmaurice (n 292 above).

300 Aminzadeh (n 107 above).

301 Mali Submission (n 24 above).

302 As above.

case, do not participate or contribute in any formal way at the climate change discussions.[303] 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 lands. 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 remedy before national tribunals regarding every alleged violation of human rights.[304] 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.[305] According to article 7 of the African Charter, 'every individual shall have the right to have his cause heard'.[306] 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.[307]

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'.[308] Also, according to article 10 of the UNDRIP, indigenous peoples are not to be forcibly removed from their lands, without free, prior and informed consent 'on just and fair compensation and, where possible, with the option of return.'[309]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.[310] Regional tribunals include the Inter-American Commission and Court of Human Rights and the European Court of Human Rights

303 Indigenous Peoples Climate Change Mitigation Report (n 207 above).
304 UDHR, art 8.
305 CESCR General Comment 3, para 5.
306 African Charter, art 7.
307 UDHR, art 40.
308 UDHR, art 28.
309 UNDRIP, art 10.
310 The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985.

(ECHR),[311] and the Commission as well as the African Court on Human and Peoples' Rights, provided the applicable condition is fulfilled.[312]

4 Conclusion

In sum, the chapter explained and justified a human rights framework as a conceptual basis for assessing the climate change regulatory framework in response to 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 constitute a human rights framework. A human rights framework is defined by core principles namely, interdependence and inter-relatedness, non-discrimination and equality, participation and inclusion, and accountability along with key provisions of rights embodied in human rights instruments. Human rights, as a conceptual framework also intersects with environmental law principles, namely, inter-generational as well as intra-generational notions of equity. When linked to a human rights framework, these principles can be translated from equitable principles of environmental law to legal rights which can be recognised and engaged 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. As shall be discussed in subsequent chapters, the relevance of the framework cannot be overstated where climate change constitutes a threat to indigenous peoples' lands and there is inadequate protection in climate change regulatory framework.

311 CIEL *Human rights and climate change* (n 160 above) 22-3.
312 MS Chapman 'Climate change and the regional human rights systems' (2010) 10 *Sustainable Development Law & Policy* 37.

CHAPTER 3 THE NOTION OF INDIGENOUS PEOPLES' LAND RIGHTS AND ADVERSE EFFECTS OF CLIMATE CHANGE IN AFRICA

1 Introduction

The preceding chapter justified 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 intersection with key environmental law principles. This chapter seeks to establish the notion of indigenous peoples' land rights as referenced in this book and its peculiar link with the adverse effects of climate change. The chapter is presented in four sections. Subsequent to the introductory comment, the second section discusses the notion of indigenous peoples' land rights. Section three 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 is adversely affected by climate change. Section four is the conclusion.

2 The nature of indigenous peoples' land rights

Lands 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] As shall be shown, indigenous peoples' lands are vulnerable to a

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).

range of challenges, more so under a rapidly changing climate. It is, however, important to unpack as a departing point the nature of indigenous peoples' land rights, Indigenous peoples use lands for subsistence in several ways including fishing, hunting, shifting cultivation, 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 lands, as canvassed here, is not merely one of 'conservation'.[8] The relationship of indigenous peoples to their lands constitutes an important source of knowledge of cultural significance to their nature or environment survival.[9] The significance of the subsistence use of lands by indigenous peoples goes beyond conservation. This subsistence use of lands by indigenous peoples is characterised by features in the form of holding patterns and practices, which, as shall be made evident in the ensuing section, defines their cultural and environmental relationship with lands.[10]

2.1 Land use as an emblem of cultural and environmental integrity

The indigenous peoples are diverse and the perception of the states in

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* IACHR (2005) Series C 125 para 154.

7 Desmet (n 4 above) 50, the author however generally states that 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.

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) Report for the land tenure service of the Food and Agriculture Organisation, see generally, Chap 5; TO Elias *The nature of African customary law* (1956) Chap 9, which generally deals with African concept of ownership and possession.

which they live may differ from region to region.[11] Lands are essential to indigenous peoples' cultural identity and survival.[12] However, this is not the end of its significance. Lands, through their use by indigenous peoples for subsistence purpose,[13] is also critical to environmental integrity. Hence, disrupting or denying their subsistence use of lands 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 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

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 (this note) 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' unpublished Thesis submitted in fulfilment of the requirements of the degree Doctor of Laws (LLD) Faculty of Law, University of Pretoria, 2008 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); EA 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.

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* (2010) 38.

18 The term 'environmental' and 'ecological integrity' has been used interchangeably, 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.

with little or no influence from human actions'.[19] The argument is made here that subsistence use of lands 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.

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]

The view of hunters and gatherers in relation to environmental integrity goes hand in hand with their cultural use of lands for subsistence purpose.[25] Indigenous peoples view themselves as culturally linked with the natural environment, including lands upon which they live.[26] This is

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 Session, 15 (Working Group Report).

23 Ingold (n 20 above) 42.

24 Ingold (n 20 above) 40.

25 L Heinämäki 'The right to be a part of nature: Indigenous peoples and the environment' academic dissertation presented with the permission of the faculty of law of the University of Lapland, 2010 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.

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 lands 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 lands 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 lands.

Among the San peoples of the Kalahari in Southern Africa, according to Nanda and Warms, lands are an expression of harmony with nature which they are willing to maintain.[33] The Maasai of eastern Africa, particularly Kenya, conceive of lands and relate to them 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 environment.[35] Francis and Situmatt maintain, given their attachment to lands, 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]

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 (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 *Cultural Anthropology* 11th ed (2014) 352, where the author refers 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.
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.

The conception of lands 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 roles 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 lands and 'every plant, beetle, animal'.[38] Suagee explains that there is little or no dividing line between indigenous peoples' environment, lands and cultural value. Rather, in the worldview of indigenous peoples, careful use of lands and its biological communities tends to be a prerequisite for cultural survival.[39]

Some commentators, however, argue that indigenous peoples' use of lands, 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 lands 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 nature.[43] In an attempt to show that the relationship of indigenous peoples with their lands 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]

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.

43 J Lüdert '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) 20.

44 A D'Amato & SK Chopra 'Whales: Their emerging right to life' (1991) 85 *American Journal of International Law* 21; 'Whales are people, too' *The Economist* 25 February 2012 69.

These viewpoints are outliers. Other commentators show that a convergence between indigenous peoples' subsistence use of lands 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 lands 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 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]

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.

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.

This is to be expected as whatever affects the use of lands of indigenous peoples has implications for their culture and environment. The recognition of the need for indigenous peoples to control and use their lands 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. For instance, the ICCPR requires that no one can be deprived of means of subsistence.[53] In interpreting article 27 of ICCPR dealing with persons belonging to ethnic, religious or linguistic minorities,[54] the Human Right Committee (HRC), in its General Comment 23,[55] 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'.[56] As an improvement upon Convention 107,[57] ILO Convention 169, recognises the right of indigenous peoples to use lands they have traditionally occupied for their subsistence and traditional activities.[58] Article 25 of the UNDRIP 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'.

The link between the subsistence land use of indigenous peoples and a sustainable environment is further underscored by the findings of Special Rapporteurs. Lands, according to 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, are an important aspect of their production and existence.[59] Subsequently, Daes 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'.[60] Indeed, according to the Report, 'the relationship with the land and all living things is at the core of indigenous societies.'[61] This point is reinforced by Stavenhagen reflecting on the continuing devastating effects of mining operations on the livelihood of

52 Ganz (n 50 above) 173.
53 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) art 1(2).
54 As above.
55 Human Rights Committee General Comment 23 'The rights of minorities' (art 27) (1994) UN Doc CCPR/C/21/Rev.1/Add.5 (General Comment 23).
56 General Comment 23, para 7.
57 The Indigenous and Tribal Populations Conventions: 1957 No 107, adopted by the International Labour Conference at its 40th session at Geneva on 26 June 1957 (ILO Convention 107).
58 ILO Convention 169, art 14(1).
59 Cobo Study (n 12 above) vol 4, para 51.
60 Daes (n 12 above) 476-477.
61 Daes Study (n 12 above) para 11.

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 lands for environmental management.[62]

In what appears to underscore the value of subsistence use of lands, 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 lands and resources'.[63] 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'.[64] 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.[65] 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'.[66] 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.[67] 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.[68] 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'.[69] It also recommended 'as custodians of the Earth's biodiversity, that indigenous peoples should be major players in the protection of world biodiversity'.[70]

At the regional level, the idea that lands, and by extension its subsistence use, is central in the agitation of indigenous peoples for human

62 R Stavenhagen 'Report of the special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, mission to the Philippines' (2003) UN Doc.E/CN.4/2003/90/Add.3, paras 28, 30 (Stavenhagen Report).
63 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.
64 As above.
65 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).
66 As above.
67 J Anaya 'Preliminary note on the situation of indigenous peoples in Botswana' (23 September 2009) A/HRC/12/34/Add.4.
68 UNPFII Study (n 3 above) para 18.
69 UNPFII 'Report on the 6th session' (14-25 May 2007) E/2007/43 E/C.19/2007/12, para 52 (UNPFII Report).
70 UNPFII Report (n 69 above) para 59.

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-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them …[71]

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.[72] 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 lands and resources of indigenous peoples, what is widespread in Africa is an unsustainable exploitation of the land resources of indigenous peoples.[73]

In the *Endorois* case, that the subsistence use of lands by indigenous peoples is of environmental and cultural significance was part of the focus in the analysis by the Commission.[74] In that case the complainants argued that the creation of a game reserve on their lands 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.[75] The Endorois community emphasised that access to their lands is crucial to the securing of their subsistence and livelihood and is inseparably linked to their cultural integrity and traditional lifestyle.[76] 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.[77]

71 Working Group Report (n 22 above) 20.
72 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.
73 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.
74 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.
75 *Endorois* case (n 74 above) para 21.
76 *Endorois* case (n 74 above) para 16.
77 As above.

In arriving at its decision, the Commission reviewed its decision in the *Ogoniland* case,[78] and reiterated the approach in the earlier jurisprudence of the Inter-American system in the matter of *Awas Tingni*.[79] 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.[80]

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 & Others v the Attorney General, the PC Rift Valley Province, Rift Valley Provincial Forest Officer, District Commissioner Nakur.*[81] 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.[82]

In *Roy Sesana, Keiwa Setlhobogwa & Others v the Attorney-General* (in his capacity as recognised agent of the government of the Republic of Botswana),[83] 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 their lands as well as undermine their culture as a people.[84] 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 lands in furtherance of their culture.

78 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).

79 *Mayagna* (Sumo) *Awas Tingni Community v Nicaragua* IACHR (31 August 2001) Ser C 79 (*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.

80 *Awas Tingni* (n 79 above) paras 148-149.

81 *Francis Kemei, David Sitienei & Others v The Attorney General, the PC Rift Valley Province, Rift Valley Provincial Forest Officer, District Commissioner Nakuru* Miscellaneous Civil Application No128 of 1999.

82 *Francis Kemei* (n 81 above).

83 *Sesana & Others v Attorney-General* (2006) AHRLR 183.

84 *Sesana* (n 83 above) para 210.

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 lands 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.

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'.[85] 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 lands.[86] 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.[87] 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.[88] However, scholarship has substantially portrayed this notion of customary land tenure using the word customary and indigenous societies/peoples' land tenure almost interchangeably, as though they are one and the same tenure.[89]

85 'What is land tenure?' http://www.fao.org/docrep/005/Y4307E/y4307e05.htm (accessed 31 May 2016).

86 As above.

87 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.

88 J Bruce & 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.

89 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' a keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1-4 August 2005 (2005), 3 (Okoth-Ogendo's tragic African commons) 11-12; Elias (n 10 above) 162.

This approach features both in the rapidly growing literature on African customary land tenure,[90] as well as writings on indigenous peoples' land tenure.[91] In particular, Okoth-Ogendo's argument that African customary law is the applicable law to indigenous peoples' lands may not be incorrect,[92] 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'.[93] 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.[94]

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.[95] 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.

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, originated during the Cold War when super powers insisted that a collective notion of rights was in conflict with individual rights.[96] The debate, however valid, has become redundant. Scholarship has shown that

90 Banda (n 10 above) 332; Okoth-Ogendo's tragic African commons (n 89 above) 3; B Cousins '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) 2; McNeil (n 1 above) 260; Elias (n 10 above) 163.

91 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.

92 Okoth-Ogendo's tragic African commons (n 89 above) 11-12.

93 Okoth-Ogendo's tragic African commons (n 89 above) 3.

94 Nelson (n 10 above) 52.

95 As above.

96 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

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.[97] 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'.[98]

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.[99] 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.

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'.[100] 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,

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 rights does not reflect a 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.

97 Buchanan (n 91) 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.

98 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'.

99 Gilbert (n 11 above) xiv; Buchanan (n 91 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.

100 UNDRIP, Preamble.

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'.[101] Article 25 safeguards the right which they have in relation to the maintenance of their special relationship with lands. 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:

> [E]stablish 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'.[102] These are lands which are traditionally vested in indigenous peoples and are held in the collective sense in accordance with established rules and customs.[103] Collective control comprises mainly extended families as opposed to individually controlled land that is not allowed as custom only permits the privilege to use lands and not to alienate or transfer it by sale.[104] The majority of indigenous communities favour 'collective stewardship' over their land and resources.[105] Generally, anthropological as well as legal commentaries exist on the collective aspect of lands 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.[106] Land relations in pre-colonial Africa emphasised, in the words of Chinock, the notion of 'ours', not 'yours'.[107] The Mbendjele of the Republic of Congo, according

101 UNDRIP, art 26(1).

102 B Cousins 'Tenure and common property resources in Africa' in C Toulmin & J Quan (eds) *Evolving land rights, policy and tenure in Africa tenure and property* (2000) 151-180 160; Okoth-Ogendo's tragic African commons (n 89 above) 12.

103 A Mahomed et al Understanding land tenure law: Commentary and legislation (2010) section 2-1.

104 AJ Njoh 'Indigenous peoples and ancestral lands: Implications of the Bakweri's case in Cameroon' in R Home (ed) *Essays in African land law* (2011) 71: Wachira (n 12 above); Barume (n 12 above) Okoth-Ogendo's tragic African commons (n 89 above) 8; C Besteman 'Individualisation and the assault on customary tenure in Africa: Title registration programmes and the case of Somalia' (1994) 64 *Africa* 484.

105 Anaya's indigenous peoples (n 11 above) 141.

106 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 104 above) 71; Cobo Study (n 12 above) vol v, para 197.

107 Chanock (n 106 above) 71.

to Barume, refer to the forests as 'ndima angosu', meaning 'our forest'.[108] Among these peoples legitimate claim to exclusive individual ownership of lands is difficult, if not impossible, as only Kombaa (God) could own land, rivers, and forest.[109] The Hadzabe of Tanzania distinguish between the 'tangoto' (open land) and the chikiko, that is, 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'.[110] In the worldview of the San people of Botswana homesteads, which include lands in the Central Kalahari, are referred to as 'nloresi' (traditional territories).[111]

Similarly, a collective relationship with lands 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 aggression and encroachment. The community cannot transfer any portion of its land to any of its members or to any outsider.[112]

However, it appears, there is no Africa-wide conception of the collectivity of land ownership. Generally, anthropological literature has shown that individual rights to lands 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 lands on account of the commission of certain crimes, or left without an intention to return, his lands could be allocated to another.[113] 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.[114] Similarly, among the Kikuyus in Kenya, individuals enjoyed a right to own their own pieces of lands,

108 Barume (n 12 above) 178.
109 Lewis (n 37 above) 64; Barume (n 12 above) 179.
110 Barume (n 12 above) 178-79, 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.
111 Barume (n 12 above) 179.
112 N Tarayai 'The legal perspectives of the Maasai culture, customs, and traditions' (2004) 21 *Arizona Journal of International & Comparative Law* 206.
113 I Schapera A *handbook of Tswana law and custom* (1994).
114 MH Wilson *Reaction to conquest: Effects of contact with Europeans on the Pondo of South Africa* (1961)113.

although rights to lands were generally held in 'commons'.[115] This pattern may be correct in terms of indigenous peoples' dealing with lands, however, it is a departure from the general perception of hunter-gatherers whose lifestyle typifies indigenous peoples in Africa.[116]

The majority of indigenous communities favour collective stewardship over their lands and resources.[117] They prefer lands possessed without the option of division into individual plots.[118] This form of land tenure system, as Wachira argues, is compatible with their cultural aspirations and way of life.[119] 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.[120]

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 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 lands 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.[121]

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,*[122] 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 lands in relation to its collective feature,[123] 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

115 J Kenyatta *Facing mount Kenya: The tribal life of the Gikuyu* (1979) 21.
116 Nelson (n 10 above) 52; Working Group Report (n 22 above)15.
117 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* 467.
118 Barume (n 12 above) 177.
119 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.
120 Okoth-Ogendo's tragic African commons (n 89 above) 12; Wachira (n 12 above).
121 Wiessner (n 16 above) 139.
122 *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700.
123 B Slattery 'Understanding aboriginal rights' (1987) 66 *Canadian Bar Review* 727 745.

> 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.[124]

There are judicial cases from different jurisdictions that further reinforce the collective notion of indigenous peoples' ownership of lands. 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. 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.[125]

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'.[126] On a similar issue, in *Alexkor Ltd & Another v Richtersveld Community & others*,[127] the Constitutional Court of South Africa affirmed 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 the 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 the 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.[128]

Regional human rights systems equally have discussed this essential aspect of indigenous peoples' land rights. For instance, in deciding whether

124 *Tsilhqot'in Nation* case (n 122 above) para 471.
125 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 115.
126 *Mabo v Queensland* (No 2) (1992) 175 CLR 1, 107 ALR 1 per Brennan para 52.
127 *Alexkor Ltd & Another v Richtersveld Community & others* (CCT19/03) [2003] ZACC 18; 204 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).
128 *Richtersveld Community* (n 127 above) paras 58 and 59.

article 21 of the American Convention on Human Rights had been violated,[129] 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.[130] 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,[131] in that sense, according to the long practice of the IACHR 'the individuals and families enjoy subsidiary rights of use and occupation'.[132] 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.[133]

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*, it was the case of the complainants that the High Court in Kenya, refused to consider the claim to a 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'.[134] 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'.[135] 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'.[136] 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'.[137]

129 American Convention on Human Rights, signed at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969.
130 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 84 above) para 140(c).
131 *Belize* case (n 5 above) para 113.
132 *Awas Tingni* case (n 79 above) para 140(a).
133 *Awas Tingn*i (n 79 above) para 149.
134 *Endorois* (n 74 above) para 12.
135 *Endorois* (n 74 above) para 87.
136 As above.
137 *Endorois* (n 74 above) para 113.

2.2.2 Customary tenure

Generally, tenure in relation to lands 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.[138] The distinction between formal and informal tenure is necessary considering that in most parts of Africa, and this is particularly true of far-flung and rural areas, the allocation of lands is effected informally through customary laws allowing individuals or groups the use of lands managed collectively.[139] It is against this background that most indigenous peoples live,[140] where the control over the use of lands is regulated through unwritten rules embedded in their customs and traditions.[141] These customs and traditions are established by indigenous peoples from time immemorial, and have not been compromised by laws imposed by colonial authorities.[142]

As earlier mentioned, an important aspect of these customs and traditions relates to its oral nature of proof of title,[143] 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.[144] Most indigenous peoples lack access to formal legal title.[145] 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.[146] 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

138 IFAD 'Land tenure security and poverty reduction' (2012) 2 http://www.ifad.org/pub/factsheet/land/e.pdf (accessed 5 March 2013).

139 B Cousins 'Characterising "communal" tenure: Nested systems and flexible boundaries' in Claassens & Cousins (n 89 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.

140 OHCHR 'The right to adequate housing' Fact Sheet No 21/Rev.

141 SD Ngidangb 'Deconstruction and reconstruction of native customary land tenure' (June 2005) 43 *Southeast Asian Studies* 50.

142 Cobo Study (n 12 above) vol iv, para 153.

143 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.

144 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.

145 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.

146 The author distinguishes the 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 89 above) 188-89.

> 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.[147]

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 and customs, which are often ignored by law.[148] Indigenous peoples are only able to prove title to their lands through reference to the graves of their ancestors and oral testimony from different generations of peoples who have inhabited the land.[149]

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'.[150] 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 lands 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 lands belonging to them'.[151] 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.[152]

The viewpoint that informal or customary rules of indigenous peoples' land tenure are valid, arguably, is strengthened by General Recommendation 23 of 1997 by the Committee on the Elimination of Racial Discrimination (CERD).[153] 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

147 McHugh (n 1 above) 200.
148 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' paper prepared for the CASS/PLAAS CBNRM Programme, 2nd Annual Regional Meeting 'Legal aspects of governance of CBNRM' (October 2000) 8-10.
149 Wachira (n 12 above) 317; C Daniels 'Indigenous rights in Namibia' in R Hitchrock & D Vinding (eds) *Indigenous peoples' rights in Southern Africa* (2004) 54.
150 UNHRC 'Resolutions on the right to adequate housing' (14 April 2008) UNHRC Res 6/27, UN Doc A/HRC/6/22.
151 ILO Convention 169, art 17(3).
152 UNDRIP, art 26(3).
153 General Recommendation 23 'Indigenous Peoples' 1997/08/18 (General Recommendation 23).

language of indigenous peoples.[154] As an integral aspect of indigenous peoples' relation to lands, it is argued that informal customs and traditions of 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 lands 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 lands 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.[155] 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 lands being claimed, or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.[156]

In proof of their case at the 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.[157] 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 lands. For many aboriginal nations, the Court held, oral histories are the only records of their past.[158] 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*.[159] In that case, the Court took the view that propositions can be validly made in relation to native title to lands without reference to documentary evidence.[160]

The reliance on 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 title deed, the Inter-American

154 General Recommendation 23 (n 153 above) para 4(a).
155 *Delgamuukw* case (n 125 above) para 7.
156 As above.
157 *Delgamuukw* case (n 125 above) para 13.
158 *Delgamuukw* case (n 125 above) para 84.
159 *Mabo* case (n 126 above).
160 *Mabo* case (n 126 above) para 64 per Brennan J.

Court of Human Rights in the *Mayagna (Sumo) Awas Tingni Community v Nicaragua,*[161] 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 lands.[162] Since the evidence of oral histories remained largely unchallenged, the Court held, it is admissible.[163] Similarly, in *Yakye Axa Indigenous Community v Paraguay,*[164] the Court asserted that to guarantee the right of indigenous peoples to communal property, it should be borne in mind that lands are closely linked to their oral expressions and traditions.[165] 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 lands and the strategy of guaranteeing remaining lands held by the indigenous nation.[166] This is most common with regard to indigenous lands in the Western hemisphere, indigenous communities in Africa such as the Maasai are a rare exception.[167] Where such a treaty relationship is proven, it can, therefore, translate an otherwise informal land ownership claim to a documented one.

2.3 Concept of parallel use

The parallel use to which indigenous peoples put lands 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 and sand, to mention a few.[168] The pattern of land tenure and use is a defining characteristic of the indigenous peoples' land ownership[169] as indigenous peoples migrate from time to time and may, as Anaya and Williams put it, 'have overlapping land use and occupancy areas'.[170] 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.[171] In particular, pastoralists such as the Maasai of Kenya and Tanzania, the Mbororo of Cameroon, the Tuareg and Fulani of West Africa and the Khoisan of Southern Africa, occupy lands in arid and semi-arid regions that are suitable for livestock keeping.[172] This form of land use

161 *Awas Tingni* (n 79 above).
162 *Awas Tingni* (n 79 above) para 83.
163 *Awas Tingni* (n 79 above) para 100.
164 *Yakye Axa* (n 6 above).
165 *Yakye Axa* (n 6 above) para 154.
166 Daes Study (n 12 above) para 49.
167 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.
168 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.
169 Anaya & Williams (n 12 above) 45.
170 Anaya & Williams (n 12 above) 33 & 45.
171 Okoth-Ogendo's tragic African commons (n 89 above) 12.
172 Working Group Report (n 22 above) 17.

by indigenous peoples, it has been argued, 'is the most feasible option of land holding'.[173] Parallel use of lands 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.[174]

Though not expressly mentioned, parallel use of lands 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'.[175] Similarly, the recognition of a parallel pattern of use of lands 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 lands is an additional description to traditional ownership and occupation of lands.

Parallel use of lands as a feature, it will seem, does not disturb exclusive claim of one indigenous group against the other in relation to lands. For instance, it does not mean that since the Endorois and the Ogiek are indigenous peoples in Kenya,[176] they can make claim to the exclusive ownership and use of lands without distinction or differentiation. This point is made clearer in *Delgamuukw v British Columbia*, where Lamer J explained the nature of indigenous peoples' lands title in relation to exclusive use and occupation as follows:

173 Wachira (n 12 above) 307.

174 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.

175 ILO Convention 169, art 14(1).

176 '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.

> 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.[177]

Although parallel use of lands 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 lands. The foregoing notion of land use and tenure of indigenous peoples, as will be argued below, is adversely impacted by climate change in modern states in Africa.

3 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.[178] 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.[179] 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.

3.1 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

177 *Delgamuukw* (n 125 above) 258.

178 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 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).

179 Resolution 10/4 (n 178 above); IITC Submssion (n 178 above).

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.[180] This approach reflects the definition of 'land use' as understood in a climate change context as 'economic purposes for which land is managed'.[181] 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 lands, in order to privatise title for realising the 'global faith' of economic development.[182] 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,[183] United Nations Development Programme (UNDP),[184] FAO,[185] the United States Agency for International Development (USAID),[186] and the European Union (EU).[187]

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,[188] because of 'development aggression',[189] 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 supports large scale agriculture, mining and logging, road building, as well as conservation programmes for economic purposes.[190]

The modern approach constitutes a development path that contributes to global climate change.[191] 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.[192]

180 Banda (n 10 above) 325.
181 IPCC 'Summary for policymakers land use, land-use change, and forestry' (2000) 21.
182 G Rist *The history of development: From western origins to global faith* (2009) 21-24.
183 World Bank *Land policy for growth and poverty reduction* (2003) 9-17.
184 United Nations Development Programme *Attacking poverty while improving the environment initiative* (1999) 13.
185 FAO *Voluntary Guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security* (2012) 17-20.
186 United States Agency for International Development *Nature,wealth and power:Emerging practice for revitalizing rural Africa* (2002) 15.
187 European Union *Land policy guidelines* (2004) 4.
188 As above.
189 *Report of the UN Special Rapporteur, Rodolfo Stavenhagen, Mission to the Philippines* UN Doc E/CN.4/2003/90, Add 3, para 30.
190 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.
191 World Development Report *Development and climate change* (2010) 1-35; C Toulmin *Climate change in Africa* (2009) 77.
192 S Amin 'The challenge of globalisation: Delinking' in *South Centre* (*Independent Commission of the South on Development Issues*) (1993) 133; see also Toulmin (n 191 above) 75-76.

Evidence of policies, laws and practices in relation to the agricultural use of lands belonging to indigenous peoples, as Barume documents, can be found in different regions of Africa since independence,[193] in nations such as Kenya,[194] Tanzania,[195] and Rwanda.[196] 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.[197] 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.[198]

Indigenous peoples' lands are often conceded to private or public business, including logging companies,[199] operating in African states, including the Democratic Republic of Congo (DRC), Nigeria, Cameroon, Tanzania, Zambia and Uganda.[200] 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.[201] Some indigenous peoples' lands is especially rich in minerals. This is the case with the Niger Delta region in Nigeria, which is rich in crude oil,[202] and the Central Kalahari Game Reserve (CKGR) in Botswana, rich in diamonds.[203] The mineral known as coltan, widely sought after by the mobile phone industry is reportedly found on Batwa ancestral lands in the DRC.[204] 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.[205] As has been shown, activities, including logging and mining, have implications for global climate change. They are a significant source

193 Barume (n 12 above) 69; also see Toulmin (n 191 above) 77.
194 Barume (n 12 above) 65.
195 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* Paper prepared for Pastoral Week at Arusha from 14-16 February 2010, 9.
196 Olengurumwa (n 195 above) 22.
197 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.
198 RW Gorte & PA Sheikh 'Deforestation and climate change' (March 2010) 13; HJ Geist & 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.
199 Barume (n 12 above) 70.
200 See generally FOA 'Forest country information' www.fao.org/forestry/country/en/ (accessed 21 June 2013).
201 FAO 'Forests and the forestry sector: Dem Republic of Congo' www.fao.org/forestry/country/57478/en/cod/ (accessed 21 May 2013).
202 TC Nzeadibe et al *Farmers' perception of climate change governance and adaptation constraints in Niger Delta region of Nigeria* (2011) 11.
203 L Odysseos 'Governing dissent in the Central Kalahari Game Reserve: 'Development', governmentality, and subjectification amongst Botswana's bushmen' (2011) 8 *Globalizations* 439.
204 Barume (n 12 above) 69.
205 Kidd & Kenrick (n 91 above) 22.

of carbon emissions, amounting to about one-fifth of global man-made emissions, thereby accelerating global rate of climate change.[206]

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.[207] 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,[208] involves territories which indigenous groups, such as the Ogoni, Efik and Ijaw, inhabit.[209] Besides its associated consequences,[210] energy-related burning, that is, oil, gas and coal contributes to 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).[211]

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,[212] 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.[213] Dam construction which results in displacement and the dispossession of lands belonging to indigenous

206 Greenpeace *Deforestation and Climate Change* www.greenpeace.org.uk/forests/climate-change (accessed 22 March 2013); Gorte & Sheikh (n 198 above) 15; Helmut & Lambin (n 198 above) 28.

207 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.

208 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).

209 'The rights of indigenous peoples: Nigeria' www1.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Nigeria.pdf (accessed 28 May 2013).

210 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).

211 REH Sims et al '2007: Energy supply'in B Metz et al (eds) *Climate change 200: Mitigation. contribution of Working Group III to the 4th Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 261-262.

212 'Rain Forest Deforestation' www.factsanddetails.com/world.php?itemid=1299&catid=52&subcatid=329 (accessed 28 March 2013); Gorte & Sheikh (n 198 above) 15; Helmut & Lambin (n 198 above) 27.

213 World Rainforest Movement 'What are underlying causes of deforestation?' www.wrm.org.uy/deforestation/indirect.html (accessed 18 June 2013).

populations, feature in Kenya – the Sondu Miriu River,[214] Namibia – the Epupa dam,[215] and Uganda – Bujagali dam.[216] The implementation of these projects comes with a considerable disruption of the subsistence lifestyle and urban migration,[217] 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.[218]

In relation to conservation, the notion that nature must be preserved from human interference has long been the underlying basis for global conservation efforts,[219] often at the expense of the indigenous peoples' land use[220] as well as traditional tenure associated with it.[221] 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 characterised by forced removal without compensation.[222] A similar occurrence is found in projects involving forest-based Batwa in the DRC,[223] and in Uganda.[224] 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 the emission of greenhouse gases which results in a changing climate.[225] However, in occasioning dispossession, taking over control and use of lands of indigenous peoples, conservation has implications for climate change as it is associated with slippage in the global effort to mitigate climate change in

214 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.
215 Dam Struggles (n 214 above) 28.
216 Dam Struggles (n 214 above) 29.
217 Dam Struggles (n 214 above) 28-29.
218 IOM 'Migration and climate change' http://www.iom.int/migration-and-climate-change (accessed 18 March 2013).
219 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.
220 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.
221 Colchester (n 219 above) 5.
222 Cernea & Schmidt-Soltau (n 220 above) 1808-30; Kidd & Kenrick (n 91 above) 10-11.
223 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.
224 C Kidd & P Zaninka 'Securing indigenous peoples' rights in conservation: A review of South-West Uganda' (2008) 16.
225 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.

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.[226]

To sum up, generally, in all activities which serve as triggers of climate change there is a clear loss of lands 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 lands occupied by indigenous peoples in Africa.

3.2 Climate change as a threat

In Africa, climate change contributes to a lack of viability of indigenous peoples' lands, leads to migration, and thus make their lands vacant for state occupation for use to serve national economic ends.[227] In West Africa, climatic impact on lands belonging to indigenous peoples such as the Bororo, and Tuareg,[228] 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.[229] 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.[230] These peoples continue to experience conditions, including drought, flood, famine, displacement, and loss of life, which are due to climate change.[231] In an article referring to research commissioned by the Christian Aid in Northern Kenya, Beaumont depicts

226 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.

227 'Agrofuels and the myth of the marginal lands' 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).

228 Working Group Report (n 22 above) 18.

229 Indigenous Peoples of Africa Coordinating Committee (IPACC) 'West Africa' http://www.ipacc.org.za/eng/regional_westafrica.asp (accessed 15 September 2011).

230 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).

231 IWGIA *The World Indigenous Report* (2011) 410; Tebtebba Foundation (n 230 above).

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 lands.[232] 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 lands 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.[233] 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.[234] 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.[235] In the Horn of Africa, the Doko, Ezo, Zozo and Daro Malo in 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 lands.[236]

The Amazigh (or Imazighn), also known as the Berbers, in North Africa[237] 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.[238] In the southern part of Africa, the San and Basarwa of the Kalahari basin,[239] 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.[240] Indeed, the concern has been expressed that as the Kalahari dunes spread, this will affect huge tracts of lands in Botswana,

232 'Kenya's herdsmen are facing extinction as global warming destroys their lands' *The Observer,* 12 November 2006.
233 Working Group Report (n 22 above) 16.
234 Tebtebba Foundation (n 230 above) 481.
235 As above.
236 '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).
237 Working Group Report (n 22 above) 18-19.
238 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).
239 Working Group Report (n 22 above) 17.
240 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).

Angola, Zimbabwe and western Zambia where these indigenous peoples live.[241]

The foregoing scenarios on lands of indigenous peoples often lead to their displacement. For instance, in the Report following 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.[242] 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 primarily from such African states as Uganda, Eritrea, Ethiopia, Somalia and Eastern Sudan.[243] It was noted that pastoralists from the south-west of Uganda, have permanently moved across the border into Northern Tanzania.[244] Similarly, pastoralists from Ethiopia, as reported, have crossed the border into Kenya and other regions in Ethiopia due to the prolonged drought.[245]

In an earlier Study of 2009, it was concluded that drought has so affected the traditional pasture lands 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.[246] Although it can be traced to other factors, severe climatic variations are the triggers for displacement in Northern Kenya.[247] Estimates in 2011 put the figure of those displaced in northern Kenya as a

241 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).

242 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).

243 Afifi et al (n 242 above) 24.

244 Afifi et al (n 242 above) 41, reporting the viewpoint of an official from Ministry of Agriculture in Uganda.

245 Afifi et al (n 242 above) 41, reporting the viewpoint of International Organisation for Migration, Ethiopia.

246 V Kolmannskog *Climate change, disaster, displacement and migration*: *Initial evidence from Africa* New Issues in Refugee Research, Research Paper 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).

247 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

result of a range of factors including drought at around 4000.[248] The ecological changes including drought, the Fulbe or Mbororo herders in the western part of Africa have altered their transhumance patterns.[249] In Nigeria, for instance, the general trend in the migratory drifts of the Mbororo has been from northwest to southeast.[250]

3.3 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 reduce the sources or enhance the sinks of greenhouse gases.[251] 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).[252] 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.[253] 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

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* 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.

248 Sheekh et al (n 247 above) 5.

249 Full citation? 'Nigeria'www1.chr.up.ac.za/chr_old/indigenous/documents/Nigeria/Report/The%20History%20And%20Social%20Organisation%20Of%20The%20Pastoral%20Fulbe%20Society.doc. Link doesn't work (accessed 28 October 2013).

250 As above.

251 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.

252 Conference of the Parties (COP) at its 7th session in 2001 through decision 5/CP.7, see Toulmin (n 191 above) 28; see art 4(9) of the UNFCCC which recognises the special needs of LDCs.

253 This is examined in detail in Chap 5, which is devoted to the national climate regulatory framework in relation to indigenous peoples' lands.

which supports nationally-led REDD+.[254] Many of the forests envisaged for these projects are in the territories historically belonging to indigenous peoples.[255] In Africa, states that are fully under the UN-REDD National programme for REDD+ include the 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.[256] In these states, 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.[257] Indigenous peoples can be empowered and their 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.[258] 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.[259] Regarding the REDD+, there are emerging concerns that projects will erode the rights of indigenous peoples who are forest-dependent,[260] due to the insecurity of land tenure of indigenous peoples which potentially

254 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.

255 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.

256 UN-REDD 'Partner countries' www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx (accessed 14 June 2013).

257 Toulmin (n 191 above) 130.

258 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.

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

260 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 191 above) 130.

constitutes a barrier to claim 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.[261] 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'.[262] 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 lands and its cultural significance.

4 Conclusion

The foregoing analysis explores the notion of indigenous peoples' land rights. Indigenous peoples view and use lands 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. Notwithstanding the foregoing, the land tenure and use of indigenous peoples is adversely affected by climate change, as has been shown. It is adversely affected in the cause of climate change in that the expropriation and unsustainable utilisation of indigenous peoples' lands for developmental purposes undermine and subordinate indigenous peoples' notion of land tenure and use. 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 lands vacant and available for state occupation for purposes which undermine their notion of land tenure and use. Also, global climate change response initiatives have negative impacts on indigenous peoples' land tenure and use. The next chapter explores the extent to which international climate change regulatory framework addresses this trend.

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

262 S Jan & A Byg (eds) *Indigenous peoples and climate change* (2007) 9.

CHAPTER 4 THE INTERNATIONAL CLIMATE CHANGE REGULATORY FRAMEWORK IN RELATION TO INDIGENOUS PEOPLES' LANDS

1 Introduction

The previous chapter unpacked the notion of indigenous peoples' land rights in terms of land use and tenure as well as discussed its link with adverse effects of climate change. Given the global nature of climate change, the response has been top-down: instruments are adopted at the international level to address the adverse impacts of climate change at the national level. In itself this is not problematic considering that climate change is a global challenge.[1] Issues such as the differentiation of responsibilities between developed and developing states and allocation and transfer of resources make international negotiation and response inevitable and distinct from other levels of climate governance. In the words of the United Nations Framework Convention on Climate Change (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 response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.[2]

In the top-down approach, Africa states as parties to the UNFCCC participate in the discussion of the Conference of Parties (COP) under the aegis of the UNFCCC[3] and as non-Annex B parties without binding

1 JL Dunnof 'Levels of environmental governance' in D Bodansky et al (eds) *The Oxford handbook of international environmental law* (2007) 87; but for limitations to the approach see generally 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).

2 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, Preamble.

3 The COP is established pursuant to article 7 of the UNFCCC.

targets in the discussion of the Meeting of the Parties (MOP) under the Kyoto Protocol,[4] and once it enters into force, states in Africa that are parties will be involved in the activities under the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement which requires all parties to take ambitious efforts towards addressing climate change.[5] They participate as member states in the role of the Intergovernmental Panel on Climate Change (IPCC) 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'.[6] Experts from states in Africa feature in the activities of the Subsidiary Body for Scientific and Technological Advice (SBSTA),[7] which contributes 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.[8] They participate under the Subsidiary Body for Implementation (SBI),[9] which scrutinises the information submitted by state parties in documentation, such as the national communications and emission inventories.[10] States in Africa are also involved in the activities under the Ad-hoc Working Group on Long Term Cooperative Action Under the Convention (AWG-LA),[11] including the negotiation of the Cancun Agreements.[12] In particular, through its common position on climate change, African states have influenced the design and use of the international regime. For instance, their emphasis on the fact that Africa faces adverse effects of climate change despite contributing least to its occurrence reinforces the notion of common but differentiated responsibility,[13] and has elicited rule-making and decisions in relation to adaptation and mitigation which are considered as global responses to climate change.[14]

4 The MOP is established by virtue of article 13 of the Kyoto Protocol.
5 Paris Agreement under the United Nations Framework Convention on Climate Change 2015, adopted by Conference of the Parties, 21st Session Paris, 30 November-11 December 2015 FCCC/CP/2015/L.9/Rev.1, art 3.
6 Presently, 195 countries are members of the IPCC, see IPCC 'Organisation' http://www.ipcc.ch/organisation/organisation.shtml (accessed 12 May 2014).
7 SBSTA is established pursuant to art 9 of the UNFCCC.
8 Gale (n 1 above) 36.
9 UNFCCC, art 10.
10 Gale (n 1 above) 37.
11 The AWG-LA was established as a subsidiary body under the UNFCCC at COP13 as part of the Bali Action Plan.
12 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).
13 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), (CAHOSCC Decision) para 6; W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 1 11; see Chap 6, for a detailed discussion of the institutions under the aegis of the African Union in relation to climate change.
14 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.

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. Following the introduction, section two deals with regulatory frameworks on the global responses to climate change. Section three examines the notions under the international climate change framework which can subordinate the protection of indigenous peoples' lands, while section four is the conclusion.

2 Regulatory frameworks on the responses to climate change

In its Preamble, the 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;[15] 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 to the global challenge of climate change.[16] For instance, the sustainable use of the forest can serve both adaptation and mitigation ends.[17] 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.[18] Hence, it has been argued that for a climate change response to be deemed comprehensive it must include adaptation and mitigation.[19]

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

15 UNFCCC, art 4(1)(b).

16 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.

17 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.

18 K Halsnæs & 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.

19 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.

all parties to the two instruments, that is, the obligation to cooperate in the implementation of measures.[20] 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,[21] and finance funds for the implementation of adaptation and mitigation measures.[22] 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.[23] However, in addition to allowing adaptation and mitigation actions by all state parties, the Paris Agreement provides that when taking action to address climate change, 'parties should respect, promote and consider their respective obligations on the rights of indigenous peoples'.[24] As shall be shown, the protection of indigenous peoples' land use and tenure features in the emerging international climate change instruments relating to these response mechanisms, that is, adaptation and mitigation.

2.1 The international adaptation regulatory framework

In climate change literature, adaptation refers to measures which can be used to cope with the 'ill-effects of climate change'[25] or activities geared toward the prevention of the adverse impacts of climate change.[26] 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.[27] Adaptation connotes adjustments to reduce vulnerability or improve flexibility to the observed or expected changes in climate, involving a range of options such

20 See UNFCCC, arts 3(5) & 4(1) (c), Kyoto Protocol art 10(c).
21 Kyoto Protocol, art 3(3).
22 Kyoto protocol, art 11 (2)(a)(b).
23 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 para 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.
24 Paris Agreement, Preamble.
25 S Caney 'Cosmopolitan justice, responsibility and global climate change' (2005) 18 *Leiden Journal of International Law* 747 752.
26 J Paavola & WN Adger 'Fair adaptation to climate change' (2006) 56 *Ecological Economics* 594.
27 RT Watson et al 'Greenhouse gases and aerosols' in JT Houghton, GJ Jenkins & JJ Ephraums (eds) *Climate Change: The IPCC Scientific Assessment* (1990) 1.

as processes, perceptions, practices and functions.[28] Adaptation, explains Goklany, can take advantage of positive impacts and reduce the negative impact of climate change.[29]

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.[30] However, for developing states including those in Africa, it has been argued that it will amount to pretence to imagine that adaptation is not urgent.[31] 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.[32] 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 crops,[33] 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.[34] 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.[35]

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

28 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.

29 IM Goklany 'A climate policy for the short and medium term: Stabilization or adaptation?' (2005) 16 *Energy & Environment* 667 675.

30 R Pielke, G Prins & S Rayner 'Climate change 2007: Lifting the taboo on adaptation' (2007) 445 *Nature* 597.

31 JA Burney, CF Kennel & DG Victor 'Getting serious about the new realities of global climate change' (2013) 69 *Bulletin of the Atomic Scientists* 52.

32 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.

33 DB Lobell et al 'Prioritizing climate change adaptation needs for food security in 2030' (1 February 2008) 319 *Science* 607.

34 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 00714.

35 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.

change.[36] 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.[37] 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, maintain, or achieve a desired state.[38] 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.[39] 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.[40] Its importance is reflected in the main instruments regulating climate change: article 4 provisions 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 fulfilment 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'.[41] 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,

36 JJ McCarthy et al (eds) *Impacts, adaptation and vulnerability Contribution of Working Group II to IPCC TAR* (2001) 491-53; 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.

37 As above.

38 As above.

39 L Schalatek et al 'Climate finance thematic briefing: Adaptation finance' (November 2013).

40 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).

41 However the provision does not exempt the developing countries of the primary obligation of meeting the adaptation needs of their populations. The understanding can be gleaned from the provision of the same article which urges the parties to take into full account of the fact that 'economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties'.

practices and processes pertinent to climate change' to developing countries. This obligation is reinforced by article 9 of the Paris Agreement which requires developed state parties to assist developing state parties with financial resources for both mitigation and adaptation measures.

2.1.1 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,[42] the Least Developed Countries Fund (LDCF) and the Special Climate Change Fund (SCCF) pursuant to article 4(9) of the UNFCCC.[43] A Green Climate Fund (GCF) was established pursuant to article 11 of the UNFCCC.[44] The funds under the LDCF and SCCF are voluntary contributions from developed country parties to the UNFCCC,[45] whereas the LDCF and SCCF, under the management of the Global Environment Facility (GEF);[46] GCF, managed by the GCF Board;[47] and the Adaptation Fund (AF), under the Adaptation Fund Board (AFB),[48] 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.

Global Environment Facility

As a financial mechanism established pursuant to article 11(1) of the UNFCCC,[49] the GEF administers three trust funds, namely, the Global

42 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 3-15 December 2007 (Decision 1/CMP.3) Preamble.

43 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.

44 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 (Decision 1/CP.16).

45 Muyungi (n 40 above); R O'Sullivan *Creation and evolution of adaptation funds* (2011) 15.

46 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).

47 UNFCCC 'Green Climate Fund' http://unfccc.int/cooperation_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.

48 Decision 1/CMP.3 (n 42 above).

49 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

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.[50] 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.[51]

(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.[52] 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 meetings.[53] The Assembly engages in a combination of activities including plenary meetings and high-level panels, exhibits, side events and GEF project site visits.[54] 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.[55] 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.[56] 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.[57]

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

Conference of the Parties, which shall decide on its policies, programme priorities and eligibility criteria related to this Convention'.

50 The GEF 'GEF Administered Trust Fund' http://www.thegef.org/gef/trust_funds (accessed 16 November 2013).

51 As above.

52 The GEF 'GEF assembly meetings and documents' http://www.thegef.org/gef/council_meetings/assembly (accessed 13 November 2013).

53 As above.

54 As above.

55 As above.

56 As above.

57 As above.

coordinates the formulation and implementation of projects in accordance with work programmes.[58] 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.[59] The STAP reports to each regular meeting of the GEF Council and, where requested, to the GEF Assembly on the status of its activities.[60]

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.[61] 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 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.[62] 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 lands through the process allowing for input by 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.[63] 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.[64]

58 The GEF 'GEF Secretariat' http://www.thegef.org/gef/Secretariat (accessed 13 November 2013).
59 As above.
60 The GEF 'The Scientific and Technical Advisory Panel (STAP)' http://www.thegef.org/gef/STAP (accessed 13 November 2013).
61 As above.
62 '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).
63 GEF Council meeting (n 62 above) para 13.
64 The GEF 'Civil Society' http://www.thegef.org/gef/csos (accessed 15 October 2013).

(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.[65] 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'.[66] 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.[67] 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 of short term activities.[68] These activities include the formulation of national communications, studies of the possible impacts of climate change, identification of adaptation options and capacity building.[69] These arrangements are endorsed in the GEF Operational Strategy for the UNFCCC.[70]

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)[71] and the GEF Policy on Public Involvement in GEF Projects (GEF Minimum Standard Policy).[72] 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).[73] 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

65 On GEF, see generally, Appendix L. Overview of the Global Environment Facility and the World Bank's Roles; UNFCCC, art 11(3)(a).
66 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).
67 Initial Guidance (n 66 above) para 1(d)(ii); also see UNFCCC, arts 4(1)(e), 4(1)(b) & 4(4).
68 Initial Guidance (n 66 above) para 1(d)(iii) & (iv).
69 Initial Guidance (n 66 above) para 1(d)(iv).
70 Initial Guidance (n 66 above) paras 3(8) to (11).
71 Council Document, GEF/C.41.10/Rev.01.
72 Council Document, GEF/C.7/6.
73 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).

criteria such as resettlement, physical cultural resources as well as accountability and grievance.[74] 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.[75]

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.[76] After regional consultations, the IPTF highlighted and recommended that the GEF should establish a rights-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.[77] 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 lands and its sustainable management without compromising the benefits of these peoples from GEF-financed projects.[78]

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.[79] It has reiterated its commitments to these ideals, subsequently, in its pronouncement at the RIO+20 United Nations Conference on Sustainable Development,[80] 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.[81]

74 'GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards' Council Document GEF/C.41/Rev.1, 17, 22-29.

75 '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.

76 GEF Guidelines (n 73 above) 8.

77 'Indigenous Peoples Task Force' Issues Paper: Final, 30 November 2011, 2-3.

78 GEF Guidelines (n 73 above)18 and 19.

79 'GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards' Council Document GEF/C.41/Rev.1; GEF Guidelines (n 73 above) 21.

80 'Statement of Commitments of the Global Environment Facility (GEF) for the United Nations Conference on Sustainable Development (Rio+20)' para 8; the 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"'.

81 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

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.[82] 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 flow.[83] Also, the COP decided that the GCF was to be designed by the Transitional Committee (TC).[84] While the GCF structure is still a work in process, at COP 17 held in Durban, the COP approved the instrument for the operationalisation of the GCF.[85]

(a) GCF structure and indigenous peoples

The GCF Fund will be governed by the GCF Board and operated in a timely manner.[86] Among other responsibilities the GCF Board is requested to balance the allocation of the GCF between adaptation and mitigation activities.[87] 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.[88]

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.[89] The fund will also assist the preparation of documentation, including NAPAs.[90] In allocating funding for adaptation purposes, the Board will aim for a regional balance, but will take into

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.

82 Decision 1/CP.16 (n 44 above).

83 Decision 1/CP.16 (n 44 above) paras 101 & 102.

84 As above.

85 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 47 above).

86 Decision 3/CP.17 (n 85 above) para 6.

87 'Governing instrument for the Green Climate Fund' (Decision 3/CP.17 Annex) para I(3).

88 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.

89 Decision 3/CP.17 Annex (n 85 above).

90 Decision 3/CP.17 Annex (n 85 above) para 40.

consideration the immediate needs of developing countries, including Africa, which are peculiarly vulnerable to the adverse impacts of climate change.[91] 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 which describes the accreditation options for different types of implementation entities.[92] 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.[93] 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,[94] and the Forest Carbon Partnership,[95] all of which are dedicated indigenous funds.[96]

91 Decision 3/CP.17 Annex (n 85 above) para 52.
92 'Green Climate Fund Business Model Framework: Access Modalities' Annex I: Draft decision of the Board (d) GCF/B.04/05 11 June 2013.
93 F Martone & J Rubis 'Indigenous peoples and the Green Climate Fund' (August 2012) A technical briefing for Indigenous Peoples, policymakers and support groups.
94 International Fund for Agricultural Development 'Indigenous grants' http://www.ifad.org/english/indigenous/grants/index.htm (accessed 25 October 2013).
95 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).
96 Martone & Rubis (n 93 above) ; see UNDP and Overseas Development Institute (ODI) 'Direct Access to Climate Finance: Experiences and lessons learned' (2011) Discussion Paper, UNDP.

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 implementation of these funds.[97] The joint submission calls upon the TC to specifically list in the 'operational modalities' the groups constituting affected communities to include indigenous peoples.[98] 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'.[99]

The governing instrument that emerged after consultation does not reflect these suggestions in their totality,[100] 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'.[101] 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'.[102] Similarly, funding can be terminated on the recommendation of the Board to the COP.[103]

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'.[104] Pursuant to this

97 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).
98 Friends of the Earth Submission (n 97 above) 3.
99 As above.
100 Decision 3/CP.17 Annex (n 85 above).
101 Decision 3/CP.17 Annex (n 85 above) para 71.
102 Decision 3/CP.17 Annex (n 85 above) para 69.
103 Decision 3/CP.17 Annex (n 85 above) para 72.
104 Kyoto Protocol, arts 10 and 11.

provision, at the 7th session of the COP the parties agreed to the establishment of the AF with the aim to finance adaptation projects and programmes in developing countries which are parties to the protocol.[105] The AP is designed to finance 'concrete adaptation projects and programmes',[106] which aim at 'addressing the adverse impacts of and risks posed by climate change'.[107] It provides funding for the 'full costs' related to the implementation of adaptive activities that address the adverse consequences of climate change.[108]

(a) AF structure and indigenous peoples

The operation entity for the AF is the Adaptation Fund Board (AFB),[109] which meets twice annually.[110] Subject to the discretion of the AFB, meetings are open to observers, namely the UNFCCC parties and its accredited observers.[111] The functions of the AFB include the development of strategic priorities, policies and guidelines, and offering recommendations about such plans to the CMP.[112] 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 a 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.[113]

(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

105 UNFCCC 'Funding under the Kyoto Protocol 'Decision 10/CP.7, FCCC/CP/2001/13/Add.1 8th plenary meeting 10 November 2001 para 1.
106 Adaptation Fund 'Operational Policies and Guidelines for Parties to Access Resources from the Adaptation Fund' para 9 (Adaptation Fund Guidelines).
107 Adaptation Fund Guidelines (n 106 above) para 10.
108 Adaptation Fund Guidelines (n 106 above) para 14.
109 Decision 1/CMP.3 (n 42 above) para 3.
110 Decision 1/CMP.3 (n 42 above) para 15.
111 Decision 1/CMP.3 (n 42 above) para 16.
112 Decision 1/CMP.3 (n 42 above) para 5(a).
113 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 embodies the general activities for which Adaptation Fund along with the Special Climate Change Fund are to be applied.

Montreal, Canada in 2005,[114] 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'.[115] 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'.[116] 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.[117]

The AFB is tasked with the functions of developing specific operational policies and guidelines,[118] and rules of procedures.[119] 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.[120] The adopting decision requests the AFB to start the processing of proposal for funding,[121] and to inform parties of the Strategic Guidelines and Rules of Procedures.[122] According to the Strategic Guidelines, the submission of project proposals can be done directly by parties including the implementing entity elected by governments to implement projects.[123] 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.[124] The Operational Guidelines enunciate various aspects of the AF

114 As above.
115 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.
116 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).
117 Decision 5/CMP.2 (n 116 above) para 2(c).
118 Decision 5/CMP.2 (n 116 above) para 5(b).
119 Decision 5/CMP.2 (n 116 above) para 5(e).
120 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).
121 Decision 1/CMP.4 (n 120 above) para 10.
122 Decision 1/CMP.4 (n 120 above) para 14.
123 Annex IV Guidelines (n 120 above) para 11.
124 Annex IV Guidelines (n 120 above) para 32.

including project or programme requirements, endorsements by country, financing windows dealing with direct and indirect access, eligibility criteria, accreditation of implementing entities, fiduciary standards, project cycles, and dispute settlements.[125] More recently, the AFB has been requested to continue the encouragement of access to funding through its direct access modality.[126]

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[127] and stemmed from the realisation that the AFB lacks a policy document on environmental and social safeguards in the application of the fund.[128] 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.[129] 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.[130] 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.[131]

Examples of existing safeguards of significance to indigenous peoples which were highlighted at the 21st meeting can be found in the review criteria of Operational Guidelines.[132] The review criteria largely aims to ensure that adaptation projects and programmes yield concrete benefits 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.[133] 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,

125 Annex IV Guidelines (n 120 above) paras 2-13.
126 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.
127 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).
128 Adaptation Fund Board 'Report of the 20th meeting of the Adaptation Fund Board' Bonn, Germany, 4-5 April 2013, AFB/B.20/7, para 126 (Adaptation Fund Board April Report).
129 Adaptation Fund Board April Report (n 128 above) para 131.
130 Adaptation Fund Board April Report (n 128 above) para 125.
131 Adaptation Fund Board July Report (n 127 above) para 89.
132 Adaptation Fund Board July Report (n 127 above) paras 84-96.
133 Annex IV Guidelines (n 120 above) para 23.

including provisions which urge the AFB, in assessing projects and programmes, to give particular attention to national communications and NAPA,[134] the 'Economic, social and environmental benefits from the projects',[135] arrangements for monitoring and evaluation and impact assessment,[136] the level of vulnerability,[137] access to the fund in a balanced and equitable manner,[138] as well as the capacity to adapt to the adverse effects of climate change.[139]

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).[140] 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.

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.

134 Annex IV Guidelines (n 120 above) para 15(a).
135 Annex IV Guidelines (n 120 above) para 15(b).
136 Annex IV Guidelines (n 120 above) para 15(f).
137 Annex IV Guidelines (n 120 above) para 16(a).
138 Annex IV Guidelines (n 120 above) para 16(c).
139 Annex IV Guidelines (n 120 above) para 16(g).
140 '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; see also 'Adaptation Fund Board Report of the 17th meeting of the Adaptation Fund Board' AFB/B.17/6, paras 38 & 39.

2.2 The international regulatory framework and mitigation

Mitigation refers to human intervention to reduce the sources or enhance the sinks of greenhouse gases.[141] Mitigation is crucial in that it is more beneficial for the global environment to promote mitigation, particularly prevention of deforestation.[142] 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:

> Take 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.[143]

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,[144] are enjoined to do the following:

> Formulate, 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.[145]

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.[146] These considerations have informed the explosion of forest-related instruments with no binding commitment to parties under international environmental law.[147]

141 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 2nd Assessment Report (SAR) 5.
142 N Stern *The economics of climate change* (2006) 217.
143 UNFCCC, Preamble.
144 UNFCCC, art 3(1).
145 UNFCCC, art 4(1)(b).
146 D Humphreys *Logjam: Deforestation and the crisis of global governance* (2006).
147 CL McDermott, K Levin & B Cashore 'Building the forest-climate bandwagon: REDD and the logic of problem amelioration' (2011) 11 *Global Environmental Politics* 85.

2.2.1 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.[148] 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'.[149] 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 enhancing reservoirs of greenhouse gases not prescribed under the Montreal Protocol, 'taking into account its commitments under relevant international environmental agreements'.[150]

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 purpose releases carbon dioxide into the atmosphere and this situation contributes approximately 17-20 per cent of total greenhouse gas emissions.[151] The protection of forests and their nurturing also serves as a 'sink' in that it can remove carbon dioxide from the atmosphere.[152] Besides, forests are a significant storehouse of biodiversity.[153] Forests provide services for indigenous peoples and local communities who rely on them for services, including food, shelter, clean water and climate prediction.[154] 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'.[155] Similarly, economists are of the view that reducing forest loss offers a low option in terms of cost for reducing global climate change.[156]

148 UNFCCC, art 4.
149 UNFCCC, art 1(8) & (9).
150 Kyoto Protocol, art 2(1)(a)(ii).
151 GR 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).
152 Van der Werf et al (n 151 above).
153 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).
154 R Brunner et al 'Back to its roots: REDD+ via the Copenhagen Accord' (Fall 2010) 1 *Reconsidering Development* 2.
155 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.
156 J Eliasch 'Climate change: Financing global forests' UK Office of Climate Change (2008); also see Stern (n 142 above) who considers the costs of mitigation generally and concludes that the costs of embarking on mitigation is lesser than the costs of inaction.

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.[157] 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.[158] However, the CDM approach has been questioned for promoting large monoculture tree plantations under the veil of afforestation and reforestation.[159] Few countries have been able to participate under the CDM projects in forestry owing to its complex procedures.[160] 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.[161] 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+. [162] As a result, the debate has shifted to the operationalisation of REDD+.[163] 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.[164]

157 Kyoto Protocol, arts 3(3) & 3(4) dealing with 'Land use, land-use change and forestry'.

158 Willem den Besten et al (n 155 above) 42.

159 J Kill et al *Trading carbon: How it works and why it is controversial* (2010) 119.

160 C Mbow, D Skole & D Moussa 'Challenges and prospects for REDD+ in Africa: Desk review of REDD+ implementation in Africa' (2012) GLP Report 5, GLP-IPO, Copenhagen.

161 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.

162 UN-REDD Programme 'What are the ecosystem-derived benefits of REDD+ and why do they matter?' (1 October 2010) 3.

163 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.

164 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.

2.2.2 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.[165] 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 creating and recognising that standing forests have a financial value.[166] 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.[167] To attain its current understanding in international climate change regulatory framework, REDD+ has evolved from two previous forms,[168] namely, Reducing Emissions from Deforestation (RED) and Reducing Emissions from Deforestation and Forest Degradation (REDD).[169]

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.[170] Prior to this proposal, the issue of forests was hotly contested

165 Centre for International Environmental Law (CIEL) *Know your rights related to REDD+: A guide for indigenous and local community leaders* (2014) 5; Willem den Besten et al (n 155 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 et al (n 160 above) 12.

166 E Corbera & H Schroeder 'Governing and implementing REDD+' (2011) 14 *Environmental Science & Policy* 89-99; Brunner et al (n 154 above) 5.

167 Brunner et al (n 154 above) 5.

168 Willem den Besten et al (n 155 above); D Humphreys 'The politics of 'avoided deforestation': Historical context and contemporary isssues' (2008) 10 *International Forestry Review* 433-42; PM Fearnside 'Saving tropical forests as a global warming countermeasure: An issue that divides the environmental movement' (2001) 39 *Ecological Economics* 167-84.

169 As above.

170 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

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.[171] 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.[172] 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'.[173] 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 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.[174] 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.[175] '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.[176]

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.[177] 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.[178] It was this network that masterminded the

safeguards in REDD+: Actors, interests and ideas' (2012) 21 *Environmental Science & Policy* 63 64.

171 Fearnside (n 168 above) 170; Humphreys (n 168 above) 434.

172 Willem Den Besten et al (n 155 above) 42; Humphreys (n 168 above) 434.

173 Willem Den Besten et al (n 155 above) 42.

174 Humphreys (n 168 above) 439.

175 As above.

176 As above.

177 Willen den Besten et al (n 155 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) Report by the University of KwaZulu Natal Centre for Civil Society (SA) and Dartmouth College Climate Justice Research Project (USA).

178 Willen den Besten et al (n 155 above) 42; MT Somare 'Statement by Sir Michael T Somare, Prime Minister of Papua New Guinea' (2005); JE Stiglitz 'Conservation: Analysis' (2005) *The Independent*.

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.[179]

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.[180] 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 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.[181] 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.[182] The conceptual shift to REDD was officially recognised at the SBSTA in 2006.[183]

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.[184] 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.[185]

179 Willem den Besten et al (n 155 above) 42.
180 As above.
181 As above.
182 Willem den Besten et al (n 155 above) 43; Brunner et al (n 154 above) 5.
183 UNFCCC SBSTA 'Reducing emissions from deforestation in developing countries: Approaches to stimulate action' (2006) FCCC/SBSTA/2006/MISC.5.
184 I Fry 'Reducing emissions from deforestation and forest degradation: Opportunities and pitfalls in developing a new legal regime' (2008) 17 *RECIEL* 166; 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).
185 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 184 above).

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).[186]

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+. 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.[187] In particular, the COP 15 adopted a decision on REDD+.[188] 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.[189] 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).[190] 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; and (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.[191]

186 UNFCCC CP 'Bali action plan' Decision 1/CP.13, FCCC/CP/2007/6/Add.1.
187 UNFCCC CP 'Copenhagen accord' Decision 2/CP.15, FCCC/CP/2009/11/Add.1.
188 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).
189 Decision 4/CP.15 (n 188 above) para 1 generally.
190 Decision 1/CP.16 (n 44 above) paras 2(c) and (d).
191 Decision 1/CP.16 (n 44 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 188 above).

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.[192] In that decision it also considered that 'appropriate market-based approaches' could be developed by the COP for results-based actions,[193] and noted that non-market-based approaches, such as joint mitigation and adaptation approaches, could be developed.[194] 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',[195] 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.[196] Also, the COP agreed that countries should provide a summary of information relating to safeguards as part of their national communications.[197] In Durban the COP in another decision launched the Green Climate Fund, which will include REDD+.[198] At COP 18, 2012, Durban, further decisions were taken in respect of policy approaches and positive incentives on REDD+.[199] 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 communications or other communication channels including the UNFCCC web platform.[200] 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

192 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).
193 Decision 2/CP.17 (n 192 above) para 66.
194 Decision 2/CP.17 (n 192 above) para 67.
195 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).
196 Decision 12/CP.17 (n 195 above) para 2.
197 Decision 12/CP.17 (n 195 above) paras 3-5.
198 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.
199 UNFCCC CP 'Agreed outcome pursuant to the Bali action plan' Decision 1/CP.18, FCCC/CP/2012/8/Add.1.
200 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.

World Bank.[201] There are also voluntary and independent initiatives, such as the Climate, Community and Biodiversity Alliance (CCBA).[202] The activities of these supporting initiatives overlap, for instance, as shall be indicated in a 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 book 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.

2.2.3 United Nations Collaborative Programme on the Reduction of Emissions from Deforestation and Forest Degradation in Developing Countries: Institutions and instruments

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).[203] 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.[204] The UN-REDD is governed by a Policy Board, Administrative Agent (AA) also known as the Multi-Partner Trust Fund Office (MPTF) and a Secretariat as other components of its structure.

201 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 Aquino 'Forest Carbon Partnership Facility: Demonstrating activities that reduce emissions from deforestation and forest degradation' 3.

202 CCBA 'About CCBA' http://www.climate-standards.org/about-ccba/ (accessed 18 October 2012).

203 UN-REDD Programme (n 201 above).

204 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

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.[205] 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.[206] 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.[207] In Africa, countries receiving support for UN-REDD Programme are the DRC, Nigeria, the Congo, the United Republic of Tanzania, and Zambia.[208]

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.[209] 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.[210] Located in Geneva, the UN-REDD Programme secretariat supports the Policy Board through a range of activities including organising meetings, producing reports and monitoring implementation of Policy Makersboard decisions.[211] In addition to serving as an important link for contact with the UN-REDD Programme, the Secretariat liaises with other REDD+ initiatives, such as

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 44 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).

205 The present full members are from Democratic Republic of Congo (DRC), Indonesia and Panama, see UN-REDD Programme 'Policy Board Composition' (2013) 2.

206 As above.

207 UN-REDD Programme 'Partner countries' http://www.un-redd.org/Partner_Countries/tabid/102663/Default.aspx (accessed 18 October 2013).

208 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).

209 '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 Programme).

210 As above.

211 As above.

the FCPF, for a variety of reasons, including the mobilisation of funds.[212] The Secretariat offers leadership in 'strategic planning, and the development and management of reporting, monitoring and evaluation frameworks for the Programme'.[213] It encourages inter-agency partnership and communication in order to ensure effective implementation of the programme.[214]

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.[215] Each of these observers has a representative from the three regions of programme operation.[216] The indigenous peoples' representatives with observer status are self-selected, although the process is facilitated by the UN-REDD secretariat and participating UN Organisations.[217] Funds are provided by the UN-REDD Programme to enable the representatives of three indigenous peoples with observer status to attend Policy Board meetings.[218] 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.[219] 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.[220] 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.

REDD+ instruments and indigenous peoples

At the Cancun COP, the normative basis for implementing REDD+ was established in the form of safeguards. According to paragraph 2 of Appendix 1 of the Cancun Agreements:[221]

212 Handbook for National Programme (n 209 above).
213 As above.
214 As above.
215 UN-REDD Programme 'Policy Board Composition' 2.
216 As above.
217 UN-REDD Programme 'Policy Board Composition' 3.
218 As above.
219 Mr Kironyi from Tanzania made this point in the interview with the author at the REDD+ Stakeholders Dialogue held at Cape Town South Africa 2013.
220 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).
221 Decision 1/CP.16 (n 44 above).

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.[222] 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. 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.

222 See Decision 12/CP.17 (n 195 above) and Decision 12/CP.19 (n 200 above) respectively.

(a) 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.[223] 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.[224] 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.[225] 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.[226] 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.[227] 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.

According to SPRAT,[228] 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.[229] 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.[230] To the indigenous peoples who may suffer displacement from their lands as a result of project implementation, SPRAT offers some hope in the implementation of REDD+ as a climate mitigation measure.

223 UN-REDD National Programme 'Social Principles Risk Assessment Tools' October (SPRAT) (2010).
224 As above.
225 As above.
226 As above.
227 McDermott et al (n 147 above) 68; UNDP '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+' (June 2010).
228 SPRAT (n 223 above).
229 SPRAT (n 223 above) 2.
230 As above.

(b) 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,[231] 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, lands and non-timber forest products, and enhanced local environmental quality.[232] However, as REDD+ can be harmful to the host communities,[233] 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.[234] 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 Programmes and other UN-REDD funded activities as well as helping countries to develop national approaches to REDD+ safeguards in accordance with the UNFCCC. [235]

SEPC consists of seven broad principles and associated criteria that further explain each principle,[236] and which are in line with the safeguards provided under the Cancun Agreements, particularly in relation to indigenous peoples.[237] 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

231 '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).
232 SEPC (n 231 above) 8.
233 As above.
234 As above.
235 SEPC (n 231 above) 3.
236 SEPC (n 231 above) 5-7.
237 See Decision 1/CP.16 (n 44 above) appendix 1, para 2(e).

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.

(c) 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[238] (Operational Guidance) which was developed by the UN-REDD Programme in 2009. The Operational Guidance built on the recommendations of the Global Indigenous Peoples' Consultation on REDD+ [239] 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.[240] 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.[241] It is intended to encourage effective stakeholder engagement in the context of REDD+.[242] 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.[243]

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

238 UN-REDD 'Operational guidance: Engagement of indigenous peoples and other forest-dependent Communities' Working Document, 25 June 2009.
239 '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).
240 '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).
241 As above.
242 Joint Stakeholders' Guidelines (n 240 above) para 4.
243 Decision 1/CP.16 (n 44 above) para 2(d).

spiritual well-being.[244] 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 of human rights.[245] 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.[246] 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.[247] 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.[248] 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.

(d) 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.[249] To reach their present form,

244 Joint Stakeholders' Guidelines (n 240 above) 1-2.
245 '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).
246 'Programme of action for the 2nd international decade of the world's indigenous peoples' Resolution adopted by the General Assembly on 16 December 2005, UN General Assembly Resolution, 60/142 60/142.
247 World Bank 'OP 4.10-Indigenous peoples' (OP.4.10).
248 OP.4.10 (n 247 above) para 7.
249 'UN-REDD Guidelines on Free, Prior and Informed Consent' January 2013 (UN-REDD FPIC).

the FPIC Guidelines are an outcome of three regional consultations which were variously held with stakeholders in Vietnam, Panama and Tanzania.[250] 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 international conventions and agreements.[251] 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:[252] they identify the expectations of the UN-REDD Programme in relation to the role of the UN-REDD partner countries in REDD+ activities,[253] when FPIC is required and applied.[254] They shed light on the appropriate persons to seek out and gain consent from as well as highlight the outcome of the FPIC process,[255] the operational framework for seeking FPIC and national grievance mechanisms.[256]

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).[257] It defines 'free' to mean consent which is given without 'coercion, intimidation or manipulation'.[258] This suggests that the process should be self-directed by the community and not externally imposed.[259] 'Prior' connotes that 'consent is sought sufficiently in advance of any authorization or commencement of activities'.[260] It further suggests that time is given to the community to 'understand, access, and analyze information on proposed activities'.[261] In this regard, information should be given to the community before activities are initiated.[262] 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

250 UN-REDD FPIC (n 249 above) 9.
251 Decision 1/CP.16 (n 44 above) para 2(a).
252 UN-REDD FPIC (n 249 above) 18.
253 UN-REDD FPIC (n 249 above) 22.
254 UN-REDD FPIC (n 249 above) 24-28.
255 UN-REDD FPIC (n 249 above) 29.
256 UN-REDD FPIC (n 249 above) 32-34.
257 '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).
258 FPIC Report (n 257 above) para 46(i); UN-REDD FPIC (n 249 above)18.
259 UN-REDD FPIC (n 249 above)18.
260 FPIC Report (n 255 above) para 46(i).
261 UN-REDD FPIC (n 249 above)19.
262 As above.

seeking consent and also as part of the on-going consent processes'.[263] The information should be handy, complete, clear, in culturally acceptable language, widespread in reach, and touching the positive and negative aspects of REDD+ projects.[264] 'Consent' means that the decision is collectively reached through the 'customary, decision-making processes of the affected peoples or communities'.[265] 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.[266] 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.[267] 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.

Implications of instruments for indigenous peoples

(a) 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.[268] 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 lands, 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 avoid adverse activities in the form of land-use change to agriculture, or activities preventing an existing use of forests, such as grazing.[269]

263 UN-REDD FPIC (n 249 above) 19.
264 As above.
265 UN-REDD FPIC (n 249 above) 20.
266 As above.
267 As above.
268 UN-REDD FPIC (n 249 above) 7.
269 UN-REDD FPIC (n 249 above) 11.

The Joint Stakeholders' Guidelines urge that the issues of land tenure, resource-use rights, property rights and livelihoods are important to indigenous peoples[270] 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.[271] 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 dispossess indigenous peoples of their lands,[272] or forcefully remove them,[273] but urges the states to maintain and strengthen the spiritual relationship of indigenous peoples with their lands,[274] and legally to recognise and protect their land rights.[275] 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.[276]According to the IFC Standard, FPIC of indigenous peoples should be secured in respect of activities involving the commercial use of lands and natural resources, cultural resources and the relocation of indigenous peoples.[277] The Environmental and Social Policy of the European Bank for Reconstruction and Development, like the FPIC

270 Joint Stakeholders' Guidelines (n 238 above).
271 As above.
272 See UNDRIP, art 8(2)(b).
273 UNDRIP, art 10.
274 UNDRIP, art 25.
275 UNDRIP, art 26.
276 '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 detail 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 249 above) 25, 26
277 IFC Performance Standard 7 – V2 Indigenous Peoples, para 16.

Guidelines, lists similar circumstances in respect of which FPIC is required with regard to project-activities.[278]

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.[279] 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,[280] the FPIC Guidelines refer to the decision of the Inter-American Commission of Human Rights in *Saramaka v Suriname*.[281] 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'.[282] 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'.[283] This signifies that it is given that consent is necessary for any project that will disturb indigenous peoples' land use and tenure.

(b) 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.[284] SPRAT requires projects to identify all stakeholders and give special attention to the most

278 UN-REDD FPIC (n 249 above) 26.
279 UN-REDD FPIC (n 249 above) 32.
280 UN-REDD FPIC (n 249 above) 25.
281 *Saramaka People v Suriname* IACHR(28 November 2007) Ser C 172.
282 *Saramaka* (n 281 above) paras 129 & 137.
283 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.
284 SPRAT (n 223 above).

vulnerable groups by observing their free, prior and informed consent.[285] 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.[286] According to the SEPC, stakeholders in project implementation should ensure full and effective participation of relevant stakeholders, especially indigenous peoples and forest-dependent communities.[287] 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.[288]

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.[289] According to the Guidelines, the consultation process should ensure that the voices of vulnerable groups are heard.[290] In conducting consultation, focus is required on issues such as transparency and timely access to information.[291] 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.[292] 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.[293] 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. According to the Guidelines, consultation should occur voluntarily, leading either to the giving or withholding of consent in the case of UN-REDD Programme.[294] Such consultations should accommodate and respect the traditional institutions and organisations of indigenous peoples.[295]

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.[296] 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.[297] Second, the planner

285 SPRAT (n 223 above) 7 & 8.
286 SPRAT (n 223 above) 8.
287 SEPC (n 231 above) 8.
288 SEPC (n 231 above) 9.
289 See generally Joint Stakeholders' Guidelines (n 240 above) para 8.
290 Joint Stakeholders' Guidelines (n 240 above) para 8(a) and (b).
291 As above.
292 As above.
293 Joint Stakeholders' Guidelines (n 240 above) para 8(b).
294 Joint Stakeholders' Guidelines (n 240 above) para 8(c).
295 Joint Stakeholders' Guidelines (n 240 above) para 8(d).
296 Joint Stakeholders' Guidelines (n 240 above) para 10 generally.
297 As above.

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.[298] 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.[299] 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.[300] Finally, consultation should be conducted in line with the terms and outcome of findings, and then analysed for dissemination to all participants.[301] 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.

(c) 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.[302] According to Cotula and Mayers, 'carbon rights are a form of property right that "commoditise" carbon allowing for its trading'.[303] 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'.[304] 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+.[305] As Peskett and Brodnig further explain, certain

298 As above.
299 As above.
300 As above.
301 As above.
302 L Peskett & G Brodnig *Carbon rights in REDD+: Exploring the implications for poor and vulnerable people* (2011) 3.
303 L Cotula & J Mayers 'Tenure in REDD start-point or afterthought?' (2009) IIED 9.
304 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).
305 Peskett & Brodnig (n 302 above)2; D Takacs *Forest carbon: Law and property rights* (2009).

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.[306]

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.[307] 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'.[308] In explaining principle 3 of the SEPC,[309] 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.[310] In formulating and implementing REDD+, the Joint Guidelines call for clarification of the rights to lands and carbon assets, 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 lands and territories, and resources of indigenous peoples and forest-dependent communities.[311] 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.

(d) 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'.[312] 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

306 Peskett & Brodnig (n 302 above) 3.
307 Peskett & Brodnig (n 302 above) 6.
308 SEPC Version 3 (n 231 above) 5.
309 SEPC Version 3 (n 231 above) principle 3 deals with the promotion and enhancement of forests' contribution to sustainable livelihoods.
310 SEPC Version 3 (n 231 above) 5.
311 UN-REDD FPIC (n 249 above) 27.
312 SPRAT (n 223 above).

grievances.[313] More importantly, according to SPRAT, a mechanism should be put in place for the effective resolution of disputes relating to the distribution of benefits.[314]

According to SEPC, a means of ensuring good governance of REDD+ activities is by establishing 'responsive national feedback, complaints and grievance mechanisms'.[315] 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.[316] National programmes, the Joint Stakeholders Guidelines affirm, should establish grievance mechanisms and, for this purpose they must embark on certain activities[317] which include an assessment of 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.[318] 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.[319] 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.[320] 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.[321] 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.[322] 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

313 As above.
314 As above.
315 SEPC Version 3 (n 231 above) 4.
316 Joint Stakeholders' Guidelines (n 240 above).
317 As above.
318 Joint Stakeholders' Guidelines (n 240 above)14.
319 Joint Stakeholders' Guidelines (n 240 above) 34.
320 As above.
321 As above.
322 As above.

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.[323]

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 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.

3 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 addressing 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.

3.1 Notion of 'sovereignty'

The concept of 'sovereignty' is the keystone of international law.[324] There are various ways in which the concept has been discussed.[325] 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

323 UNDRIP, art 40.

324 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.

325 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.

territory.[326] This meaning of sovereignty under international law aptly reflects the definition by Max Huber in *Island of Palmas* case (*Netherlands v USA*).[327] 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.[328]

Sharing the above position, in *Corfu Channel* (*UK v Albania*),[329] 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'.[330] 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.[331] 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 third world states (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.[332]

In the context of international negotiation on environmental issues, sovereignty connotes that one state may not prescribe to another how the latter must regulate its activities, such as pollution or exploration of natural

326 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.
327 *Island of Palmas* case (*Netherlands, USA*) 4 April 1928 vol II 829-871.
328 *Island of Palmas* (n 37 above) 838.
329 *Corfu Channel (UK v Albania)* 1949 ICJ 39 & 43.
330 As above.
331 Cassese (n 326 above) 49-52.
332 ME Keck & K Sikkink *Activists beyond borders: Advocacy networks in international politics* (1998) 215.

resources, in its jurisdiction.[333] This position is, however, 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 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.[334]

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.[335] The Paris Agreement anchors effective implementation on 'a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty'.[336] 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.[337] 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.[338]

333 Gardner (n 324 above) 133-134.
334 Gardner (n 324 above) 133.
335 UNFCCC, Preamble.
336 Paris Agreement, art 13(3).
337 Gardner (n 324 above) 134.
338 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.

Against this backdrop and in the interest of protecting varied elements of the environment, academia explores principles, such as precautionary measures,[339] 'trusteeship', 'guardianship', 'custodianship' and 'stewardship', all of which operate as limitation measures on the traditional notion of sovereignty.[340] 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. At least starting from the 26th session of the SBSTA, it has been signalled that the notion of 'sovereignty' will be critical to the negotiation of REDD+. In the submission made by the UNFF, for instance,[341] 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.[342] 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 lands in that it involves a transfer of carbon rights in standing trees to another. [343]

At the 28th session of the SBSTA, the joint submission made by parties, particularly from countries including African states, namely, Cameroon, the 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.[344] The parties maintained that REDD+ activities should remain voluntary and

339 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.

340 PH Sand 'Sovereignty bounded: Public trusteeship for common pool resources' (2004) 4 *Global Environmental Politics* 63.

341 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).

342 UNFF paper (n 341 above) 46-47.

343 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.

344 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,

that '[p]arties alone will determine how best to implement specific measure toward these objectives'.[345] 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. 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.[346] This invitation sought their views on issues relating to indigenous peoples and local communities for the development and application of methodologies for REDD+.[347] 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 lands and resource rights, are guaranteed to these populations on the continent.[348] 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 a large measure of discretion on certain issues pertaining to indigenous peoples.[349] 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,[350] others generally

Lesotho, Liberia, Madagascar, Panama, Papua New Guinea, Singapore, Solomon Islands, Thailand, Uganda and Vanuatu' UNFCCC SBSTA 28th session Bonn, 4-13 June 2008, FCCC/SBSTA/2008/MISC.4/Add.1 (Cameroon Joint Submission).

345 Cameroon Joint Submission (n 344 above) 3.

346 UNFCCC SBSTA 'Report of the Subsidiary Body for Scientific and Technological Advice on its 29th session' held in Poznan from 1-10 December 2008 (17 February 2009) FCCC/SBSTA/2008/13, para 45.

347 As above.

348 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.

349 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.

350 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).

prefer the principle of 'consultation', instead of 'consent' in dealing with climate-related actions affecting indigenous peoples.[351] 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.[352] 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'.[353] 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.[354] 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'.[355] 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

351 UNFCCC SBSTA 'Paper No 2: Ecuador' FCCC/SBSTA/2009/MISC.1 5; Czech Submission (n 350 above) 4; Panama Submission (n 350 above) 9.

352 '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).

353 Decision 1/CP.16 (n 44 above).

354 Decision 12/CP.17 (n 195 above) Preamble.

355 Decision 12/CP.17 (n 195 above) 2.

on Long-term Cooperative Action under the Convention in 2012 which 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.[356] 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.[357] 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.[358]

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.[359] More aptly, Falk notes: [360]

> 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

However, this is not the case in most states in Africa in relation to indigenous peoples where basic instruments that specifically aim to

356 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.

357 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' . The template replaces version 5 of December 22.

358 Decision 12/CP. 19 (n 200 above) para 5.

359 R Falk 'Sovereignty and human dignity: The search for reconciliation' in FM Deng and T Lyons *African reckoning: A quest for good governance* (1998).

360 Falk (n 359 above) 14.

safeguard their land rights are still not ratified. For instance, only one African state has ratified the ILO Convention 169.[361] 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.[362] When the final version of the Declaration was adopted on 13 September 2007, three African states, Burundi, Kenya and Nigeria abstained.[363] It is encouraging that a number of African states supported its adoption,[364] but this is not translated into any significant change in terms of recognition of rights in the legal framework at the domestic level.[365]

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.

3.2 Notion of 'country-driven'

Related to the notion of 'sovereignty' is the concept of 'country-driven' which implies state ownership of the 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 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

361 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).
362 F Viljoen *International human rights law in Africa* (2012) 230.
363 As above.
364 As above.
365 Chapter 5 is particularly devoted to evidence of gap in the national climate change regulatory framework in relation to indigenous peoples' lands.

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.[366] It was equally stressed that support be given to the states in the preparation of NAPA.[367] 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.[368] Guidelines were formulated for the preparation of National Adaptation Plan of Actions (NAPA Guidelines).[369] 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'.

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,[370] and COP 9[371] respectively, endorsed the NAPA Guidelines. At the COP 10,[372] 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

366 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.
367 Decision 5/CP.7/2001 (n 366 above) para 15.
368 Decision 5/CP.7/2001 (n 366 above) para 20.
369 UNFCCC CP 'Guidelines for the preparation of national adaptation programmes of action' FCCC/CP/2001/13/Add.4 (Decision 28/CP.7/2001).
370 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).
371 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).
372 UNFCCC CP 'Buenos Aires programme of work on adaptation and response measures' FCCC/CP/2004/10/Add.1 (Decision 1/CP.10/2004) 4.

national communications 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.[373] 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'.[374] 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.[375] Although originally conceived for Least Developed Countries, at COP 17 held in Durban, th 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.[376] At the same meeting, the LDCs were urged to provide in their national communications and other channels the steps they have taken in actualising NAPA.[377]

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'.[378] In a decision reached at COP 17, titled 'Guidance on systems for providing information on how safeguards are addressed and

373 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).
374 UNFCCC CP 'Bali action plan' FCCC/CP/2007/6/Add.1 (Decision 1/CP.13/2007).
375 Decision 1/CP.16 (n 44 above)11-14.
376 UNFCCC CP 'National adaptation plan' FCCC/CP/2011/9/Add.1 (Decision 5/CP.17/2011) 28-29.
377 Decision 5/CP.17/2011 (n 376 above) 33.
378 As above.

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'.[379] 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.[380] 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.[381]

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 lands. 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 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.

3.3 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+.[382] 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

379 Decision 12/CP.17 (n 195 above).
380 n 357 above.
381 As above.
382 UNFCCC SBSTA (n 346 above) para 45.

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.[383]

In order to achieve the foregoing, Tuvalu suggested a national legislation framework that protects the rights of indigenous peoples and local communities.[384] 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.[385]

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.[386] Mainly, in respecting the knowledge and rights of indigenous peoples and local communities, it calls on parties to take into

383 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.

384 As above.

385 UNFCCC SBSTA 'Paper No 2: Mexico Submission' FCCC/SBSTA/2009/MISC.1 (Mexico Submission).

386 Mexico Submission (n 385 above) 2(c).

account relevant international obligations along with national circumstances and laws.[387] 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.[388]

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.[389] Although in contrast with the provisions that follow, a preamble is not a source of law, however, it has a significant legal effect.[390] It is useful in identifying the purpose of a statute and serves as an important aid in construing unclear legislative language.[391] In *Reference re Remuneration of Judges*, Chief Justice Lamer explained that 'the preamble articulates the political theory which the Act embodies'.[392] 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.[393]

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.[394] 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

387 As above.
388 Mexico Submission (n 385 above) para 2(a).
389 Decision 12/CP.17 (n 195 above) Preamble.
390 Decision 12/CP.17 (n 195 above) 216.
391 As above.
392 See Lamer CJ in *Reference re Remuneration of Judges* para 95.
393 Decision 12/CP.17 (n 195 above) 2.
394 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.

Congo, Gabon, Ghana, Kenya, Sierra Leone and Uganda is relevant. Although no reference was specifically made to national legislation, these parties stressed that implementing REDD+ should be voluntary, bearing in mind the national circumstances of developed and developing countries.[395] 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.[396]

4 Conclusion

The land tenure and use of indigenous peoples is progressively featuring in the emerging international climate regulatory framework. It is particularly discernible in the normative arrangement dealing with 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 domestic climate change regulatory regime which may not protect indigenous peoples' land tenure and use. The next chapter demonstrates that this is, in fact, the reality as the domestic climate change regulatory framework does not adequately address indigenous peoples' land tenure and use in Africa.

395 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.

396 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.

CHAPTER 5 NATIONAL CLIMATE CHANGE REGULATORY FRAMEWORKS IN RELATION TO INDIGENOUS PEOPLES' LANDS: CASE STUDIES OF TANZANIA, ZAMBIA AND NIGERIA

1 Introduction

The previous chapter demonstrated 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. Using the climate related legislative environment of Tanzania, Zambia and Nigeria as case studies, 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. The development has negative implications for their participation, carbon rights and benefit-sharing, grievance mechanism and access to remedies. Following this introduction, section two discusses the significance of a domestic regulatory framework. Section three assesses the domestic climate change regulatory framework on adaptation in relation to the case studies while section four examines the domestic climate change regulatory framework on migration with a particular focus on the REDD+ initiative. Section five is the conclusion.

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 reform of

1 C Redgwell 'National implementation' in D Bodansky, J Brunee & E Heys (eds) *The Oxford handbook on international environmental law* (2007) 922-946 923; for a good collection of contributions on the interaction between the national and supra national regulatory governance of climate changes, see BJ Richardson (ed) *Local climate change law: Environmental regulation in cities and other localities* (2012).

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 lands, 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.

3 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[8] or through national communications for non-LDC states.[9] Tanzania and Zambia have raised climate change adaptation concerns through NAPAs,[10] while Nigeria

2 Redgwell (n 1 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.
8 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).
9 Decision 5/CP.17 (n 8 above) para 33.
10 United Republic of Tanzania 'National Adaptation Programme of Action (NAPA)' (January 2007) 1 (Tanzania NAPA); Republic of Zambia *National Adaptation Programme of Action on climate change* (September 2007) (Zambia NAPA).

being a non-LDC responded through its National Communication.[11] Generally, 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.

In the NAPA of Tanzania which was submitted in 2007 (Tanzania NAPA)[12] 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 lands in Tanzania. Some of the adaptation options suggested in the NAPA are in fact 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.[13]Arguably, these approaches will potentially compromise the interest of the 'livestock communities', particularly, pastoralists in Tanzania.

The Zambia NAPA of 2007 does not respond to pertinent issues of land use and tenure protection which is crucial particularly to forest-dependent communities.[14] Certainly, neither does it indicate the role of their land use and tenure or its protection as crucial in the formulation of adaptive measures. It does not signify the circumstances of the Tonga or any of its communities likely to be more acutely impacted by climate change. In its communication, Nigeria does not specifically refer to communities affected by the adverse impact of climate change. 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 lands 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 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.[15]

11 'Nigeria's 1st National Communication under the United Nations Framework Convention on Climate Change' (2003) 3 (Nigeria National Communication).
12 Tanzania NAPA (n 10 above).
13 Tanzania NAPA (n 10 above) 29-31.
14 Zambia NAPA (n 10 above).
15 O Oluduro *Oil exploitation and human rights violations in Nigeria's oil producing communities* (2014) 13 214.

3.1 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 the 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 lands 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).[16] 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 are not meant for furthering the land rights of indigenous peoples in these areas.[17]

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 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.

16 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).

17 As above.

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.[18] 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.[19] 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.[20] 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.[21] The essence of documenting the coping strategies is in order to enable NAPAs address the 'urgent and immediate adaptation needs'.[22] 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+.

18 AfDB 'Operationalising the Green Climate Fund: Enabling African access' (October 2012) 3.

19 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).

20 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.

21 '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).

22 Annex to Decision 28/ CP.7 (n 21 above) Preamble.

4 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. The UN-REDD Programme operates through two complementary modalities, namely National Programme[23] and the Global Programme.[24] 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.[25] 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:

> Choices 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.[26]

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, the sequence of steps that must be taken in the realisation of that goal, what should be done and by whom, the duration and available resources for specific activities.[27] 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

23 There are three stages in a national programme cycle. These are Stage 1 (Scoping), Stage 2 (Finalisation) 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).

24 '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.

25 UN-REDD Programme Strategy (n 24 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).

26 USLEGAL 'Online legal definition' http://definitions.uslegal.com/s/strategy/ (accessed 18 November 2013).

27 http://www.businessdictionary.com/definition/strategy.html (accessed 18 November 2013).

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.[28] 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.[29] The second phase of the REDD+ activities is otherwise known as the results-based demonstration phase.[30] This phase includes the implementation of national strategies or action plans which could advance capacity building, technology development and transfer.[31] This stage largely focuses on further capacity building for the monitoring and measurement, report and verification (MRV) of activities.[32] 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.[33]

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.[34] 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.[35]

4.1 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 the way for long-term engagement of REDD into the carbon market through payment for ecosystem services.[36]

28 Handbook for National Programme (n 23 above) 11.
29 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.
30 Herold et al (n 25 above).
31 Herold et al (n 25 above); UN-REDD Programme Strategy (n 24 above).
32 As above.
33 UN-REDD Programme Strategy (n 24 above).
34 As above.
35 UN-REDD Programme Strategy (n 24 above) 4.
36 '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 84 above) 22-23; 'Draft for discussion: Quick start actions and establishment of the Multi-Donor Trust

Of the nine countries selected for this support, the DRC, Tanzania and Zambia are in Africa.[37] 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.[38] While Tanzania has concluded Phase 1 with a national strategy and ready to move into implementation phase,[39] Zambia and Nigeria are still at different stages in phase 1.[40]

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 UN-REDD National programme. This is demonstrated by using three countries, that is Zambia, Tanzania and Nigeria as a typology for Africa.

4.1.1 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.[41] The process is financially supported by the UN-REDD Programme (USD 4.3 million) and the Royal Norwegian Government (USD 80 million).[42] 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.[43] FCPF membership merely serves as a way for Tanzania to be up-to-date with international REDD+ policy and to learn from other partnership

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).

37 Other countries are Indonesia, Papua New Guinea and Vietnam (Asia and the Pacific), Bolivia, Panama and Paraguay (Latin America and the Caribbean), see Handbook for National Programmes (n 23 above).

38 Other nations are Cambodia, Ecuador, the Philippines and Solomon Islands, see UN-REDD Programme 'Report of the 7th Policy Board Meeting' 13-14 October 2011, Berlin, Germany 4.

39 The 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.

40 The information is confirmed by Mr Victor Chiiba during my interview with him at the 'Rights based REDD+ dialogue II' 18-19 October 2013 at Cape Town; in relation to Nigeria, 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.

41 Tanzania *REDD readiness progress fact sheet* (March, 2012) (Tanzania fact sheet).

42 ND Burgess et al 'Getting ready for REDD+ in Tanzania: A case study of progress and challenges'(2010) 44 *Fauna & Flora International* 340; SA Milledge 'Getting REDDy in Tanzania: Principles, preparations and perspectives' (2009) *The Arc Journal* 2.

43 Tanzania fact sheet (n 41 above).

members.[44] It has completed an R-PP,[45] and finalising a draft national strategy in place,[46] and REDD Social Environmental Safeguards (Tanzania REDD+ SES).[47]

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.

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 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, the 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 (MALE), Zanzibar.[48]

With composition largely dominated by directors of the various ministries in the National Steering Committee, the NCCTC is not different. A 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

44 'REDD in Tanzania' http://theredddesk.org/countries/tanzania// (accessed 18 November 2013).
45 Tanzania 'Final draft: Forest Carbon Partnership Facility (FCPF) and Readiness Preparation Proposal (R-PP)'15th June 2010 (Tanzania R-PP).
46 United Republic of Tanzania 'National Strategy for Reduced Emissions from Deforestation and Forest Degradation (REDD+) (June 2012) (Tanzania National Strategy).
47 United Republic of Tanzania 'Tanzania REDD+ Social and Environmental Safeguards' (June 2013) Annex 1: Glossary of key terms (Tanzania REDD+ SES).
48 Tanzania R-PP (n 45 above) 6.

consists of 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.[49]

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,[50] while the NRTF is tasked with the responsibility of anchoring the stakeholders' consultation.[51] 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 the representation of indigenous peoples in the decision-making set up for REDD+ as a critical component in ensuring their participation.[52] 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.[53] 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.

49 Tanzania National Strategy (n 46 above) 5.
50 Tanzania National Strategy (n 46 above) xiv.
51 As above.
52 See for instance, 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 (Decision 1/CP.16) 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.
53 UN-REDD Programme 'Policy board composition' (2013) 2.

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 paragraphs, there is a general insecurity of indigenous peoples' land tenure and use under the regulatory regime for REDD+ in Tanzania.

(a) 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+.[54] 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.[55] For instance, in providing that policies and programmes shall be directed towards ensuring that human rights and human dignity are respected,[56] the constitution sets an important stage for the application and implementation of National Strategy on REDD+. However, there are specific provisions which may undermine the protection of indigenous peoples' land tenure and use. Among these is 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'.[57] 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

54 Tanzania National Strategy (n 46 above) 29.
55 The Constitution of the United Republic of Tanzania, 1977 (as amended).
56 Tanzania Constitution, art 9(a).
57 Tanzania Constitution, art 13(5).

public benefit.[58] In effect, these provisions offer the state the platform to enact laws to acquire lands or pursue development programmes in the national interest even if it infringes on the rights of others. That the above is in fact the reality is seen in the limitations in a range of laws applicable in the implementation of REDD+.

The Land Act of Tanzania aims at ensuring that lands are productively and sustainably used.[59] 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. Under the Land Act, all lands 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 lands are categorised as general, village and reserved lands.[60] The President may subject to compensation,[61] compulsorily acquire a land for the purpose of transferring from one category of governance to the other.[62] Similarly, a customary right of occupancy may be revoked if a land is adjudged as lying fallow for about five years or used for any purpose which is considered illegal.[63]

The possibility that 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,*[64] the respondents had acquired land 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.[65] 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.*[66] 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

58 Tanzania Constitution, art 30(2)(b).
59 The Land Act (1999), Cap 113, sec 1(1)(e).
60 The Land Act, sec 4.
61 The Land Act, sec 9.
62 The Land Act, sec 7.
63 Village Land Act (1999) art 45(a).
64 *Attorney General v Lohay Akonaay and Joseph Lohay* 1995 TLR 80 (CA).
65 *Akonaay* case (n 64 above) 91.
66 *National Agricultural and Food Corporation v Mulbadaw Village Council & Others* 1985 TLR 88 (CA).

that villagers cultivating land through the permission of the applicants were at best licensees.[67]

Furthermore, the right held under any category of governance including customary law may be forfeited if a 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,[68] and by reason of this neglect, the land is incapable of productive purposes without substantial costs being incurred.[69] Once this is proved, the Commissioner can commence the proceedings which may lead to the revocation of the right of occupancy.[70] 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.[71]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 development, social services or housing'.[72] 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 lands. This is not unlikely considering that the National Strategy relies on the Land Act, signifying that this may be used in declaring lands traditionally belonging to indigenous peoples as vacant for REDD+ activities.

The Forest Act of Tanzania is also critical in the implementation of the REDD+ particularly its provisions on participatory forest management (PFM) through Community Based Forest Management (CBFM) Scheme.[73] 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 reserve.[74] 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.[75] 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

67 *Mulbadaw* (n 66 above) 90.
68 The Land Act (1999) sec 51(1)(c) generally.
69 The Land Act, sec 51(1)(e)(i).
70 The Land Act, sec 51(4).
71 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).
72 Land Acquisition Act (1967) sec 4(1).
73 Tanzania National Strategy (n 46 above) 29.
74 The Forest Act (2002) sec 22(1)(a) and (b).
75 The Forest Act (2002) sec 22(4) and (5).

applicable in forest reserves, declare a given area as a Beekeeping Zone.[76] This zone refers to an area either within national or local forests reserves in which activities relating to beekeeping are taking place.[77] Related to this is the Wildlife Conservation Act 2009 which defines a conservation area in relation to wildlife as including a forest reserve under the Forest Act.[78] The Minister can declare any area of land as a game controlled area and prohibit activities which are incompatible with the Forest Act, the Beekeeping Act, the Environmental Management Act or any other relevant laws.[79]

The power of the minister under the Environmental Management Act to declare a given land as environmentally protected area[80] may have a qualifying effect on the land use and tenure of indigenous peoples. 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,[81] local communities' interests,[82] and international obligations.[83] 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 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 section 58 of the Village Land Act that permits land sharing arrangement, and other provisions allowing for customary occupancy of land.[84]

The implication of the foregoing is that contrary to the international safeguards under the UN-REDD Programme, these laws permit states to apply restrictive measures which may justify the displacement of indigenous peoples for the purpose of implementing REDD+ activities.

(b) 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+.[85] In Tanzania, pillar policies are the National Environmental Policy,[86]

76 The Beekeeping Act (2002) sec 11.
77 The Beekeeping Act (2002) Preamble.
78 Wildlife Conservation Act (2009).
79 Wildlife Conservation Act, sec 31(6).
80 The Environmental Management Act (2004) art 47.
81 The Environmental Management Act, sec 47(3)(a).
82 The Environmental Management Act, sec 47(3)(f).
83 The Environmental Management Act, sec 47(3)(g).
84 Village Land Act, art 14.
85 Tanzania National Strategy (n 46 above).
86 National Environmental Policy (1997).

National Forest Policy,[87] National Water Policy,[88] National Energy Policy,[89] and National Human Settlements Development Policy.[90] For Zanzibar, key policies are the National Forest Policy,[91] Environmental Policy,[92] Agricultural Sector Policy,[93] Tourism Policy,[94] National Land Policy,[95] and Energy Policy (2009).[96] 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.

The National Environmental policy lacks the indication on how to ensure that ownership of lands 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.[97] Without a clear role for indigenous peoples, it is difficult to see how sustainable use of the environment can be achieved. While the National Forest Policy[98] acknowledges the role of local communities in sustainable management of the forests, it is uncertain in its protection of lands and tree tenure. The reality is that its 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.[99] The prescription of procedures 'for getting legal rights of occupancy' to lands under the National Human Settlements Development Policy[100] seems discriminatory as it presupposes that the informal tenure of indigenous peoples such as the Maasai is inferior. Also the provision that lands can be expropriated for expansion purposes may 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.

What seems like a set of promising provisions in relation to customary rights under the National Land Policy law are, however limited by several qualifications.[101] For instance, a land in Tanzania is regarded as 'public land', whether granted, customary or unoccupied, and is vested in the

87 National Forest Policy (1998).
88 National Water Policy (2002).
89 National Energy Policy (2003).
90 National Human Settlements Development Policy (2000).
91 National Forest Policy (1995).
92 Environmental Policy (1992).
93 Agricultural Sector Policy (2002).
94 Tourism Policy (2004).
95 National Land Policy (1995).
96 Energy Policy (2009).
97 Tanzania National Strategy (n 46 above) 23.
98 National Forestry Policy (1995) sec 2.
99 See generally, Decision 1/CP.16 (n 52 above) embodying the safeguards; REDD+ SES (n 52 above).
100 National Human Settlements Development Policy (2000) secs 3(2)(i) & 3(2)(vi).
101 National Land Policy (1997) sec 2(2).

President as trustee on behalf of all citizens.[102] 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.[103] The National Water Policy,[104] and particularly the National Energy Policy views forest clearance as a negative trigger of environmental challenges.[105] However, forbidding as it does of forest clearance as a strategy for the implementation of the REDD+ process,[106] may be counterproductive for indigenous peoples. This is in the sense that it 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 the Zanzibar National Policy, National Environmental Policy, Zanzibar Agricultural Policy of 2002, Zanzibar Tourism Policy and Forest Resources Conservation and Management Act Zanzibar (1996).

Zanzibar: Regulatory framework and indigenous peoples' lands

(a) Legislation environment and REDD+

The Forest Resources Conservation and Management Act Zanzibar (1996) is useful in shaping the implementation of REDD+ activities.[107] It allows members of the community to enter into a forest management arrangement with the Forest Administrator over an area designated as a 'Community Forest Management Area'.[108] However, this merely relates to the use and not tenure of the forests. Reinforcing this gap is the fact that the community forest management area can only be granted by the Forest Administrator after a consultation with relevant authorities and community leaders.[109]

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.[110] 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.[111] Also, the Forest Administrator is empowered

102 National Land Policy (1997) sec 4(1)(1).
103 National Land Policy (1997) sec 4(2)(1)(3)-4(2)(14).
104 National Water Policy (2002) sec 2(10).
105 National Energy Policy (2009) sec 139.
106 National Water Policy (2002) sec 27.
107 Tanzania National Strategy (n 46 above) 29.
108 The Forest Resources Conservation and Management Act Zanzibar (1996) Preamble.
109 The Forest Resources Conservation and Management Act Zanzibar, sec 38.
110 The Forest Resources Conservation and Management Act Zanzibar, sec 15.
111 The Forest Resources Conservation and Management Act Zanzibar, sec 32.

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.[112] Along a 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 lands of indigenous peoples and undermine their tenure on lands.

(b) 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 implementation of sustainable forestry programmes. It also advances a legislation regime which establishes a secure and flexible legal framework for community initiatives.[113] 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.[114] Also, instead of safeguarding land tenure, the policy merely encourages participation of community including private individuals and NGOs in environmental programmes.[115]

A critical aspect of the Zanzibar Agricultural Policy of 2002 is to ensure that the 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.[116] Showing that it does not depart from the provisions of a 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.[117] 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.

4.1.2 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) has been formulated and approved for REDD+ preparation.[118] The legal framework for REDD+ has been profiled in a Report on the Study on

112 The Forest Resources Conservation and Management Act Zanzibar, sec 47(1).
113 The National Environmental Policy for Zanzibar (1992) sec 5.
114 The National Environmental Policy for Zanzibar, sec 2(e).
115 The National Environmental Policy for Zanzibar (1992) sec 9.
116 Zanzibar Agriculture Policy (2002) 12.
117 Zanzibar Agriculture Policy (2002) 8.
118 UN-REDD Programme 'National Programme Document-Zambia' (17-19 March 2010) UN-REDD/PB4/4ci/ENG (Zambia Programme Document).

Legal Preparedness for REDD+ in Zambia.[119] It is currently in the first phase of preparing for REDD+.[120] Although a national REDD+ Strategy was expected to be completed in the second quarter of 2013,[121] 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.[122] 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.

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.[123] However, the management and coordination of 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.[124] 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).[125] 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.[126]

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.[127] Further functions

119 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).
120 'REDD in Zambia' http://theredddesk.org/countries/zambia (accessed 25 December 2013).
121 As above.
122 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.
123 T Kalinda et al *Use of integrated land use assessment (ILUA) data for forestry and agricultural policy review and analysis in Zambia* (2008) 1.
124 'Zambia: The REDD desk' http://theredddesk.org/countries/zambia (accessed 18 November 2013).
125 As above.
126 UN-REDD Programme 'National Programme Document – Zambia' (17-19 March 2010) UN-REDD/PB4/4ci/ENG, (Zambia Programme Document) 67.
127 As above.

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.[128] 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.[129] The ENRMMP is established within the Ministry of Tourism, Environment and Natural Resources (MTENR) to coordinate environmental resource management priorities and policies across ministries.[130]

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 Natural Resources and serviced by the REDD+ secretariat existing within the Forestry Department to provide administrative assistance in day-to-day activities and coordination.[131] 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.[132] 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.[133]

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,

128 Zambia Programme Document (n 126 above) 119.
129 As above.
130 Zambia Programme Document (n 126 above) 39.
131 Zambia Programme Document (n 126 above) 121-122.
132 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.
133 Republic of Zambia 'Integrated land use assessment (ILUA) II, project plan' 31.

however, questioned considering that there is no specific representation of forest-dependent communities in the ENRMMP.[134]

Regulatory framework and indigenous peoples' lands

It is noteworthy that forests in Zambia are categorised according to the land on which it rests.[135] 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.[136] 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.

(a) 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 contains a number of provisions which undermine its usefulness for the implementation of REDD+ activities.[137] 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.[138] 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, lands held under customary tenure cannot be alienated by the president without considering the local customary laws on land tenure,[139] consultation with the Chiefs and the Director of National Parks and Wildlife Service, in the case of a game management area,[140] consultation of anyone likely to be affected by the alienation,[141] and prior approval of the Chief and local government where the land is situated.[142]

134 UN-REDD Programme 'Report on the UN-REDD Mission to Zambia 28-29 September 2009' 06 November 2009.
135 Zambia Programme Document (n 126 above) 46.
136 Zambia Programme Document (n 126 above) 14, 15 & 46 profiles rather incorrectly, private ownership of land as part of tenure structure in Zambia.
137 Republic of Zambia Constitution (1996).
138 Republic of Zambia Constitution, art 23(4)(d).
139 Lands Act (1995) Cap 184, sec 3(4)(a); M Hansungule 'Dual land tenure in Zambia & implications' (on file with the author).
140 Lands Act (1995) sec 3(4)(b).
141 Lands Act (1995) sec 3(4)(c).
142 Lands Act (1995) sec 3(4)(d).

In addition to the general provision of the Act that vests all lands in Zambia in the president,[143] 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 lands of indigenous peoples for use and benefit in implementing REDD+ activities is only possible with the approval of chiefs and local authorities.[144] 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 a 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'.[145] In *Bridget Mutwale v Professional Services Limited*, the Supreme Court of Zambia held that failure to obtain consent for a sub-lease renders the entire contract including the provision for payment of rent unenforceable.[146]

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 vacant land. As what amounts to 'vacant land' is not defined anywhere under the Act, this provision can be used in criminalising the occupation and use of indigenous peoples of forests and their resources as well as dispossess forest-dependent populations of their traditional territories. This possibility is reinforced by another provision of the Act which allows for the eviction of persons occupying undeveloped lands.[147]

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 any description.[148] It is, however, silent on whether there will be 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

143 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.
144 Lands Act (1995) sec 8(2).
145 Lands Act (1995) sec 5.
146 *Bridget Mutwale v Professional Services Limited* (1984) ZR 72 (SC) 76.
147 Lands Act (1995) sec 9(2).
148 Lands Acquisition Act (1970) Cap 189.

raising objection if any.[149] 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 lands or unutilised lands.

There are a number of gaps in the Forests Act which weaken its potential relevance for the protection of indigenous peoples in REDD+ activities.[150] Unless lawfully transferred under any written law, the ownership of all trees and forests produce derived from customary areas, National Forests, Local Forests, State Lands and open areas is vested in the President to hold on behalf of the people of Zambia.[151] 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.[152] 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,[153] while a license is required to enter national forest.[154] 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.[155] The Act, however, confers the powers to execute certain functions on the President and the Board of the Water Management Authority which may have an undermining effect on indigenous peoples' land tenure and use. For instance, the president may, in accordance with the provisions of the LAC compulsorily acquire any land for the purpose of protecting a water resource area.[156] The Board can after consulting an appropriate authority or conservancy authority be declared as a water resource area.[157]

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 a clean, safe and healthy environment.[158] 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 a clean, safe and healthy

149 Lands Acquisition Act, secs 5 & 7.
150 The Forests Act (1999).
151 The Forests Act, sec 3.
152 The Forests Act, secs 11 & 19.
153 The Forests Act, sec 24(1)(a).
154 The Forests Act, sec 16(1).
155 Lands Acquisition Act, sec 30(a), (c), (e) & (f) respectively.
156 Lands Acquisition Act, sec 41.
157 Water Resources Management Act (2011) sec 29(1).
158 Environmental Management Act, sec 4.

environment to the provision of the Constitution.[159] 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,[160] it is questionable. First, the 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,[161] which empowers the president, upon the recommendation of the Minister, to acquire lands if such are required for inclusion in a structure plan or local plan or approved structure plan or approved local plan.[162] 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.[163] Hence, where Zambia decides to establish a regional 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.[164]

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.[165] 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.[166] 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 an environmental impact study is necessary in any area where mining activities are being proposed,[167] no obligation in terms of consultation and protection of tenure and benefit-sharing is anticipated to

159 See secs 3 and 4(1) which respectively describe the limit of the superiority clause and the right to clean, safe and healthy environment.
160 Environmental Management Act (2011) sec 76(1)(c).
161 Town and Country Planning (Amendment) Act (1997).
162 Town and Country Planning (Amendment) Act (1997) sec 40.
163 Town and Country Planning (Amendment) Act, second schedule (secs 16 & 44) matters for which provision may be made in a development plan.
164 Zambia Legal Preparedness (n 119 above) 20.
165 Mines and Minerals Development Act (2008).
166 'Local forest' means an area declared as such under sec 17 of the Forest Act, while 'National Forest' means an area declared as such under sec 8 of the Forests Act, see sec 2 of the Mines and Minerals Development Act (2008).
167 Mines and Minerals Development Act, sec 25(5) & 36(4).

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.[168]

(b) 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,[169] National Environmental Action Plan,[170] National Policy on Environment,[171] Forestry Policy,[172] Zambia Forest Action Plan,[173] National Agricultural Policy,[174] Irrigation Policy and Strategy,[175] National Biodiversity Strategy and Action Plan,[176] National Energy Policy,[177] and National Water Policy.[178] These policies as indicated in the NJP and Legal Preparedness Document are linked with different aspects of forest governance.

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 per cent and agricultural productivity and land under cultivation.[179] 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 little 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+. Equally, the provisions of the National Policy on Environment are doubtful for the protection of forest-dependent peoples' interest in REDD+. For instance, the provision

168 Mines and Minerals Development Act, sec 3.
169 Zambia 'Vision 2030: A prosperous middle-income nation by 2030' (Zambia vision 2030).
170 National Environmental Action Plan (1994).
171 National Policy on Environment (2007).
172 Forestry Policy (1998).
173 Zambia Forest Action Plan (ZFAP) (1995).
174 National Agricultural Policy (1995).
175 Irrigation Policy and Strategy (2004).
176 National Biodiversity Strategy and Action Plan (1999).
177 National Energy Policy (2008).
178 National Water Policy (1994).
179 Zambia Vision 2030 (n 169 above) 30.

dealing with tenure security is only ensured for 'smallholder farmers'.[180] Similarly, although the policy expresses that customary rights to lands and resource use will be recognised and protected,[181] 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 states will increase rents reflecting market value with the view of promoting sustainable leasehold lands.[182]

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.[183] 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.[184] Against this backdrop, a review has been carried out leading to the formulation of a draft National Forest Policy 2009 which was developed along Zambia's preparation for REDD+ readiness.[185] A Draft National Forest Policy for 2009 still awaits the approval of parliament.[186] Nonetheless, in addition to not articulating clearly what these roles 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.

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 lands to its fullness by farmers.[187] Although presented as relevant to the implementation of REDD+ activities in Zambia,[188] 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. In

180 National Policy on Environment (2007) para 7(1)(13)(2).
181 National Policy on Environment, para 7(1)(13)(2)(c).
182 National Policy on Environment, para 7(1)(13)(2)(h).
183 Zambia Programme Document (n 126 above) 43.
184 Zambia Programme Document (n 126 above) 44.
185 Zambia Legal Preparedness (n 119 above) vii.
186 Zambia 'Plans and policies' http://theredddesk.org/countries/zambia/plans-policies (accessed 19 December 2013).
187 National Agricultural Policy (1995) 23.
188 Zambia Legal Preparedness (n 119 above) 60.

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.[189] The National Energy Policy implicates forests in a number of areas.[190] 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.[191] Arguably, this may not include the exploitation of these peoples in forest related projects such as REDD+. In all, the gap in tenureship negatively affects consultation, carbon rights, access to benefit as well as remedies of indigenous peoples and forest-dependent communities in Zambia.

4.1.3 Nigeria and readiness for REDD+

The involvement of Nigeria in the REDD+ programme dates back to 2009 when it requested along with the 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+.[192] Its primary objective is to implement the REDD+ programme, using CRS, one of the 36 states in Nigeria as a demonstration model.[193] 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.[194] Toward the process of phase 1, Nigeria has been supported with a financial allocation of US$ 4 million for the period 2012-2015.[195] It also applied for 3.6 million dollars from the FCPF Programme.[196]

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.[197] 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

189 Zambia Legal Preparedness (n 119 above) 24.
190 National Energy Policy (2008).
191 National Energy Policy (2008) para 5(2)(2)(2)(d)(iii).
192 Federal Republic of Nigeria 'REDD+ readiness preparation proposal (R-PP)' (November 2013) 5 (Nigeria R-PP) 6.
193 UN-REDD Programme 'National Programme Document-Nigeria' (2011) UN-REDD/PB7/2011/8, 10 (Nigeria NPD).
194 Nigeria R-PP (n 192 above) 6.
195 As above.
196 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).
197 Nigeria NPD (n 193 above).

expected to shape the national process that will then drive other states that may wish to implement REDD+ activities.[198] 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.[199] These documents are analysed 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.

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.[200] The FME has established the Special Climate Change Unit (SCCU), which is vested with mandates including negotiation, planning, policy, education and carbon finance.[201] 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.[202]

Established in April 2013, the National Climate Change Committee (NCCC) is an inter-ministerial body that includes the ministers of national planning commission, aviation, agriculture and rural development and environment. Others are ministers of works, science and technology, water resources, health, and transport.[203] While the Minister of National Planning is the Chairman, the Minister of Aviation acts as Vice Chairman.[204] The NCCC is with the mandate to develop a national

198 Nigeria NPD (n 193 above) 11.

199 'Review synthesis of Nigeria R-PP' October and November 2013 (Nigeria Synthesis Report); as above. 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 Commission and UNDP 1 (Nigeria Preliminary Assessment).

200 Nigeria NPD (n 193 above) 20.

201 Federal Ministry of Environment 'Nigeria Climate Change Unit' http://www.climatechange.gov.ng/ (accessed 18 December 2013).

202 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 193 above) 20.

203 GFCS '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).

204 As above.

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.[205] The NCCC allows for cross-sectoral coordination of national climate change policies.[206] 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+.[207] 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.[208]

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.[209] 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, monitoring and evaluation process and implementation. Once inaugurated this Council will meet once in a year.[210] In addition to the inadequacy of this representation, sandwiched 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 in fact 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

205 As above.
206 Nigeria R-PP (n 192 above) 13.
207 Nigeria R-PP (n 192 above) 12-17.
208 As above.
209 As above.
210 Nigeria R-PP (n 192 above) 12.

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.[211] 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.[212] The Committee meets twice a year.[213]

A closer examination of this composition leaves one with the impression that the Sub-Committee has too much presence of government. 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 Sub-Committee. 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, training and institutional capacity building on REDD+ issues.[214] 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.[215] In dealing with daily management of federal level activities, the Secretariat performs a range of functions.[216] These functions include the preparation of work-plan, overseeing of programme activities and consultants; coordination of inputs and outputs from the various REDD+ programmes and related programmes.[217] Other functions include the offering of progress and monitoring reports, coordination of national REDD+ activities and programmes, and ensuring efficient record of

211 Nigeria R-PP (n 192 above)14.
212 As above.
213 As above.
214 As above.
215 As above.
216 As above.
217 As above.

programme payment in line with international standards.[218] The Secretariat is expected to strengthen the engagement of Nigeria with the international community and international negotiations, particularly in the UNFCCC.[219] 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.[220]

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 feedback that may shape the fulfilment of its role. However, this is not yet achieved as there is no clearly set out platform which is specifically linked with these communities and aimed at incorporating their world view 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.[221] The PSC is tasked with the coordination of programme including the approval of work-plans and budgets and overall monitoring.[222] 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.[223] 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.

218 As above.
219 As above.
220 Nigeria R-PP (n 192 above) 15.
221 As above.
222 As above.
223 As above.

Existing as part of the architecture of the national REDD+ programme is the National Stakeholder Platform for REDD+.[224] 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.[225] Members to the platform are selected on their records and their past engagement and activity.[226] 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 members will write a letter to the 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.[227] Although this seems a great platform to secure a broad based participation in the REDD+ activities, the process of becoming a member 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.[228] The 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.[229] 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.[230] Other members are the Department of Forestry and Wildlife, the Faculty of Environmental

224 As above.
225 As above.
226 As above.
227 As above.
228 Nigeria NPD (n 193 above) 73.
229 As above.
230 As above.

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.[231] There is space for at least three NGO representatives, four community representatives and the Chairperson of the CRS House of Assembly's Committee on Environment.[232] 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.[233] 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.[234] 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.[235] 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.[236] 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'.[237] This observation, however, flies in the face of findings of the Working Group that prescribe the conditions 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 lands. 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 Justice, Finance, Agriculture, Environment and Lands, the State Planning Commission, Department for International Donor Support and the Chairman of the Forestry Commission, serving as

231 As above.
232 Nigeria R-PP (n 192 above) 16.
233 Nigeria R-PP (n 192 above) 17.
234 As above.
235 As above.
236 As above.
237 As above.

the Coordinator.[238] The Council acts as an inter-ministerial body which ensures there is co-ordination across different sectors.[239]

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.

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.[240] The first sector is what the author regards as the general framework, namely, the Constitution of the Federal Republic of Nigeria,[241] National Policy on Environment,[242] and National Environmental Standards and Regulations Enforcement Agency Act.[243] The other sectors are specific consisting of industries,[244] permitting and licensing system,[245] telecommunications,[246] noise,[247] marine and coastal areas resources,[248] sanitation,[249] mining & mineral resources,[250] greenhouse gas emission,[251] pest management,[252] water quality, efficiency

238 As above.
239 As above.
240 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.
241 Constitution of the Federal Republic of Nigeria (1999).
242 National Policy on Environment Act 42 of 1988.
243 National Environmental Standards and Regulations Enforcement Agency Act (NESREA) (2007).
244 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).
245 National Environmental (Permitting and Licensing System) Regulations (2009).
246 National Environmental (Standards for Telecommunications and Broadcast Facilities) Regulations (2011).
247 National Environmental (Noise, Standards and Control) Regulations (2009).
248 National Environmental (Coastal and Marine Area Protection) Regulations (2011).
249 National Environmental (Sanitation and Wastes Control) Regulations (2009); Quarantine Act (2004).
250 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, LN 71 of 1967; Petroleum (Drilling & Production) Regulations, LN 69 of 1967; Oil in Navigable Waters Act, Cap 06 LFN 2004; Oil in Navigable Waters Regulations, LN 101 (1968).
251 National Environmental (Ozone Layer Protection) Regulations (2009).
252 Bees (Import Control and Management) Act, LFN (2004); Animal Diseases (Control) Act (2004).

and resources,[253] flora and fauna,[254] waste management,[255] settlements,[256] energy use,[257] noise pollution,[258] land use and soil conservation,[259] toxic and hazardous substances,[260] water resources,[261] resource conservation,[262] wildlife,[263] forestry,[264] and air pollution.[265] 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.[266]

Illustrating that this sectional overlap cannot be ruled out in the context of climate change regulatory framework is the REDD+ measure, which 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

253 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).
254 National Crop Varieties and Livestock Breeds (Regulation) Act, LFN (2004).
255 National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations (1991); Harmful Waste (Special Criminal Provisions) Act, Cap H1, LFN (2004).
256 Nigerian Urban and Regional Planning Act, Cap N138, LFN (2004).
257 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).
258 National Environmental (Noise, Standards and Control) Regulations (2009).
259 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).
260 Harmful Waste (Special Criminal Provisions) Act, Cap H1 (2004); National Environmental (Base Metals, Iron and Steel Manufacturing/ Recycling Industries Sector) Regulations (2011).
261 National Water Resources Institute Act, Cap N83, LFN (2004); Territorial Waters Act, Cap T5, LFN (2004)
262 Federal National Park Service Act, Cap N65, LFN (2004); National Environmental (Access to Genetic Resources and Benefit- Sharing) Regulations (2009).
263 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.
264 National Forestry Policy (1988).
265 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).
266 Fagbohun (n 240 above).

indicated in the documentation, the applicable framework features instruments namely, National Forestry Policy,[267] National Policy on Environment,[268] Land Use Act,[269] National Environmental Standards and Regulations Enforcement Agency (NESREA) Act,[270] and the Law on the Management and Sustainable Use of the Forest Resources of Cross River State.[271] 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.

(a) 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.[272] It is, however, improbable that it will safeguard 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 lands through a number of its provisions. The purport of section 1 of the Act is to vest ownership of lands 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 lands in their respective territories. Further reinforcing these provisions, section 28 of the Act provides that a land may be appropriated for 'overriding public interests' which is defined as including 'the requirement of the land for

267 National Forestry Policy (1988).
268 National Policy on Environment Act 42 of 1988.
269 Land Use Act L5, LFN (2004).
270 National Environmental Standards and Regulations Enforcement Agency Act (NESREA) (2007).
271 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 3 of 2010 (Cross-River Law on Sustainable Management of Forest Resources).
272 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.

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*.[273] 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).[274]

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',[275] 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.[276] 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,[277] 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.

Another law indicated by the NPD as relevant to REDD+ activities in Nigeria is the National Environmental Standards and Regulations Enforcement Agency (NESREA) Act,[278] which repealed the Federal

273 *Abioye v Yakubu* (1991) 5 NWLR (pt 190) 130.
274 *Yakubu* case (n 273 above) 223, paras (d)-(g) per Obaseki JSC.
275 K Omeje *High stakes and stakeholders: Oil conflict and security in Nigeria* (2006) 47.
276 RT Ako 'Nigeria's Land Use Act: An anti-thesis to environmental justice' (2009) 53 *Journal of African Law* 289.
277 Draft National Forestry Act (2006).
278 NESREA (2007); Nigeria NPD (n 193 above).

Environmental Protection Agency Act (FEPA Act) of 1988.[279] 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,[280] 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.[281] Significantly, apart from 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,[282] in exempting oil and gas pollution from its line of activities, the 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.[283] This is detrimental to forest-dependent communities while implementing REDD+ as it can potentially be used in checkmating legitimate resistance of these communities about REDD+ projects on their lands.

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.[284] This law contains provisions in respect of all the different types of forests within the state.[285] It defines the roles and responsibilities

279 For some relevance of FEPA and criticisms against its lifetime, see Fagbohun (n 240 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 240 above).

280 NESREA (2007 above) section 7 (a), (c), (d), (e), (f), (g), (h),(i) & (j).

281 NESREA (2007 above) section 7(a) & (l) respectively.

282 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* (2013) 50-53.

283 NESREA (2007 above) sec 26(2).

284 Cross-River Law on Sustainable Management of Forest Resources (n 271 above).

285 These are namely, state forest reserve, local government forest, community forest, private forest, wildlife sanctuary, forest plantation, strict nature reserve and garden, park and urban forest; see section 24, Cross-River Law on Sustainable Management of Forest Resources (n 271 above).

of all the potential stakeholders and beneficiaries of forest resources in the state.[286] 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 a community based forest management association.[287] 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'.[288] Interestingly, the law requires the Commission to comply with 'international conventions and treaties on natural resources management'.[289] 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.[290]

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 lands without approval of the governor.[291] Further reinforcing this position are provisions affirming that the 'protection, control and management of forest reserves' shall be 'directed' by the Commission,[292] which is empowered to close right of way or water course in forest reserve.[293] In the law, there is overbearing prohibition of activities including cutting of forest for any use,[294] and harvesting of forest products.[295] With provisions criminalising activities such as cultivation of soil, herbage, erection of

286 See for instances, Cross-River Law on Sustainable Management of Forest Resources (n 271 above) secs 1 and 3 respectively establishing the commission and its composition; sec 9(1) which set out the various departments within the commission; sec 29 on the duty of reserve settlement officer; secs 59 and 60 dealing with community based forest management.

287 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 42.

288 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 59.

289 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 6(e).

290 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 9(3).

291 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 39.

292 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 42.

293 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 40(1).

294 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 48.

295 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 50(1).

building and residence in the forests,[296] 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.[297] More importantly, going by the doctrine of covering the field,[298] 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.[299] 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.

(b) Policy environment and REDD+

The National Environmental Policy embodies a range of interesting provisions which emphasise the sustainable management of forests.[300] 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.[301] 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

296 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 83(1).
297 Nigeria 1999 Constitution, art 12(1).
298 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 & Others v AG Federation & Others* SC 99/2005, SC 121/2005, SC 216/2005 (Consolidated).
299 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 92.
300 National Policy on the Environment, Act 42 of 1988, sec 2(a)(b) and (c), sec 4(10)(i), sec 4(6)(h) & (9)(h).
301 National Policy on the Environment, Act 42 of 1988, sec 4(16)(n); see generally, sec 6(6) which deals with public participation.

sustainable management of the environment.[302] 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 groups.[303] 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.[304] 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.[305] 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 lands, including trees growing on it belongs to the state.

4.1.4. Implications of inadequate land tenure and use legislation

The foregoing regulatory framework in relation to land tenure and use for REDD+ in Tanzania, Zambia and Nigeria 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.

Participation

In Tanzania, much remains to be desired about participation. 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.[306] For instance, of the thirty organisations indicated in the Report as having given input into the preparation of documentation,[307] 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

302 Rights and Resources Initiative *What future reform? Progress and slowdown in forest tenure reform since 2002* (2014).
303 National Forestry Policy (1988) sec 3 generally.
304 National Forestry Policy, sec 3(1)(ix).
305 National Forestry Policy, sec 3(3)(2)(3)(i).
306 'TZ – REDD newsletter' Issue 3 January 2011 http://www.tfcg.org/pdf/TZ%20REDD%20Newsletter3.pdf (accessed 14 January 2014); 'Tanzanian Civil Society Comments on R-PP'pdf.wri.org/rpp_country_table_tanzania.pdf (accessed 25 December 2013).
307 As above.

society expects the authors of R-PP to propose clearer approach to consultation and incorporation of feedback into decision-making.[308] 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 lands and forests are generally state owned and the claim of indigenous peoples to this is subordinate.

In Zambia, 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.[309] It is therefore not strange that it has been suggested that more consultations are needful as activities progress to readiness stage.[310] 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 entitlement to benefit-sharing of indigenous peoples.

The Nigeria RPP documents series of meetings which have been held so far in connection with preparation for REDD+ activities,[311] 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.[312] Hence, in the guise of implementing REDD+, the concern has been expressed that these populations are likely going to be evicted from their lands and denied access to the forests that constitutes the basis of their culture and livelihoods.[313] 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

308 As above.
309 As above.
310 UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries National Joint Programme Document 'Independent technical review: Zambia'.
311 Nigeria R-PP (n 192 above) 56-57.
312 'Don't sell forests, groups urge Nigerian governments' Appendix xiv to Nigeria Preliminary Assessment (n 199 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).
313 As above.

protection or safeguard of the environment. Rather, it is the huge funds involved in the programme.[314]

The above 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.[315] 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.[316] This will reduce the potential risks of having too many structures and administrative layers, with attendant inefficiencies.[317] 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+.[318]

Carbon rights and benefit-sharing

The Draft National Safeguards define carbon rights in the context of Tanzania to mean:

> The 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.[319]

It describes benefits as including 'financial benefits such as payments for carbon, employment or investments in local infrastructure'.[320] It also entails non-financial benefits including 'improved access to forests, land and non-timber forest products, and enhanced local environmental quality'.[321] 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

314 As above.
315 Nigeria Synthesis Report (n 199 above) 3.
316 Nigeria Synthesis Report (n 199 above) 4.
317 As above.
318 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.
319 United Republic of Tanzania *Tanzania REDD+ social and environmental safeguards* (June 2013) draft, annex 1: Glossary of key terms (Tanzania REDD+ SES) 23.
320 As above.
321 As above.

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.[322] For example, the 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.[323]Although the Environmental Management Act allows a space for benefit-sharing in the design of environmental plans for national protected areas,[324] that is only possible in the restricting context of the power of the minister to declare a given land as environmentally protected area.[325] This approach 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.[326] Section 27 of the National Environmental Policy (NEP) merely commits the state to grant access to land resources to communities. In fact, the Zanzibar National Policy essentially recognises the resource access of the communities and not tenure.

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.[327] 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 lands 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. 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.[328] Effectively in this context, ownership of carbon rights cannot be interpreted as belonging to communities such as

322 Forest Act (2002) art 3(b).
323 Forest Act (2002) art 16(c).
324 Environmental Management Act (2004) sec 49(3)(e).
325 Environmental Management Act (2004) sec 47.
326 Environmental Management Act (2004) art 53.
327 Forest Act (2002) art 42(1).
328 Tanzania National Strategy (n 46 above) xi.

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 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.

The Zambia Legal Preparedness, makes a distinction between 'property rights tied to forests and those tied to land'.[329] According to the document, this connotes that investors may enjoy carbon rights over trees in the forest without having title to lands. By extension this signifies that those who hold land tenure may not own forest produce and therefore accruing carbon for REDD+ compensation.[330] The lack of clarity of the carbon ownership in the existing framework is 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.[331] 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 lands without compensation and therefore exclude them from a claim to benefits from carbon transaction. This fact is further buttressed under the Act which describes lands solely used for cultivation or pasturage as unutilised.[332] 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+.

In Nigeria, while the specialised law in CRS at least embodies provisions dealing with carbon and concessions,[333] 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 a 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

329 Zambia Legal Preparedness (n 119 above) 30.
330 Zambia Legal Preparedness (n 119 above) 44.
331 Land Acquisition Act (1970) secs 10-14.
332 Land Acquisition Act, sec 15(4)(b)(iii).
333 Cross-River Law on Sustainable Management of Forest Resources (n 271 above) sec 9(3).

> the benefit of the community, in accordance with applicable customary law.[334]

The implication of the above provision on benefit-sharing is that the government prefers to deal with the 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 lands 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.[335]

Grievance mechanism and access to remedies

As evidence from Tanzania shows, potential grievances and conflicts may result from the operationalisation of key legislation. An example is the provisions that criminalise the failure by anyone to comply with a regulation declaring a land as environmentally sensitive for protection.[336] Also grievance may result where land areas are declared as closed 'to livestock keeping, occupation and other specified activities'.[337] 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.[338] 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. 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 mainland Tanzania, and The Magistrate Court The Kadhis Court, High Court Act of 1985, Land Tribunal in the case of Zanzibar.[339] 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

334 Land Use Act, sec 29 (3)(b).
335 K Ebeku 'Oil and the Niger Delta People: The injustice of the Land Use Act' (2001) *CEPMLP Internet Journal* 9; also see Constitutional Rights Project (CRP) 'Land, oil and human rights in Nigeria's delta region' (1999, CRP) 15-16.
336 Environmental Management Act (2004) sec 51(3).
337 Environmental Management Act, sec52(f)
338 '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).
339 Tanzania REDD+ SES (n 52 above) 18.

approach which may compromise indigenous peoples' access to remedy in REDD+ matters.

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.[340] 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.[341] 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.[342] 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 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'.[343]

The mechanism available for conflict resolution remains largely what exists under the regime before REDD+. For instance, disputes regarding the compulsory acquisition of lands, except for the level of compensation, can be brought by legal proceedings before the High Court of Zambia.[344] The Ministry of Lands also has units including the Lands Tribunal that carry out dispute resolution service.[345] 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 & 5 Others v Attorney General & I Other.*[346] 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

340 Zambia Legal Preparedness (n 119 above) 44.
341 Zambia Programme Document (n 126 above) 54.
342 UN-REDD Programme 'National Programme 2012 Annual Report-Zambia' March 2013, 32; also see UN-REDD Programme 'Zambia National Programme 2011 Annual Report 31 January 2012 24.
343 Zambia Legal Preparedness (n 119 above) 49.
344 Zambia Programme Document (n 126 above) 60.
345 Zambia Programme Document (n 126 above) 16.
346 *Zambia Community Based National Resource Management Forum & 5 Others v Attorney General & I Other* 2014/HP/A/006.

and the report that the EIA was based on technical inadequacies.[347] 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.[348] 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'.[349]

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 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.[350] Generally, there are concerns around delay in the administration of justice in Zambia.[351]

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.[352] 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 in fact 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

347 *Zambia Community* (n 346 above) 3-6.
348 *Zambia Community* (n 346 above) 14.
349 *Zambia Community* (n 346 above) 22.
350 Zambia Programme Document (n 126 above) 17.
351 Zambia Legal Preparedness (n 119 above) 44; See P Matibini 'Access to justice and the rule of law' 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).
352 Nigeria R-PP (n 192 above) 32.

concerns'.[353] 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,[354] 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.[355]

5 Conclusion

Evidence from states in Africa such as Tanzania, Zambia and Nigeria indicates inadequate protection of indigenous peoples' lands in the national application of the international climate change regulatory framework on adaptation and mitigation. In relation to adaptation, 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 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. Regarding mitigation, 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 framework can be constructed as a regional response to address this weakness.

353 Nigeria Synthesis Report (n 199 above).
354 Cross-River Law on Sustainable Management of Forest Resources (n 271above) sec 60(5).
355 As above.

CHAPTER 6 THE INADEQUACY OF THE NATIONAL CLIMATE CHANGE REGULATORY FRAMEWORK IN RELATION TO INDIGENOUS PEOPLES' LANDS: A HUMAN RIGHTS FRAMEWORK AS A REGIONAL RESPONSE

1 Introduction

Against the backdrop that the climate change regulatory framework at the national level may not adequately protect indigenous peoples' lands in Africa, this chapter argues that recourse can be had to a regional human rights framework for protection. The chapter anchors the argument using three legal reasons. The first is the incompatibility of the inadequacy with relevant regional human rights instruments and obligations thereunder. The second ground is that there is potential in the emerging regional climate change regulatory framework to link it to human rights for the protection of indigenous peoples' lands. Finally, the argument in support of recourse to the regional human rights system is based on its potential to address the inadequacy of the climate change regulatory framework at the national level. Following this introduction, section two sets out the legal basis for the application of a human rights framework at the regional level of Africa. Section three assesses national legislative frameworks, using a regional human rights framework; while section four explores potentials in the emerging regional climate change regulatory to link to a human rights framework for the protection of indigenous peoples' land use and tenure in Africa. Section five explores potentials in regional human rights mechanisms with a focus on the African Commission on Human and Peoples' Rights (the Commission). Section six is the conclusion.

2 Legal basis for the application of a regional human rights framework

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 a valid justification of a 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 toward implementing human rights at the national level. 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

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?' (September 1999) http://www2.warwick.ac.uk/fac/soc/csgr/events/conferences/1999_conferences/3rdannualconference/papers/bowles.pdf (accessed 19 April 2014).

regional policies and programmes on mitigation and adaptation.[7] However, states are yet to fully utilise 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. 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.[9] As the current state of international human rights indicates, suits against international organisations and accountability of non-state actors, in the implementation of the climate change response measures are in doubt.[10] 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, 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 current climate status and the despoliation of the Arctic, the outcome was unsuccessful.[11] Hence, the experience at regional level sympathises with 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

7 United Nations Framework Convention on Climate Change (UNFCCC) adopted at the World Conference on Environment and Development at Rio de Janeiro, 3-14 June 1992, Preamble & 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 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; 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.

10 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.

11 '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).

unlikely to make any difference.[12] In the particular context of an African human rights system, other weaknesses include weak compliance with decisions and inadequate capacity and resources.[13] Also in the specific context of the adverse impacts of climate change, as observed earlier, Africa does not have a homogenous experience of climate change.[14] 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.

Notwithstanding the global nature of climate change, it is commonplace that states in Africa, as duty bearers, have an obligation under international human rights law towards their citizens, who are the rights holders.[15] As earlier observed, one state cannot use the inaction of another as a defence for failing to discharge its obligations.[16] In the context of applying a regional human rights framework, 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.[17] 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 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

12 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.

13 Viljoen (n 1 above).

14 P Collier, G Conway & T Venables 'Climate change and Africa'(2008) 24 *Oxford Review of Economic Policy* 337.

15 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.

16 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.

17 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).

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 a 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 a 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 of the grounds on which human rights at the regional level can help in addressing the gap at the domestic level.

3 Assessing national regulatory frameworks in the context of a regional human rights framework

The 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 obligations and a range of rights guaranteed under regional human rights instruments in Africa: the African Charter, Kampala Convention and the Conservation Convention, the content of which have been discussed in the methodology section of chapter one of this book,

3.1 Incompatibility of 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.[18] The conceptualisation of these obligations owes its introduction and current influence on international human rights law to the pioneering work of Shue and Eide.[19] In Shue's view, the tripartite typology of duties include, (1) duties to avoid the

18 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).

19 De Schutter (n 18 above) 5.

deprivation of the right concerned, (2) duties to protect rights holders from deprivation, and (3) duties to aid rights holders who have been deprived.[20] 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.[21] 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.[22] 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 obligations 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'.[23] Also, it has been shown that these layers of obligations apply to civil and political rights.[24]

The African human rights system offers four layers of obligations. In the *Ogoniland* case,[25] the Commission, in the context of environmental claims over the degradation of the land of Ogoni people developed jurisprudence on a four-layer of obligations in respect of the civil, political and socio-economic rights, guaranteed under the African Charter; the obligations 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. It also signifies that there should be respect on the part of the state for 'right-holders, their freedoms, autonomy, resources, and liberty of their action'.[26] In relation to the situation of a collective group, the obligation to respect entails that resources collectively belonging to this group should be respected.[27] 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.[28] Corresponding to the obligation to protect human rights, according to the

20 S Shue *Basic rights: Subsistence, affluence, and US foreign policy* (1980) 2 ed 52.
21 General Comment 12: The right to adequate food, UN ESCOR, Comm on Econ, Soc & Cult Rts, 20th Sess, 14-20, UN Doc E/C.12/1999/5 (1999) (United Nations General Comment 12); General Comment 13: The right to education, UN ESCOR, Comm on Econ, Soc & Cult Rts, 21st Sess, 46-48 (1999) (United Nations General Comment 13).
22 A Eide 'Realisation of social and economic rights and the minimum threshold approach'(1989) 10 *Human Rights Law Journal* 35 37.
23 Committee on Economic, Social and Cultural Rights 'Report on the 22nd, 23rd and 24th sessions' E/2001/22E/C.12/2000/21 para 33.
24 M Nowak *UN Covenant on Civil and Political Rights: CCPR commentary* 2d ed (2005) 37-41.
25 *Social and Economic Rights Action Centre* (SERAC) *& Another v Nigeria* (2001) AHRLR 60 (ACHPR) (*Ogoniland* case).
26 *Ogoniland* case (n 25 above) para 45.
27 As above.
28 *Ogoniland* case (n 25 above) para 46.

Commission, is the obligation to promote the enjoyment of all human rights,[29] which entails that the state should ensure 'that individuals are able to exercise their rights, for example, by promoting tolerance, raising awareness, and even building infrastructures'.[30] The obligation to fulfil, according to the Commission, requires the state to mobilise 'its machinery towards the actual realisation of the rights'.[31]

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.[32] 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'.[33] 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. 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

29 As above.
30 As above.
31 *Ogoniland* case (n 25 above) para 47.
32 Kampala Convention, art 4(5).
33 Kampala Convention, art 3(i).

relation to their lands, 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.[34] 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 the 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.[35] It may also hinder the obligation of states to provide these peoples with the necessary access to survival amenities.[36]

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*.[37] In that case, the Supreme Court of India was approached for relief after several states in India 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.[38] 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 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 is not only in breach of the foregoing layers of obligations required of states under the regional human rights instruments, but also the inadequate climate

34 *Ogoniland* case (n 25 above) para 47.
35 Kampala Convention, art 4(3).
36 *Ogoniland* case (n 25 above) para 47.
37 *Peoples' Union for Civil Liberties v Union of India* [(Civil) No 196 of 2001] (SC).
38 As above.

regulatory framework affects a range of rights guaranteed under these instruments.

3.2 Threat to a range of rights

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 and related instruments. While other rights may be linked to climate change, the discussion below focuses particularly on the rights of indigenous peoples to property, participation, food, water, adequate housing, protection of environment, peace and self-determination as these rights are directly impacted adversely by climate change.

3.2.1 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 lands 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. Article 4(5) of the Kampala Convention enjoins parties to the Convention to 'protect communities with 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. 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 lands 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 lands which were allegedly expropriated by the government of Kenya for

game-reserve purposes.[39] 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'.[40] 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.[41] Accordingly, the Commission found a violation of the right to property.[42]

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 lands. For instance, in *Mayagna* (Sumo) *Awas Tingni v Nicaragua,*[43] 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*,[44] the Court defines states' obligation in relation to the exploitation of natural resources on indigenous peoples' lands. The Court defined collective property rights as the practice among indigenous peoples that does not place ownership of lands in the hands of one individual, but in the whole community.[45] 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'.[46] 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.[47] On the issue of compensation and benefit-sharing, the case of *Yakye Axa Indigenous Community v Paraguay*,[48] 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.[49] More importantly, however, the state is required to

39 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 22.
40 *Endorois* case (n 39 above) para 295.
41 *Endorois* case (n 39 above) para 296.
42 *Endorois* case (n 39 above) para 298.
43 *Mayagna* (Sumo) *Awas Tingni Community v Nicaragua* IACHR (31 August 2001) Ser C 79 paras 140(b) and 151
44 *Saramaka People v Suriname* IACHR (28 November 2007) Ser C 172.
45 *Saramaka* (n 44 above) 149.
46 As above.
47 As above.
48 *Yakye Axa v Paraguay* IACHR (17 June 2005) Ser C 146.
49 *Yakye* (n 48 above) para 145.

award compensation taking into account the dependency of the community on their land resources.[50] In *Saramaka*, it was affirmed that the state must ensure that a 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'.[51]

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 lands 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 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.

3.2.2 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 2, on participation and inclusion as core principles in human rights which can help address indigenous peoples' claims in respect of rights to lands 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.[52] Similarly, article

50 *Yakye* (n 48 above) para 151.
51 *Saramaka* (n 44 above) para 139.
52 See generally, Conservation Convention 2003 art XVI.

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 affecting their protection and assistance.[53] 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.[54]

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.[55] This right is also guaranteed under article 25 of the ICCPR which forbids unreasonable restrictions on taking part 'in the conduct of public affairs, directly or through freely chosen representatives'.[56] 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.[57] 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.[58]

In the *Endorois* case, the Commission considered that an essential element of deciding whether lands are appropriated in accordance with law relates to the consultation of indigenous peoples.[59] 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.[60] In determining this case, the Commission relied on *Saramaka*.[61] 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

53 Kampala Convention, art 10(2)(k).
54 United Nations Declaration on the Rights of Indigenous Persons (UNDRIP), adopted by a majority vote of the United Nations (UN) General Assembly on 13 September 2007, also see generally arts 5, 27 & 41.
55 United Nations Declaration on Human Rights, art 21.
56 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.
57 As above.
58 Human Rights Committee, General Comment 25 (1996), UN Doc CCPR/C/21/Rev.1/Add.7, para 5 (United Nations General Comment 25).
59 *Endorois* case (n 39 above).
60 *Endorois* case (n 39 above) 226.
61 n 44 above.

customs and traditions. The Court stressed that the state has a duty to consult indigenous peoples during the early stages of any proposed plan, respecting their customs and traditions. In certain cases, the state is not only required to consult, but is to obtain the 'free, prior and informed consent' of the affected group.[62] Another important decision on the participation of indigenous peoples in projects affecting their lands is the case of *Apirana Mahuika et al v New Zealand*.[63] In that case, the Human Rights Committee (HRC) considered the consultation carried out by the government adequate though complicated, and, therefore, was unable to find a violation of Maori fishing rights.[64]

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.

3.2.3 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 lands 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.[65] 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 accessibility entails economic and physical accessibility. Economic accessibility refers to the acquisition pattern through which food is procured, such as lands 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.[66] In Africa, for pastoralists especially, as earlier indicated, changing weather conditions, resulting from climate change can lead to the destruction of grazing lands, low yield of farm products, and little or no

62 *Saramaka* (n 44 above) para 134.
63 *Apirana Mahuika et al v New Zealand* Communication 547/1992, CCPR/C/70/D/547/1993.
64 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; see also DK Anton & DL Shelton *Environmental protection and human rights* (2011).
65 United Nations General Comment 12 (n 21 above) paras 10-13.
66 As above.

production of meat and milk.[67] 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 the *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 lands may hinder access to food.[68] Therefore, where there is an 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.

3.2.4 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.[69] The impact of climate change will worsen an already calamitous situation of access to water in Africa: water stress exists in various countries including Tunisia, Algeria, Morrocco, Sudan and, indeed, in most parts of sub-Saharan Africa.[70] 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'.[71] 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',[72] quality entails that water must be safe and

67 CH Bals, S Harmeling & M Windfuhr *Climate change, food security and the right to adequate food* (2008) 84-99.
68 *Endorois* case (n 39 above).
69 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.
70 C Toulmin *Climate change in Africa* (2009) 40.
71 'United Nations General Comment 15: 'The right to water, arts 11 and 12' (2000) para 1 (United Nations General Comment 15).
72 United Nations General Comment 15 para 12(a).

free of any substance that is harmful to health.[73] Water accessibility has four dimensions, namely, physical, economic and non-discrimination and information dimensions.[74]

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 lands 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.

3.2.5 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.[75] Also, mitigation measures which essentially involve Africa, as explained earlier, can occasion displacement of population. This development, no doubt, poses a challenge 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.[76] These are legal security of tenure, availability of services, materials, facilities and infrastructure, accessibility, location, affordability, habitability, and cultural adequacy.[77]

Legal security of tenure refers to different forms of tenure, such as rental accommodation, cooperative housing, lease, owner occupation, emergency housing and informal settlements.[78] It does not necessarily mean a right to lands, but it imposes a legal protection against forced eviction and harassment, regardless of the type of tenure.[79] 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

73 United Nations General Comment 15 para 12(b).
74 United Nations General Comment 15 para 12(c).
75 Toulmin (n 70 above) 87.
76 United Nations General Comment No 4: The right to adequate housing, art 11(1) of the Covenant (1991) 6th session (United Nations General Comment 4).
77 United Nations General Comment 4 para 8.
78 United Nations General Comment 4 para 8(a).
79 As above.

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.[80] 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.[81] 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,[82] 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'.[83] 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'.[84]

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[85] 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.[86]

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 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.[87] 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

80 United Nations General Comment 4 para 8(b).
81 United Nations General Comment 4 paras 8(e) & (f).
82 United Nations General Comment 4 para 8(c).
83 United Nations General Comment 4 para 8(d).
84 United Nations General Comment 4 para 8(g).
85 United Nations General Comment 7: 'The right to adequate housing, art 11(1) of the Covenant: Forced evictions' (1997) 16th session (United Nations General Comment 7).
86 United Nations General Comment 7 para 3.
87 United Nations General Comment 7 para 4.

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.

3.2.6 Rights in relation to the protection of environment

Inadequate domestic legislation will worsen the adverse effects of climate change on the enjoyment of the right to environment by indigenous peoples. In addition to being guaranteed under article 24 of the African Charter, article IV of the Conservation Convention 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 14 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'. 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 comments on the right to water,[88] the right to health,[89] the right to food,[90] and the right to housing.[91] 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.[92]

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.[93] 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 indigenous peoples' lands thereby compromising their environmental integrity. It signifies that these activities may undermine the conservation efforts for which indigenous peoples are noted.[94] 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

88 United Nations General Comment 15 paras 6, 8, 22, 48 & 53.
89 United Nations General Comment 14: 'The right to the highest attainable standard of health' (2000)E/C.12/2000/4 paras 4, 11 & 15.
90 United Nations General Comment 12: 'The right to adequate food' (1999) paras 4, 10 & 20.
91 M Orellana, M Kothari & S Chaudhry 'Climate change in the work of the Committee on Economic, Social and Cultural Rights' (2010) 20.
92 United Nations General Comment 12 para 4.
93 As above.
94 E Desmet *Indigenous rights entwined in nature conservation* (2011) 50.

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. What is more, it is incompatible with article 10 of the Kampala Convention that generally requires of states to carry out socio-economic and environmental impact assessment (EIA) before projects are embarked upon.

The jurisprudence from the African 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 the government to take reasonable and other measures to prevent pollution and ecological degradation, promote conservation, and secure an ecologically sustainable development and use of natural resources.[95] 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.[96] Similarly, this jurisprudence is supported by the Inter-American human rights system in *Saramaka* where the Court ordered Suriname to repair the environmental damages caused by the logging companies and to provide equitable compensation to the community.[97]

Besides the application of a substantive right to environment, the ends of environmental protection and the realisation of human rights can be attained through the interpretation of existing human rights and application of procedural rights which are not connected with the environment.[98] There is interesting jurisprudence on how the interpretation of existing human rights which are not connected with the environment, such as the rights to life, privacy, property, health and culture, have been protected in the context of a finding of environmental harm. In *Case Concerning the Gabcikovo-Nagymaros Project*,[99] Judge

95 *Ogoniland* case (n 25 above) para 52.
96 *Ogoniland* case (n 25 above) para 71.
97 *Saramaka* (n 44 above).
98 D Shelton 'Human rights, environmental rights and the right to environment' (1992) 28 *Stanford Journal of Internatonal Law* 103 105; MR Anderson 'Human rights approaches to environmental protection: An Overview' in A Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1998) 7; N Peart 'Human rights-based climate change litigation: A radical solution?' (2012) 24 *Environmental Law & Management* 77.
99 *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7.

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.[100]

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 '[e]veryone has the right to respect for his private and family life, his home and his correspondence'.[101] This has been mostly successful when the environmental harm consists of pollution.[102] In *Lopez-Ostra v Spain,* the applicant and her daughter alleged a 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 a 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.[103] In *Öneryıldız v Turkey*, the Court recognised that the state has an obligation to provide deterrence against threats to life, including environmental harms.[104] 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.[105]

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

100 *Gabcikovo-Nagymaros Project* (n 99 above) 9-92, per Judge Weeremantry.
101 European Convention on Human Rights as amended by Protocols Nos 11 & 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).
102 Shelton (n 98 above).
103 *Lopez-Ostra v Spain* ECHR (1994) Series A 303C, but see *Powell and Rayner v United Kingdom* (1990) Series A 172, where the ECHR found that aircraft noise from Heathrow Airport constituted a violation of art 8, but was justified under art 8(2) as necessary in a democratic society for the economic well-being of the country.
104 *Öneryıldız v Turkey* ETS No 150-Lugano, 21 June 1993.
105 *Tatar v Romania* Application 67021/01, Judgment of 27 January (2009) paras 120-137.

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.[106] 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*.[107] In returning a finding of violations of their rights, including the right to property, the Court unanimously 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.[108]

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.[109] 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'.[110] 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.[111] The Nigerian case, *Gbemre v Shell Petroleum Development Company Nigeria Limited & Others*

106 *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).

107 n 43 above para 140.

108 *Awas Tingni* (n 43 above) paras 167-169.

109 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).

110 Letter from Ariel E Dulitzky, Assistant Executive Sectary, Organisation of American States, to Paul Crowley, Legal Rep (16 November 2006) http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf. (accessed 27 October 2012).

11 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;

(*Gbemre* case)[112] 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.[113] 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 of, among other things, the Nigerian gas-flaring regulations, and thus contribute to climate change.[114] 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 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.[115] Relying on article 61 of the African Charter which allows the Commission and arguably the Court from taking into consideration legal precedents recognised by states in Africa, the foregoing cases are relevant under the African human rights system to shape approach toward climate change litigation.

Procedural rights also exist at the regional level 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.[116] 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.[117] For the purpose of protecting the

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.

112 *Gbemre v Shell Petroleum Development Company Nigeria Limited & Others* (2005) AHRLR 151 (NgHC 2005).

113 *Gbemre* (n 112 above) para 4(7).

114 *Gbemre* (n 112 above) para 4(7)(c).

115 *Gbemre* (n 112 above) para 5-7.

116 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 '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' 18-20 April 2012, 6.

117 On examples of other instruments with EIA provisions, 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 5 June 1992, 1760 UNTS 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 UNTS 108, 117 (entered into force 26 December 1996) art10(4); Aarhus Convention, art 6 generally.

environment and natural resources, the Conservation Convention requires parties to 'adopt legislative and regulatory measures necessary to ensure timely and appropriate access to justice'.[118] The Conservation Convention also provides for peaceful resolution of disputes, and where this fails, recourse to the Court of Justice of the African Union.[119]

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 lands,[120] is incompatible with the right to the environment, and other rights including the rights to life, dignity of human persons, the right to enjoy best attainable state of physical and mental health under the African Charter.[121] Such inadequacy of the framework is in breach of articles 14 and particularly 16 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.[122]

3.2.7 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 the 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.[123] 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 families.[124] Further reiterating such a possibility is the evidence in West African states, including Ghana and Burkina Faso, where climate change has been found

118 Conservation Convention, art 16(1)(d).
119 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)'.
120 ILO Convention 169 defines lands as the 'total environment occupied by the indigenous peoples'.
121 See arts 4, 5 and 16 of the African Charter, respectively.
122 Kampala Convention, art 10(3).
123 WN Adger et al 'Human security' IPCC WGII AR5 (2014).
124 Toulmin (n 70 above) 111; O Brown, A Hammill & R Mcleman 'Climate change as the "new" security threat: Implications for Africa' (2007) 83 *International Affairs* 1141 1143-1144.

to have security implications.[125] 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.[126] 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.

3.2.8 Right to self-determination

The adverse impacts of climate change and its response measures have the potential to displace indigenous peoples from their lands 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 lands 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 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,[127] 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

125 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.

126 Oxfam 'Survival of the fittest: Pastoralism and climate change in East Africa' (2008) 21.

127 See Chap 3 of the book.

processes which in practice allow the exercise' of the right to self-determination.[128]

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.[129] In what appears to define internal self-determination, Viljoen,[130] and Alfreðsson,[131] 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.[132] As Alfreðsson maintains, arguments can be made in support of the rights of indigenous peoples to external self-determination.[133] 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 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-determination 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.[134]

Although the initial reluctance of political leadership to adopt the UNDRIP is associated with its provision on self-determination, which

128 UN Human Rights Committee (HRC) General Comment 12 'Article 1: Right to self determination' (13 March 1984) UN Doc HRI/GEN/1/Rev.1 para. 4.
129 M Sterio 'On the right to external self-determination: "Selfstans", secession and the great powers' rule' (2010) 19 *Minnesota Journal of International Law* 1.
130 Viljoen (n 1 above) 226.
131 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.
132 MP Scharf 'Earned sovereignty: Judicial underpinnings' (2003) 31 *Denver Journal of Law and Policy* 373 379.
133 G Alfreðsson 'Indigenous peoples and autonomy' in M Suksi (ed) *Autonomy: Applications and implications* (1998) 133.
134 African Charter art 22(1) and (2).

they claim will offend the sovereignty and unity of African states,[135] 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,[136] 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'.[137] 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.[138] 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'.[139]

In addition to the criticism that it fails clearly to articulate the distinction between internal and external self-determination,[140] a limitation on the option to exercise self-determination externally is noticeable in the subsequent case of *Gunme v Cameroon* (*Southern Cameroon* case).[141] While 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'.[142] In what seems to be a glimmer 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.[143] It is thus understandable the argument by scholars that the jurisprudence of the Commission could have supported secession and independence in *Darfur* case,[144] 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

135 '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.
136 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).
137 *Katangese* (n 136 above) para 4.
138 *Katangese* (n 136 above) para 6.
139 Viljoen (n 1 above) 224.
140 Viljoen (n 1 above) 225.
141 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR) (*Southern Cameroon*).
142 *Southern Cameroon* (n 141 above) para 199.
143 *Southern Cameroon* (n 141 above) paras 197 & 198.
144 *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 75 (ACHPR 2009) (*Darfur* case).

human rights violations justified secession and independence for Darfur'.[145]

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 lands, 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 lands.

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 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 a human rights framework for the protection of indigenous peoples' land use and tenure in Africa.

4 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. Rather, 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

145 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.

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), the African Ministerial Conference on the Environment (AMCEN), the ClimDev-Africa Programme which operates through the three channels of African Climate Policy Centre (ACPC), the 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).

4.1 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.[146] 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.[147] 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 (AGNCC) serves as the coordinator at the experts' level.[148]

The main mandate of the CAHOSCC is to advance a common African position on climate change.[149] The African common position was released in preparation for the 15th Conference of the Parties to the UNFCCC held in Copenhagen, Denmark in 2009.[150] It underscores that although Africa

146 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), (CAHOSCC Decision) see generally para 6; W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 1.

147 Decision on the implementation of the decision on the African Common Position on Climate Change EX.CL/Dec.500(XV).

148 CAHOSCC decision (n 146 above) para 6.

149 CAHOSCC Decision (n 146 above) para 6; Scholtz (n 146 above) 11.

150 Algiers Declaration on African Common Position on Climate Change, see also http://climate-l.iisd.org/news/african-union-announces-position-on-climate-change/ (accessed 18 April 2014).

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.[151] The position subsequently has been affirmed and improved in the 2009 Nairobi Declaration,[152] and the 2013 Gaborone Declaration.[153]

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 $67 billion and a demand for compensation to that amount from the developed states.[154] In preparation for the COP 17 held in Durban, CAHOSCC noted that it would focus on the 'continuation of the Kyoto Protocol and operationalisation of the Green Climate Fund for the second commitment period' as well as stress the importance of mitigation and adaptation funds for Africa.[155] Indeed, CAHOSCC has been commended for a 'valued and continued commitment' in climate change negotiations.[156]

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,[157] commit states in Africa

151 'Decision on the African Common Position on Climate Change' AUDoc Assembly/AU/8(XII) Add 6 paras 5-7.

152 '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).

153 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).

154 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).

155 'Report of HE 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.

156 '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.

157 UNDRIP was adopted by a majority of 143 states in favour, four 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

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.[158] Also, in so far as the content of UNDRIP consists of customary international law principles,[159] 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'.[160]

4.2 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.[161] 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.[162] 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.[163]

AMCEN meets yearly and has an organisation structure consisting of Conference, Bureau, Secretariat, African Technical Regional Environment Group and Inter-Agency Working Group.[164] In its

indigenous peoples' http://www.ohchr.org/en/Issues/IPeoples/Pages/Declaration.aspx _(accessed 18 January 2014); for a detailed legislative history of UNDRIP, see Viljoen (n 1 above).

158 Indigenous Bar Association *Understanding and implementing the UN Declaration on the Rights of Indigenous Peoples: An introductory handbook* (2011) 7.

159 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).

160 Constitutive Act of the African Union, adopted by the 36th ordinary session of the Assembly of the Heads of State and Government 11 July 2000, Lome, Togo, art 4(m).

161 P Acquah, S Torheim & E Njenga *History of the African Ministerial Conference on the Environment 1985-2005* (2006) 12-13.

162 UNEP 'AMCEN at a glance' http://www.unep.org/roa/amcen/About_AMCEN/default.asp (accessed 26 June 2013).

163 UNEP 'AMCEN role' http://www.unep.org/roa/amcen/About_AMCEN/default2.asp (accessed 26 June 2013).

164 Acquah et al (n 161 above) 14-17.

functioning, the highest organ of AMCEN is the Conference which is composed of the ministers in charge of the environment from states in Africa.[165] In addition to reviewing the main tasks, including the implementation of regional projects, establishment of priority sub regional activities, and financial arrangements,[166] 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.[167] 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 submission to the AMCEN session.[168] It is also responsible for the implementation of the Conference decisions and receives decisions, recommendations and proposals from committees and network of AMCEN.[169] The UNEP and the Economic Commission for Africa and the AU serve as the secretariat for AMCEN.[170] 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. [171]

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.[172] 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.[173] 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.[174] 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

165 n 161 above.
166 '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.
167 Acquah et al (n 161 above) 14.
168 Acquah et al (n 161 above) 15.
169 As above.
170 '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.
171 Acquah et al (n 161above) 15.
172 '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.
173 Acquah et al (n 161above) 16.
174 '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 161 above) 16.

members of the Inter-Agency group participates in appropriate AMCEN activities.[175]

AMCEN has raised awareness with a view to increase the participation of African peoples in building a regional consensus on climate issues.[176] 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.[177] Similar issues were reiterated at the East African sub-regional meeting where representatives of local populations stressed that 'unequal distribution of lands and property rights, together with access to lands and resources' should be taken into consideration while addressing climate change impacts.[178] 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'.[179] At least those suggestions would have been impossible without the participation of indigenous peoples and signifies that the functioning of AMCEN, at least to some extent, allows for the participation of indigenous peoples and has the potential to improve.

4.3 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[180] endorsed an 'Action Plan for Africa', and calls for the integration of climate change in development strategies designed by member states in conjunction with entities including regional economic communities (REC), private sector,

175 Acquah et al (n 161 above) 16-17.
176 Acquah et al (n 161 above) 43.
177 '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.
178 '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.
179 '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).
180 'Decision on climate change and development in Africa' Doc.Assembly/AU/12(VIII).

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.[181]

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.[182] Principal stakeholders in the ClimDev Africa Programme are identified as including 'poor rural people whose livelihoods are sensitive to climate variability',[183] which, arguably, may include indigenous peoples whose lands are negatively impacted.

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.[184] 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 providing direct oversight of the Programme.[185] It receives the annual report of the operation of the ClimDev-Africa Programme and the minutes of all Steering Committee meetings. It oversees accountability for the operation of ClimDev.[186] 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.[187] 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).[188] 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.[189]

181 Economic Commission for Africa: Conference of African Ministers of Finance, Planning and Economic Development 40th session of the Commission, Addis Ababa, Ethiopia 2-3 April 2007 'Ministerial statement' E/ECA/COE/26/L6, para 24.
182 EAC, AUC & AfDB *Revised ClimDev-Africa Framework Programme Document* (2012) 15 (EAC, AUC & AfDB Document).
183 EAC, AUC & AfDB Document (n 182 above)17.
184 As above.
185 As above.
186 As above.
187 EAC, AUC & AfDB Document (n 182 above) 22.
188 EAC, AUC & AfDB Document (n 182 above) 22-23.
189 EAC, AUC & AfDB Document (n 182 above) 22.

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.[190] 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.[191] In the three conferences organised thus far,[192] 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.[193] The involvement of NGOs in the meetings shows that there is potential 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).[194]

4.3.1 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.[195] 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.[196] In the pursuit of this goal, the ACPC's tasks include the rendering of assistance on the integration of climate

190 EAC, AUC & AfDB Document (n 182 above) 23.
191 As above.
192 '2nd 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); '3rd 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).
193 As above.
194 EAC, AUC & AfDB *ClimDev-Africa programme work plan and budget for 2012-2014* (2012) (ClimDev-Africa budget); EAC, AUC & AfDB Document (n 182 above) 20.
195 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).
196 EAC, AUC & AfDB Document (n 182 above) 24; UNESCO Report (n 195 above) 3.

change in the economic planning process and the development of an African consensus in preparation for international negotiations on climate change and development.[197] 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.[198] 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.[199]

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.[200] In some of its key-note papers, focus has been on the impact and challenges of climate change on water resources and hydropower sustainability in Africa.[201] It disseminates technical information concerning the impacts of climate change on agriculture in Africa.[202] 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.[203] 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.

197 EAC, AUC & AfDB Document (n 182 above) 24.
198 EAC, AUC & AfDB Document (n 182 above) 25-26.
199 As above.
200 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, 4 (ClimDev-Africa Report).
201 As above.
202 ClimDev-Africa Report (n 200 above) 9.
203 General adverse effects of climate change on the environment of the indigenous peoples, see Chap 3.

4.3.2 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.[204] The establishment of the CCDU was recommended by the Executive Council of the AU,[205] 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.[206] 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.[207] 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.[208] 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.[209] 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.[210]

204 ClimDev-Africa Report (n 200 above) 16; 'Climate Change and Desertification Unit' http://www.climdev-africa.org/Climate-Change-and-Desertification-Unit (accessed 26 March 2014).

205 '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.

206 '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 182 above) 27.

207 ClimDev-Africa Report (n 200 above) 18.

208 As above.

209 As above.

210 ClimDev-Africa budget (n 194 above) 16.

The CCDU has only recently received funds to commence its activities,[211] due to the nature of its objectives it will play a role in the implementation of the Great Green Wall for Sahara and Sahel Initiative.[212] 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.[213] 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, may potentially address the plight of indigenous peoples living across the corridors of desertification.

4.3.3 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.[214] 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.[215] 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.[216] Acting in line with article 8 of the Agreement establishing the Bank, which allows the AfDB

211 ClimDev-Africa Report (n 200 above) 18.

212 AU-EU partnership 'Achievements and milestones' http://www.africa-eu-partnership.org/areas-co-operation/climate-change/achievements-and-milestones (accessed 26 February 2014).

213 '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).

214 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.

215 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).

216 UNCCD, para 3.

to establish or be entrusted with the administration of special funds, the AfDB accepted the request to establish the ClimDev-Africa Special Fund and to administer its resources.[217]

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).[218] The CRMAS serves as a platform to influence national development and policies and plans to accommodate climate risk management and adaptation strategies.[219] Second, in implementing projects and programmes that use special funds over the years, the bank has accumulated experience which is useful in managing the CDSF.[220] Finally, unless addressed, climate change may undermine the efforts of the bank in the areas of poverty reduction and sustainable development.[221]

The governance of the CDSF is largely made up of member countries of the Bank and other organisations acceptable to the Bank.[222] 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 is 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.[223] 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.

The scope of CDSF intervention may accommodate proposals made by indigenous peoples for combating challenges to their lands posed by

217 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).

218 African Development Bank 'Framework Document for the Establishment of the ClimDev-Africa Special Fund' (CDSF) (October 2009) (AfDB Climate Framework) 3.

219 As above.

220 As above.

221 As above.

222 AfDB climate instrument (n 214 above) 4.

223 As above.

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.[224] For indigenous peoples who have had a special relationship with their lands 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,[225] 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.[226] 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.

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.[227] 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'.[228]

4.4 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

224 AfDB climate instrument (n 214 above) 2.
225 AfDB Climate Framework (n 218 above) 4.
226 AfDB Climate Framework (n 218 above) 5.
227 ECA & AUC *ClimDev special fund operational procedures manual* (December 2011) 12-13 (ClimDev special fund operational procedures).
228 ClimDev Special fund operational procedures (n 227 above)13.

(AU).[229] 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.[230] 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.[231] 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).[232]

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.[233] 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.[234] In implementing this project, the AUC operates through the African, Caribbean 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).[235] 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 Botswana 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

229 Viljoen (n 1 above) 191.
230 'The Commission' http://www.au.int/en/commission (accessed 13 February 2014).
231 'Department of Rural Economy and Agriculture (DREA)' http://rea.au.int/en/about (accessed 13 February 2014).
232 'DREA' http://rea.au.int/en/ (accessed 13 February 2014).
233 '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).
234 '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).
235 As above.

management in Mauritius in the region of the IOC; and crop and range land management in Niamey, in the region of the ECOWAS.[236] The AUC serves as the political head for the CDSF by coordinating regional support by governments and policy response.[237] It is involved in the decision-making process of the ClimDev-Africa secretariat and the CDSF.[238]

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 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.

4.5 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.[239] 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.[240] 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.[241] The NEPAD also works with the AUC, regional economic communities, national governments, civil society and the private sector on

236 As above.
237 ClimDev-Africa budget (n 194 above) 3; AfDB Climate Framework (n 218 above) 7.
238 AfDB Climate Framework (n 218 above) 8.
239 '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.
240 R Herbert 'The survival of Nepad and the African Peer Review Mechanism: A critical analysis' (2004) 11 *South African Journal of International Affairs* 21.
241 Kilander (n 239 above) 42-43.

programmes and projects that focus on improving the lives of populations in Africa.[242]

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.[243] 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'.[244] As a response, NEPAD has a specific theme focusing on climate change and natural resources management.[245] 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.[246] It seeks to bring together regional and continental stakeholders to manage, share knowledge and encourage one another in addressing the threat of climate change.[247] 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 eligibility criteria and the clearly-defined targeted areas of support by the fund.[248] 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.[249] 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).[250]

242 '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).

243 Open Society Foundation 'The New Partnership for Africa's Development (N EPAD) in plain language: A resource for organisations' (2003) 39-40.

244 African Union and NEPAD 'New Partnership for Africa's Development (NEPAD) action plan of the environment initiative' (October 2003) paras 32 and 33.

245 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).

246 'Climate change and national resource management NEPAD Thematic areas' http://www.nepad.org/thematic-area (accessed 10 February 2014).

247 As above.

248 http://www.nepad.org/climatechangeandsustainabledevelopment/climate-change-fund (accessed 10 January 2014).

249 '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) sec 111.

250 NEPAD 'Climate change fund' http://www.nepad.org/climatechangeandsustainabledevelopment/climate-change-fund (accessed 13 February 2014).

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.[251] The APRM seeks to inspire a common approach to fulfilling political, economic and corporate governance values, codes and standards, among African countries within the New Partnership for Africa's Development.[252] Participation in the process commences upon the adoption of the Declaration on Democracy, Political, Economic and Corporate Governance,[253] by which a country notifies the Chairman of the NEPAD Heads of State and Government of its willingness to participate.[254] 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.[255] Member states are expected to indicate what is being done to ensure that corporations contribute to environmental sustainability,[256] to establish an enabling environment and to indicate the existence of an EIA programme,[257] as well as the realisation of human rights which generally feature in all the thematic areas of the APRM.[258]

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 lands. It will help in drawing attention to combating challenges, such as desertification and bringing about the rehabilitation of degraded lands. Through this

251 The New Partnership for Africa's Development 'The African Peer Review Mechanism base Document' (2003) para 1.
252 APRM 'Mission' http://aprm-au.org/mission (accessed 22 May 2014).
253 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.
254 The New Partnership for Africa's Development 'The African Peer Review Mechanism base Document' (2003) para 5.
255 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.
256 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).
257 APRM Standard Document (n 256 above) 22.
258 APRM Standard Document (n 256 above).

approach, the traditional practices of indigenous peoples can also 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 lands. 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 lands.

4.6 Pan-African Parliament

There are four relevant instruments that constitute the legal basis for the Pan-African Parliament (PAP). These are the African Economic Community (AEC) Treaty,[259] Protocol to the Treaty Establishing the African Economic Community relating to the Pan-African Parliament (PAP Protocol),[260] the AU Constitutive Act[261] and the Pan African Parliament Rules of Procedures (PAP Rules).[262] 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.[263] With regard to establishing PAP, the AEC Treaty indicates that its membership would be determined within five years after establishing an African common market.[264] 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.[265] Adopted in 2001, the Constitutive Act provides for the establishment of PAP as one of the organs of the African Union,[266] 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'.[267]

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.[268] The functions and powers, further, are to assist with harmonising the laws of

259 Treaty establishing the African Economic Community adopted in Abuja, Nigeria, 1991 and entered into force in 1994 (AEC Treaty).
260 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).
261 Constitutive Act of the African Union adopted in Lome Togo on 11 July 2000 and entered into force on 26 May 2001 (Constitutive Act).
262 Pan African Parliament Rules of Procedures.
263 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.
264 AEC Treaty, art 6(2)(f)(iv).
265 AEC Treaty, art 14(2).
266 Constitutive Act, art 5(c).
267 Constitutive Act, art 17(1).
268 PAP Protocol, art 11(1) and (2).

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.[269] The functions and powers include adopting appropriate rules of procedure and the performance of other functions as may be deemed appropriate in actualising the objectives of PAP.[270] 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 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'.[271] In its meetings, it has noted that national legislation can play a critical role in ensuring that climate change is addressed.[272] The inability of states in Africa to effectively deal with climate change, as has been observed, is due largely to a weak 'legislative framework to stimulate climate change strategies'.[273] 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.[274] 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,[275] 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

269 PAP Protocol, art 11(3)-(7).
270 PAP Protocol, art 11(8)-(9).
271 T Chagutah 'PAP is fully behind the common African position on climate change' http://www.za.boell.org/web/cop17-785.html (accessed 10 January 2014).
272 '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).
273 As above.
274 As above.
275 Dinokopila (n 263 above) 308.

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.[276] 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 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.[277]

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.[278] The Committee also promotes the development policy and the implementation of programmes relating to natural resources and the environment.[279] 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.[280]

Parliamentarians potentially play a crucial role in the promotion of environmental governance, particularly in advancing its laws and policies at the national level.[281] 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,[282] the efforts of the PAP at the regional level may serve as a

276 Pan African Parliament Rules of Procedures, rule 22.
277 Pan African Parliament Rules of Procedures, rule 72 generally.
278 Pan African Parliament Rules of Procedures, rule 26 (1)(a) & (b).
279 Pan African Parliament Rules of Procedures, rule 26(1)(c).
280 Pan African Parliament 'Resolutions and recommendations of the Permanent Committee on Rural Economy, Agriculture, Natural Resources and Environment' (May 2011).
281 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).
282 AU Sourcebook (n 281 above) 11.

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.[283] Second, the PAP links national parliaments and keeps them informed of its activities.[284] 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.[285] 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 lands in implementing environmental agreements. As they are also responsible for budgetary allocations for several development programmes,[286] 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.

4.7 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.[287] 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).[288] 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

283 AU Sourcebook (n 281 above) 12.
284 Pan African Parliament Rules of Procedures, rule 77(3).
285 AU sourcebook (n 281 above) 1.
286 AU sourcebook (n 281 above) 14.
287 Protocol on the Establishment of Peace and Security Council (PSC Protocol), adopted on 10 July 2002, and entered into force on 26 December 2003.
288 LM Fisher et al 'African peace and security architecture' 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.

policy in that regard as well as to promote democratic practices[289] 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.[290] Although not yet operational, the African Standby Force exists to support peace missions and interventions,[291] and the Peace Fund allows for financial resources to support operational activities related to peace.[292] 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.[293] 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.[294] 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.[295]

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. 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'.[296] 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 fall within the scope of the PSC objectives.

The above viewpoint is supported by the subsequent instrument, the Solemn Declaration on a Common African Defence and Security Policy (CADSP).[297] 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.[298] It defines the notion of security as

289 PSC Protocol, art 3.
290 PSC Protocol, art 12.
291 PSC Protocol, art 13.
292 PSC Protocol, art 15.
293 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.
294 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).
295 Jegede (n 293 above) 419.
296 PSC Protocol, art 3(a).
297 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).
298 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.

embodying 'protection against natural disasters, as well as ecological and environmental degradation'[299]and mentions 'environmental degradation' as a security threat.[300] 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.[301] Hence, it urges states to strengthen co-operation in dealing with transnational challenges such as climate change impact in consideration of its transboundary nature.[302]

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.[303] 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 open to representation from NGOs,[304] 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

299 CADSP, para 6.
300 CADSP, para 6.
301 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).
302 As above.
303 DA Mwiturubani & Jo-Ansie Van Wyk (eds) *Climate change and natural resources conflicts in Africa* (2010).
304 Modalities of the POW.

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.

5 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 address climate change issues on the continent.[305] 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).[306] 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.[307] 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.[308]

305 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; J-A van Wyk 'The African Union's response to climate change and climate security' in DA Mwiturubani & J-A van Wyk (eds) *Climate change and natural resources conflicts in Africa* (2009) Monograph 3-23 19.

306 '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.

307 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 trends and the implication of the creation of these institutions within the African human rights system, see generally Viljoen (n 1 above) 448-466.

308 '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

The focus of this analysis, however, is on the Commission in consideration of the relevance of its mechanisms in applying human rights in a manner that involves state and non-state actors in 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.[309] 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.

5.1 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.[310] 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.

5.1.1 State reporting

Regarded as the 'core' of the Commission's promotional mandate,[311] 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 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).

309 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.

310 Viljoen (n 1 above) 349.

311 As above.

and 'inspection'.[312] 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'.[313] 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.[314] 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.[315] 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.

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 populations, 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 the 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

312 Viljoen (n 1 above) 350.
313 As above.
314 As above.
315 Viljoen (n 1 above) 355.

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.[316]

5.1.2 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.[317] These are the Special Rapporteur and Working Groups. While there is no express provision in the Charter which serves as a legal basis for these mechanisms, the Commission has adopted a progressive approach to create space for these mechanisms in operationalising its mandate.[318]

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.[319] 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.[320] 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.[321]

So far, none has been appointed in relation to environmental protection, let alone 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

316 EAC, AUC & AfDB Document (n 182 above) 23.
317 Viljoen (n 1 above) 369.
318 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.
319 Viljoen (n 1 above) 371.
320 Viljoen (n 1 above) 371; Guidelines adopted in the 17th Annual Report, para 33.
321 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).

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,[322] 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 among state and non-state actors about the plight of these vulnerable groups and promote the implementation of the relevant standards.[323] This mandate can accommodate climate-related displacement or migration of indigenous peoples, more so as researches have shown that an environmental crisis may underlie internal displacement and result in migration beyond national boundaries.[324]

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 a vulnerable group in the light of the climate change challenge. It will empower non-state actors involved in indigenous peoples' rights to include addressing climate change and adverse effects in their agenda. Climate change can also 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 individuals 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.[325]

322 Viljoen (n 1 above) 376.
323 As above.
324 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.
325 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.

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 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 impact of climate change on their lands.

Working groups

The Commission has also established a number of working groups that can be useful in 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.[326] 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.[327] These include the Working Group on Economic, Social and Cultural Rights in Africa,[328] and the Working Group on Extractive Industries, Environment and Human Rights Violations.[329]

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

326 Viljoen (n 1 above) 377.
327 'Special mechanisms' http://www.achpr.org/mechanisms/ (accessed 26 June 2013).
328 '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.
329 '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.

DRC,[330] Rwanda,[331] and Kenya.[332] 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 pastoralism or hunting and gathering as a viable way of life and, instead, has been pressurising indigenous peoples to become sedentary farmers.[333] 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'.[334]

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 lands tenure and use. In doing so, it may also assist state and non-state actors in coming 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',[335] is relevant to climate change in the sense that activities in relation to extractive industry, particularly oil and gas, are linked to climate change.[336] Hence, the Working Group on extractive industries offers an opportunity to promote

330 'Report of the Country Visit of the Working Group on Indigenous Populations/ Communities to the Republic of Congo' 15-24 March 2010, 37.

331 '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.

332 '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.

333 As above.

334 As above.

335 As above.

336 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.

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 been on minerals such as extraction of precious stones, it has made its first visit to Zambia to study Quantum Copper Mining under Kalumbila project in January 2014.[337] 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'.[338]

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 recommendations for monitoring and protecting their rights.[339] 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 and non-state actors to protect indigenous peoples' land rights while integrating adaptation and mitigation measures with activities relating to climate change and desertification.[340]

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

337 Discussion with Professor Michelo Hansungule, Expert Member, Working Group on Extractive Industries, Environment and Human Rights Violations, on 5 August 2014.
338 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.
339 'Working Group on Indigenous Populations/Communities in Africa' http://www.achpr.org/mechanisms/indigenous-populations/(accessed 25 April 2014).
340 ClimDev Africa Report (n 200 above) 18.

rights by non-state actors 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 lands.[341] 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.[342]

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,[343] 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.

5.1.3 '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.[344] 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.[345] In an atmosphere where political leadership in Africa considers climate change as largely traceable to the development pattern historically chosen by the developed states,[346] promotional visits can be helpful. They can engage in sensitising states and other interest holders

341 *Endorois* case (n 39 above) where the indigenous peoples alleged a violation of their property rights in the context of property right.
342 Working Group on Extractive Industries, Environment and Human Rights Violations http://www.achpr.org/mechanisms/extractive-industries/ (accessed 25 June 2013).
343 Pan African Parliament Rules of Procedures, rule 38(1)(g).
344 Viljoen (n 1 above) 379.
345 As above.
346 This is reiterated in key environmental instruments of climate change such as the UNFCCC, Preamble.

such as NGOs and non-state actors 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 the subject of a decision by the Commission.[347] 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.[348] More than 'talk shops', as Viljoen observes, workshops and seminars are often organised by an NGO along with the Commission as 'nominal co-organiser'.[349] 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 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.[350] 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.[351] 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

347 *Ogoniland* case (n 25 above).
348 Viljoen (n 1 above) 382.
349 As above,
350 Viljoen (n 1 above) 383.
351 Viljoen (n 1 above) 382.

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 initiatives 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.

5.1.4 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.[352] The participation of NGOs has been critical in the growth and consolidation of the Commission.[353] According to Viljoen, they have participated in the drafting 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.[354] 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 five representing less than one per cent of these NGOs have 'environment'[355] or related words such as 'land',[356] and 'forestry'[357] 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.

352 ACHPR 'NGOs with observer status' http://www.achpr.org/network/ngo/by-name/ (accessed 26 June 2013).
353 Viljoen (n 1 above) 383.
354 Viljoen (n 1 above) 384.
355 '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).
356 'Arid Lands Institute' http://www.achpr.org/network/ngo/399/ (accessed 26 June 2013).
357 '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).

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,[358] the national human rights institutions (NHRIs) are required to assist the Commission 'in the promotion and protection of human rights at national level'.[359] The affiliate status entitles the NHRIs to be invited, be present at and to participate 'without voting rights' in the Commission sessions.[360] If properly constituted as 'protectors' and not 'pretenders',[361] 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 can consistently 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.[362] 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.[363]

358 '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).
359 As above.
360 Viljoen (n 1 above) 389.
361 Human Rights Watch 'Protectors or pretenders – Government Human Rights Commissions in Africa' (2001).
362 PSC Protocol, art 12(6).
363 Pan African Parliament Rules of Procedures, rule 38(1)(g).

5.1.5 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.[364] Resolutions inform the obligations of states as well as the promotional and protective mandates of the Commission. Resolutions of the Commission can be thematic in dealing with a specific issue. They can also be directed against states where reports of human rights abuse are rampant.[365] 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',[366] the Commission demonstrated how this normative tool can be used to elaborate the link between climate change and human rights. 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'.[367] 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.[368]

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:

> [T]hat 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

364 Viljoen (n 1 above) 379.
365 Viljoen (n 1 above) 380.
366 African Commission of Human and Peoples' Rights 'Resolution on climate change and human rights and the need to study its impact in Africa' (25 November 2009) ACHPR/Res153(XLVI) 09 (Resolution 153).
367 Resolution 153 (n 366 above) Preamble.
368 Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 143, 151, entered into force 29 December 1993.

and conflicts are included in any international agreement or instruments on climate change.[369]

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,[370] there is little doubt that the Commission takes climate change to be a serious issue in Africa. Where it speaks to and addresses the activities of other institutions in the region, such as AMCEN, ACPC, CAHOSCC, PSC, PAP, the ClimDevelopment programme, NEPAD, AUC, ACPC, CCDU and CDSF, and other interest holders such as NGOs and non-state actors, 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.

5.2 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.[371] 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,[372] 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 Court through the Commission if respondent states are parties to the Court Protocol and matters arise after its coming into effect.[373] With climate change featuring in the function of regional courts elsewhere, notably, the European Court of Human Rights (ECHR), it is not a

369 As above.
370 As above.
371 African Charter, art 60.
372 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'.
373 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.

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,*[374] 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.[375] An argument made by government was that the displacement of the islanders was inevitable due to adverse impact of climate change in the area.[376] 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. In *Hatton & Others v the United Kingdom,*[377] 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.[378] While these 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.

5.2.1 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 an amicable settlement procedure.[379] 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

374 *Chagos Islanders v the United Kingdom* ECHR Application 35622/04, decision of 11 December 2012.
375 See European Convention on Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221; *Chagos Islanders* (n 403 above) para 32.
376 *Chagos Islanders* (n 374 above) para 24-26.
377 *Hatton & Others v the United Kingdom* ECHR (Application 36022/97) Grand Chamber, judgment of 8 July 2003.
378 *Hatton* (n 377 above), see Joint dissenting opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner, 41.
379 African Charter, arts 47-50 & 51-53.

Association pour la sauvegarde de la paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia.[380] 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.[381] 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.[382]

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 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.[383] 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.[384]

5.2.2 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

380 Communication 157/96 *Association Pour La Sauvegarde De La Paix Au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia* (*Burundi* case).
381 *Burundi* case (n 380 above) para 4.
382 *Burundi* case (n 380 above) paras 76-78.
383 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.
384 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.

including complaints brought by individuals.[385] 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.[386] 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,[387] 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 wrong.[388] 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,[389] 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.[390]

5.3 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

385 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.
386 Viljoen (n 1 above) 304.
387 Viljoen (n 1 above) 316.
388 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.
389 *Ogoniland* case (n 25 above) para 41.
390 *Endorois* case (n 39 above).

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.[391] 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.

5.4 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,[392] the AU Assembly of Heads of State and Government (AU Assembly) is involved in championing the common position of Africa in climate change negotiations.[393] Also, it engages in the functioning of CAHOSCC and AMCEN, as earlier mentioned. As an organ of the AU with a human rights mandate,[394] 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.[395] 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'.[396] This is not yet operationalised. 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

391 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.
392 Viljoen (n 1 above) 171.
393 NEPAD '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).
394 Viljoen (n 1 above).
395 Resolution 153 (n 366 above).
396 As above.

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 Conclusion

To recapitulate, what emerges from this analysis is that failure to put in place adequate legislation at the national level negatively affects the obligations and a range of land-related rights of indigenous peoples. It is inconsistent with the obligations recognised under the regional human rights instruments, namely the African Charter, Kampala Convention amd 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 lands. In addition to infringing the obligations of state, failure to put in place adequate legislation at the national level negatively affects the land-related rights of indigenous peoples in Africa, that is, 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. Emerging climate change regulatory activities at the regional level have potentials to protect indigenous peoples' land rights at the regional level. As the framework is not well-coordinated and often haphazard in approach, and generally not specifically directed at indigenous peoples in Africa, the potential is limited. 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 state and non-state actors to address the gap in the national climate change regulatory framework in relation to the protection of indigenous peoples' lands. The protective, interpretive and assembly-entrusted activities of the Commission can also be engaged in addressing the inadequacy in the climate change regulatory framework in relation to the protection of indigenous peoples lands at the national level in Africa.

CHAPTER 7

CONCLUSION AND THE WAY FORWARD

1 Conclusion

Increasing warming of the earth due to human activity has resulted in climate change with significant negative impacts world wide. Considering the limited ecologically damaging footprint of their activities, indigenous peoples contribute least to climate change. Yet, their lifestyle is largely dependent on lands and its resources and they are most seriously affected by climate change. In investigating the human rights implications of this reality, the book answered 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?

Human rights framework at both the international and regional levels is discussed as the obligations along with rights required of states in relation to the protection of indigenous peoples' lands. The sources of the framework consists of instruments in form of Declaration, Covenants and Conventions established under the aegis of the UN and instruments established under the aegis of the AU. Under the UN the basis for a human rights framework is found in the UDHR, ICCPR, ICESCR, ILO Convention 107, ILO Convention 169, and the UNDRIP. Reinforcing the framework are instruments under the AU, namely the African Charter, Kampala Convention and the African Convention on the Conservation of Nature and Natural Resources (Revised version). The discussion of the framework is presented in greater details in the Chapter 2 of the book which examines 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 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 a 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. As shown in Chapter 3 of the book, the adverse impacts of climate change and response measures feature in and exacerbate the existing subordination of indigenous peoples' land tenure and use in Africa.

Despite the above reality, as presented in Chapter 4, at the international level, the climate change regulatory framework governing the response measures to the adverse effects of climate change does not adequately safeguard the land tenure and use of indigenous peoples in Africa. There is evidence showing that some measure of protection exist for indigenous peoples' land use and tenure under the key instruments and institutions governing funding of 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 also 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. Similarly, 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 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 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.

Chapter 5 showed 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. Generally, the implications of the framework on 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. 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+. The trend has negative implications for indigenous peoples' participation, carbon rights and benefit-sharing and their access to grievance mechanisms and remedies.

Chapter 6 demonstrated that an inadequate national regulatory framework is incompatible with obligations under regional human rights instruments and rights guaranteed thereunder, notably right to property, right to participation, right to food, right to water, right to adequate housing, right to healthy environment, right to peace and right to self-determination. Engaging human rights framework as a legal response and the way forward on the gap pertaining to inadequate protection of indigenous peoples' lands in climate change regulatory framework, it further showed the potential in the regional level, particularly the emerging climate change regulatory framework and the promotional, protective, interpretive and assembly entrusted functions of 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. Predominantly, institutions and initiatives under the aegis of the emerging climate change regulatory framework with potential for the protection of indigenous peoples lands rights 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).

In relation to a regional human rights mechanism, particularly the Commission, promotional functions including 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 potential of rights protection and can be linked with the emerging regional climate change regulatory framework. 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, a human rights framework can inform changes at all levels of the regulatory framework and contribute to the effective protection of indigenous peoples' land tenure and use in the light of the adverse impacts of climate change in Africa.

2 The way forward

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.

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 because 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 provisions 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 lands are 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 lands are 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.

2.2 National level

An inadequate domestic legal framework is detrimental to indigenous peoples as the pressure to expropriate lands 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 the 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 the 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.

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. Ultimately, regional human rights can help to prevent different treatment of indigenous peoples across the states in which they can be found in Africa. 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 6, 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's 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 lands 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' lands in the light of the climate change challenge in Africa.

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