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# What Role for Human Rights in Clean Development Mechanism, REDD+ and Green Climate Fund Projects?

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## Abstract

All UN bodies have a duty to contribute to the universal respect for and observance of human rights. From this basis, the article analyzes whether and how human rights are integrated in the approval of projects under the Clean Development Mechanism (CDM), REDD+ (United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries) and projects funded by the Green Climate Fund and other adaptation mechanisms under the UN Framework Convention on Climate Change. Regarding the CDM, its Executive Board has reiterated that it has no mandate to investigate human rights impacts of the approved projects, but human rights concerns are at least implicit in some of the recommendations in the Report of the High-Level Panel on the CDM Policy Dialogue. As for the REDD+, human rights are present in three Guidelines applying to REDD+ projects. The mandate for the Board of the Green Climate Fund includes the establishment of two mechanisms; one to promote the input and participation of stakeholders and one independent redress mechanism. The article finds that there has been certain progress, also due to an increased acknowledgement of conflicts emerging

from projects with negative human rights impact, but even seemingly comprehensive frameworks contain wording that might restrict the application of human rights. There must be an awareness of these weaknesses in the negotiations of the post-Kyoto regime, mandated by the Durban Platform for Enhanced Action.

Keywords: Inter-American Court of Human Rights; Human Rights Committee; African Commission on Human and Peoples' Rights; human rights principles; free, prior and informed consent; United Nations Declaration on the Rights of Indigenous Peoples.

## 1. Introduction

The Kyoto Protocol tool for climate mitigation projects in developing countries, the Clean Development Mechanism (CDM), was established without any concern for human rights impacts of its projects. As argued convincingly,<sup>1</sup> there is a need for a Project Review Mechanism under the CDM's Executive Board (EB), as the EB consistently has argued that it has no mandate to examine human rights impacts. The EB's awareness is growing, however, and the CDM EB's 2011 an-

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<sup>1</sup> D S Olawuyi, 'Towards a Transparent and Accountable Clean Development Mechanism: Legal and Institutional Imperatives' (2012) 4 *Nordic Environmental Law Journal* 33; see also A Johl and S Duyck, 'Promoting Human Rights in the Future Climate Regime' (2012) 15 *Ethics, Policy and Environment* 298; presenting four recommendations to the negotiations within the Durban Platform for Enhanced Action; FCCC, *Decision 1/CP.17 Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action* (2012).

nual report reads: 'During the reporting period, the Board was confronted with the issue of human rights, specifically the rights of people affected or potentially affected by a CDM project.'<sup>2</sup>

When REDD+ (United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, where the '+' refers to the role of conservation, sustainable management of forests and enhancement of forest carbon stocks) was established, it was monitored much closer by non-governmental organisations, and human and indigenous peoples' rights have been introduced as elements of the overall safeguards. REDD+ projects are to be implemented by applying a human rights-based approach:

Activities follow a human rights-based approach and adhere to the UNDRIP [UN Declaration on the Rights of Indigenous Peoples], UN Development Group Guidelines on Indigenous Peoples' Issues, and International Labour Organization (ILO) Convention No. 169.<sup>3</sup>

We see that the human rights-based approach as defined by REDD+ is based on both binding and non-binding international instruments as well as UN-wide Guidelines.

Three decisions on adaptation were taken at the 17<sup>th</sup> meeting of the Conference of the Parties (COP) to the UN Framework Convention on

Climate Change (FCCC),<sup>4</sup> most notably the specific modalities for the Green Climate Fund. A seminar on human rights and climate change reported that '...recent developments at the COP17 in Durban created a much needed opportunity for the human rights issues surrounding climate change to be integrated in the new climate regime.'<sup>5</sup> The article will seek to answer whether this positive assessment is actually justified.

This article will analyze whether – and in which form – human rights is a part of the existing climate change mitigation and adaptation measures, and how human rights can be better integrated into the project assessments. As projects under both the CDM and the REDD+ are run by corporate actors that might transform large areas of land and affect land rights and traditional land uses, the UN Guidelines on business and human rights and other reports by the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (hereafter 'UN Special Representative on business and human rights') will be included in the analysis.<sup>6</sup> In this context it is also highly relevant to note that

<sup>2</sup> CDM EB, *Executive Board Annual Report 2011, Clean Development Mechanism* (2012) 13; see also CDM High-Level Panel, *CDM Policy Dialogue: Recommendations from the High-Level Panel* (2012) 42 and 56; and CDM Secretariat, *Input to the high-level panel for the CDM Policy Dialogue. Background paper by the secretariat* (2011) paragraphs 2 and 41(a).

<sup>3</sup> UN-REDD and the World Bank's Forest Carbon Partnership Facility, *Guidelines on Stakeholder Engagement in REDD+ Readiness: With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities* (2012) (20 April version) 2, paragraph 6(a).

<sup>4</sup> FCCC, *Decision 3/CP.17, Annex: Governing instrument for the Green Climate Fund* (2012) (note that the decision to establish the Green Climate Fund was done in *Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (2011) paragraphs 102–111); FCCC, *Decision 5/CP.17, National adaptation plans* (2012); FCCC, *Decision 12/CP.17, 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* (2012).

<sup>5</sup> UN, *A/HRC/20/7* (2012) paragraph 69.

<sup>6</sup> For the Guidelines, see *A/HRC/17/31, Annex* (2011) paragraphs 17–21; for the endorsement, see *A/HRC/RES/17/4* (2011) paragraph 1; another important document by the former UN Special Representative on business and human rights is *A/HRC/17/31/Add.3, Annex, Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators* (2011).

human rights are increasingly understood to an integral part of the sustainable development requirements, hence giving them more specificity. The OECD requires review of 'adverse project-related human rights impacts' when applications for export credits are assessed.<sup>7</sup>

A 2011 human rights resolution has stated – albeit not in an operative paragraph:

Affirming that 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.<sup>8</sup>

Stating that human rights have the potential to promote coherence, legitimacy and sustainable outcomes in the complex realm of climate change decision making must be said to be ambitious. We see that the term 'human rights principles' is applied. A better understanding of human rights principles and its usefulness when implement-

ing climate change mitigation projects is central in this article, simply as the term human rights principles is applied without a clear understanding of what it entails.<sup>9</sup>

Human rights and the environment can be studied from several perspectives. One can adopt a retroactive approach and study the jurisprudence of many courts linking human rights and environment issues.<sup>10</sup> Alternatively, one can apply a long-term, future-looking approach stressing that human rights implementation is about long-term innovative planning and monitoring systems, and that overall climate change impacts need to be addressed if human rights are to be enjoyed adequately. A third perspective is to emphasize human rights principles, which specify the requirements for appropriate conduct in public decision-making processes.<sup>11</sup> The

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<sup>7</sup> OECD, *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches")* (2012) 5; similar trend of strengthened human rights integration is also seen in the International Finance Corporation's 2012 Performance Standards and in the regional development banks; for an analysis of the European Investment Bank's relevant tools, see N Hachez and J Wouters, 'The role of development banks: The European Investment Bank's substantive and procedural accountability principles with regard to human rights, social and environmental concerns', in O de Schutter, J Swinnen and J Wouters eds., *Foreign Direct Investment and Human Development* (Routledge, London 2013); see also the new version of the Equator Principles for project finance, *Equator Principles III* (2013) available at <[www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf)> accessed 12 June 2013.

<sup>8</sup> UN, *Human rights and climate change, A/HRC/RES/18/22* (2011) last preambular paragraph [adopted without a vote]. Operative paragraphs 2–5 called for the convening of a seminar. The report of this seminar, attended by representatives of at least 85 states, is available as *A/HRC/20/7*.

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<sup>9</sup> While Olawuyi (n 1) lists most of the human rights principles in the very start of his article (participation, non-discrimination (by specifying that projects tend to be located in poor and vulnerable communities), accountability, transparency and access to remedies), at 50 and 52n79 the term 'human rights principles' is applied without making it clear what he refers to.

<sup>10</sup> For relevant cases from the African, American and European human rights systems, see UN, *A/HRC/19/34, Analytical study on the relationship between human rights and the environment* (2011) notes 1–4.

<sup>11</sup> Human rights have been specified by states in the context of the FAO (UN Food and Agricultural Organization), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012) principle 3B: Human dignity, non-discrimination, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, rule of law, transparency, accountability, and continuous improvement. A shorter and, according to this author, more precise listing is found in FAO, *Focus on: The right to food and indigenous peoples* (2007), with seven human rights principles: dignity, non-discrimination, rule of law, accountability, transparency, participation and empowerment. These seven human rights principles were also identified as the core of the right to food based approach in background paper 3 for the International Conference on Forests for Food Security and Nutrition, FAO, Rome, 13–15 May, 2013; FAO, *The right to food based approach to enhance the contribution of non-wood forest products to food security and nutrition* (2013) 3–5.

article will primarily apply the third approach, identifying the mutually reinforcing and necessary interaction between human rights principles and substantive human rights, in order to improve climate change mitigation and adaptation measures. In order to give an updated analysis, recent international human rights jurisprudence will be included in the analysis, primarily from Latin America and Africa, both because they are relevant for the overall analysis of the article, illustrating the inappropriate situations many local communities are living under, and because these continents will host many of the climate change mitigation and adaptations measures.

The article continues as follows: part two clarifies the term 'human rights principles', while part three explores the term free, prior and informed consent (FPIC) and its relationship with human rights. Part four analyzes the approval of projects under Clean Development Mechanism (CDM), identifying whether human rights concerns are explicitly or implicitly recognized, as well as examining the most relevant recommendations from the 2012 Report of the High-Level Panel on the CDM Policy Dialogue.<sup>12</sup> Part five reviews the proposals for establishing safeguard mechanisms for REDD+ projects as part of the so-called Bali Action Plan,<sup>13</sup> primarily by analyzing three Guidelines on Stakeholder Engagement,<sup>14</sup> on FPIC,<sup>15</sup> and on a feedback and grievance re-

dress mechanism as part of the National Readiness Management Arrangements.<sup>16</sup> Part six identifies whether human rights are integrated into the procedures within the Green Climate Fund. Part seven identifies the human rights elements of other decisions on adaptation taken at the COP 17 meeting.

Hence, this article seeks to answer the following question: *How does the UN Framework Convention on Climate Change (UNFCCC) integrate human rights principles and standards when establishing the overall framework for designing and undertaking climate change mitigation and adaptation projects?*

## 2. What are human rights principles?

Human rights principles identify the minimum requirements for good public conduct,<sup>17</sup> and can also be referred to as principles of implementation.<sup>18</sup> They are derived from substantive human rights, but with one exception,<sup>19</sup> there is no international agreement on requirements for being considered a human rights principle. As human rights principles tend to be mentioned together with human rights obligations and standards,<sup>20</sup> it is considered relevant to have a more precise understanding of these principles. We will now identify the origin, content, status, potential and risks of human rights principles, while their ap-

<sup>12</sup> CDM High-Level Panel (n 2).

<sup>13</sup> FCCC, *Decision 1/CP.13, Bali Action Plan* (2008) paragraph 1(b)(iii), calling for 'positive incentives'. Note that while the *verb* safeguard is frequently applied in the 1989 ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (Articles 4.1, 12, 14.1 and 15.1), the *noun* safeguard has been applied more recently, referring to standards and policies, initially within the World Bank, but now spreading.

<sup>14</sup> UN-REDD and Forest Carbon Partnership Facility (n 3).

<sup>15</sup> UN-REDD, *Guidelines on Free, Prior and Informed Consent* (2013) available at <[www.un-redd.org/Launch\\_of\\_FPIC\\_Guidelines/tabid/105976/Default.aspx](http://www.un-redd.org/Launch_of_FPIC_Guidelines/tabid/105976/Default.aspx)> accessed 8 April 2013.

<sup>16</sup> Forest Carbon Partnership Facility and UN-REDD, *Readiness Preparation Proposal (R-PP), Version 6 Working Draft* (2012) 16–18.

<sup>17</sup> H M Haugen, 'Human Rights Principles: Can they be Applied to Improve the Realization of Social Human Rights?', in *Max Planck Yearbook of United Nations Law, Vol 15* (Martinus Nijhoff Publishers, Leiden 2011); for the first explicit linking between human rights principles and environmental law; see J Ebbeson, 'The Notion of Public Participation in International Environmental Law', in *Yearbook of International Environmental Law Vol 8* (Oxford University Press, Oxford 1997).

<sup>18</sup> FAO (n 11) principle 3B

<sup>19</sup> The UN Convention on the Rights of Persons with Disabilities lists 'General principles' in Article 3.

<sup>20</sup> UN 2011 (n 8).



plication within the climate change regime follows in the subsequent parts.

The origin of human rights principles are recent, emerging from various processes. General Comment 12 on the right to food specifies: 'The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary.'<sup>21</sup> We see that only the term 'principles' is applied, but another paragraph applies the term 'human rights principles', but without giving additional clarity on the essence of these principles.<sup>22</sup> In a UN-wide process culminating with the so-called Common Understanding, the term human rights principles are specified on a high level of generality, as illustrated by the terms universality and inalienability.<sup>23</sup> The Common Understanding is the most quoted source for determining what is meant by human rights principles.<sup>24</sup>

As already mentioned, there is no international authoritative list of human rights princi-

ples that applies generally. In addition to guiding policies and decision-making processes, it must be considered essential that human rights principles enable individuals and communities to be more in charge of all decision-making processes affecting their lives. In addition human rights principles must be in accordance with the core and essential idea of human rights. Moreover, the requirements on any external policy-maker and on the communities must be seen in conjunction and as mutually reinforcing. Therefore, the listing made by FAO in the context of a study on indigenous peoples is found by this author to be both concise and comprehensive.<sup>25</sup> In this listing (dignity, non-discrimination, rule of law, accountability, transparency, participation and empowerment), the principle 'holistic and sustainable approach'<sup>26</sup> is not included. As a sustainable approach to all decision-making is most important, this author supports including this among the human rights principles. The principle of holistic and sustainable approach confirms the reciprocal relationship between sustainable development and human rights as encompassed by the principle of integration:

Integration is pivotal to the promotion of sustainable development. It is the principle of integration that both brings together the many challenges confronting the international community and, at the same time, provides the most realistic chance of their solution.<sup>27</sup>

While this observation takes a macro approach, the principle of integration is applicable also on the project level.

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<sup>21</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12, The right to adequate food (art. 11)*, E/2000/22, 102–110 (2000) paragraph 23 (extract).

<sup>22</sup> Ibid, paragraph 21.

<sup>23</sup> UN Development Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding among UN Agencies* (2003) 2, available at <[www.undg.org/archive\\_docs/6959-The\\_Human\\_Rights\\_Based\\_Approach\\_to\\_Development\\_Cooperation\\_Towards\\_a\\_Common\\_Understanding\\_among\\_UN.pdf](http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf)> accessed 8 April 2013. Note that J Kirkemann Hansen and H-O Sano, 'The Implications and Value Added of a Human-Rights-Based Approach', in B A Andreasen and S. P. Marks eds., *Development as a Human Rights. Legal Political and Economic Dimensions* (2. ed) (Harvard School of Public Health and Harvard University Press, Cambridge (Mass.) 2010) find on 45–47 that these are applicable in order to guide policy decisions.

<sup>24</sup> UN-REDD and Forest Carbon Partnership Facility (n 3) 21, listing the Common Understanding under 'Useful Resources'; see also OECD, *DAC Action-Oriented Policy Paper on Human Rights and Development* (OECD, Paris 2007), 13, note 2.

<sup>25</sup> FAO 2007 (n 11); see also FAO 2013 (n 11).

<sup>26</sup> FAO 2012 (n 11), principle 3B, 5.

<sup>27</sup> ILA Committee on *International Law on Sustainable Development*, International Law Association, Berlin Conference (2004) 13.

It must also be acknowledged that peoples', including indigenous peoples' control over their natural resources is specifically recognized in common Article 1.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and of the International Covenant on Civil and Political Rights (ICCPR), and reiterated towards the end of these two covenants, in Articles 25 and 47, respectively. For minorities that are not recognized as indigenous peoples, the relationship between culture and land has been clarified by the Human Rights Committee:

culture manifests itself in many forms, including a particular way of life associated with the use of land resources... The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>28</sup>

The paragraph emphasizes effective participation, which is both a substantive right, recognized in the ICCPR Article 25(a) ('take part in the conduct of public affairs, directly or through freely chosen representatives') and a human rights principle, included in all relevant listings.<sup>29</sup> Therefore, participation is one of the human rights principles that is included in the analysis below, the others being accountability, non-discrimination and rule of law, including access to remedies.

On the status of human rights principles, the fact that the most recently adopted human rights treaty, the Convention on the Rights of Persons with Disabilities (CRPD) lists 'principles of the present Convention' indicates the emerging sta-

tus of human rights principles. By this qualification, these principles cannot be said to be generally applicable – beyond the scope of the CPRD. The inclusion of human rights principles in FAO's Voluntary Guidelines on land tenure, adopted by states,<sup>30</sup> is another other indication that human rights principles are gaining increased status internationally. Additional evidence of the increasing status of human rights principles is provided by the fact that all relevant UN specialized agencies, funds and programs have stressed that human rights principles should guide all programming activities.<sup>31</sup> Finally, the World Bank is approving human rights principles as an approach to a more proactive endorsement of human rights in their operations, as stated by one of the Bank's Senior Policy Officers: 'The World Bank evidences a growing convergence with human rights, particularly at the level of principles.'<sup>32</sup> Neither of these, however, are evidences of a general approval of human rights principles as an integral part of international law.

Concerning the potential of human rights principles, this can be summarized as more inclusive decision-making processes, leading to a better outcomes and less conflicts. Complying with all human rights principles is demanding and might lead to longer decision-making processes. In order to guide development projects, human rights principles have a considerable potential. When discussing the substantive human rights approach and the procedural human rights approach in the context of investment decisions, Olivier de Schutter, who is currently the UN Special Rapporteur on the right to food,

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<sup>28</sup> Human Rights Committee, *General Comment No. 23, The rights of minorities (Art. 27), CCPR/C/21/Rev.1/Add.5* (1994) paragraph 7 (extracts).

<sup>29</sup> FAO 2013 (n 11); FAO 2012 (n 11); FAO 2007 (n 11); UN Development Group (n 23).

<sup>30</sup> FAO 2012 (n 11).

<sup>31</sup> UN Development Group (n 23).

<sup>32</sup> S McInerney-Lankford, *Presentation held at Panel on Human Rights Mainstreaming at the 19th Session of the Human Rights Council* (2012) available at <[www.unmultimedia.org/tv/webcast/2012/02/world-bank-panel-on-human-rights-mainstreaming-19th-session-human-rights-council.html](http://www.unmultimedia.org/tv/webcast/2012/02/world-bank-panel-on-human-rights-mainstreaming-19th-session-human-rights-council.html)> accessed 8 April 2013.

finds that only by 'combining the two approaches can we arrive at satisfactory results...'<sup>33</sup> The main problem with human rights principles is that they do not represent a definite standard, unlike rules. The easiest way to explain this is by pointing to the distinction between a principle and a rule, where the latter 'are norms that, given the satisfaction of specific conditions, definitively command, forbid, permit, or empower', while principles 'are norms commanding that something must be realized to the highest degree that is actually and legally possible.'<sup>34</sup> Hence, one can specify the boundaries of rules, outside which they do not apply, while it is more difficult to specify principles' boundaries. There are, however, human rights principles which are rather specific, such as participation and non-discrimination, the latter being applicable to any field of public policy.<sup>35</sup>

Finally, with regard to potential risks, the main point is that human rights principles can only be effective when linked to substantive human rights. Any document that merely applies the term principles and never refers to substantive human rights risks being too vague and not adequately useful. As an illustration, the Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources ('RAI Principles')<sup>36</sup> have no reference to substantive human rights or to any accountability mechanism. FAO is now in a process to 'develop' the RAI Principles for possible adoption at the 2014

Session of the FAO Committee on World Food Security,<sup>37</sup> which might result in improvements to the current text.

In summary, human rights principles are gaining increased popularity, and are applicable both on the community level and on the individual level. The plethora of various catalogues or lists on what these principles actually are might, however, be a cause for frustration and confusion. In the rest of the article we will apply the human rights principles of participation, accountability, non-discrimination and rule of law, including access to remedies. While the other human rights principles of dignity, transparency, empowerment and holistic and sustainable approach are also crucial in order to assess public conduct, they are less applicable in assessing specific projects within the context of climate change mitigation and adaptation. The human rights principles are interrelated, for example will effective participation depend on full transparency, for instance full display of project plans.

### 3. What is the free, prior informed consent (FPIC) requirement?

There is no international binding agreement on the scope of and content of the free prior and informed consent (FPIC) requirement. While the FPIC requirement is not explicitly recognized in any UN human rights treaties, it is recognized in the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries Article 16.2<sup>38</sup> and in six provisions of the UNDRIP.<sup>39</sup>

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<sup>33</sup> O de Schutter, 'The host state. Improving the monitoring of international investment agreements at the national level', in O de Schutter, J Swinnen and J Wouters eds., *Foreign Direct Investment and Human Development* (Routledge, London 2013) 162.

<sup>34</sup> R Alexy, 'Legal Reasoning and Rational Discourse' (1992) 5 *Ratio Juris* 143, 145.

<sup>35</sup> UN Human Rights Committee, *General Comment No 18: Non-discrimination* (1989) paragraph 12.

<sup>36</sup> FAO, IFAD, UNCTAD and the World Bank, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (2010).

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<sup>37</sup> FAO, Committee on World Food Security, Thirty-ninth Session, Final report (2012) 9 and Annex D.

<sup>38</sup> ILO 169, Article 16.2 reads (extract): '...relocation shall take place only with their free and informed consent.'

<sup>39</sup> UN, *A/HRC/61/295* (2007) Article 10 (relocation); paragraph 11.2 (taking of property); Article 19 (measures that may affect indigenous peoples); paragraph 28.1 (restitution and compensation); paragraph 29.2 (storage or disposal of hazardous materials) and paragraph 32.2 (projects affecting land and natural resources). Also Article 30

Three human rights committees have, however, specified the FPIC requirement both when examining state parties' reports and when deciding in individual complaint cases.<sup>40</sup> Is this an indication that the committees have overstretched their mandates, as FPIC is not explicitly recognized in the treaties themselves?

First, as regards the ICESCR and the ICCPR, they have a common Article 1.2 that reads (extracts): 'All peoples may, for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence.' By the terms 'their' and 'its own' it is reasonable to state that this entails an understanding of collective property. To be deprived of their means of subsistence is a most threatening situation for any peoples, and strong protection must be ensured to avoid such situations from occurring. Hence it is reasonable to state that the FPIC requirement is one reasonable procedural guarantee from allowing such a situation from occurring. Therefore, the author concurs with the position that FPIC is embedded in and is an integral element in the the right to self-determination of peoples, as control over natural resources is integral to self-determination.<sup>41</sup>

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has a wording that comes very close to a FPIC requirement. Note that UNDRIP has now been endorsed also by the four states that originally voted no (USA, Canada, Australia and New Zealand). On a more general level, addressing inadequate specification on compensation and benefit-sharing, A Angelsen and D McNeill notes that 'FPIC seems to be an impossible precondition to satisfy', see 'The evolution of REDD+', in M Brockhaus, W D Sunderlin and L V Verchot (eds) *Analysing REDD+: Challenges and choices* (Center for International Forestry Research, Bogor 2012) 31–49 at 41.

<sup>40</sup> UN-REDD, *Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC). International Law and Jurisprudence Affirming the Requirement of FPIC* (2013) available at <[www.un-redd.net/index.php?option=com\\_docman&task=cat\\_view&gid=2655&Itemid=53](http://www.un-redd.net/index.php?option=com_docman&task=cat_view&gid=2655&Itemid=53)> accessed 8 April 2013.

<sup>41</sup> UN Expert Mechanism on the Rights of Indigenous Peoples, *Final report on the study on indigenous peoples and*

Second, as regards the International Convention on the Elimination of all forms of Racial Discrimination, it recognizes in Article 5(d)(v): 'The right to own property alone as well as in association with others.' The Committee on the Elimination of all forms of Racial Discrimination has made it clear that states must 'recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources...'<sup>42</sup> Also here we see that the term 'their lands' is applied, indicating a property relationship. Hence, there is an explicit recognition of communal or collective ownership of land. Territorial rights are generally stronger for indigenous peoples than for other minorities, but it must be noted that the UN-REDD and the World Bank's Forest Carbon Partnership Facility, Guidelines on Stakeholder Engagement has a title which lists both 'Indigenous Peoples' and 'Other Forest-Dependent Communities'.<sup>43</sup> Moreover, the individual governments' inadequate recognition of indigenous peoples or of communally owned land is not decisive in order to determine whether such peoples and such lands are to be respected as such.<sup>44</sup>

Concerning the content of the FPIC requirement it is the understanding of the term 'consent' that differs most. The multi-stakeholder Forest Stewardship Council specifies that consent includes the possibility to modify, withhold or withdraw approval.<sup>45</sup> By including the possibil-

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*the right to participate in decision-making, A/HRC/18/42* (2011) paragraph 20.

<sup>42</sup> CERD, *General Recommendation No. 23: Indigenous Peoples* (1997) paragraph 5 (extract).

<sup>43</sup> UN-REDD and Forest Carbon Partnership Facility (n 3).

<sup>44</sup> UN-REDD, *Guidelines on Free, Prior and Informed Consent* (2013) 26 (on communally owned land) and 38 (Annex 1) (on indigenous peoples) available at <[www.un-redd.org/Launch\\_of\\_FPIC\\_Guidelines/tabid/105976/Default.aspx](http://www.un-redd.org/Launch_of_FPIC_Guidelines/tabid/105976/Default.aspx)> accessed 8 April 2013.

<sup>45</sup> Forest Stewardship Council, *FSC guidelines for the implementation of the right to free, prior and informed*



ity to withdraw approval, this understanding of what is implied in the FPIC goes rather far. A more cautious approach is taken by the UN-REDD, defining consent as:

the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected peoples or communities. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community.<sup>46</sup>

This definition is a strengthening of the consent requirement as defined by UN-REDD, as the former UN-REDD definition of FPIC did not explicitly include the option of withholding consent. We saw above that the FSC has an understanding of consent which includes the possibility to withdraw consent, which is unlike the current UN-REDD definition. This definition does, however, implicitly include the option of withdrawal, provided that the 'conditions upon which the original consent was based',<sup>47</sup> are no longer met.

To sum up, the FPIC requirement is integral to both the natural resource dimension of the right to self-determination of peoples and to the right to own property alone or collectively. Hence, FPIC can be understood as a operationalization of the more generally formulated substantive human rights. FPIC can also be considered to be an operationalization of human rights principles, as

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consent (FPIC), Version 1 11 (Bonn: FSC, 2012). For a non-binding instrument specifying the 'option of a no-action alternative...', see CBD COP 2004, *Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, Decision VII/16 F, Annex*, paragraph 21.

<sup>46</sup> UN-REDD (n 15) 20.

<sup>47</sup> *Ibid*, 30, reading: 'if the conditions upon which the original consent was based are being met, ongoing consent is implied.'

FPIC specifies the content of the human rights principle of participation,<sup>48</sup> addresses issues of discrimination,<sup>49</sup> and cannot be exercised effectively without transparency. In the UN-REDD and the World Bank's Forest Carbon Partnership Facility Guidelines on Stakeholder Engagement, human rights and the FPIC are specified in the same paragraph on requirements of stakeholder engagement practices, which indicates the mutually reinforcing relationship between the two.<sup>50</sup>

#### **4. Are human rights taken into account in projects approved under the Clean Development Mechanism?**

In brief, the Kyoto Protocol to the UNFCCC says in Article 12 that projects in non-Annex I states resulting in certified emission reductions (CER) can be funded by Annex I states or companies registered in such states. Such CER can be used to achieve compliance with part of their reduction commitments. The projects must be approved or validated by an independent auditor accredited by the CDM Executive Board (CDM EB). Such auditors are hence given a status as Designated Operational Entity (DOE).<sup>51</sup> The basis for the validation are criteria set down by the CDM EB.<sup>52</sup>

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<sup>48</sup> UN-REDD and the World Bank's Forest Carbon Partnership Facility (n 3) paragraph 6(b) reads (extracts): 'FPIC is essential to ensure the full and effective participation of indigenous peoples in program activities and policy and decision-making processes.'

<sup>49</sup> UN-REDD (n 15) 33 ('whether special measures have to be adopted to ensure the participation of women and other vulnerable groups within the the community'); see also *ibid*, 44.

<sup>50</sup> UN-REDD and the World Bank's Forest Carbon Partnership Facility (n 3) paragraph 6.

<sup>51</sup> A list of the 44 DOEs is available at <<http://cdm.unfccc.int/DOE/list/index.html>> accessed 8 April 2013. For an overview of the whole process, see C Streck and J Lin, 'Making Markets Work: A Review of CDM Performance and the Need for Reform' (2008) 19 *European Journal of International Law* 409, 414–415.

<sup>52</sup> All applicable rules applying to CDM project are found at <<http://cdmrulebook.org/315>> accessed 8 April 2013.

When referring to human rights in the 2011 annual report, the CDM EB also identified the following measures already taken: improved access to information; adopted modalities for direct communication with stakeholders; revised procedures for handling communications to the Board; and making the performance of DOEs more transparent, in order to improve accountability.<sup>53</sup> The revised CDM's Project Cycle Procedure has been welcomed by the organisations with observer status in the CDM EB,<sup>54</sup> and a CDM Sustainable Development Tool (SD tool) has been adopted, noting that 'the use of this SD tool is entirely voluntary.'<sup>55</sup>

There is one other crucial actor within the CDM system, namely the Designated National Authority (DNA), established within each state party to the Kyoto Protocol with a mandate to

authorise and approve participation in CDM projects. As for the relationship between the DNA and the CDM EB regarding alleged human rights violations resulting from CDM projects, the High-Level Panel report notes:

Some suggest that, taking into account the fundamental principles reflected in the Charter of the United Nations, the CDM Executive Board has a responsibility to consider such allegations [of human rights violations arising from CDM projects], even if the designated national authority has assessed that the project has positive sustainable development effects.<sup>56</sup>

We see that there is a requirement on the part of the DNA of assessing the 'sustainable development effects', but how this is done in each case is determined by each DNA. In this context, the UN Guidelines on Business and Human Rights provides most relevant instructions, saying that all state agencies that shape business practices 'are aware of and observe the State's human rights obligations when fulfilling their respective mandates...'<sup>57</sup> The criticism against CDM projects causing severe conflicts and evictions,<sup>58</sup> has

<sup>53</sup> CDM EB (n 2).

<sup>54</sup> CDM EB, *Sixty-seventh meeting, Report, CDM-EB-67*, (2012) 23, paragraph 112(a); especially the provisions for direct communication with stakeholders on case specific issues. The same observers noted that '...sustainable development co-benefits of CDM project activities is not ambitious...' (ibid, paragraph 112(c); see also CDM EB, *Report on Sustainable Development Co-benefits and Negative Impacts of CDM Project Activities (Version 01.0) EB 65, Proposed Agenda – Annotations, Annex 17* (2011).

<sup>55</sup> The SD tool version 0.8 was approved by the CDM EB, *CDM Executive Board seventieth meeting report, CDM-EB70* (2012) 20, paragraph 82; it is maintained by the UNFCCC secretariat. The SD tool manual is available at <http://cdm.unfccc.int/Reference/index.html>, and the SD tool is available at [www.research.net/s.aspx?sm=18gHbqaSXS tje1ZSfnNI3k2%2be9hblXIZ7ZPrqk8cVyc%3d](http://www.research.net/s.aspx?sm=18gHbqaSXS tje1ZSfnNI3k2%2be9hblXIZ7ZPrqk8cVyc%3d) (both accessed 12 June 2013), the latter containing 12 substantive sustainable development criteria and specification of actual or intentional third party verification of any claims made in the SD declaration (questions 19 and 20). Note that the version 0.6 of the SD tool, available at [www.research.net/s.aspx?sm=%2fdumoEfBCbSDw8R4AtZsHioFvPZTV6gyvm%2bIrnclzI%3d](http://www.research.net/s.aspx?sm=%2fdumoEfBCbSDw8R4AtZsHioFvPZTV6gyvm%2bIrnclzI%3d) (accessed 12 June 2013) also included six 'no harm safeguards principles, including respect human rights (question 17) and land rights (question 21), as well as a detailed specification of stakeholder engagement (question 23). The CDM EB asked the CDM secretariat to '[s]implify the tool'; see CDM EB, *CDM Executive Board sixty-ninth meeting report, CDM-EB-69* (2012) 20, paragraph 98 (a).

<sup>56</sup> CDM High-Level Panel (n 2) 42. The reference to the UN Charter is relevant, as FCCC is a part of the UN, and therefore Article 59 of the UN Charter, referring to the integration of human rights throughout the UN system, must be observed by all UN bodies. The FCCC Secretariat implicitly refers to the UN Charter in a slightly incorrect manner, by stressing its contribution to '...realizing the vision of peace, security and human dignity on which the United Nations is founded'; see *Secretariat staff vision* (undated) available at <http://unfccc.int/secretariat/items/1629.php> accessed 8 April 2013. Human rights – not human dignity – is a foundational basis of the UN.

<sup>57</sup> UN Guidelines (n 6) 11, principle 8 (extract).

<sup>58</sup> A full review of disputed projects is beyond the scope of this article; for a CDM project that allegedly violates the recognized property rights of the largest indigenous peoples in Panama, see CDM Watch, *Press Release: UN's offsetting project Barro Blanco hampers Panama peace-talks* (2012) available at [www.cdm-watch.org/?p=3293](http://www.cdm-watch.org/?p=3293) accessed 8 April 2013; see also Olawuyi (n 1) 34n6 and

so far not been adequately addressed as potential human rights concerns by any of the CDM actors (EB, DOE and DNA).

While it is correct that current rules or criteria under the CDM do not specify human rights obligations, and human rights is not explicitly mentioned neither in the UNFCCC nor in the Kyoto Protocol, a COP decision emphasizes that 'Parties should, in all climate change related actions, fully respect human rights.'<sup>59</sup> This gener-

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35 n11 (the latter on Bajo Aguán gas project in Honduras; where FIAN, *Human Rights Violations in Bajo Aguán* (2011) 14–16 reports that 23 peasants have been killed); for cases from Africa, see P Bond and others, *The CDM in Africa Cannot Deliver the Money: Why the carbon trading gamble and 'Clean Development Mechanism' won't save the planet from climate change and how African civil society is resisting* (2012), available at <<http://ccs.ukzn.ac.za/files/CCS%20EJOLT%20CDM%20report%20final.pdf>> accessed 8 April 2013. The report analyzes several dubious CDM projects: landfills outside of Durban and Alexandria, which might pose a danger for the local community; recovery of oil-associated gas flaring in Nigeria; forestry projects by (Norwegian-owned) Green Resources in Mozambique, South Sudan, Tanzania and Uganda and (UK-owned) New Forests Company in Uganda – without a proper FPIC; as well as large hydropower dam project that will result in resettlement of farming- and fishing-dependent communities. Other highly polluting activities are receiving CDM CERs; see Christian Aid, *The Role of Carbon Markets in Countering Climate Change* (2009) 3n8. Moreover, ActionAid is opposing efforts to allow carbon sequestration projects in the realm of agriculture becoming eligible for CDM CERs.

<sup>59</sup> FCCC, Decision 1/CP.16 (n 4) paragraph 8. While we saw (n 55) that the CDM EB decided to remove human rights from the SD tool, there is a reference to human rights in CDM EB, *Experience gained by the UNFCCC secretariat in implementing the CDM, Version 01.0, CDM-EB72-AA-A01* ('Secretariat experiences') (2013) 8; see also *ibid* for specific recommendations on revising the CDM Modalities and Procedures (specified in FCCC, Decision 3/CMP.1 (2006)), scheduled to be done at the CMP 9 in November 2013, including a 'requirement to monitor/assess the contribution of the CDM in promoting sustainable development...' (recommendation 10; on the role of human rights within sustainable development, see OECD 2012 (n 7)). See also recommendation 13 ('extend the oversight role of host Parties towards CDM project activities they host over the whole project life cycle...'). While nothing is said on the requirement of any consultation process, this is addressed in CDM EB, *Summary*

ally worded, but encompassing paragraph addressed the duties of the DNA, as these are the CDM bodies representing states. Hence, each DNA's actions or omissions can be attributed to the respective states, and as long as the DNA are not explicitly instructed to take into account how the CDM project might impact on human rights enjoyment, the CDM has inadequate human rights accountability.

Concerning participation, there exist specifications on how stakeholders shall be invited to comment on the project, and how these comments shall be taken due account of by the DOE in the validation of a project.<sup>60</sup> A stakeholder is defined as 'the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism project activity.'<sup>61</sup> Hence, anyone can comment on the CDM project activity and these comments are to be taken due account of by the DOE.<sup>62</sup> In principle, this is an inclusive approach, which can lead to most diverse voices on the proposed project by the members of affected communities. The High-Level Panel recommends 'guidelines for adequate local consultation procedures...'<sup>63</sup>

Currently, there is no mechanism under the CDM to ensure that persons who traditionally are sidelined from decision-making processes are actually able to voice their opinions. Another

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*compilation of stakeholder inputs regarding possible changes to the CDM modalities and procedures, Version 02.0, CDM-EB72-AA-A02* ('Stakeholder inputs') (2013) 5, paragraph 23 (DNAs 'acting as a capacity-builder/trainer...') and 7, paragraph 43(a) (requiring confirmation 'that the consultation has met host Party guidelines or procedures...').

<sup>60</sup> FCCC, Decision 3/CMP.1, *Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol* (2006) paragraph 37(b).

<sup>61</sup> *Ibid*, 7, paragraph 1(e).

<sup>62</sup> This understanding saying that all members of the public are stakeholders is confirmed by the CDM EB, *Sixty-sixth meeting, Report, CDM-EB-66, Annex 64* (2012) 7n2.

<sup>63</sup> CDM High-Level Panel (n 2) 58 (recommendation 10.4).

weakness is that the information on stakeholders' views is only available for the DOE, and these views might not be adequately transmitted to the DNA or the CDM. It is the state that is responsible for the conduct of an inclusive and participatory consultation process, which fulfills all the main requirements of the FPIC. As guidance tools can be applied the Principles for responsible contracts, particularly on community engagement.<sup>64</sup>

Finally on access to justice, the High-Level Panel makes this recommendation, quoted in full:

Establish a grievance mechanism for local stakeholders to address environmental and social concerns and to facilitate the resolution of issues emerging after the registration of a project, while fully respecting national sovereignty and without impeding ongoing project operations. The mechanism should be established at the national level, but can be supported by existing CDM institutions if requested by a host country.<sup>65</sup>

This recommendation is interesting in terms of both procedure and substance. On procedure, by establishing the grievance mechanism at the national level, it can be expected that the institutional capacities will differ considerably between countries. Moreover, in order to build credibility and coherence, decisions should be published on a common home-page and regular experience-sharing between the different grievance mechanisms must be ensured. It also seems as if the grievance mechanism is to be applied only by local stakeholders. There have been several successful human rights litigations undertaken by

international organisations on behalf of affected communities,<sup>66</sup> which seems to be restricted by the wording of this recommendation. As to the substance, we see that the term 'environmental and social concerns' is applied. These formulations are vague, and any non-judicial grievance mechanism should comply with the effectiveness criteria outlined in the UN Guidelines on Business and Human Rights.<sup>67</sup>

In order to identify whether 'environmental and social concerns' can be understood to encompass human rights, it is most relevant to remind that OECD explicitly says that 'social impacts encompass relevant adverse project-related human rights impacts.'<sup>68</sup> Hence, human rights impacts can be seen as a specification of the social dimension within sustainable development. As specified in the Kyoto Protocol paragraph 12.2, the purpose of the CDM is that non-Annex I states are achieving sustainable development.

It is not possible to predict whether these recommendations, as well as the recommendations for the revision of the CDM Modalities and Principles,<sup>69</sup> will actually be approved and whether the other on-going processes will actually improve the working of the CDM EB and the DOEs. While there is an increased emphasis on stakeholder participation, transparency, accountability and access to justice that is to be welcomed from a human rights perspective, there should also be guidelines specifying when a project should not be allowed to proceed, or

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<sup>64</sup> Special Representative on business and human rights (n 6) 18–20.

<sup>65</sup> High-Level Panel (n 2) 61 (recommendation 11.2).

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<sup>66</sup> The maybe most known example is *Social and Economic Rights Action Center* [based in Lagos] and *the Center for Economic and Social Rights* [based in New York] v. *Nigeria*, *Communication No. 155/96*, where the African Commission on Human and People's Rights in 2001 found violations of 7 provisions of the African Charter, resulting from the oil activities in the Ogoniland.

<sup>67</sup> UN (n 6) 26, principle 31.

<sup>68</sup> OECD (n 7) 5.

<sup>69</sup> CDM EB (n 59) ('Secretariat experiences'), 7–8.



when a project could lose its status as a CDM project as there are no sustainable development co-benefits.<sup>70</sup>

### 5. Are human rights taken into account in REDD+ projects?

The FCCC's Conference of the Parties' meeting in 2007 acknowledged as a part of the Bali Action Plan 'positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries...'<sup>71</sup> A vaguely worded preambular paragraph identified what has later become known as safeguard measures: 'Recognizing also that the needs of local and indigenous communities should be addressed when action is taken...'<sup>72</sup>

As already seen, REDD+ projects are to be implemented by applying a human rights-based approach, complying with both legally binding and non-binding international instruments.<sup>73</sup> The problem is that these operative paragraphs are preceded by a wording that is somehow schizophrenic. The second sentence says that 'countries are *expected* to adhere to standards outlined in key relevant international instruments...'<sup>74</sup> while the third sentence specifies that it is 'critical' to ensure compliance with human rights and FPIC requirements. Moreover, customary tenure systems are to be recognized within the context of REDD+ projects.<sup>75</sup>

There is, however, an emphasis on national legislation, national circumstances and national sovereignty in the implementation of safeguard mechanisms.<sup>76</sup> These references might reduce the importance of both local customary tenure systems and international human rights law in the implementation of REDD+ projects. In general, national legislation and enforcement mechanisms are not necessarily adequately effective in order to secure the rights of indigenous peoples and other local forest-dependent communities, also as there are states denying that they have indigenous peoples. Implementation of REDD+ projects might result in the deprivation of their land and resources, as recognized by Norway.<sup>77</sup> The UN Permanent Forum on Indigenous Issues (UNPFII) observed that 'the current [REDD framework] is not supported by most indigenous peoples.'<sup>78</sup> The recommendations from the UNPFII said that REDD needs to be guided by the UNDRIP, specifically by 'respecting the rights of self determination and the [FPIC] of the indigenous peoples concerned.'<sup>79</sup>

The government of Norway, playing an important role in the REDD+ discussions due to its large financial contributions both to national initiatives and multilateral initiatives, has in an

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<sup>70</sup> Termination of projects is addressed in CDM EB (n 59) ('Stakeholder inputs'), 5, paragraph 22.

<sup>71</sup> FCCC, *Decision 2/CP.13, Reducing emissions from deforestation in developing countries: approaches to stimulate action* (2008) 3, paragraph 11.

<sup>72</sup> *Ibid.*, preambular paragraph 10.

<sup>73</sup> UN REDD and the Forest Carbon Partnership Facility (n 3) 2, paragraph 6(a).

<sup>74</sup> *Ibid.*, paragraph 6.

<sup>75</sup> *Ibid.*, paragraph 6(a). UNDRIP (n 39) Article 26 is on the lands indigenous peoples possess by reason of traditional ownership or other traditional occupation or use, saying that 'States shall give legal recognition and protection to these lands...'

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<sup>76</sup> FCCC (n 59) 24, Appendix I, paragraphs 2(a) and 2(b).

<sup>77</sup> FCCC, *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan. Submissions from Parties, FCCC/AWGLCA/2009/MISC.4, Part II* (2009) 58. As REDD+ projects are essentially about conserving forest areas, it is relevant to remind of conservation projects which have been found to violate affected communities' rights, see *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v. Kenya, Comm. No. 276/2003* (2010), finding violations of six Articles of the African Charter, including the right to property [Article 14] (paragraph 238) and the right over natural resources [Article 21] (paragraph 268).

<sup>78</sup> UN Permanent Forum on Indigenous Issues, *Report on the seventh session, E/2008/43* (2008) paragraph 45.

<sup>79</sup> *Ibid.*

earlier submission specified what the Parties *shall* do under their actions under the REDD+ mechanism:

Respect the rights of indigenous peoples and ensure the full and effective involvement of stakeholders, in particular indigenous peoples and local communities, in the design and implementation of all activities linked to this mechanism.<sup>80</sup>

By stressing the full and effective involvement in all activities, this might be understood as requiring a more challenging process, but this will also imply a much greater likelihood that the relevant rights are actually observed and that fewer conflict will arise. The FPIC Guidelines are comprehensive and they do specify under which conditions a consent must be said *not* to have been given. It also implicitly addresses the issue of cooptation of community leaders and sidelining of vulnerable members of the community, stressing that women's voices are adequately heard.<sup>81</sup>

If, however, a REDD+ project should proceed despite these clearly expressed objections and in disregard of the FPIC Guidelines, a relevant question is what consequences this will have for the state in question.

On the one hand, specific guidelines on a feedback and grievance redress mechanism (hereafter 'Guidelines on Grievance Mechanisms') have been adopted. They specify that:

Effective grievance redress mechanisms should address concerns promptly and fairly, using an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected stakeholders, and at no cost and without retribution or impeding other administrative or legal remedies.<sup>82</sup>

These are elements that generally falls within the effectiveness criteria for non-judicial grievance mechanisms,<sup>83</sup> but the UN Guidelines also state that the such mechanisms must be rights-compatible and predictable, where the latter is operationalized as 'clear and known procedure with an indicative timeframe for each stage...' These must be considered to be requirements that come in addition to those listed by the Guidelines on Grievance Mechanisms, which also requires 'an effective and timely system for informing complainants of the action taken'.<sup>84</sup>

While national mechanisms for feedback and grievance redress are to be established, there are no appropriate venue within UN-REDD to bring complaints. Hence, there are no sanctions against states that has conducted a consultation with affected communities, but which proceeds with a project that has not obtained their explicit consent.<sup>85</sup> The only sanction is that the financier,

<sup>80</sup> FCCC, *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan. Submissions from Parties*, FCCC/AWGLCA/2009/MISC.4, Add.2 (2009) 21, paragraph 11d.

<sup>81</sup> UN-REDD (n 15), 44, identifying women-only interviews and focus group interviews as well as '[o]ther methods to support women's engagement that are not meeting-based...' The Guidelines on Stakeholder Engagement (n 3) are, however, less instructive, by stating on p. 5, paragraph 8.d: 'It is also important to ensure that consultations are gender sensitive.'

<sup>82</sup> Forest Carbon Partnership Facility and UN-REDD (n 16) 17; see also p. 16.

<sup>83</sup> UN (n 6) 26, principle 31.

<sup>84</sup> Forest Carbon Partnership Facility and UN-REDD (n 16) 17.

<sup>85</sup> Note that the World Bank's *Operational Policy 4.10* (2005) applies the term consultation, in paragraph 11, while IFC's *Performance Standard 7 on Indigenous Peoples* (2012) applies the term consent, in paragraphs 13–17. Norway has called for 'free, prior and informed consultation', not consent (FCCC (n 75) 58, which has been met with concerns, as noted in *Norad Evaluation Report 12/2010*, 42. For three recent cases specifying that inadequate consultation can lead to human rights violations, see Human Rights Committee, *Ángela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006 (2009) paragraphs 7.7 (finding a violation of the right to enjoy her own culture together with

either a state or a corporation, withdraws its financing from the project.

An additional concern as regards REDD+ projects is that plantations are not in principle excluded from any REDD+ efforts.<sup>86</sup> Plantations are positively assessed in the 1992 Forest Principles,<sup>87</sup> and the motivation for the adoption in of the Voluntary guidelines on responsible management of planted forests<sup>88</sup> implies that it is most unlikely that planted forests will in legal terms be considered qualitatively different from other forests. Plantations might threaten the continued use and harvesting of forest resources by indigenous peoples and other local communities and FAO seems to have an understanding of

only persons and enterprises taking out timber being 'forests users'.<sup>89</sup>

Therefore, while planted forests would appear to be different from natural forests, there is no basis in international law or non-binding instruments for treating plantation forests different from other forests. Hence, it is fair to say that the inclusion of planted forests in REDD+ might threaten the continued use of the land and harvesting of natural resources by indigenous peoples and other local communities.

On the positive side, human rights and customary rights over land have a more explicit recognition within REDD+ than within the CDM, and the three Guidelines analyzed are rather comprehensive, even if some of the paragraphs are inadequate.<sup>90</sup> The Guidelines on Stakeholder Engagement states that they apply equally to indigenous peoples – which enjoy strong protection under international human rights law – and to other forest-dependent communities – which do not enjoy strong protection under international human rights law.<sup>91</sup> In the FPIC Guidelines there is, however, a distinction made between indigenous peoples and forest-depending communities.<sup>92</sup>

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the other members of her group); Inter-American Court of Human Rights, *Sarayaku v. Ecuador, Merits, Reparations and Costs, Judgment of 27 June 2012 (Series C No. 245)* paragraph 299; see also paragraph 176 (finding a violation of the right to communal property of the Sarayaku People, for having failed to adequately guarantee their right to consultation); and *Xákmok Kásek v. Paraguay Judgment of 24 August 2010 (Merits, Reparations, and Costs) (Series C No. 245) (2010)* paragraph 182 (finding a violation of the right to property) and paragraph 217 (finding a violation of the right to a decent life, resulting from inadequate provision of food, water, health care and education).

<sup>86</sup> FCCC (n 75) 56, where Norway states: 'Concerns have been raised over the inclusion of industrial plantations in the definition of forests, as this could lead to the conversion of natural forest into plantations. In our view, this concern is not best addressed by excluding plantations from the forest definition.'

<sup>87</sup> UN, *A/CONF.151/26 (Vol. III), Annex III, Non-legally Binding Authoritative Statement of Principles for A Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests* (2012) paragraph 6(d).

<sup>88</sup> FAO, *Responsible management of planted forests. Voluntary guidelines* (2006) 41, reporting that the Voluntary Guidelines was a response to adverse environmental, social and economic effects, resulting in negative perceptions of planted forests, creating a need to promote sound planted forest investment and management. The Voluntary Guidelines acknowledges on p. 34: 'Even apparently degraded land may be of great importance to the survival of the poorest, precisely because it is of no economic value to stronger members of the community.'

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<sup>89</sup> FAO, *Forest Management and Climate Change: a literature review, Forests and Climate Change Working Paper 10* (2012) 5, 7 and 9, applying a limited concept of who is a 'forest user'.

<sup>90</sup> See n 75 and accompanying text.

<sup>91</sup> UN-Redd and Forest Carbon Partnership Facility (n 3) 1–2, paragraph 4.

<sup>92</sup> UN-REDD (n 15) 11, stating that 'the Guidelines do not require a blanket application of FPIC to all forest-depending communities', clarifying on p. 12 that the Guidelines 'requires States to ... secure FPIC from communities that share common characteristics with indigenous peoples'; for an argument saying that traditional communities as such are entitled to enjoy the right to self-determination, drawing upon two cases from the Inter-American Court of Human Rights (*Moiwana Community vs. Suriman, Judgment of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs) (Series C No. 124)* [being descendants of slaves] and *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs*

As compared to the much more limited CDM tools for sustainable development,<sup>93</sup> the REDD+ guidelines analyzed in this section are more comprehensive. Moreover, it seems as if these guidelines are published and applied without any formal approval by any UNFCCC decision-making body.

## 6. Are human rights taken into account in projects under the Green Climate Fund?

We saw in the introduction that the decisions from the COP 17 in Durban allegedly implied an opening for 'human rights issues surrounding climate change to be integrated in the new climate regime.'<sup>94</sup> As there is no specific reference, there is a need to review the decisions in order to identify what is their human rights-relevant content. After a most careful examination, the following human relevant COP 17 decisions have been identified, relating to human rights adaptation:<sup>95</sup> i) the effective involvement of all stakeholders in Green Climate Fund (GCF) decisions; ii) the establishment of a mechanism on stakeholder engagement in the design, development and implementation of the GCF's activities; iii) establishment of an independent redress mechanism; (iv) the requirement of national plans for adaptation; and v) addressing safeguards in the context of forest reference emission levels. Each of them will be reviewed, first those applying to GCF, while the two latter on adaptation will be analyzed in the subsequent part.

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*Judgment of November 28 2007 (Series C No. 172)* [titulated tribal people] see de Schutter (n 33) 166n28.

<sup>93</sup> See n 55 for a brief presentation of the voluntary SD tools.

<sup>94</sup> UN 2012 (n 8) 15, paragraph 69.

<sup>95</sup> Note that preambular paragraphs are not included in the analysis; for one example of a preambular paragraph, see FCCC, *Decision 2/CP.17* (n 4) 12, referring to poverty alleviation and socio-ecological issues in the context of the REDD+ safeguards.

First, the GCF is to

promote the paradigm shift towards low-emission and climate-resilient development pathways by ... channelling new, additional, adequate and predictable financial resources to developing countries... and strengthen engagement at the country level through effective involvement of relevant institutions and stakeholders ... and taking a gender-sensitive approach.<sup>96</sup>

Hence, the GCF is to fund projects, programmes, policies and any other activities for a low-emission and climate-resilient future in developing countries. We see that effective engagement of stakeholders, including women, is emphasized in the working of the GCF. One of the roles and functions of the Board for the GCF is specified as: 'Develop environmental and social safeguards and fiduciary principles and standards that are internationally accepted.'<sup>97</sup> Hence, there are to be fiduciary principles and standards, in addition to the requirement that safeguards are to be *developed*, provided that they are internationally accepted.

How is the term 'internationally accepted' to be understood? Obviously, human rights treaties, particularly those which are ratified by a high number of states, must be considered as being internationally accepted. Moreover, as the UNDRIP has now been endorsed by those states that originally voted against, also this declaration must be considered to be internationally accepted.

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<sup>96</sup> FCCC, *Decision 3/CP.17, Annex* (n 4) 4, paragraphs 2 and 3

<sup>97</sup> *Ibid*, 6, paragraph 18 (e); see also 11, paragraph 56: 'financing agreements will be in keeping with the Fund's fiduciary principles and standards and environmental and social safeguards to be adopted by the Board'; and 12, paragraph 65.



Fiduciary duties are usually applied in financial matters, and is defined in *A Dictionary of Law* as: 'A person, such as a trustee, who holds a position of trust or confidence with respect to someone else and who is therefore obliged to act solely for that person's benefit.' There has, however, been a development in the understanding of fiduciary duties in the context of responsible investments, including how to safeguard the interests of third parties.<sup>98</sup> Hence, a reasonable explanation of how fiduciary principles and standards are to be implemented is that the body that is to undertake a project financed by the GCF has to act for the benefit of the funder, while at the same time complying with environmental and social safeguards that are internationally accepted.

Second, the working of the GCF is to be based on a participatory approach:

The Board will develop mechanisms to promote the input and participation of stakeholders, including private-sector actors, civil society organizations, vulnerable groups, women and indigenous peoples, in the design, development and implementation of the strategies and activities to be financed by the Fund.<sup>99</sup>

There is no basis for claiming that 'stakeholder engagement' provisions generally qualifies for

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<sup>98</sup> Section 172 (1) (d) of the 2006 United Kingdom Companies Act, specifying that company directors must have regard to 'the impact of the company's operations on the community and the environment'; see also J Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) 3 *Innovations: Technology, Governance, Globalization*, 189, 195; C A Williams and J M Conley, 'Is there an Emerging Fiduciary Duty to Consider Human Rights?' (2008) 74 *University of Cincinnati Law Review*, 75–104; and UN Principles for Responsible Investments, *Responsible investment and fiduciary duty* (no date) available at <[www.unpri.org/viewer/?file=wp-content/uploads/3.Responsibleinvestmentandfiduciaryduty.pdf](http://www.unpri.org/viewer/?file=wp-content/uploads/3.Responsibleinvestmentandfiduciaryduty.pdf)> accessed 8 April 2013.

<sup>99</sup> FCCC, *Decision 3/CP.17, Annex* (n 4) 12, paragraph 71.

being relevant for human rights. The fact, however, that the CGF emphasizes participation of vulnerable groups, women and indigenous peoples implies that this provision has a relationship to the realization of human rights, more specifically non-discrimination. There is, however, no specification on how women and other vulnerable persons are to be involved and how it to be ensured that they are able to present their views without fear for reprisals from community or district leaders.

Third, there shall be an independent redress mechanism that will report to the GCF Board. It 'will receive complaints related to the operation of the Fund and will evaluate and make recommendations.'<sup>100</sup> Unlike the proposed grievance mechanisms under the CDM and the UN-REDD which are to be national, this mechanism is to operate under the GCF Board. While the term redress refers merely to the final outcome of a grievance process, the fact that the term grievance is not included in the name of the mechanism should not be a reason for concern: redress requires a process that clarifies the reason for the redress. While the redress mechanism is on the GCF's 2013 work plan,<sup>101</sup> there is no available information on any details on the redress mechanisms. The effectiveness criteria found in the UN Guidelines on Business and Human Rights are most relevant also in the context of this redress mechanism, even if the GCF will be an international fund administered by an international secretariat based on decisions by the GCF Board.

In summary, the participatory approach is evident in the mandate given to the GCF.<sup>102</sup> There are several processes to operationalize the working of the GCF, whose final outcome

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<sup>100</sup> Ibid, paragraph 69.

<sup>101</sup> FCCC, *Report of the Green Climate Fund to the Conference of the Parties, FCCC/CP/2012/5* (2012), 23 (Annex IV, V(h)).

<sup>102</sup> See n 99 and accompanying text.

is difficult to assess. The paragraphs mandating these processes are rather general, but the establishment of an independent redress mechanism to receive complaints relating to the CGF's operation goes in principle further than what is entailed in the three UN-REDD guidelines, for FPIC,<sup>103</sup> Stakeholder Engagement,<sup>104</sup> and for a Grievance Mechanism.<sup>105</sup> The latter does not encompass any mechanism on an international level. The coming year will be decisive for the CGF's institutional structure, including its safeguard mechanisms.

### **7. Are human rights taken into account in other climate change adaptation measures?**

The decision on adaptation says:

enhanced action on adaptation ... should follow a country-driven, gender-sensitive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional and indigenous knowledge, and by gender-sensitive approaches...<sup>106</sup>

Also here, the emphasis on the vulnerable groups, and the gender-sensitive, participatory

and fully transparent approach is relevant for human rights realization. Moreover, traditional and indigenous knowledge is emphasized, but this part of the provision is weakened, however, by the phrase 'as appropriate'. A possible explanation for this might be that there is currently no international treaty which specifically regulates traditional knowledge.<sup>107</sup> There is a basis in human rights provisions – both the ICCPR and the ICESCR – for recognizing traditional knowledge as a human rights.<sup>108</sup> The most specific recognition of traditional knowledge is in the 1994 United Nations Convention to Combat Desertification (UNCCD), Article 18.2.<sup>109</sup> It is obvious that traditional and indigenous knowledge could be most valuable when implementing national adaptation plans.

Moreover, the decision on adaptation says that national adaptation plans, should be based on and guided by the best available science. The relevant paragraph of the decision on national adaptation plans continues: 'Requests developed country Parties to continue to provide least de-

<sup>103</sup> UN-REDD (n 15).

<sup>104</sup> UN-REDD and Forest Carbon Partnership Facility (n 3).

<sup>105</sup> Forest Carbon Partnership Facility and UN-REDD (n 16).

<sup>106</sup> FCCC *Decision 5/CP.17* (n 4) 1, paragraph 3. For an indication of relevant climate adaptation projects and programmes, many of which will affect land rights and traditional land uses, see FCCC, *Decision 1/CP.16* (n 4) 3h1. Indigenous knowledge is also emphasized by the International Indigenous Peoples' Forum on Climate Change (IIPFCC) 2012, *Statement to the UNFCCC-Subsidiary Body for Implementation (SBI), 36<sup>th</sup> session*, available at <[www.forestpeoples.org/sites/fpp/files/publication/2012/05/subsidiary-body-implementation-sbi-statement-unfccc.pdf](http://www.forestpeoples.org/sites/fpp/files/publication/2012/05/subsidiary-body-implementation-sbi-statement-unfccc.pdf)> accessed 8 April 2013.

<sup>107</sup> The mandate of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (GRTKF) was given by WIPO General Assembly in 2000 (WIPO, *WO/GA/26/10* (2000) paragraph 71), which in 2003 was specified by stating: "no outcome of its work is excluded, including the possible development of an international instrument or instruments" (WIPO, *WO/GA/30/8* (2003) paragraph 93(iii)), and in 2011, by mandating: "negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs" (WIPO, *WO/GA/40/7* (2011) paragraph 16(a); see also WIPO, *WO/GA/40/19* (2011) paragraph 181).

<sup>108</sup> H M Haugen, 'Traditional Knowledge and Human Rights' (2005) 8 *Journal of World Intellectual Property* 663; H M Haugen, *Technology and Human Rights: Friends or Foes? Highlighting Innovations Applying to Natural Resources and Medicine* (Republic of Letters Publishing, Leiden 2012) ch. 6.

<sup>109</sup> UNCCD Article 18.2 reads (extracts): 'The Parties shall ... protect, promote and use in particular relevant traditional and local technology, knowledge, know-how and practices...'

veloped country Parties with finance, technology and capacity-building...'<sup>110</sup> A study has identified three problems relating to technology transfer decisions in international treaties, namely defining and assessing such transfers and holding developed countries to account.<sup>111</sup> The same study, however, finds that the discussions on the implementation of the so-called 'Technology Mechanism'<sup>112</sup> have already made progress on resolving these problems.<sup>113</sup>

In this context, it should be acknowledged that the ICESCR recognizes 'the right for everyone to enjoy the benefits of scientific progress and its applications.'<sup>114</sup> Hence, there is a human rights basis both for recognizing and applying traditional knowledge and for making scientific progress and its applications more available.<sup>115</sup>

Finally, when providing information on how the REDD safeguards are addressed and respected, there should be a recognition of 'relevant international obligations and agreements, and respecting gender considerations.'<sup>116</sup>

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<sup>110</sup> FCCC *Decision 5/CP.17* (n 4) 3 paragraph 20.

<sup>111</sup> P Gehl Sampath and P Roffe, *Unpacking the International Technology Transfer Debate: Fifty Years and Beyond*, International Centre for Trade and Sustainable Development Discussion Paper (2012) 49.

<sup>112</sup> FCCC 2011 (n 59) 17, paragraph 117.

<sup>113</sup> Gehl Sampath and Roffe 2012 (n 111) 50. The study also finds that the key is the linking of technology transfers and trade, while this author would focus as much on foreign direct investments as a tool for technology transfers.

<sup>114</sup> ICESCR, Article 15.1(b); see also Article 15.2 on the diffusion of science and Article 15.4 on international scientific cooperation; for an analysis of ICESCR Article 15.1(b) and technology transfer, see Haugen 2012 (n 108), chapter 2 and 8, respectively.

<sup>115</sup> On the scope of obligations derived from Article 15.1(b), see UNESCO 2009, *Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications*. Only one reference is made to climate change in the Venice Statement, namely paragraph 13(c) on protection from abuse and adverse effects of science and its applications, listing climate change as an area of 'contemporary controversy', most likely referring to geoengineering. For a brief discussion, see Haugen 2012 (n 101) 226–232.

<sup>116</sup> FCCC, *Decision 12/CP.17* (n 4) 1, paragraph 2.

This paragraph stands out from the other paragraphs reviewed above in three respects. First, there should only be a 'recognition' of relevant international obligations and agreements. Second, even if gender is included immediately after 'relevant international obligations and agreements' this does not necessarily assist in defining what is 'a relevant agreement'. Third, gender 'considerations' are only to be respected. While the provision might be read so as to include international human rights treaties, particularly those relating to women's rights, this paragraph is both vaguer and less participatory than the other paragraphs reviewed.

Hence, we see that the decision on adaptation is explicitly acknowledging vulnerable persons, and emphasizing participatory and fully transparent approaches, but include no accountability mechanisms. Moreover, as with the decisions on the GCF, there are no references to the FPIC requirement. This can be considered somewhat surprising, as GCF and national adaptation projects will imply making use of land which might affect land rights and traditional uses of this land.

## 8. Conclusions

Projects that are to make use of vast land areas have come under great criticism recently, irrespective of whether they have been granted CER under the CDM or being identified for REDD activities.<sup>117</sup> A study by the World Bank finds

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<sup>117</sup> There are 72 afforestation and reforestation projects under the CDM; see <[www.cdmpipeline.org/cdm-projects-type.htm](http://www.cdmpipeline.org/cdm-projects-type.htm)> accessed 8 April 2013; and the number of REDD+ 'arrangement records', according to the voluntary REDD+ Database, are 1292; see <[www.reddplusdatabase.org/by/recipients](http://www.reddplusdatabase.org/by/recipients)> accessed 8 April 2013; for a definition of what is considered to constitute land grabbing, see International Land Coalition, *Tirana Declaration* (2011) paragraph 4, available at <[www.landcoalition.org/about-us/aom2011/tirana-declaration](http://www.landcoalition.org/about-us/aom2011/tirana-declaration)> accessed 8 April 2013.

that 'lower recognition of land rights increases a country's attractiveness for land acquisition...'<sup>118</sup>

On this background, the need for robust safeguard mechanisms is most important. It is not the frequent referencing to human rights treaties or other human rights instruments that matters, but whether there is actually a human rights compliant conduct. It must be acknowledged that by having safeguard mechanisms that are embedded in human rights provisions, this enhances legitimacy, accountability and predictability.

The article has found that FPIC is an operationalization of both substantive human rights – particularly the right to self-determination as applying to natural resources and the rights applying to collectively owned land – and of human rights principles. Moreover, the states have agreed on the FPIC in the context of the non-binding UNDRIP. While the article has not undertaken an in-depth analysis of the substantive human rights that might be affected as a result of the restrictions on the use of or access to traditional lands,<sup>119</sup> it must be noted that in several cases, procedural rights were found to have been violated, but through these violations, also substantive human rights were deemed to have been violated.

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<sup>118</sup> K Deininger and D Byerlee, *Rising Global Interest in Farmland. Can It Yield Sustainable and Equitable Benefits?* (The World Bank, Washington 2010) 55. Half of the land that has been transferred in the last decade is in Africa, and of this land, 66 per cent were intended to be used for biofuels, while 15 per cent is intended for food production, and approximately 7 per cent were intended for forestry, including carbon sequestration; see W Anseeuw et al., *Land Rights and the Rush for Land, Findings of the Global Commercial Pressures on Land Research Project* (International Land Coalition, Rome 2012) 25. FAO 2012 (n 11) indicates a greater emphasis on explicit human rights and customary rights when dealing with land

<sup>119</sup> See n 66, n 77, n 85 and n 92 for international human rights jurisprudence.

As for the three realms of climate change measures, the CDM as it currently operates has an inadequate integration of human rights. It is too early to make any assessment on the implementation of the recommendations from the High-Level Panel on the CDM Policy Dialogue and the revision of the CDM Modalities and Principles, but some of the recommendations point in a positive direction. As regards the UN-REDD, the Guidelines have many positive aspects, but the use of the term 'expectations' in adhering to international instruments and the reference to national legislation, national circumstances and national sovereignty in the implementation of safeguard mechanisms can give states too much leeway.<sup>120</sup> In the mandate for the Green Climate Fund, the reference to women and to vulnerable persons is of little value unless specific guidance is adopted on how their participation is actually to be promoted, but an international redress mechanisms will at least provide for a minimum level of accountability of actors undertaking projects or programs with GCF funding.

If human rights are to be effectively integrated into the relevant realms of the FCCC analyzed in this chapter, it is of little value merely to 'refer to' or to 'consider' human rights. What is crucial is that the respective bodies are entrusted with a mandate which allow them to take human rights actively into account, by applying both human rights principles and substantive human rights.

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<sup>120</sup> See n 74 and 76 and accompanying text.