

Rights away from home: Climate-induced displacement of indigenous peoples and the extraterritorial application of the Kampala Convention

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Summary

Existing accounts of the relationship between human rights and climate change are not explicit regarding the link between climate change and the displacement of indigenous peoples and its implications for their rights in Africa. Even if a link exists, legal redress is problematic in that an extraterritorial conduct or omission of a state within and outside Africa may feature in climate-induced displacement. Little is known on the way forward to address this challenge. The article demonstrates how climate change is linked to the displacement of indigenous peoples and how their rights are threatened in Africa. Underscoring the extraterritorial nature of activities underlying their displacement, the article examines the basis of the Kampala Convention and the way it may be applied extraterritorially to enhance the protection of indigenous peoples facing climate-induced displacement and the threat to key rights in Africa.

Key words: *climate change; climate-induced displacement; extraterritoriality; indigenous peoples' rights; Kampala Convention*

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1 Introduction

Human activities are increasing the concentration of greenhouse gases in the atmosphere, thus enhancing the greenhouse effect which, in turn, has led to an increased warming of the earth surface, resulting in climate change and, consequently, negatively affects society.¹ In general discussions about the adverse effects of climate change, the term 'climate-induced displacement', that is 'the forcible or voluntary, temporary or permanent removal of people from their home or territory due to climate change', has featured.² The work of the Human Rights Council (HRC) under the United Nations (UN) Resolutions 10/4 (2009), 18/22 (2011) and 26/33 (2014), linking climate change to human rights, mentions cursorily that indigenous peoples are vulnerable to climate change.³ Several authors have commented on the adverse impact of climate change on indigenous peoples' land use and tenure in Africa.⁴

However, the direct link between climate change and the displacement of indigenous peoples, and the implications of climate change for their rights and legal protection in Africa, has received little attention. On the question whether climate change is linked to displacement at all, two divergent schools exist: the maximalist and minimalist schools.⁵ Drawing no distinction between indigenous peoples and the broader population, and between displacement caused by climate change and other factors linked to it, the maximalists hold that displacement results from climate change.⁶ On the contrary, but also without a distinction between indigenous peoples and the broader population, the minimalists posit that displacement due to a strict causal link with climate change is rare and

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- 1 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.
 - 2 Displacement Solutions *The rights of climate displaced persons: A quick guide* (2015) 3; Displacement Solutions *The Peninsula principles on climate displacement within states* (2013); J McAdam (ed) *Climate change and displacement: Multidisciplinary perspectives* (2010).
 - 3 United Nations Human Rights Council 'Resolution 10/4 – Human rights and climate change', adopted on 25 March 2009 at the 41st meeting of the Human Rights Council Preamble; United Nations Human Rights Council 'Resolution 18/22 – Human rights and climate change', adopted 30 September 2011 at the 37th meeting A/HRC/RES/18/22) Preamble; United Nations Human Rights Council 'Resolution 26 L/33 – Human rights and climate change', adopted on 23 June 2014 at the 26th session A/HRC/26/L.33 para 1.
 - 4 M Hansungule & AO Jegede 'The impact of climate change on indigenous peoples' land tenure and use: The case for a regional policy in Africa' (2014) 21 *International Journal on Minority and Group Rights* 256; for a discussion on other parts of the world, see RS Abate & EA Kronk (eds) *Climate change and indigenous peoples: The search for legal remedies* (2013).
 - 5 W Kaälin 'Conceptualising climate-induced displacement' in McAdam (n 2 above) 81; J Morrisey *Environmental change and forced migration: A state of the art review* (2009) 1-48; A Suhrke 'Environmental degradation and population flows' (1994) 47 *Journal of International Affairs* 474.
 - 6 Morrisey (n 5 above) 4; Suhrke (n 5 above) 478.

difficult to determine.⁷ On whether climate-induced displacement can give rise to a threat to the rights of indigenous peoples, little is known. For instance, while the resolutions of the HRC mention the vulnerability of indigenous peoples,⁸ there is no reference to displacement, let alone a discussion thereof and the implications for the rights of indigenous peoples. The form of legal protection available to indigenous peoples displaced by climate change is equally problematic in that activities at the root of a changing climate, although disproportionate, are global in nature.⁹ Reflecting on the situation, an argument has been made for a specific international instrument to address the plight of those at risk,¹⁰ but the need for such an instrument has been discredited in other writings, arguing that a treaty without wide ratification and implementation cannot address the humanitarian issues raised by climate change.¹¹ Other scholars contend that the available bodies of international, regional and national laws can secure the rights of those who suffer the adverse impact of climate change.¹²

In Africa, their recognition at the regional level as against the general reluctance of states to recognise indigenous peoples' identity and claims to land makes their recourse to regional protection attractive.¹³ More importantly, although formulated in the language of obligations, the African Union (AU) Convention for the Protection and Assistance of Internally-Displaced Persons in Africa (Kampala Convention) is an instrument which specifically aims at protecting and assisting internally-displaced persons (IDPs) in Africa.¹⁴ The Kampala Convention accommodates the African Charter on Human and

7 A Baldwin 'Racialisation and the figure of the climate change migrant' (2013) 45 *Environment and Planning* 1474; Morrissey (n 5 above) 4; R Black 'Environmental refugees: Myth or reality?' (2001) *New Issues in Refugee Research* 34.

8 n 3 above.

9 United Nations General Assembly 'Protection of global climate for present and future generations of mankind' UNGA Res 43/53, 70th plenary meeting 6 December 1988.

10 D Hodgkinson et al 'Towards a convention for persons displaced by climate change: Key issues and preliminary responses' <http://greencrossaustralia.org/media/120204/ccdp%20convention.pdf> (accessed 28 February 2015).

11 J McAdam 'Swimming against the tide: Why a climate change displacement treaty is not the answer' (2011) 23 *International Journal of Refugee Law* 2.

12 J Peel & HM Osofsky *Climate change litigation* (2015) 13.

13 On the recognition of indigenous peoples at the regional level, see *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case); on the discussion around the contested nature of the term and the reluctance of states in Africa to recognise indigenous peoples, see GM Wachira 'Indigenous peoples' rights to land and natural resources' in S Derso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 297-348; KN Bojosi 'The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: Some reflections on its work so far' in Derso (above) 95-137.

14 African Union Convention for the Protection and Assistance of Internally-Displaced Persons in Africa, adopted by the Special Summit of the AU held in Kampala, Uganda, 23 October 2009 (Kampala Convention).

Peoples' Rights (African Charter) by virtue of articles 20(1) and (2),¹⁵ and is as justiciable as the African Charter in that article 20(3) allows for complaints by IDPs before the African Commission on Human and Peoples' Rights (African Commission) and the African Court of Justice and Human Rights (African Court).¹⁶ For these reasons, one cannot but conclude that the Kampala Convention is a unique instrument in terms of the protection of the human rights of IDPs. The African Commission has also passed Resolution 153 of 2009¹⁷ and Resolution 271 of 2014 in relation to climate change in Africa.¹⁸ In particular, Resolution 153 urges African states to take measures to protect vulnerable groups such as indigenous communities who are victims of natural disasters.¹⁹

Despite the above, the unclear link with climate-induced displacement and the fact that multiple states and legal regimes in and outside Africa can be involved in extraterritorial conduct or omission resulting in climate-induced displacement in Africa make the construction of legal protection of indigenous peoples problematic. A state in or outside Africa can feature in activities in and beyond its national territory resulting in climate-induced displacement. Not all states are bound by the same legal regime. Under the United Nations Framework Convention on Climate Change (UNFCCC)²⁰ and Kyoto

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- 15 African 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; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29.
 - 16 Art 20(3) Kampala Convention (n 14 above); Protocol on the Statute of the African Court of Justice and Human Rights (2008) in Heyns & Killander (n 15 above) 47; on the trend and implication of the creation of these institutions within the African human rights system, see generally F Viljoen *International human rights law in Africa* (2012) 448-466; a further development emerged at the Assembly of the AU 23rd ordinary session, 26-27 June 2014, Malabo, Equatorial Guinea. At the session, the AU Assembly adopted a Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. The new Protocol creates in the African Court on Human and Peoples' Rights three sections: General Affairs; Human and Peoples' Rights; and International Criminal Law. See 'Decision on the Draft Legal Instruments' Doc Assembly/AU/8(XXIII)' Assembly/AU/Dec.529(XXIII).
 - 17 African Commission on Human and Peoples' Rights 'Resolution on climate change and human rights and the need to study its impact in Africa' ACHPR/Res153(XLVI)09, 25 November 2009.
 - 18 African Commission of Human and Peoples' Rights 'Resolution on climate change in Africa' Resolution 271, adopted at the African Commission's meeting at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014.
 - 19 Resolution 153 (n 17 above).
 - 20 The United Nations Framework on Climate Change Convention (UNFCCC), adopted at the World Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.

Protocol,²¹ only developed states²² have mandatory commitments relevant to climate-induced displacement. These include commitments in relation to the reduction of emissions; the provision of finance; and appropriate and practical technology and other relevant measures to address adverse climate change. However, developed states are not parties to the Kampala Convention. States in Africa with applicable obligations under the Kampala Convention have no concrete commitment under the UNFCCC and Kyoto Protocol. The foregoing situation exemplifies Boyd's observation that, except when the 'plurality of normative orders' is harnessed, addressing global environmental problems will remain difficult.²³ The article connects climate change to the displacement of indigenous peoples and the threat to their key rights, arguing for the extraterritorial involvement of states in and outside Africa. It interrogates the basis and possible application of the Kampala Convention extraterritorially in addressing the plight of indigenous peoples displaced by climate change in Africa.

2 Connecting indigenous peoples and climate-induced displacement

In Africa, the term 'indigenous peoples' is contested,²⁴ but its significance in the context of climate-induced displacement merits consideration. In identifying certain communities as indigenous, the African Commission's Working Group on Indigenous Populations/Communities (Working Group) adopts an approach which focuses on self-identification, special attachment to and use of land, marginalisation and discrimination based on their cultural

21 United Nations Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted in 1998, entered into force 16 February 2005 (Kyoto Protocol) art 3; the 1st commitment under the Protocol ended in 2012 and was extended in Doha from 1 January 2013 to 31 December 2020; see http://unfccc.int/kyoto_protocol/items/2830.php (accessed 23 May 2015).

22 States with 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 a process of economic transition. These are Belarus, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Russian Federation, Ukraine; however, Russia, Canada and Japan indicated that their obligations did not extend beyond the first commitment. See Mellow 'Losing Canada, Japan and Russia in the climate regime: Could the solution be in Asia?' 11 April 2013 <https://unfccccecosingapore.wordpress.com/2013/04/24/losing-canada-japan-and-russia-in-the-climate-regime-could-the-solution-be-in-asia/> (accessed 27 July 2015).

23 W Boyd 'Climate change, fragmentation, and the challenges of global environmental law: Elements of a post-Copenhagen assemblage' (2014) 32 *Journal of International Law* 457.

24 n 13 above.

difference.²⁵ It identifies the lifestyles of hunters and gatherers as well as pastoralists in Africa as fulfilling the above criteria.²⁶ However, the requirements laid down by the Working Group have been contested. Bojosi argues that the criteria used by the Working Group are not internally generated but the product of a 'long enduring external mission to have the concept of indigenous peoples ... applied to certain pre-determined peoples in Africa'.²⁷ Viljoen also criticises the criterion on 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.²⁸ The reliance on 'attachment to the use of land' in defining the concept, others argue, will exclude poor or rural Africans who do not fit into the 'indigenous peoples' criterion, but who depend on informally-held land.²⁹ The emphasis, as argued further, must focus on the protection of land rights based on informally-held land obtainable among many of the world's poorest and most vulnerable citizens, even if not indigenous.³⁰

The foregoing viewpoints, however, must not be accepted uncritically in the context of climate change. For instance, unlike indigenous peoples in the context of climate change, to an agrarian community the issue of cultural attachment to ancestral land hardly arises in that movement for subsistence farming is an acceptable means of adapting to climate change.³¹ Therefore, in a changing climate, the urgency for an emphasis on the peculiar vulnerability of communities who are culturally linked to ancestral land is not achieved when populations are regarded as local, agrarian or rural populations without distinction. In implementing intervention, the approach may in fact protect, at the expense of indigenous peoples, their historical oppressors, a situation which is incompatible with the rights regime as articulated particularly by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).³² Because

25 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities adopted by the African Commission at its 28th ordinary session 2005 (Working Group Report) 93.

26 Working Group Report (n 25 above) 14-61.

27 Bojosi (n 13 above) 96.

28 F Viljoen 'Reflections on the legal protection of indigenous peoples' rights in Africa' in Dersso (n 13 above) 77.

29 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.

30 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 2015).

31 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.

32 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly on 13 September 2007.

of their reliance on land for physical, cultural and spiritual survival,³³ the term 'indigenous peoples' is useful, as demonstrated below, to show that displacement as a result of climate change adversely impacts on their land, a development which threatens their rights.

2.1 Displacement as outcome of non-viability of land

In Africa, the non-viability of land due to climate change is occasioning the displacement of pastoralists and hunters and gatherers.³⁴ Among the Bororo and Tuaregs, the destruction of grazing land, drought, the destruction of animals and traditional fishing activities associated with climate change compel a movement away from traditional lands.³⁵ Among the Maasai, Ogiek, Endorois and Yaaku in Eastern Africa, drought, disappearing grazing land, famine and extreme weather conditions are climatic presentations underlying displacement.³⁶ Evidence of the depletion of forest products, the unpredictability of seasons and floods are seen to be responsible for the movement of the Batwa in Rwanda, Burundi, Uganda and the Democratic Republic of the Congo (DRC), also known as the Baka in Central African Republic (CAR) and Gabon, and the Bagyeli in Cameroon.³⁷

The migration of the Amazigh (or Imazighn), known as the Berbers in North Africa,³⁸ has been linked to the extreme scarcity of water, the degradation of palm trees, the deterioration of a unique tree species in South-Western Morocco, and salinisation traceable to a changing climate.³⁹ The spread of Kalahari dunes in Botswana, Angola, Zimbabwe and Western Zambia has been linked to climate change,⁴⁰ a development which does not only threaten the survival and lifestyle of the Sans and Basarwa of the Kalahari basin, but which

33 *Maya Indigenous Communities of Toledo District v Belize* 12.053, report 40/4 (*Belize case*), Inter-American Commission on Human Rights, OEA/Ser L/V/II122 Doc 5 Rev (2004) para 155.

34 'Agrofuels and the myth of the marginal lands' a briefing by the Gaia Foundation, Biofuelwatch, the African Biodiversity Network, Salva La Selva, Watch Indonesia and EcoNexus (September 2008) <http://www.cbd.int/doc/biofuel/Econexus%20Briefing%20AgrofuelsMarginalMyth.pdf> (accessed 24 May 2015).

35 Indigenous Peoples of Africa Co-ordinating Committee (IPACC) 'West Africa' <http://www.ipacc.org.za/en/where-we-work/west-africa.html> (accessed 6 April 2016).

36 IWGIA *The world indigenous report* (2011) 410; Tebtebba Foundation *Indigenous peoples, forests and REDD Plus: State of forests, policy environment and ways forward* (2010) 440.

37 Working Group Report (n 25 above) 16; Tebtebba Foundation (n 36 above) 481.

38 Working Group Report (n 25 above) 18-19.

39 'Climate change in three Maghreb countries. Special Report on selected side events at UNFCCC COP-7' (2001) <http://www.iisd.ca/climate/cop7/enbots/nov1> (accessed 4 April 2016).

40 'Shifting sands: Climate change in the Kalahari' <http://journals.worldnomads.com/shrummer16/story/52708/South-Africa/Shifting-Sands-Climate-Change-in-the-Kalahari> (accessed 5 April 2016).

is altering migration in that region.⁴¹ Finally, there are findings indicating that climatic threat to land use is an emerging cause of the displacement of pastoralists around Uganda, Eritrea, Ethiopia, Somalia and Eastern Sudan.⁴²

2.2 Displacement as outcome of climate response projects on land

Under the auspices of the UNFCCC and the Kyoto Protocol, climate change response projects are sustainable projects required in addressing climate change.⁴³ The displacement of indigenous peoples results from their ineffective implementation in Africa. For instance, projects promoting renewable sources of energy under article 2, paragraph 1(a)(iv) of the Kyoto Protocol, are a driver of the displacement of indigenous peoples.⁴⁴ These include biofuel plantations in states with the presence of indigenous peoples, such as Kenya, Tanzania, Namibia and Ethiopia.⁴⁵ These projects have led to the involuntary resettlement and decimation of traditional cultures and livelihoods of indigenous communities such as the Bodi, Daasanach, Kara (Karo), Muguji (Kwegu), Mursi and the Nyangatom who live in the Omo Valley in Ethiopia,⁴⁶ and the Maasai in Tanzania.⁴⁷

Displacement also features in the ineffective implementation of land-related initiatives under the Clean Development Mechanism (CDM)⁴⁸ and REDD+.⁴⁹ In respect of initiatives under the CDM in the

41 R Mwebaza 'Is climate change creating more environmental refugees than war in Africa?' <http://www.issafrica.org/iss-today/is-climate-change-creating-more-environmental-refugees-than-war-in-africa> (accessed 3 April 2016).

42 T Afifi et al *Climate change, vulnerability and human mobility: Perspectives of refugees from the East and Horn of Africa* http://www.reliefweb.int/sites/reliefweb.int/files/resources/East%20and%20Horn%20of%20Africa_final_web.pdf (accessed 1 May 2015).

43 Arts 3(4) & 4(1)(d) UNFCCC.

44 V Tauli-Corpuz & A Lyngge 'Impact of climate change mitigation measures on the territories and lands of indigenous peoples' 14-25 May 2007 E/2007/43 E/C.19/2007/12 para 52.

45 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* 899; L Cotula et al *Fuelling exclusion? The biofuel boom and poor people's access to land* (2008) 1-82.

46 Oakland Institute *Understanding land investment deals in Africa: Half a million lives threatened by land development for sugar plantations in Ethiopia's lower Omo valley* (2011).

47 E Laltaika *Biofuels in Tanzania: Legal challenges and recommendations for change* Monograph 120-121.

48 Art 12 Kyoto Protocol (n 21 above). CDM allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits. 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 4 February 2015).

49 REDD+ refers to 'Reducing emissions from deforestation and forest degradation "plus" conservation, the sustainable management of forests and enhancement of forest carbon stocks'. See J Willem den Besten et al 'The evolution of REDD+: An

DRC, a report reveals that the Batwa people have been exploited, excluded and expelled from their land.⁵⁰ Although in its preparatory stage, concern is being expressed by indigenous communities that the implementation of REDD+ in Central and Eastern Africa will occasion land alienation, and will reward states for practices of dispossession and not indigenous communities.⁵¹ In Tanzania, a study shows that indigenous communities are not consulted in REDD matters.⁵² Furthermore, the criminalisation of activities of indigenous populations, such as hunting and gathering, by the law regulating the implementation of climate-related projects, is a major tool for the state to effect displacement.⁵³ The foregoing constitutes a threat to the key human rights of indigenous peoples, as will be seen below.

2.3 Climate-induced displacement as a threat to human rights

The patterns of displacement discussed above are a threat to the key rights guaranteed to indigenous peoples under the UNDRIP, including other international human rights instruments it accommodates by virtue of its article 1. In the discussion here, considering their direct link to climate conditions occasioning the displacement of indigenous peoples, the emphasis is placed on the rights to self-determination, water, food, housing, environment and health.

Displacement due to the non-viability of land and the implementation of climate-related projects are threats to indigenous peoples' right to self-determination defined in article 4 of the UNDRIP, as including the freedom to pursue their economic, social and cultural development. As further elaborated upon by article 25 of the UNDRIP as part of their right to self-determination, indigenous peoples have the right to secure their cultural and spiritual relationship with their ancestral lands, territories, waters and coastal seas and other resources. In removing indigenous peoples from their land, climatic conditions such as drought, flooding, disrupted rainfall and the criminalisation of their activities while implementing climate response projects disrupt their cultural and spiritual attachment to traditional land, thereby threatening their right to self-determination.

The scarcity of water, drought, flooding and disrupted rainfall are a threat to indigenous peoples' right to water. Although not particularly

analysis of discursive-institutional dynamics' (2014) 35 *Environmental Science and Policy* 40.

- 50 SM Adrien *The DRC case study: The impacts of the carbon sinks of Ibi-Batéké project on the indigenous pygmies of the Democratic Republic of the Congo* (2006) (on file with author).
- 51 'Dialogue between the World Bank and indigenous peoples in Central and East Africa on the Forest Carbon Partnership Facility' Bujumbura, Burundi, 13-14 March 2008 <http://www.ipacc.org.za/en/2008/19-dialogue-between-the-world-bank-and-indigenous-peoples-in-central-and-east-africa-on-the-forest-carbon-partnership-facility-fcfc/file.html> (accessed 5 April 2016).
- 52 E Laltaika 'Indigenous peoples' recent engagement in the REDD process Tanzania' in IWGIA (ed) *REDD and indigenous peoples* (2009) 28-31.
- 53 See eg Tanzania Wildlife Conservation Act (2009) sec 31(6).

mentioned in the UNDRIP, the right to water derives from article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁴ and article 16(1) of the African Charter on the right to health.⁵⁵ That climate change can undermine the right to water may be seen from General Comment 15, when the Committee on Economic, Social and Cultural Rights (ESCR Committee), in delineating states' obligations, urged state parties to adopt strategies and programmes that address climate change as this may hamper the realisation of the right to water.⁵⁶ At the regional level, the African Commission in the *Free Legal Assistance Group* case affirmed that the failure by governments to provide basic services, including safe drinking water, could constitute a violation of article 16.⁵⁷ Displacements associated with drought, flooding and disrupted rainfall arising from climate change and the ineffective implementation of climate-related projects deprive indigenous peoples of access to traditional water sources, thereby constituting a threat to the right to water.

Climatic conditions and climate-related projects that are ineffectively implemented are a threat to the right of indigenous peoples to food. Although not expressly mentioned in the UNDRIP, the right of indigenous peoples to food is covered by the right to subsistence in article 20(1) of the UNDRIP. It is also accommodated under article 11 of the ICESCR. Noting the adverse impact of climate change on the right to food, the ESCR Committee urges state parties to note that the right to food can be adversely affected by climatic and ecological factors.⁵⁸ At the regional level, the African Commission has noted that the eviction of indigenous peoples from their land can hinder their access to food.⁵⁹ Consequently, as demonstrated earlier, a similar outcome can result from occurrences such as environmental degradation, the depletion of forest products, the destruction of plants and animals and traditional fishing and the criminalisation of subsistent activities of indigenous peoples associated with climate change and response measures.⁶⁰ Such occurrences are a threat to their right to food.

In removing indigenous peoples from the territory they have inhabited as their home, displacement arising from the non-viability of land and the ineffective implementation of climate-related projects threatens their right to housing guaranteed under article 21(1) of the

54 International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966.

55 United Nations General Comment 15: The right to water, arts 11 & 12 (2000); *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

56 General Comment 15 para 28; MA Orellana et al *Climate change in the work of the Committee on Economic, Social and Cultural Rights* (2010) 21.

57 *Free Legal Assistance Group* case (n 55 above) para 47.

58 General Comment 12 paras 4 & 7.

59 *Endorois* case (n 13 above).

60 See secs 2(1) and (2) of this article.

UNDRIP, article 11 of the ICESCR and articles 14 and 16 of the African Charter. The interface of the right to housing with climate change has featured in General Comment 4, in which the ESCR Committee urged states to note that the right to adequate housing may be affected adversely by climatic and ecological considerations.⁶¹ General Comment 4 is strengthened by General Comment 7 on the right to housing, which addresses forced evictions as an interference with the right to housing.⁶² At the African regional level, the African Commission noted in Resolution 231 that forced evictions can undermine socio-economic rights.⁶³ In *Sudan Human Rights Organisation & Another v Sudan*,⁶⁴ the Commission held that the state's failure to prevent evictions or to ensure the return of displaced persons to their homes constituted a violation of the right to housing implicit in article 12 of the African Charter. Accordingly, in depriving indigenous peoples of their traditional territories, displacement associated with environmental degradation and the ineffective implementation of climate change response projects constitutes a threat to their right to adequate housing.

Warmer weather increases episodes of malaria,⁶⁵ while the salinisation of land and water resources contributes to degradation.⁶⁶ In exposing them to newer episodes of disease and undermining the integrity of their environment, these conditions constitute a threat to the right to health and environment of indigenous peoples. For instance, illnesses reported among the pastoralists in the Turkana county of Kenya, associated with warmer weather, include increasing episodes of malaria.⁶⁷ The right to health is guaranteed in article 21(1) of the UNDRIP, article 25 of the Universal Declaration of Human Rights (Universal Declaration),⁶⁸ article 12(a) of the ICESCR and article 16(1) of the African Charter. Linking the right to health to the environment, the ESCR Committee in General Comment 14 urges state parties to secure for its population a healthy natural and workplace environment and the right to the prevention, treatment

61 United Nations General Comment 4: The right to adequate housing, art 11(1) of the Covenant 6th session (1991) para 18.

62 United Nations General Comment 7: The right to adequate housing, art 11(1) of the Covenant: Forced evictions 16th session (1997) para 3.

63 Resolution 231 on the right to adequate housing and protection from forced evictions, adopted at the 52nd ordinary session of the African Commission on Human and Peoples' Rights held in Yamoussoukro, Côte d'Ivoire, 9-22 October 2012.

64 (2009) AHRLR 153 (ACHPR 2009) paras 186-190.

65 P Collier et al 'Climate change and Africa' (2008) 24 *Oxford Review of Economic Policy* 337.

66 RDH Bagan et al 'Quantifying the catchment salt balance: An important component of salinity assessments' (2015) 111 *South African Journal of Science* 1.

67 Human Rights Watch 'There is no time left: Climate change, environmental threats, and human rights in Turkana county, Kenya' 15 October 2015 <https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana> (accessed 5 April 2016).

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

and control of diseases.⁶⁹ Article 29(1) of the UNDRIP guarantees the right to conservation and protection of the environment, while article 24 of the African Charter provides for the right to a satisfactory environment. In respect of Nigeria, the ESCR Committee expresses concern over the effect of environmental degradation on the right to health.⁷⁰ Applying article 16(1) of the African Charter in the *SERAC* case the African Commission ruled that environmental depreciation of the region had a negative impact on the right to health.⁷¹ Displacement associated with the non-viability of land and the ineffective implementation of climate-related projects can lead to the exposure of indigenous peoples to diseases that they are not familiar with and, therefore, can undermine their right to health and a healthy environment.⁷²

The foregoing discussion has shown that displacement as a result of the non-viability of land and the ineffective implementation of climate change projects both constitute a threat to the key rights of indigenous peoples. These are the rights to self-determination, water, food, housing, health and a healthy environment. The next question is whether the extraterritorial activities of states in and outside Africa are implicated in climate-induced displacement and a threat to human rights.

3 Displacement as a result of an extraterritorial conduct or omission

Extraterritoriality connotes the exercise of legal power outside territorial borders.⁷³ In relation to the realisation of human rights, particularly socio-economic rights, extraterritoriality encompasses the conduct or omission of a 'state within or beyond its territory that have effects on the enjoyment of human rights outside of that state's territory'.⁷⁴ The displacement of indigenous peoples through the non-viability of land and the ineffective implementation of climate-related projects raises an important issue. The question is whether a state in Africa or beyond can be responsible for the climate-induced displacement of indigenous peoples and its threat to their rights in

69 United Nations General Comment 14: The right to the highest attainable standard of health E/C.12/2000/4 (2000) paras 15 & 16.

70 Concluding Observations of the ESCR Committee, Nigeria E/C.22/1/Add.23, 13 May 1998, para 29.

71 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case) para 52.

72 *Inter-American Court Comunidad Yanomami v Brazil*, decision of 5 March 1985, Case 7615 (*Yanomami* case).

73 AJ Colangelo 'What is extraterritorial jurisdiction?' (2014) 99 *Cornell Law Review* 1302; S Besson 'The extraterritoriality of the European Convention on Human Rights' (2012) 25 *Leiden Journal of International Law* 857.

74 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 1101.

another African state. Arguably, this is possible in two ways: through the conduct or omission of an African state in and outside its territory in Africa; and the conduct or omission of non-African states (developed states) in their territories and in Africa.

3.1 Conduct or omission of an African state in and outside its territory in Africa

African states generate emissions which have implications for climate change and the displacement of indigenous peoples and pose a threat to their rights. The increased emission profile of some states in Africa is characterised by large-scale agriculture, mining, construction and logging which, according to the findings of scientific research, are a substantial driver of climate change.⁷⁵ For instance, South Africa's contribution to the African carbon emission profile is 40 per cent, followed by Egypt at 17 per cent, Algeria at 10 per cent and Nigeria at 7 per cent.⁷⁶ While the impact of these activities is not responsible for the immediate state of the climate,⁷⁷ it can be argued that at such an emission rate, any of these states will contribute to the future worsening of the climate and, by implication, the scenarios underlying the displacement of indigenous peoples and the threat to their rights.

There is evidence indicating that the failure of a state to regulate or influence its non-state actors to implement climate response measures in a manner that prevents displacement and respects rights abroad is a driver of the displacement of indigenous peoples in Africa. For instance, a company based in South Africa, J & J Group Property Limited Pretoria, is involved in the biofuel project associated with the displacement of indigenous peoples in Tanzania.⁷⁸ In this context, there is no direct link between South Africa and the displacement of indigenous peoples. However, this development questions the availability of appropriate legislation in the state to regulate the activities of companies abroad. South Africa is also involved in the conversion of 300 000 to 400 000 hectares of wetland in Southern Benin for the production of palm oil, which is criticised as undermining rights.⁷⁹ The fact that no specific legislative measure is in place to regulate or influence such activities abroad shows how a state

75 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* (2010).

76 Urban Earth South Africa 'Carbon snapshot' 2012 http://urbanearth.co.za/system/files/private/Urban%20Earth_SA%20Carbon%20Snapshot_0.pdf (accessed 27 June 2015).

77 'Climate is the average weather condition at least for 30 years' http://www.ipcc.ch/publications_and_data/ar4/wg2/en/annexessglossary-a-d.html (accessed 23 March 2015).

78 n 42 above.

79 African Biodiversity Network *Agrofuels in Africa: The impacts on land, food and forests* http://www.biofuelwatch.org.uk/docs/ABN_Agro.pdf (accessed 16 August 2015).

in Africa can indirectly be linked to displacement, threatening the rights of indigenous peoples elsewhere in Africa.

3.2 Conduct or omission of developed states in their territories and in Africa

With regard to the causation of climatic change resulting in the displacement of indigenous peoples, the conduct of developed states in their own territories or in support of investments abroad is a driver of climate-induced displacement and its effect on the rights of indigenous peoples. Historically, developed states have been responsible for the current state of the climate which is due to past emissions associated with their economic development path.⁸⁰ At the heart of this development are the investments of actors such as ExxonMobils, Chevron, Western Fuels and the Edison Electric Institute.⁸¹ The emissions generated from these activities are largely responsible for climate change which undermines water resources, food security, natural resource management and biodiversity, human health, settlements and infrastructure, and desertification in Africa.⁸² Since these are factors in the displacement of indigenous peoples, it is logical to link the displacement of indigenous peoples in Africa to the contribution of developed states.

The ineffective implementation of climate response projects in Africa which drives the displacement of indigenous peoples is linked to the omission of developed states to regulate or influence the activities of their non-state actors in Africa. For instance, the involvement of London-based Central African Mining and Exploration Company (CAMEC) in a large bio-ethanol project, called Procan, is not only responsible for dispossession and displacement in Central and Southern Africa,⁸³ but it shows a failure on the part of the United Kingdom (UK) to influence or regulate the activities of its non-state actors abroad. A similar inference may be drawn from the lack of accountability of companies originating from Malaysia, Italy and South Korea, which are involved in land grab for biofuel purposes causing the displacement of communities, including the Bodi, Daasanach, Kara (Karo), Muguji (Kwegu), Mursi and Nyangatom, who live in the Omo Valley in Ethiopia.⁸⁴ Further, Prokon Renewable Energy Solutions and Systems Ltd of Germany, Mitsubishi Corporation of Japan and Sun Biofuel of the UK are involved in the biofuel sectors

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

81 Greenpeace *Dealing in doubt: The climate denial machine v climate science* (2013) 8-13.

82 MI Boko et al 'Africa: Climate change, impacts, adaptation and vulnerability' 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.

83 Cotula et al (n 45 above) 35.

84 Oakland Institute (n 46 above).

in Tanzania which implicate the displacement of indigenous communities from their land,⁸⁵ indicating that these companies are not under any restriction by their home countries to operate in a manner that respects rights abroad. Regarding the implementation of projects under the CDM, evidence from Tanzania indicates that no accountability is assumed by Norway for its Green Resources Limited implementing reforestation activities occasioning displacement.⁸⁶

Overall, the conduct or omission of African states in and outside their territories in Africa and the conduct or omission of non-African states (developed states) in their territories and in Africa are responsible for the displacement of indigenous peoples which undermines rights. The next section considers the basis of the Kampala Convention and how it may be applied extraterritorially to address climate-induced displacement of indigenous peoples in Africa.

4 Extraterritorial application of the Kampala Convention

The extraterritorial application of states' human rights obligations, namely, holding a state responsible for its violation of rights or that of its agents abroad is a topical subject in international human rights discourse.⁸⁷ It is supported by international instruments such as the United Nations Charter,⁸⁸ and the Draft Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission, which require the accountability of a state and other states that aid or assist it in the violation of human rights.⁸⁹ It serves a similar purpose as the 'do no harm' principle of international environmental law, which holds that a state should not allow its territory to be used in a manner that results in injury to another state,⁹⁰ and the principle that states are responsible for the damage caused by their acts or omissions of which they are aware or 'ought to know'.⁹¹ The notion that a state's human rights obligations extend beyond its borders is popularised by the Maastricht Principles on

85 Cotula et al (n 45 above).

86 B Karumbidza & W Menne 'Unclean development mechanism' <http://www.pambazuka.org/en/category/features/67532> (accessed 27 February 2015).

87 As part of the global debate on the subject, see K da Costa *The extraterritorial application of selected human rights treaties* (2013); De Schutter et al (n 74 above) 1084.

88 United Nations *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI art 55(3).

89 International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement 10 (A/56/10), ch iv.e.1 art 16.

90 *Trail Smelter (US/Canada)* (1941) 3 RIAA 1905.

91 *Corfu Channel (UK/Albania)* (1949) ICJ Rep 4, 22.

Extraterritorial Obligations of States (Maastricht Principles).⁹² The urgency for developed states to ensure that rights are respected extraterritorially has featured in the Concluding Observations and General Comments of treaty-monitoring bodies.

In its concluding observations, the ESCR Committee condemns the failure of countries such as China,⁹³ Austria⁹⁴ and Norway⁹⁵ to regulate the activities of state and privately-owned companies abroad. Regarding the specific situation of indigenous peoples in the context of climate change, the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD Committee) are definite on the need for extraterritorial accountability. While examining the report of the UK, the CERD Committee notes that the activities of its transnational corporations are adversely threatening the rights of indigenous peoples to land, health and environment abroad.⁹⁶ General Comment 12 of the ESCR Committee on the right to food affirms that individual and joint responsibility should be assumed by states to provide disaster relief and humanitarian assistance to refugees and IDPs.⁹⁷ General Comment 15 on the right to water calls upon states not only to ensure that their companies and citizens do not interfere with the right to water abroad, but to ensure the provision of adequate water as a form of disaster relief and humanitarian assistance to refugees and IDPs.⁹⁸

At the African regional level, whether a human rights instrument can apply extraterritorially was questioned initially in relation to the African Charter on the basis that the instrument is territorial.⁹⁹ However, new literature has shown that in so far as there is no jurisdictional clause in its provisions, the African Charter can give rise to extraterritorial obligations.¹⁰⁰ In particular, contending that there is

92 *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1\[downloadUid\]=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1[downloadUid]=23) (accessed 30 March 2015) (Maastricht Principles).

93 ESCR Committee Concluding Observations on the second periodic report of China, including Hong Kong, China, and Macao, China, 13 June 2014, E/C.12/CHN/CO/2 para 13.

94 ESCR Committee Concluding Observations on the fourth periodic report of Austria, 20 November 2013, E/C.12/2013/SR.53 & 54 para 12.

95 ESCR Committee Concluding Observations on the fifth periodic report of Norway, 13 December 2013, E/C.12/NOR/CO/5 para 6.

96 UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the eighteenth to twentieth periodic reports of the United Kingdom and Northern Ireland, 1 September 2011, CERD/GBR/CO/18-20 para 29.

97 General Comment 12 para 38.

98 General Comment 15 paras 33-34.

99 C Anyangwe 'Obligations of state parties to the African Charter on Human and Peoples' Rights' (1998) 10 *Arizona Journal of International and Comparative Law* 625.

100 Leading literature on the subject in Africa includes TS Bulto 'Public duties for private wrongs: Regulation of multinationals' in M Gibney & W Vandenhoe (eds) *Litigating transnational human rights obligations: Alternative Judgment* (2014) 239;

no jurisdictional clause in the African Charter limiting the application of rights to the territory of a member state, Bulto concludes that there is '[n]o textual basis to limit the spatial reach of socio-economic rights such as the right to water or correlative state obligations to a state's territorial jurisdiction'.¹⁰¹ Arguably, the Maastricht Principles, Concluding Observations and General Comments relating to extraterritorial obligations apply to the African Charter by virtue of article 60 which allows for reference to human rights instruments other than the African Charter in interpreting its provisions. Therefore, since the Kampala Convention by virtue of articles 20(1) and (2) accommodates the application of the African Charter, one may argue that the Maastricht Principles, Concluding Observations and General Comments relating to extraterritorial obligations are relevant in the extraterritorial application of the Kampala Convention.

4.1 Climate-induced displacement and indigenous peoples' specific provisions as basis

Affirming that displacement can result from climatic conditions, the Kampala Convention defines internal displacement as 'the involuntary or forced movement, evacuation or relocation of persons',¹⁰² and 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'. Also, article 10, which deals with displacement induced by projects, accommodates displacement resulting from ineffectively implemented climate response projects in Africa. As a result, it may be asserted that the Convention is the first international instrument to link climate change to displacement, thus rendering redundant the debate as to whether displacement is linked to climate change.

Although the term 'indigenous peoples' is not used anywhere in the Kampala Convention, it may be concluded from various of its provisions that the instrument speaks to the specific features describing indigenous peoples. The possibility that indigenous communities are included among people affected by climate change is recognised in article 4(5) of the Kampala Convention, which enjoins parties to the Convention to 'protect communities with special attachment to, and dependency, on land due to their particular culture and spiritual values'. In similar vein, the Kampala Convention affirms the need to 'protect individual, collective and cultural properties', and to safeguard areas where IDPs are located from environmental degradation.¹⁰³ Article 11(5) requires states to take

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* 1.

101 Bulto (2011) (n 100 above) 39.

102 Art 1(i) Kampala Convention (n 14 above).

103 Arts 9(2)(i) & (j) Kampala Convention.

measures to 'restore the lands of communities with special dependency and attachment to such lands upon return'. The features emphasised in the foregoing provisions agree with the report of the Working Group which explains special attachment to and use of land, marginalisation and discrimination based on their cultural difference in the description of indigenous peoples.¹⁰⁴ This is consistent with articles 25 and 26 of the UNDRIP which generally safeguard the spiritual and cultural attachment of indigenous peoples to their ancestral lands. These provisions are also in line with the recommendations by the Special Rapporteur on Indigenous Peoples that decisions in relation to the development on indigenous peoples' lands are not taken without genuine and good faith efforts to obtain the free, prior and informed consent of those communities.¹⁰⁵ Accordingly, the inference that may be drawn from these provisions is a legal certainty that the Kampala Convention applies to the climate-induced displacement of indigenous peoples in Africa.

Equally, the evidence that the provisions apply extraterritorially is almost certain. The provisions calling upon states to protect the collective and cultural properties of IDPs,¹⁰⁶ to address environmental degradation in areas of IDPs,¹⁰⁷ and to create and maintain effective registration and personal documentation of IDPs,¹⁰⁸ are unique in that they are expected to be achieved within their jurisdiction or effective control. While the reference to areas under 'their effective control' suggests an extraterritorial reach, its scope is, however, debatable. The question is whether the term refers only to activities in an area under military control or whether it can be interpreted to cover activities of non-state actors abroad. Supporting the former interpretation, a case relating to the invasion of the territory of the DRC¹⁰⁹ demonstrates that extraterritorial application of the African Charter is possible, but appears to limit such interpretation to where a state exercises military control abroad. However, it appears that the interpretation need not be limited to military occupation. Although adjudged inadmissible, in discussing the scope of application of the territorial jurisdiction of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),¹¹⁰ the case of *Bankovic*¹¹¹ is instructive. It recognises that exceptional

104 Working Group of Experts (n 25 above).

105 United Nations General Assembly Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, 22 February 2010 A/HRC/15 para 92.

106 Art 9(2)(i) Kampala Convention (n 14 above).

107 Art 9(2)(j) Kampala Convention.

108 Art 13(1) Kampala Convention.

109 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) paras 79 & 81.

110 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

111 *Bankovic & Others v Belgium & Others* [2001] ECHR 970 para 67.

circumstances, other than the factor of 'military control', may allow for the extraterritorial application of the European Convention.

Therefore, the decision in *Bankovic* is useful to validate the assumption that, where a non-state actor belonging to one state but conducting activities in another state embarks upon climate response projects which results in the internal displacement of indigenous communities from their lands, this should constitute an exceptional circumstance necessitating the accountability of the former state. This is particularly so in the context of the Kampala Convention which in article 3(1)(h) urges state parties to ensure the accountability of non-state actors, which include multinational companies, for their involvement in displacement. This reasoning is supported by the Concluding Observations and General Comments of international monitoring bodies, particularly the CERD Committee, which affirms that the rights of indigenous peoples should be protected extraterritorially¹¹² as applicable under article 61 of the African Charter and, by implication, articles 20(1) and (2) of the Kampala Convention. It is reinforced by Resolution 157 of the African Commission which calls for the inclusion of indigenous peoples in climate-related actions and instruments.¹¹³

4.2 Applying obligations capable of extraterritorial interpretation

The Kampala Convention provides for the obligations of different stakeholders in internal displacement. The obligations of state parties with regard to protection from internal displacement and protection and assistance are set out in articles 4, 5 and 9 respectively. The obligations with regard to displacement induced by projects, sustainable return and relocation and compensation are set out in articles 10, 11 and 12 respectively. Article 6 deals with obligations relating to international organisations and humanitarian agencies, while article 8 deals with obligations of the African Union (AU). These obligations are generally couched without specifying jurisdiction, which is not unintended: Where the contrary is intended, the Kampala Convention is specific. For instance, the obligation to provide humanitarian assistance and protection in article 5(1) is territorial in the sense that it is limited to the IDPs in their territory or jurisdiction.¹¹⁴ These obligations, arguably, apply extraterritorially in addressing the climate-induced displacement of indigenous peoples by states in and outside Africa.

4.2.1 Obligations applicable among states in Africa

The Kampala Convention is unique in that the above provisions relating to different actors on the subject of displacement are situated in the context of states' obligations to respect, protect, fulfil and

112 CERD Committee (n 96 above).

113 Resolution 153 (n 17 above).

114 Art 5(1) Kampala Convention (n 14 above).

promote rights.¹¹⁵ These obligations may be substantiated by the jurisprudence of the African Commission and the Maastricht Principles. The jurisprudence of the Commission in the *SERAC* case¹¹⁶ sets out four tiers of obligations, namely, the obligations to respect, protect, fulfil and promote rights. Furthermore, as mentioned earlier, the Maastricht Principles are important in motivating the Kampala Convention by virtue of article 61 of the African Charter. Using the jurisprudence of the African Commission and the Maastricht Principles as a guide, the extraterritorial application of the Kampala Convention may be advanced.

According to the African Commission, the obligation to respect connotes that states should not interfere in the enjoyment of rights of collective groups.¹¹⁷ According to the Maastricht Principles, the extraterritorial obligation to respect requires states to refrain from direct conduct which may hinder the realisation of rights outside their territories.¹¹⁸ The Kampala Convention has provisions which may be used to ensure the obligation to 'respect' the rights of indigenous peoples in the context of climate-induced displacement. These include provisions which call on state parties to 'refrain from, prohibit and prevent arbitrary displacement of populations'.¹¹⁹ In the context of climate-induced displacement and indigenous peoples, the extraterritorial obligation to 'respect' signifies that no state in Africa should, by itself or through its agents, be involved in climate response projects which may bring about the displacement of indigenous communities in another African state. It connotes that where involvement in such projects is inevitable, the rights of indigenous communities should not in the process be compromised. Accordingly, a state involved in biofuel projects or other climate-related initiatives, such as REDD+ and CDM, which occasions displacement and undermines the rights of indigenous peoples in another state, contradicts the obligation to respect under the Kampala Convention.

In discussing the obligation to protect, the African Commission enjoins states to adopt measures, including legislation, and to provide effective remedies for the protection of rights holders 'against political, economic and social interferences' and to regulate non-state actors to ensure that their operations do not hinder the realisation of rights.¹²⁰ The Maastricht Principles explain the 'obligation to protect' as requiring that states should adopt appropriate measures to ensure that their non-state actors do not hamper the realisation of rights abroad. Where they cannot regulate their conduct, they should influence the conduct of non-state actors and co-operate to ensure

115 Preamble Kampala Convention.

116 *SERAC* case (n 71 above).

117 *SERAC* case para 45.

118 Maastricht Principles (n 92 above) Principles 20-22; De Schutter et al (n 74 above) 1126-1133.

119 Arts 3(1)(a), (d) & 4(1) Kampala Convention (n 14 above).

120 *SERAC* case (n 71 above) para 46.

that rights are not impeded extraterritorially by non-state actors. This mode of protection involves the creation of an appropriate atmosphere and framework through a mix of laws and regulations so that beneficiaries of rights can achieve their rights.¹²¹ The Kampala Convention requires states to formulate regulation and to ensure the accountability of non-state actors.¹²² The displacement of indigenous peoples by climate-related activities of a state or its agents in another state shows that participating non-state actors from a state in Africa operating in another African state are not necessarily subject to any law in their home country requiring them to respect rights abroad. Such failure is in breach of the obligation to protect which African states owe to one another under the Kampala Convention.

The obligation to 'fulfil', according to the African Commission, requires states to mobilise 'its machinery towards the actual realisation of the rights'.¹²³ It entails the provision of 'basic needs such as food or resources that can be used for food'.¹²⁴ According to the Maastricht Principles, the extraterritorial implication of the obligation to 'fulfil' involves the co-ordination and allocation of responsibilities, the use of maximum abilities and resources, co-operation, request and response to international assistance and co-operation.¹²⁵ The Kampala Convention urges state parties to make available, as far as possible, the necessary funds for protecting IDPs without prejudice to international support.¹²⁶ The assistance includes the provision of food, water, shelter and medical care for the necessary protection of IDPs.¹²⁷ The urgency of assistance in the context of a harsh environmental situation is discussed by the Indian Supreme Court in *Peoples' Union for Civil Liberties v Union of India*.¹²⁸ In that case, the Supreme Court of India was approached for relief when several states in India faced an acute drought. The Court ordered that 'food is provided to the aged, disabled, destitute, women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children'.¹²⁹ Indirectly, the non-viability of land underlying the displacement of indigenous peoples reflects inadequate assistance or the failure by a state to seek assistance and/or to co-operate, a situation which contradicts the extraterritorial obligation to fulfil the rights of indigenous peoples displaced by climate change.

121 Maastricht Principles (n 92 above) Principles 24-27; De Schutter et al (n 74 above) 1133-1145.

122 Arts 3(1)(i), 3(2)(a) & 14(4) Kampala Convention (n 14 above).

123 *SERAC* case (n 71 above) para 47.

124 As above.

125 Maastricht Principles (n 92 above) Principles 29-35; De Schutter et al (n 74 above) 1145-1159.

126 Art 3(2)(d) Kampala Convention (n 14 above).

127 Art 9(2)(b) Kampala Convention.

128 (Civil) 196 of 2001 (SC).

129 As above.

The African Commission explains the obligation to promote the enjoyment of all human rights as entailing that state parties should ensure 'that individuals are able to exercise their rights, for example, by promoting tolerance, raising awareness, and even building infrastructures'.¹³⁰ Its extraterritorial connotation is explained by the Maastricht Principles to include the observance of principles such as informed participation¹³¹ and impact assessment.¹³² This obligation is evident in the provisions of the Kampala Convention that aim at promoting sustainable livelihood among IDPs,¹³³ and ensuring the protection of communities culturally and spiritually dependent on lands.¹³⁴ Further, it is exemplified by the Kampala Convention which provides for consultation and participation of IDPs in decision making,¹³⁵ and the socio-economic and environmental impact assessment of projects related to development.¹³⁶ While these provisions generally relate to IDPs, is not difficult to imagine that it serves the purpose of indigenous peoples, considering its similarity with indigenous peoples' rights regime.¹³⁷ Therefore, interpreting the extraterritorial obligation to promote under the Kampala Convention implies that a state sourcing non-state actors operating in another state in Africa should encourage such actors to embark on programmes and activities which strengthen and do not undermine the cultural distinctiveness of indigenous peoples abroad. To act otherwise is to be in breach of the obligation to promote rights under the Kampala Convention.

Overall, in respect of the foregoing extraterritorial obligations, indigenous peoples should be able to lodge complaints against the state whose extraterritorial conduct or omission underlies climate-induced displacement before the African Commission or African Court, provided the article 34(6) requirement of the African Court Protocol has been made.¹³⁸ This is in accordance with article 20(3) of the Kampala Convention, which allows an IDP to lodge a complaint before the African Commission or Court, as appropriate.

4.2.2 Obligations applicable to developed states outside Africa

States outside Africa are not bound by the Kampala Convention in that they are not parties to the instrument. Hence, the discussion of

130 *SERAC* case (n 71 above) para 46.

131 Maastricht Principles (n 92 above) Principle 7.

132 Maastricht Principles (n 92 above) Principle 14.

133 Art 3(1)(k) Kampala Convention (n 14 above).

134 Art 4(5) Kampala Convention.

135 Arts 10(2) & 9(2)(l) Kampala Convention.

136 Art 10(3) Kampala Convention.

137 See UNDRIP arts 15, 17, 30, 36 & 38 dealing with consultation and consent; *Anaya's Botswana Report* (n 105 above).

138 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in Addis Ababa, Ethiopia on 10 June 1998, entered into force on 25 January 2004.

their obligations cannot be articulated by using the framework of the extraterritorial obligation to respect, protect, fulfil and promote rights under the Kampala Convention. For the same reason, indigenous peoples displaced by climate change cannot litigate under the instrument against states outside Africa. However, there are provisions in the instrument which justify a proposition that developed states can indirectly be accountable for their extraterritorial conduct or omission underlying the climate-induced displacement of indigenous peoples in Africa. The specific provisions fall under the obligations of the AU to 'co-ordinate mobilisation of international resources for the assistance and protection of IDPs'.¹³⁹ The fulfilment of this role entails 'collaboration with international organisations and humanitarian agencies, civil society organisations and other relevant actors' to support concerned state parties.¹⁴⁰ The AU is also tasked with co-operating with African states and other actors for the protection of and assistance to IDPs.¹⁴¹ The fact that these provisions highlight the relevance of 'international organisations and humanitarian agencies, civil society organisations and other actors', without limiting this to Africa, suggests that the reach for international support for IDPs extends beyond Africa.¹⁴² This construction is supported by the Maastricht Principles, which recognise the role of international assistance and co-operation of organisations and humanitarian agencies, civil society organisations and other actors.¹⁴³

In the context of indigenous peoples displaced by climate change, there are grounds to expect that the request and response to such assistance extend to developed states outside Africa. Developed states listed under the UNFCCC and Kyoto Protocol already have a commitment to provide different forms of assistance, including the promotion, facilitation and provision of finances and appropriate technology, practices and processes to address the adverse effect of climate change in developing states, including Africa.¹⁴⁴ An important platform to negotiate and harvest the commitment under the UNFCCC is the Conference of Parties (COP), which is made up of state parties and acts as the main forum of elaborating the climate change regime.¹⁴⁵ Since states in Africa participate in the discussion

139 Art 8(3)(b) Kampala Convention (n 14 above).

140 Art 8(3)(c) Kampala Convention.

141 Art 8(3)(d) Kampala Convention.

142 International organisations in developed countries, according to *The Economist*, deliver more aid than the UN system; see *The Economist* 'The non-governmental order' 11 December 1999 20; also see E Ferris 'Faith-based and secular humanitarian organisations' (2005) 87 *International Review of the Red Cross* 1.

143 De Schutter et al (n 74 above) 1104.

144 Art 4(1)(b) UNFCCC; Arts 10(c) & 11(2)(a)(b) Kyoto Protocol (n 21 above).

145 Art 7 UNFCCC; D Bodansky 'International law and the design of a climate change regime' in U Luterbacher & DF Sprinz (eds) *International relations and global climate change* (2001) 201 213.

at the COP as a group,¹⁴⁶ in line with its obligations under the Kampala Convention, it is logical to expect the AU to use this medium to mobilise international resources for the assistance and resources required to address the climate-related displacement of indigenous peoples. By doing so, the AU will be aligning developed states outside Africa with the obligations under the Kampala Convention.

Where the AU fails to perform the role above, it is debatable whether indigenous peoples affected by climate-induced displacement can hold it accountable before the African Commission or African Court. In *Femi Falana v African Union*,¹⁴⁷ the Court held that an individual complaint against the AU by a non-state entity and state party that has not made a declaration pursuant to 34(6) of the African Court Protocol is impossible. In its analysis, the Court relied on article 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations¹⁴⁸ to hold that 'as far as an international organisation is not a party to a treaty, it cannot be subject to legal obligations arising from that treaty'.¹⁴⁹

However, it is doubtful whether the above reasoning will apply to the application of the Kampala Convention. There are grounds to infer that the *Falana* case can be distinguished and that, unlike the African Charter and the African Court Protocol, the AU can be accountable under the Kampala Convention. First, the Court in the *Falana* case expressed itself on the African Charter and the Court Protocol which have no specific provision on AU obligations, but not on the Kampala Convention in which obligations for the AU are clearly set out. Second, it is clear that in respect of the AU obligations, relief may be sought by complainants by virtue of article 20(3) of the Kampala Convention which saves the right to lodge complaints, a provision which suggests that since the AU enjoys the legal capacity to act, a complaint can be lodged against it. Third, if applied without distinction, the position of the African Court in the *Falana* case, that the AU cannot answer for its conduct except if it is a party to an instrument of its member states,¹⁵⁰ will render the AU obligations under the Kampala Convention non-justiciable. This is because it signifies that in so far as the AU remains a non-party to the Kampala Convention, no complaint in relation to its obligations under the instrument can successfully be lodged before the African Commission or African Court. Arguably, such a legal consequence is inconsistent

146 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 Application 001/2011, judgment delivered on 26 June 2012.

148 United Nations Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 12 March 1986.

149 *Falana* case (n 147 above) para 71.

150 *Falana* case para 71; also see the separate opinion of Judge Fatsah Ouguergouz, para 32.

with article 20(2) of the Kampala Convention which provides that no provision of the instrument should be interpreted in a manner that restricts the rights of IDPs. It is incompatible with a fundamental objective of the Kampala Convention as articulated in article 2(e), which requires relevant actors, including the AU, to prevent internal displacement and to protect and assist IDPs. As a result, the fact that the AU is not a party or cannot make the article 34(6) declaration of the Protocol should not constitute a bar to lodging a complaint before the African Commission and the African Court by indigenous peoples displaced by climate change in respect of the specific AU obligations arising from the Kampala Convention.

5 Conclusion

Due to the non-viability of their land due to climate change and the ineffective implementation of climate-related projects, there is a link between climate change and the displacement of indigenous peoples in Africa. The displacement of indigenous peoples has implications for a range of their rights, mainly the rights to self-determination, water, food, housing, environment and health. As has been shown above, the extraterritorial conduct or omission of states in and outside Africa in causing climate change and the ineffective implementation of climate response projects may be implicated in the displacement of indigenous communities and threats to their rights. Established to address internal displacement in Africa, the Kampala Convention incorporates the African Charter and has provisions which can be motivated by the Maastricht Principles to apply extraterritorially in protecting indigenous peoples under the risk of climate-induced displacement and resultant threat to their rights in Africa.

The basis for this, as the article has demonstrated, is that the Kampala Convention speaks to the specific features and issues of indigenous peoples challenged by displacement due to climate-related extraterritorial activities of states in and outside Africa. Its obligations to respect, protect, fulfil and promote apply to states in Africa where the conduct or omission of one state occasions the displacement of indigenous peoples in another state. While states outside Africa are not parties to the Convention and are not bound by its provisions or accountable before its complaints mechanism, the AU can, in fulfilling its obligations to mobilise international assistance, engage in the UNFCCC COP platform to render assistance required by indigenous peoples displaced by climate-related conditions and, thereby, ensure the indirect accountability of developed states. Where the AU fails its obligations under the Kampala Convention, indigenous people should be able, as it has been argued, to lodge a complaint before the African Commission or African Court, as the case may be.