

ARTICLE

Property Rights and Participation in REDD +: The Case of Mozambique

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Abstract

Reducing emissions from deforestation and forest degradation with the help of the emerging REDD+ mechanism provides an opportunity to combine climate protection with biodiversity conservation and poverty alleviation. However, one of the crucial questions is how the rights of indigenous peoples and local communities will be protected in REDD+ implementation. This article depicts the challenges involved in protecting the rights of local communities in the case of Mozambique. The study finds that constraints regarding property and participation rights arise, in particular, from incomplete procedures of delimitation and titling, corruption, lack of rights awareness, lack of democratic structures within the community or poor infrastructure. Because many states with a REDD+ potential are not able to guarantee sufficient rights protection, the REDD+ mechanism itself needs to be endowed with strong safeguards for the rights of indigenous peoples and local communities.

Keywords: REDD+, Land Tenure, Participation, Local Communities, Mozambique

1. INTRODUCTION

The so-called ‘REDD+ mechanism’ (Reducing Emissions from Deforestation and Forest Degradation plus nature conservation, sustainable forest management and the enhancement of carbon in forests in developing countries) aims to protect forests in their function as carbon stocks by giving carbon an economic value. Industrialized countries, as well as other donors from the developed world, compensate developing countries and emerging economies for reductions in forest emissions. According to the Intergovernmental Panel on Climate Change (IPCC), the forestry sector is the third largest source of greenhouse gas emissions after the energy supply and industry sectors.¹

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¹ IPCC, ‘Climate Change 2007: Synthesis Report’, 2007, available at: http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

Worldwide, 13 million hectares of forests are being converted to other uses or are lost through natural causes every year.² Forests do not only store carbon,³ but are also estimated to provide a habitat for more than half of the terrestrial animal and plant species (a great majority of which are in the tropics).⁴ Tropical forests also accommodate the majority of the world's indigenous cultures.⁵ There are a variety of factors, individually or combined, that cause the loss of tropical forests. These vary in diverse geographical and historical contexts and their respective contribution and interaction have still not been understood correctly.⁶ More generally speaking, the increasing demands for agricultural products stemming from the urban population in the tropics and from international markets can be seen to be a major driver.⁷ Other important factors are also, for instance, logging,⁸ and – to a lesser extent – the extraction of fuel wood.⁹ There are also several other circumstances that facilitate the loss of tropical forests such as weak law enforcement, corruption and development efforts supported by state policies.¹⁰ REDD+ was mentioned in the legally non-binding Copenhagen Accord.¹¹ The 16th Conference of the Parties (COP16) to the United Nations Framework Conference on Climate Change (UNFCCC)¹²

² Food and Agriculture Organization of the United Nations (FAO), 'Global Forest Resources Assessment – Key Findings', 2010, at p. 3, available at: <http://www.fao.org/forestry/fra/fra2010/en>.

³ E.g., S.L. Lewis *et al.*, 'Increasing Carbon Storage in Intact African Tropical Forests' (2009) 457(7232) *Nature*, pp. 1003–U1003.

⁴ Secretariat of the Convention on Biological Diversity (CBD), 'Global Biodiversity Outlook 3' (CBD: 2010), at p. 32, available at: <http://www.cbd.int/iyb/doc/prints/gbo3-final-en.pdf>.

⁵ A. Grainger *et al.*, 'Biodiversity and REDD at Copenhagen' (2009) 19(21) *Current Biology*, pp. 974–6, at 974. See also T.H. Ricketts *et al.*, 'Indigenous Lands, Protected Areas, and Slowing Climate Change' (2010) 8(3) *PLoS Biology*, pp. 1–4, at 1.

⁶ H.J. Geist & E.F. Lambin, 'Proximate Causes and Underlying Driving Forces of Tropical Deforestation' (2002) 52(2) *BioScience*, pp. 143–50; A. Grainger, 'Difficulties in Tracking the Long-Term Global Trend in Tropical Forest Area' (2008) 105(2) *Proceedings of the National Academy of Sciences of the United States of America*, pp. 818–23; J. Eliasch, *Climate Change: Financing Global Forests – The Eliasch Review* (The Stationery Office, 2008), pp. 35–6.

⁷ R.S. DeFries *et al.*, 'Deforestation Driven by Urban Population Growth and Agricultural Trade in the Twenty-First Century' (2010) 3(3) *Nature Geoscience*, pp.178–81; D. Nepstad *et al.*, 'The End of Deforestation in the Brazilian Amazon' (2009) 326 *Science*, pp. 1350–1, at 1350; T.K. Rudel *et al.*, 'Changing Drivers of Deforestation and New Opportunities for Conservation' (2009) 23(6) *Conservation Biology*, pp. 1396–405, at 1397. The range of the use of agricultural products reaches from food and feed, via natural renewable resources for the industry, to energetic use of biomass. One reason for the increase in the demand for agricultural products is the growing world population, which will probably reach 9 billion in 2050. On the other hand, dietary habits are changing and include more land-intensive produced meat and dairy products. Climate change and energy security aspects have led to the promotion of biomass as a source of energy. With the decrease in oil reservoirs, industry is looking for alternative raw materials: see J. Douglas & M. Simula, *The Future of the World's Forests: Ideas vs Ideologies* (Springer, 2010), at p. 84.

⁸ Douglas & Simula, *ibid.*, at p. 96; H.J. Geist & E.F. Lambin, *What Drives Tropical Deforestation?* (LUCC, 2001), at p. 44.

⁹ Douglas & Simula, *ibid.*, pp. 145–6; N. Rüger *et al.*, 'Long-Term Impacts of Fuelwood Extraction on a Tropical Montane Cloud Forest' (2008) 11 *Ecosystems*, pp. 868–81, at 877; Douglas & Simula, *n. 7* above, at p. 95.

¹⁰ M. Kanninen *et al.*, *Do Trees Grow on Money? The Implications of Deforestation Research for Policies to Promote REDD* (Center for International Forestry Research, 2007), at pp. 21–3; C.P. Hansen, J.F. Lund & T. Treue, 'Neither Fast, Nor Easy: The Prospect of Reduced Emissions from Deforestation and Degradation (REDD) in Ghana' (2009) 11(4) *International Forestry Review*, pp. 439–55, at 444–5.

¹¹ Paras. 6 and 10 of the Copenhagen Accord, Decision 2/CP.15, FCCC/CP/2009/11/Add.1, 18 Dec. 2009, available at: <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>.

¹² New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <http://unfccc.int>.

in Cancún, Mexico, agreed upon a phased approach, starting with the development of national strategies.¹³ A number of open questions to REDD+ are left to be resolved, one of them being the respect for the rights of indigenous peoples and local communities.¹⁴ However, it is expected that a consensus in the form of a legally binding framework for the REDD+ mechanisms will be achieved in the next COP meetings.

Literature indicates that most deforestation and forest degradation is driven by factors that are exogenous to communities.¹⁵ In contrast, a number of case studies suggest that forests managed by local communities tend to have a higher level of sustainability than areas which are managed by the government alone.¹⁶ However, in the first place the REDD+ mechanism does not aim to reward current sustainable forest management practices, and legal rules regarding the forest will have effects on local communities.¹⁷ There are opportunities and threats for local communities associated with REDD+. The risks include the following:

- restriction of access to forests for subsistence and income generation needs;
- intended REDD benefits confined to elites;¹⁸
- state ownership of forests;¹⁹
- violations of customary land, even in the form of physical displacement from forests, and harsh enforcement measures;
- an increase in the value of forested land, which, in the context of poorly defined property rights and inadequate participation of relevant stakeholders, is likely to further marginalize the poorest of the poor;²⁰ and
- recentralization of forest governance.²¹

¹³ Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, Decision 1/CP.16, FCCC/CP/2010/7/Add.1, 11 Dec. 2010, Sec. III.C, available at: <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

¹⁴ Other questions are, e.g., how to distribute the funds between forest nations: cf. J. Phelps *et al.*, 'What Makes a "REDD" Country?' (2010) 20(2) *Global Environmental Change*, pp. 322–32, at 332; C. Okereke & K. Dooley, 'Principles of Justice in Proposals and Policy Approaches to Avoided Deforestation: Towards a Post-Kyoto Climate Agreement' (2009) 20(1) *Global Environmental Change*, pp. 82–95, at 84. Another point is that incentives need to be high enough to compete with other land use options: M.U. Persson & C. Azar, 'Preserving the World's Tropical Forests: A Price on Carbon May Not Do' (2010) 44(1) *Environmental Science and Technology*, pp. 210–5, at 214.

¹⁵ Kanninen *et al.*, n. 10 above, at pp. 17–9.

¹⁶ Secretariat of the CBD, n. 4 above, at pp. 40–1; Phelps *et al.*, n. 14 above, at p. 324; M.M. Skutsch & L. Ba, 'Crediting Carbon in Dry Forests: The Potential for Community Forest Management in West Africa' (2010) 12(4) *Forest Policy and Economics*, pp. 264–70, at 269; A. Chhatre & A. Agrawal, 'Trade-offs and Synergies between Carbon Storage and Livelihood Benefits from Forest Commons' (2009) 106(42) *Proceedings of the National Academy of Sciences of the United States of America*, pp. 17667–70, at 17669; D. Murdiyoso & M.M. Skutsch (eds.), *Community Forest Management as a Carbon Mitigation Option: Case Studies* (Center for International Forestry Research, 2006), at pp. 4–6.

¹⁷ Douglas & Simula, n. 7 above, at p. 182.

¹⁸ Indigenous peoples and local communities may be unable to participate in conservation payment programmes because of a lack of property rights (to forests or forest carbon), lack of information, lack of legal protection, high implementation and transaction costs, or because historical contributions to conservation render them ineligible.

¹⁹ Okereke & Dooley, n. 14 above, at p. 93.

²⁰ *Ibid.*, at p. 91; L. Alden Wily, 'Custom and Commonage in Africa: Rethinking the Orthodoxies' (2008) 25(1) *Land Use Policy*, pp. 43–52, at 47.

²¹ J. Phelps, E.L. Webb & A. Agrawal, 'Does REDD+ Threaten to Recentralize Forest Governance?' (2010) 328(5976) *Science*, pp. 312–3; C. Sandbrook *et al.*, 'Carbon, Forests and the REDD Paradox' (2010) 44(03) *Oryx: The International Journal of Conservation*, pp. 330–4, at 332.

The following are potential opportunities arising from REDD+:

- synergies between climate protection, biodiversity conservation and poverty alleviation;
- maintenance of the ecosystem services of forests (for example, in the provision of food, firewood and medicine, as well as flood control and disease prevention);
- new income streams for forest-dependent people;
- generation of revenue that governments could direct to social services in rural areas (such as for health care centres, schools, and water systems); and
- incentive for governments to recognize and formalize land tenure.²²

These opportunities and threats apply also to forest-dependent communities in Mozambique. Located in the eastern part of southern Africa, more than half of the country is covered by a semi-arid savannah woodland formation (the Miombo woodlands).²³ Up to 80% of the estimated 23 million inhabitants live in local communities in forest-dependent areas. Mozambique is number 172 of the 182 countries considered in the 2009 United Nations (UN) Development Programme (UNDP) Human Development Index.²⁴ Deforestation is a serious problem, especially in the surrounding area of the major urban centres, since most urban households use charcoal for cooking and heating.²⁵ Other important drivers of deforestation are shifting cultivation and permanent agriculture. Recently, there has also been considerable investment in the production of biofuels for the international market in Mozambique.²⁶ Illegal and unsustainable logging of precious African hardwood is an important factor contributing to forest degradation.²⁷ The deforestation rate in Mozambique was

²² For opportunities and challenges in detail, see K. Lawlor & D. Huberman, 'Reduced Emissions from Deforestation and Forest Degradation (REDD) and Human Rights', in J. Campese, T. Sunderland, T. Greiber & G. Oviedo (eds.), *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation* (CIFOR & IUCN, 2009), pp. 269–86, at 271–2.

²³ C.J. Geldenhuys & J.S. Golding, 'Resource Use Activities, Conservation and Management of Natural Resources of African Savannas', in F.G. Faleiro & A.L. de Farias Neto (eds.), *Savannas: Desafios estratégicos para o equilíbrio entre sociedade, agronegócio e recurso naturais* (Embrapa, 2008), pp. 225–60, at 230; Global Forest Coalition (GFC), *REDD Realities* (GFC, 2009), at p. 53, with reference to Mozambican National Forest Inventory: Inventário Florestal Nacional, National Directorate of Lands and Forests (DNTF), Maputo, 2008. Miombo forests have a lower wood carbon storage per hectare than humid forests, but because they cover such extensive areas, their overall contribution is considered to be quite high: see P.A. Dewees *et al.*, 'Managing the Miombo Woodlands of Southern Africa: Policies, Incentives and Options for the Rural Poor' (2010) 2(1) *Journal of Natural Resources Policy Research*, pp. 57–73, at 67.

²⁴ Available at: <http://hdr.undp.org/en/statistics>.

²⁵ A. Salomão & F. Matose, 'Towards Community-Based Forest Management of Miombo Woodlands in Mozambique', available at: <http://www.cifor.cgiar.org/miombo/docs/CBNRMMozambique1207.pdf>.

²⁶ L. Di Lucia, 'External Governance and the EU Policy for Sustainable Biofuels: The Case of Mozambique' (2010) 38(11) *Energy Policy* pp. 7395–403, at 7397; I. Nhantumbo & A. Salomão, *Biofuels, Land Access and Rural Livelihoods in Mozambique* (International Institute for Environment and Development (IIED), 2010), at p. 7.

²⁷ V. Ribeiro, 'An Overview of the Problems Faced by Mozambique's Forests, Forest-Dependent Peoples and Forest Workers', at p. 4, available at: <http://www.wrm.org.uy/countries/Mozambique.html>; C. Mackenzie, *Forest Governance in Zambia, Mozambique: Chinese Takeaway!* (Fongza, 2006), at pp. 73–4, available at: http://www.illegal-logging.info/uploads/Mozambique_China.pdf.

estimated to be 0.58 %.²⁸ In a matrix with four categories of developing countries based on forest cover and recent deforestation,²⁹ Mozambique has to be classified as a country with high forest cover (>50%) and a high deforestation rate (>0.22% annually). Mozambique is one of the countries within the World Bank's Forest Carbon Partnership Facility (FCPF)³⁰ and a national REDD+ strategy is already being developed. In addition, Mozambique has two ongoing carbon forestry payments for environmental services (PES) projects with REDD+ components and other activities are being prepared.³¹

2. HUMAN RIGHTS AND REDD+

Because of links to rights, livelihoods and well-being, the rights of indigenous peoples and local communities are of particular interest in the REDD+ discussion and have been a contentious issue in the COP negotiations. Within the framework for REDD+ governance these rights need to be secured with safeguards. Given previous experience with the Kyoto Protocol's³² Clean Development Mechanism (CDM), a REDD+ mechanism should include mandated (rather than voluntary) applications of social and environmental safeguards and co-benefits.³³ Safeguards within REDD+ could be fixed at the international or national level. One argument against the statutory basis in national law is the wide differences between national and sectoral land-use policies and regulations and their implementation. Safeguards in international law could guarantee a certain level of equal preconditions of implementation in all participating countries. There are two options in favour of this: direct consideration within a REDD+ mechanism under the UNFCCC³⁴ or other international instruments such as international human rights instruments, voluntary standards, and civil society advisory boards.³⁵ One may argue that the option of safeguards within the international climate regime may infringe national sovereignty. However, the vast majority of states are

²⁸ S. Wertz-Kanounnikoff, A. Siteo & A. Salomão, *How is REDD+ Unfolding in Southern Africa's Dry Forests? A Snapshot from Mozambique* (CIFOR, 2011), at p. 2, with reference to A. Marzoli, *Inventário Florestal Nacional, Avaliação Integrada das Florestas de Moçambique* (DNTF, Ministry of Agriculture, Maputo, 2007).

²⁹ C. Parker, A. Mitchell, N. Mardas & K. Sosis, *The Little REDD+ Book* (Global Canopy Foundation, 2009), p. 28.

³⁰ A list of REDD Country Participants is available at: <http://www.forestcarbonpartnership.org/fcp/Node/19>.

³¹ Wertz-Kanounnikoff, Siteo & Salomão, n. 28 above, at p. 4.

³² Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: http://unfccc.int/kyoto_protocol/items/2830.php.

³³ Art. 12 of the Kyoto Protocol does not include safeguards concerning rights of indigenous peoples and local communities. This has resulted in adverse effects on the rights of indigenous peoples and local communities of some CDM projects, e.g., through controversial large-scale plantations: see Phelps *et al.*, n. 14 above, at p. 323.

³⁴ N. 12 above.

³⁵ Meridian Institute, *Reducing Emissions from Deforestation and Forest Degradation (REDD): An Options Assessment Report* (Meridian Institute, 2009), at pp. 25–7.

party to both the climate treaties and human rights treaties.³⁶ As such, they are obliged to approach climate change not just as a global environmental problem, but also as a human rights concern.³⁷ The option of direct consideration within the REDD+ mechanism is expressed by the safeguards that have so far been included in the two existing REDD+ documents that provide for:

- respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws; and
- full and effective participation of relevant stakeholders.³⁸

Although this is a start, in its current state these safeguards are so abstract and vague that they hardly provide a basis for proper implementation. The mechanisms for compliance control are also deficient. Decision 1/CP.16, made in Cancún in 2010, obliges states only to establish a ‘system for providing information on how the safeguards . . . are being addressed and respected throughout the implementation of the activities . . . , while respecting sovereignty’.³⁹ In contrast, the draft text for Cancún had demanded ‘[a] robust and transparent national forest monitoring system for the monitoring and reporting’,⁴⁰ but this demand was lowered during the negotiations. In sum, the protection of the rights of indigenous peoples and local communities within the REDD+ mechanism has to be characterized as insufficient.

The other option for protecting the rights of indigenous peoples and local communities, mentioned above, are international instruments, such as international human rights instruments, voluntary standards, and civil society advisory boards. If, and the extent to which, indigenous peoples and local communities can rely on human rights instruments for the protection of their rights, in particular property and participation rights, will be analyzed in this article. There are some international treaties which are relevant to the protection of rights of indigenous peoples and a few that also cover the rights of local communities.⁴¹ For the rights of local communities, the International Covenant on Civil and Political Rights (ICCPR)⁴² and the International Covenant on

³⁶ There are 166 parties to the ICCPR (n. 42 below), 160 to the ICESCR (n. 43 below), 194 to the UNFCCC (n. 12 above), and 190 to the Kyoto Protocol (n. 32 above).

³⁷ L. Rajamani, ‘The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change’ (2010) 22(3) *Journal of Environmental Law*, pp. 391–429, at 412.

³⁸ Annex G, para. 2 lit. (c)–(d) of the Report of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention on its Eighth Session, Copenhagen (Denmark), 7–15 Dec. 2009, UN Doc. FCCC/AWG/LCA/2009/17, 5 Feb. 2010, available at: <http://unfccc.int/resource/docs/2009/awglca8/eng/17.pdf>; and Appendix I, para. 2 lit. (c)–(d); Decision 1/CP.16, n. 13 above.

³⁹ Decision 1/CP.16, n. 13 above, no. 71.d.

⁴⁰ Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention in Copenhagen, UN Doc. FCCC/CP/2010/2, 11 Feb 2010, Annex V, para. 5(c), available at: <http://unfccc.int/resource/docs/2010/cop16/eng/02.pdf>.

⁴¹ For a more comprehensive overview on the relevant international law, see R. Lyster, ‘REDD+, Transparency, Participation and Resource Rights: The Role of Law’ (2011) 14(2) *Environmental Science & Policy*, pp. 118–26, at 119–20.

⁴² New York, NY (US), 16 Dec. 1966, in force 23 Mar 1976, available at: <http://www2.ohchr.org/english/law/ccpr.htm>.

Economic, Social and Cultural Rights (ICESCR)⁴³ are the most prominent, as well as the legally non-binding Universal Declaration on Human Rights (UDHR).⁴⁴ Another binding treaty is the Rio Declaration on Environment and Development.⁴⁵ Human rights are also granted by regional international law, such as the Council of Europe (COE) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁴⁶ the American Convention on Human Rights (ACHR),⁴⁷ and the African Charter on Human and Peoples' Rights (ACHPR).⁴⁸

Examples of those treaties that specifically protect the rights of indigenous peoples are the UN Declaration on the Rights of Indigenous Peoples (DECRIPS),⁴⁹ the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,⁵⁰ and the International Labour Organization's (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.⁵¹ For instance, Article 8(2)(b) DECRIPS obliges states to prevent any action which has the effect of dispossessing indigenous peoples of their lands, territories and resources. Before adopting and implementing legislative or administrative measures that may affect indigenous peoples, states are to consult and cooperate in order to obtain their free, prior and informed consent (Article 19 DECRIPS). Special provisions applicable to indigenous peoples are also part of the ICESCR and the ICCPR: the second sentences of Article 1(2) ICESCR and Article 1(2) ICCPR state: 'In no case may a people be deprived of its own means of subsistence.' Article 27 ICCPR grants a right to culture and livelihood:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

However, in the African context, the rights of local communities are more relevant than the rights of indigenous peoples. The term 'indigenous peoples' originally had referred to forest-dependent people in South America and is generally not applied

⁴³ New York, NY (US), 16 Dec. 1966, in force 3 Jan. 1976, available at: <http://www2.ohchr.org/english/law/cescr.htm>.

⁴⁴ New York, NY (US), 10 Dec. 1948, GA Res. 217 A (III), UN Doc. A/810, 71, available at: <http://www.un.org/en/documents/udhr>.

⁴⁵ UN Conference on Environment and Development, Rio de Janeiro (Brazil), 13 June 1992, UN Doc. A/CONF. 151/26 (vol.1), Annex 1, available at: <http://www.un.org/documents/ga/conf151/aconf15126-1.htm>.

⁴⁶ Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953. The 1st Protocol was adopted 20 Mar. 1952, in force 18 May 1954. Both are available at: <http://conventions.coe.int>

⁴⁷ San José (Costa Rica), 22 Nov. 1969, in force 18 July 1978, available at: <http://www.cidh.org/basicos/English/Basic3.American%20Convention.htm>.

⁴⁸ Banjul (Gambia), 27 June 1981, in force 21 Oct. 1986, available at: http://www.achpr.org/english/_info/charter_en.html.

⁴⁹ UN Doc. A/RES/61/295, 13 Sept. 2007, available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

⁵⁰ UN Doc. A/RES/47/135, 18 Dec. 1992, available at: <http://www2.ohchr.org/english/law/minorities.htm>.

⁵¹ ILO Convention No. 169, Geneva (Switzerland), 27 June 1989, in force 5 Sep. 1991, available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

to people in Africa.⁵² There is no overall accepted definition of ‘indigenous peoples’, but the most commonly recognized features are:

Descent from original inhabitants of a region prior to the arrival of settlers who have since become the dominant population; maintenance of cultural differences, distinct from a dominant population; and political marginality resulting in poverty, limited access to services, and absence of protections against unwanted ‘development’.⁵³

In general, the dominant population in Africa is descended from the original inhabitants, so that the definition usually does not apply in the African context. Although some attempts have been made by African communities to claim the title ‘indigenous people’ in a strict sense, all Africans are indigenous to Africa.⁵⁴ Therefore, this article refers to forest-dependent people in Mozambique only as the ‘local community’. This term is normally used in a broad sense to refer to a group of interacting people living in a common location. The special rules for indigenous peoples will only be touched upon in this examination. This applies also to the rights of minorities – for example, as stated in Article 27 ICCPR – because local communities in Mozambique form up to 80% of the population and are therefore part of the majority society.

3. THE RIGHT TO PROPERTY

Land tenure has been denominated as the starting point for REDD+.⁵⁵ Indeed, the question of land and resource rights is closely linked with the social impacts of an instrument. The distribution of tenure may be an expression of unequal power relations between different stakeholders. Hence, the guarantee of land and resource tenure for forest-dependent people within REDD+ decides to a large extent if the mechanism will indeed contribute to poverty alleviation. Beyond that, property rights over land and resources are the first premise for the legitimacy of REDD+. However, there is no binding human rights standard that protects the right to property on the international level. The right to property is neither part of the ICCPR nor the ICESCR. Thus, the UDHR is the only internationally applicable document with references to the right to property. But the UDHR was not adopted as a legally binding human rights document. Meanwhile, there are considerations as to whether the UDHR can be seen as legally binding either as part of customary international law, as part of the general principles

⁵² G. Lynch, ‘Kenya’s New Indigenous: Negotiating Local Identities in a Global Context’ (2011) 17(1) *Nations and Nationalism*, pp. 148–67, at 156–7; M. Pelican, ‘Umstrittene Rechte indigener Völker: das Beispiel der Mbororo in Nordwestkamerun (Contested Indigenous Rights: The Case of the Mbororo in Northwest Cameroon)’ (2010) 135(1) *Zeitschrift für Ethnologie*, pp. 39–60, at 41–2.

⁵³ R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003), at p. 19.

⁵⁴ African Commission on Human and People’s Rights (ACHPR), *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities* (ACHPR & International Work Group for Indigenous Affairs, 2005), at p. 86.

⁵⁵ L. Cotula & J. Mayers, *Tenure in REDD: Start-Point or Afterthought?* (IIED, 2009); Global Forest Coalition, n. 23 above, at p. 85.

of law, or indeed by virtue of interpretation of the UN Charter itself by subsequent practice,⁵⁶ but this is not supported by the majority opinion at present. In any case, for the protection of the right to property we can rely on regional human rights treaties, namely Article 1 of the First Protocol of the ECHR, Article 21 ACHR, or Article 14 ACHPR. This regional international law binds the majority of the REDD+ donor as well as recipient countries.

Although human rights treaties have their bases in the legal framework of Western countries, it is recognized today that the right to property not only protects individual but also customary forms of property, like community property in lands.⁵⁷ The scope of the right to property in lands comprehends the recognition of property in lands, resources and business interests, recognition of customary types of ownership of lands and resources linked to the lands, demarcation and legal title, and expropriation only with compensation. With the REDD+ debate, the question of ownership has arisen with regard to the carbon stored in forests. The international human rights instruments are, in principle, open to include these. However, because every form of property needs to be defined by law, national legislation on carbon rights is necessary to make this concept applicable in practice.⁵⁸

3.1. *Land and Resource Tenure: The Legal Position in Mozambique*

In Mozambique there are limits to the recognition by law of communities' property rights with respect to land and forest resources and also constraints relating to implementation and awareness of rights. Since the independence of Mozambique in 1975, property on land has been vested in the state (Article 98 of the Constitution⁵⁹ and Article 3 of the Land Law⁶⁰). The Land Law regulates the acquisition of use and benefits rights, which can be based on occupancy, custom or the administrative granting of a title. The *Direito de Uso e Aproveitamento da Terra* (DUAT), which is

⁵⁶ Cf. for the discussion, M.N. Shaw (ed.), *International Law* (Cambridge University Press, 6th edn, 2008), 279; I. Brownlie, *Principles of Public International Law* (Oxford University Press, 1998), at p. 574; T.R.G. Banning, *The Human Right to Property* (Intersentia, 2001), at p. 58.

⁵⁷ Cf. Inter-American Court of Human Rights cases involving Art. 21 of the ACHR: *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 Aug. 2001; *Case of the Indigenous Community Yakye Axa v. Paraguay*, Judgment of 17 June 2005; and *Saramaka People v. Suriname*, Judgment of 28 Nov. 2007, all available at: <http://www.oas.org/en/iachr/decisions/archive.asp>. In the *Mayagna* case the court found that the state must obtain consent from indigenous communities for activities on lands they have historically occupied and that the state must enact procedures to grant these communities legal title to their lands in order to uphold the right to property. In the *Saramaka* case the same court found that Art. 21 indicates the right of the Saramaka people to property. It was further found that this right requires the state to grant them legal title to their customary lands. However, the state may still restrict the 'use of property in circumstances that are defined by law and that are proportionate to the achievement of a legitimate objective'.

⁵⁸ There are a few states that have already recognized carbon sequestration rights as separate from the property in trees or the forest. For the example of Australia cf. Lyster, n. 41 above, at p. 123. See also D. Takacs, *Forest Carbon: Law and Property Rights* (Conservation International, 2009), at pp. 21–3.

⁵⁹ Constituição da República de Moçambique 2004, English version available at: http://confinder.richmond.edu/admin/docs/Constitution_%28in_force_21_01_05%29%28English%29-Mozlegal.pdf.

⁶⁰ Government of Mozambique 1997, Lei de Terra 19/97. English translation available at: <http://faolex.fao.org/docs/pdf/moz15369E.pdf>.

a land use and usufruct right, is currently Mozambique's single form of right of land tenure. It is inheritable (Article 16(1) of the Land Law), but may be transferred only in the special case of urban tenements (Article 16(4) of the Land Law). The DUAT may not be mortgaged.⁶¹ According to Article 12(a) of the Land Law individuals and communities have the DUAT to the land they have occupied in accordance with customary norms and practices which do not contradict the Constitution. The accrual of the DUAT in terms of sub-paragraph (a) of Article 12 does not depend on titling (Article 13(3) of the Land Law).

The assignment of full property rights over land to the state can be explained by Mozambique's socialist past. However, there have been attempts to amend the Constitution of Mozambique and the Land Law in order to allow the assignment of full property rights over lands to private persons and local communities; these attempts have not been successful. The restriction on the right to property over lands inevitably involves decision-making by the state administration, which endows public servants with an immense power – foremost in the expanding cities – which they may also use to their own advantage. This may be one explanation for the continuing constricted legal position.

Questions of forest tenure are dealt with by the Law of Forests and Wildlife⁶² and its regulations.⁶³ Forests in Mozambique are administered by the state, as was the case with 97.9% of forests in Africa from 2002 to 2008.⁶⁴ The DUAT for the communities includes the right to use forest resources in a very limited way. According to Articles 9 and 1(9) of the Forest and Wildlife Law, local communities have the right to use forest and wildlife resources for their own consumption in a subsistence economy without any commercial interest, when this is done respecting local norms and practices. With regard to the use of forest and wildlife resources for commercial purposes, the title holder of the DUAT requires a licence and a management plan (Article 9 and Articles 14 and further of the Forest and Wildlife Law). The complex licensing requirements – including proof of the technical capacity to harvest, transport and process the resources – make it extremely difficult for local communities to access forest resources for commercial use.⁶⁵

To summarize, Mozambican law (in the form of the DUAT) grants only a limited right to the property of lands for the community. The DUAT is, for instance, not transferrable. It includes the right to use forest resources and wildlife resources only for own consumption. For commercial use, the community needs a licence which is – as

⁶¹ The titleholder of the right of land use and benefit may mortgage the immovable assets and improvements which he or she has duly been authorized to make on the land, or over which he or she has legally acquired a right of ownership: Art. 16(5) Land Law.

⁶² Lei de Florestas e Fauna Bravia 1999, Law No. 10/99, available at: http://www.legisambiente.gov.mz/index.php?option=com_docman&task=doc_details&gid=37&Itemid=39.

⁶³ Available at: http://www.legisambiente.gov.mz/index.php?option=com_docman&task=cat_view&gid=14&Itemid=39.

⁶⁴ Rights and Resources Initiative (RRI) & International Tropical Timber Organization (ITTO), *Tropical Forest Tenure Assessment: Trends, Challenges and Opportunities* (RRI & ITTO, 2009), at p. 16. The study accounts for 84% of African tropical forests.

⁶⁵ Salomão & Matose, n. 25 above, at p. 13.

a result of complex licensing requirements – extremely difficult to acquire. Beyond that, the legal nature of rights on carbon stored in forests and their ownership has not yet been defined in Mozambique. This will be necessary to ensure the implementation of REDD+.

3.2. *Constraints Stemming from the Interpretation of Property Rights*

As we have seen, property rights to lands and forest resources are quite restricted in their legal design. However, beyond these constraints local communities in Mozambique are confronted with a restricted interpretation of the property rights granted by the law. In order to understand these constraints we have to go back a few steps in history. The concept of human rights was developed from the older notion of natural rights and the modern understanding of natural rights evolved in the European struggle to legitimate its overseas empires.⁶⁶ As far as property was concerned, natural rights included the right to appropriate ‘vacant’ lands by using them,⁶⁷ which was understood as fencing and cultivating.⁶⁸ Traditional systems of ownership of local communities in developing countries are usually based on common ownership. Holding occupation to be necessary, the common use of areas for hunting and fishing, land lying fallow, shifting cultivation, pasture land, forests and savannahs providing fuel wood, food and medicine, and ritual places did not fulfil the level of occupation required by the colonial powers. The colonial authorities did not recognize that the area as a whole was owned by the community. The result was that African landowners, who had been settling in the areas and using the lands for generations, were left landless.⁶⁹

One has to keep this historical background in mind when reading Article 12(a) of the Mozambican Land Law. This provision could be understood in a way that the land ‘occupied by the communities in accordance with customary norms and practices which do not contradict the Constitution’ also includes the areas mentioned above for hunting, fishing, shifting cultivation, collection of fuel wood, and so on. Because local communities are scattered across the entire country, as a consequence in practice it would follow that virtually all land in rural areas in Mozambique would be under the DUAT of local communities. However, Article 13(3) of the Land Law suggests that ‘occupation’ in the sense of Article 12(a) means ‘occupation’ in the described Western sense, which only comprises cultivated and fenced lands. Article 13(3) of the Land Law refers to potential conflicts between the community and applicants for the DUAT from outside, and states: ‘The application for a title to the right of land use and benefit shall include a statement by the local administrative authorities, preceded by consultation with the respective communities, for the purpose of confirming that the area is free and

⁶⁶ A. Pagden, ‘Human Rights, Natural Rights, and Europe’s Imperial Legacy’ (2003) 31(2) *Political Theory*, pp. 171–99.

⁶⁷ *Ibid.*, at p. 182.

⁶⁸ D. Damler, *Wildes Recht: Zur Pathogenese des Effektivitätsprinzips in der neuzeitlichen Eigentumslehre (Wild Law: About the Pathogenesis of the Principle of Effectiveness in the Doctrine of Property Rights of the Modern Age)* (Dunker & Humblot, 2010), at p. 12.

⁶⁹ Alden Wily, n. 20 above, at p. 44.

has no occupants.’ This rule is not based on the assumption that the DUAT for the entire territory of the Mozambican state is in the hands of local communities. In fact, the perception of the legislator is that there are some community assets, but the majority of the lands are not traditionally occupied by communities. In this respect, communities have to be consulted when allocating a DUAT to an investor, but the Land Law does not even assign the right of veto to the communities. In understanding the Law, such consultation literally serves the purpose ‘of confirming that the area is free and has no occupants’, and that is what usually happens in community consultations. The result of the consultation is thus pre-determined by the law and degrades consultation to a mere provision of information to the community. Furthermore, the result of the consultation is not directly incorporated into the titling procedure. Rather, the statement by the local administrative authorities in the titling procedure is preceded by the community consultation.

The result in practice is that consultations are often insufficient,⁷⁰ and are characterized as a ‘fairly routine cooption of local leaders by investors to approve their applications when acquiring customary lands’.⁷¹ It was found that consultations were used by executive agencies to provide a cosmetic screen for land grabbing.⁷² This is supported by the following figures. By the end of 2004, there were some 10,000 or more approved investor applications over sometimes vast expanses of communal property, while only 180 communities had managed to demarcate their claimed domains.⁷³

3.3. Demarcation and Titling

A land title is not necessary for the local community to possess the DUAT, although it would reinforce the community with a stronger legal position against the state and foreign investors. As illustrated in the previous section, community property rights may easily be ignored as long as the physical limits of the assets are not clear. If the title is assigned to the community owner of the lands in common property, the danger that they will be bought out by investors is lower compared to the position where single forest dwellers are bestowed a title.⁷⁴ Vast parts of Mozambique are still not

⁷⁰ Global Forest Coalition, n. 23 above, at p. 56; 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(4) *Journal of Peasant Studies*, pp. 899–916, at 909; Nhantumbo & Salomão, n. 25 above, at pp. 31–2.

⁷¹ L. Alden Wily, ‘Land Rights Reform and Governance in Africa: How to Make it Work in the 21st Century’, UNDP Discussion Paper, Feb. 2006, at p. 31, available at: http://knowledgebase.terrafrica.org/fileadmin/user_upload/terrafrica/docs/Land_Rights_Reform_and_Gov_in_Africa.pdf.

⁷² C. Serra & C. Tanner, ‘Legal Empowerment to Secure and Use Land and Resource Rights in Mozambique’, in L. Cotula & P. Mathieu (eds.), *Legal Empowerment in Practice: Using Legal Tools to Secure Land Rights in Africa* (IIED & FAO, 2008), pp. 61–70, at 61.

⁷³ Alden Wily, n. 71 above, at p. 32.

⁷⁴ L. Barrera-Hernández, ‘Got Title, Will Sell: Indigenous Rights to Land in Chile and Argentina’, in A. McHarg *et al.* (eds.), *Property and the Law in Energy and Natural Resources* (Oxford University Press, 2010), pp. 185–209, at 208.

delimited. Demarcating the land and titling land rights is a time-consuming process.⁷⁵ One of the reasons for this is that very limited public resources are allocated to the community and occupation aspects of the Land Law, whereas most attention is being given to facilitating and recording DUATs awarded by the state to investors and others who are not eligible via the occupation routes. The result is a cadastre that is very incomplete, containing mainly information on a very small percentage of all the land rights recognized by law.⁷⁶ In practice, delimitation is only undertaken where non-governmental organization funds or other external facilitation and funds are available.⁷⁷ Another aspect is that the precise boundaries of the customarily owned territories are often ambiguous if they are not distinguished by a river or road. Knowledge of the exact limit of the assets of the domains of another community is usually not necessary; it only starts to be of interest for delimitation and land titling exercises and then may raise contention.

3.4. *Awareness of Rights*

Local communities in Mozambique have an extremely low level of awareness and knowledge about their legal rights.⁷⁸ Even when they have a notion about their rights, they have very little idea of what they can do with their rights in practice, and what they can do if their rights are threatened or ignored.⁷⁹ Case studies have shown that most rural people still think of land as belonging to the state, and that they are therefore relatively powerless when their property rights are threatened.⁸⁰ This fact probably has its roots in the prevalent notion about the distribution of property between the communities and the state according to the restricted interpretation of 'occupation' described in Section 3.2 above. When faced with public agents intervening or apparently acting on behalf of investors, members of local communities are easily manipulated. Another aspect is that authorities of the post-colonial state continue to be managed by an administrative and technical cadre that has been trained and habituated in top-down management processes.⁸¹ It was found that remaining outside a government-backed land system is a priority for many small-scale property

⁷⁵ The Forest Carbon Partnership Facility (FCPF), Readiness Plan Idea Note (R-PIN) submitted by Mozambique on 15 Dec. 2008, at p. 6, available at: http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Mozambique_R-PIN_Revised_Feb_2009.pdf.

⁷⁶ S. Norfolk & C. Tanner, *Improving Tenure Security for the Rural Poor: Mozambique Country Case Study* (FAO, Support to the Legal Empowerment of the Poor, 2007), at p. vii. See also Alden Wily, n. 71 above, at p. 28: 'Mozambique does not practice what it preaches, giving investor interests in customary lands more support than customary interests.'

⁷⁷ Alden Wily, *ibid.*, at pp. 31–2.

⁷⁸ FCPF, n. 75 above. Serra & Tanner, n. 72 above, at p. 63.

⁷⁹ Global Forest Coalition, n. 23 above, at p. 56; Serra & Tanner, n. 72 above, at p. 61; Norfolk & Tanner, n. 76 above, at p. 31.

⁸⁰ Norfolk & Tanner, *ibid.*, at p. 31.

⁸¹ *Ibid.*, at p. xi; C. Tanner *et al.*, *Making Rights a Reality: Participation in Practice and Lessons Learned in Mozambique* (FAO, LSP Working Paper 27, 2006), at p. 24.

rights holders in Africa. Anonymity offers a certain degree of protection from the demands of government or elements with the governments.⁸²

4. ACCESS TO INFORMATION AND PARTICIPATION

As a prerequisite to exercise the right to property, access to information and effective participation in decisions and measures regarding lands and resources are necessary. The statutory basis for information and participation rights is found in various human rights treaties. The right to information, for instance, is founded in Article 19(2) ICCPR, the right to participation in Article 25 ICCPR. Both are granted by Principle 10 of the Rio Declaration on Environment and Development, the second sentence of which states:

At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including . . . activities in their communities, and the opportunity to participate in decision-making processes.

The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)⁸³ is also applicable in this case. It is regional international law, signed with the UN Economic Commission for Europe (UNECE), and as such binds most of the donor states in the REDD+ mechanism. Articles 9 and 13 of the ACHPR⁸⁴ make up regional international law for the African states and should also be mentioned.

The right of access to information means that holders of rights and stakeholders need timely access to appropriate and accurate information about intentions and the scope of decisions and measures. In the REDD+ context, these decisions and measures include land-use zoning, reform of property rights, questions of benefit distribution, and the management of forest carbon revenues. ‘Participation’ is a process that facilitates and negotiates the identification of priorities between different groups and stakeholders at the local level. These groups will have different perspectives and a well-facilitated process could assist in reaching consensus and in resolving conflicts, both existing and potential. Because decisions regarding REDD+ are made at the international, national, regional and local levels, participation in principle has to be ensured at all of these levels.⁸⁵

For indigenous peoples, a special form of participation exists, which is the free, prior and informed consent (FPIC). It is not only a rule for process, but it combines processes and outcomes. It is required, for instance, by Article 16 of the 1989 ILO

⁸² J.D. Unruh, ‘Carbon Sequestration in Africa: The Land Tenure Problem’ (2008) 18(4) *Global Environmental Change*, pp. 700–7, at 702.

⁸³ Aarhus (Denmark), 25 June 1998, in force 30 Oct. 2001, available at: <http://www.unece.org/env/pp/welcome.html>.

⁸⁴ N. 48 above.

⁸⁵ With regard to participation in REDD+, cf. in detail E. Morgera, ‘Participation, Balancing of Rights and Interests, and Prior Informed Consent’, in J. Costenbader (ed.), *Legal Frameworks for REDD Design and Implementation at the National Level* (IUCN, 2009), pp. 35–56, at 49–53.

Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries⁸⁶ or by Article 10 of DECRIPS.⁸⁷ The FPIC is a collective right of peoples and not a human right guaranteed to all individuals; it requires a consensual agreement to be sought without coercion or manipulation. It has to be made sufficiently in advance of any authorization of activities and based on full and comprehensive information relating to the proposed project and its likely impacts. The community's internal collective decision-making processes and authority or representative structure need to be respected. When it is not possible to achieve the consent of the indigenous people concerned, the project cannot be realized.

4.1. *Definition of 'Community' and 'Structures' Within the Community*

For the question of who is going to be represented in decision-making processes, as a first step it has to be clear who belongs to the community, which is not always the case. In Mozambique, membership of a community is not determined by settling in a certain area, but by links with a local leader. Local communities are not homogeneous and are usually not structured in a democratic way. As a result of internal information policies, information may not reach every community member and it is possible that only the most visible and powerful members of the community receive information.⁸⁸ Thus, it is not sufficient to disseminate information to the community leaders; rather, all community members must be envisaged.⁸⁹ As a result of scattered settlement, this may turn out to be a considerable cost factor.

Another question is who is going to represent the community in REDD+ administrative bodies at the regional level. In the Land Law context, Decree 15/2000 has assigned a range of functions of the state to 'local authorities'. These are identified by the community following tradition: a process in which democratic rules are less important.⁹⁰ When implementing REDD+, one needs to keep in mind that treating communities as homogeneous and as units organized in a democratic way can reinforce existing power inequalities.⁹¹ Projects that advocate 'participation' and focus on the role of the identified community representatives can be sowing the seeds for new local elites to emerge, and the de facto freezing of deeper and wider forms of local participation in the long run.⁹²

A special question in this context is the representation of women. Traditionally, the majority of women do not have a significant influence on the decision-making processes of the community. The potential adverse effect of REDD+ on women,

⁸⁶ N. 51 above.

⁸⁷ N. 49 above.

⁸⁸ 'Community participation' must not end up at the community leader: cf. H.M. Kyed, *State Recognition of Traditional Authority: Authority, Citizenship and State Formation in Rural Post-War in Kenya* (PhD Dissertation, Roskilde University, 2007), at p. 363, available at: http://www.diis.dk/graphics/_Staff/hmk/HeleneKyed_Dissertation_State%20recognition%20of%20traditional%20Authority.pdf.

⁸⁹ Regarding access to information on REDD+, see also Morgera, n. 85 above, at p. 49.

⁹⁰ Own observations; Tanner *et al.*, n. 81 above, at p. 54.

⁹¹ M. Hobley, *Where in the World is There Pro-Poor Forest Policy and Tenure Reform?* (Rights and Resources, 2007), at p. 27, available at: http://www.rightsandresources.org/documents/files/doc_658.pdf.

⁹² Tanner *et al.*, n. 81 above, at p. 67.

especially when they are not invited to participate in design, implementation, monitoring and evaluation, has already been pointed out.⁹³

4.2. *Practical Constraints: Language, Identity Cards, Transport*

Mozambique encompasses a multiplicity of languages, which correspond to several ethnic groups that are acknowledged.⁹⁴ Portuguese is the official and most widely spoken language of the nation, but only 40% of the population speak it, most of them as a second language.⁹⁵ The right of access to information, if applied in a meaningful way, will make the translation of all relevant documents into local languages necessary. Low literacy rates demand an extensive oral dissemination, using the local language. Furthermore, there may be a low rate of birth registration and identity cards may not be held by all community members. The REDD+ mechanism has to ensure that members who do not possess an identity card are not excluded from the right to be representative of the community.⁹⁶

Challenges also arise from the representation mechanism itself – namely the costs of transport to meetings of the regional REDD+ administrative body, the language spoken during the meetings, and the pace of the process. Normally, in forest regions the population density is not that high; meetings of REDD+ administrative bodies may be held long distances away from the community, and the transport of the representatives to the meetings has to be ensured. The high cost of transport is one reason for widespread concerns that REDD+ will increase the costs to forest-dependent peoples.⁹⁷ In terms of language, competent interpretation must be provided at meetings if representatives do not have sufficient knowledge of the language used during the meeting and, in some cases, competent interpreters may not be available. As for the pace of consultation and decision-making processes, the meetings should allow for serious, open and profound discussions on a just mechanism also in regions with a lower level of education. It has to be ensured that there is sufficient time for the independent analysis of governmental proposals as well as feedback from the representative to the community and vice versa.

4.3. *Information on REDD+ in Mozambique*

In sum, there are many constraints to overcome and it will be anything but easy to ensure appropriate access to information and the participation of local communities

⁹³ Global Forest Coalition, n. 23 above, at p. 78; F. Seymour, 'Forests, Climate Change and Human Rights: Managing Risks and Trade-Offs', in S. Humphreys (ed.), *Human Rights and Climate Change* (Cambridge University Press, 2010), pp. 207–37, at 216.

⁹⁴ Numbers vary between 20 and over 40: R.M.M. Cumbane, *Mozambique: Language Situation* (Elsevier, 2006); M.P. Lewis (ed.), *Ethnologue: Languages of the World* (Ethnologue, 2009), 16th edn, online version, available at: http://www.ethnologue.com/show_country.asp?name=Mozambique.

⁹⁵ Cumbane, *ibid.*, at p. 359.

⁹⁶ Norfolk & Tanner, n. 76 above, at pp. 27–8, illustrate a case where the lack of ID cards was a constraint in the delimitation and land titling process.

⁹⁷ Phelps *et al.*, n. 14 above, at p. 326.

within the REDD+ process. These findings concur with experiences made in the initial process of REDD+ implementation in Mozambique. Limited access to local information from government institutions was recorded; repeated requests and even meetings did not lead to any results, and it was very difficult to obtain official interviews. Most of the Mozambican population had never even heard of REDD+. The understanding of REDD+ was found to verge on the non-existent – even those working on the REDD+ process, and were therefore presumed to understand the general concept, appeared to have little information.⁹⁸

5. ACCESS TO JUSTICE

Land titling, awareness of rights, access to information and participation cannot contribute to the real involvement of local communities if there is no tangible chance of realizing and defending rights. Access to justice is granted by Article 7 ACHPR and by Article 9 Aarhus Convention, as well as by Principle 10 of the Rio Declaration. The right to legal access encompasses the existence of grievance mechanisms, a court system and the right and opportunity to take legal action.

Mozambique has not yet established a National Commission for Human Rights.⁹⁹ The opportunity to exercise access to justice through the state court system is, for most Mozambicans, limited by a range of obstacles. Physical access to courts is particularly restricted for citizens located in districts far from urban areas or provincial capitals. In the context of the immense distances within Mozambique (the country's coastline has a length of almost 2,500 kilometres), compounded by a very poor transport network, the distance that citizens need to cover to get to courts is in many cases prohibitive. Even within districts, the distances between settlements and the main village in which the court is located can be up to 100 kilometres.¹⁰⁰ Access to courts is also limited by high fees which, for the average citizen, are prohibitively expensive. The same applies to the cost of legal advice.¹⁰¹

Other obstacles for legal protection are an extremely low awareness of, and knowledge about, rights,¹⁰² corruption within tribunals, delay in court proceedings and a lack of respect for and enforcement of court decisions.¹⁰³ In fact, political power is still seen as the real basis of decision-making,¹⁰⁴ which results in little trust in the judicial system. Case studies have shown that communities perceive judges and prosecutors to be part of the state apparatus and on the side of those wanting their land. Cases are usually brought before the district administration; they jump certain administrative steps, and end up

⁹⁸ Global Forest Coalition, n. 23 above, at pp. 54–5.

⁹⁹ See <http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx>.

¹⁰⁰ Own observations; Open Society Initiative for Southern Africa (OSiFS), *Mozambique – Justice Sector and the Rule of Law* (OSiFS Africa, 2006), at p. 123.

¹⁰¹ *Ibid.*, at pp. 123–4.

¹⁰² Own observations; cf. also Section 3.4 above.

¹⁰³ OSiFS Africa, n. 100 above, at pp. 125–6 and 135.

¹⁰⁴ Norfolk & Tanner, n. 76 above, at p. 31; Serra & Tanner, n. 72 above, at p. 64.

with the provincial governor.¹⁰⁵ Administrators and politicians assume a judicial role, applying their own interpretations of laws that they do not fully understand, while public officials and civil servants in general violate the basic constitutional principles on an almost daily basis. In order to guarantee meaningful access to grievance procedures, the REDD+ mechanism cannot rely on the state court system. The consequence is that the mechanism itself has to provide for a sufficient system for handling grievances.

6. DISCUSSION

As the case study has shown, local communities in Mozambique have, at best, a weak tenure over land and forest resources,¹⁰⁶ with many constraints regarding access to information, participation and legal access. Regarding the protection of property rights, the following constraints have been identified:

- a weak legal guarantee of land rights and a restricted interpretation of the Land Law;
- a low degree of awareness of rights; and
- incomplete delimitation and titling processes.

The state administration tends to hinder rather than promote the protection of property rights of local communities. The rights of members of local communities to access information and participation encounters practical constraints such as different local languages, a lack of identity cards, remote forest areas, scattered communities, poor infrastructure, as well as a lack of awareness of rights and the absence of democratic structures within the local community. Community consultations provided for by the Land Law in the past were far from sufficient, serving as a cosmetic screen for land grabbing. People willing to defend their property and participation rights are faced with a poor judicial system with long distances to the courts, prohibitively high fees for tribunals and legal advice, corruption within tribunals, delays in court proceedings, and a lack of respect for the enforcement of court decisions. In summary, because of the insufficient recognition of property rights, limited opportunities for participation and very limited legal access, Mozambique cannot yet be characterized as a 'REDD country'.¹⁰⁷

In the same way as local communities in Mozambique, a large but unknown number of the estimated 800 million members of local communities and indigenous peoples living in forests worldwide have weak land and forest tenure, insufficient involvement in decision-making and inadequate opportunities to take legal action.

¹⁰⁵ Norfolk & Tanner, *ibid.*, at p. 31.

¹⁰⁶ With the same conclusion: I. Bond *et al.*, *REDD+ in Dryland Forests: Issues and Prospects for Pro-Poor REDD in the Miombo Woodlands of Southern Africa* (IIED, 2010), at p. 24.

¹⁰⁷ The term was shaped by Phelps *et al.*, n. 14 above, and comprises – besides carbon storage in forests – a quality forest governance and the protection of rights of forest-dependent people. With regard to forest governance, it was pointed out that Mozambique has serious problems, which are linked in the first place with corruption: Mackenzie, n. 27 above, at p. 71, for Zambézia Province.

It was found that only about 25% of Readiness Preparation Proposals (R-PP) and National Programme Documents (NDP) within the UN-REDD programme linked land reform and tenure to their REDD+ strategy.¹⁰⁸ In a critical analysis of a number of R-PPs submitted to the Forest Carbon Partnership Facility it was held that, although the World Bank has expressed the view that recognition of tenure rights is crucial to effective REDD+ implementation, this view is not reflected in the R-PPs.¹⁰⁹

Tropical forest regions are usually remote, sparsely populated and difficult to access, providing the ideal grounds for corruption in the forest sector,¹¹⁰ but not for the facilitation of information access, community participation and the defence of human rights. On the other hand, the REDD+ mechanism is very complex, demanding strong efforts in terms of involving people with a lower level of education as a result of limited access to the educational system in their regions. Therefore, tremendous endeavours need to be undertaken in terms of civic education and capacity-building in order to implement REDD+ in a way that respects the rights of indigenous peoples and local communities. In developing participatory policies, one has to be aware of the fact that communities are normally not organized in a democratic way and therefore community participation could have a negative impact, particularly for poorer and marginalized groups within a community.

Therefore, REDD+ will only contribute to poverty alleviation – and not worsen poverty – if the REDD+ mechanism itself is endowed with strong safeguards regarding the protection of property rights, access to information and participation, and should also provide for an effective grievance mechanism to guarantee access to justice for the local population. This will significantly increase the costs of implementing REDD+,¹¹¹ but it is the only way to secure the legitimacy of REDD+. Anything other than full engagement from the communities will only serve to open up opportunities for private gains of those administering the process. Large amounts of money flowing into countries that do not sustain appropriate and functioning institutions ‘may exacerbate corruption and scupper the intentions of the scheme’.¹¹² Without the establishment of basic rules of

¹⁰⁸ M. Simula, *Analysis of REDD+ Financing Gaps and Overlaps* (REDD+ Partnership, 2010), at p. 58.

¹⁰⁹ K. Dooley *et al.*, *Smoke and Mirrors: A Critical Assessment of the Forest Carbon Partnership Facility (FERN and Forest Peoples Programme, 2011)*, at p. 16. For more references, see L. Westholm *et al.*, *REDD+ and Tenure: A Review of the Latest Developments in Research, Implementation and Debate* (Focali, 2011), at p. 14. Cf. also C. Davis *et al.*, *A Review of 25 Readiness Plan Ideas: Notes from the World Bank Forest Carbon Partnership Facility* (WRI Working Paper, 2009), at p. 2.

¹¹⁰ M.L. Brown, ‘Limiting Corrupt Incentives in a Global REDD Regime’ (2010) 37(1) *Ecology Law Quarterly*, pp. 237–68, at 254. Not surprisingly, developing countries highly dependent on forest resources, and thus in the first line of potential countries eligible for REDD+ funds, are among the most corrupt countries in the world: N. Kishor & R. Damania, ‘Crime and Justice in the Garden of Eden: Improving Governance and Reducing Corruption in the Forestry Sector’, in J.E. Campos & S. Pradhan (eds.), *The Many Faces of Corruption: Tracking Vulnerabilities at the Sector Level* (World Bank, 2007), pp. 89–114, at 90.

¹¹¹ E.g., the costs of information and participation in the form of free, prior and informed consent for the implementation of REDD+ in the 40 provinces in Viet Nam were estimated to be US\$14 million: T. Boyle, *Application of Free Prior Informed Consent in the UN-REDD Programme: Experiences from Viet Nam*, Presentation at the FPIC and Recourse Workshop, Panama, Oct. 2010, at p. 29.

¹¹² I. Ring *et al.*, ‘Biodiversity Conservation and Climate Mitigation: What Role Can Economic Instruments Play?’ (2010) 2(1–2) *Current Opinion in Environmental Sustainability*, pp. 50–8, at 52. In respect of corruption within REDD+ in detail, see Brown, n. 110 above.

law, the implementation of REDD in most tropical forest countries is likely to replicate the flaws of existing legislative frameworks.¹¹³ With regard to legal access, as state judicial systems are usually not adequate, access to international dispute resolution bodies within the REDD+ mechanism becomes more important. Separate rules and control systems within the REDD+ mechanism have to be established.¹¹⁴ Nevertheless, the current COP decisions on REDD+ do not sufficiently reflect this urgent need.

However, an outcome of the REDD+ negotiations that does not adequately consider the rights of local communities is more likely because the global environmental change governance system is not structured in a way that gives official voice to non-state entities.¹¹⁵ Governments in democracies that are not fully developed often have their own objectives that do not reflect the interests of the majority of the population. The state representatives of developing countries are usually drawn from the bureaucratic and the political elite that are often very distant from the experiences of local communities.¹¹⁶ Indigenous peoples, local communities and other non-state actors have some procedural rights under Article 7 of the Rules of Procedure.¹¹⁷ These include rights to participate in the proceedings of any session in the COP under certain rules, to hold side events, and to make submissions to the Secretariat. However, the right to vote is not included. This state-centric logic of the international system offers very little scope for questions of justice and human rights within the states to be addressed, questions which have long existed. Therefore, the international community, when negotiating standards for REDD+, is asked to remember its obligations set down in human rights treaties and to take into account the rights of actors within states who would otherwise suffer from an undesirable implementation of the international agreement.

As REDD+ is a mechanism stipulated between states, and as the prevention of leakage effects makes it necessary to implement REDD+ not only in projects but at the national level,¹¹⁸ in conjunction with REDD+ there is also the tendency to re-centralize forest governance in developing countries. This goes hand in hand with a devaluation of efforts made in the past to leave forest management to communities, providing them with a stronger position in terms of property rights. Centralized governance can protect forests, but it requires costly enforcement and can result in resentment among excluded users, undermining conservation goals. On the contrary, community-managed systems

¹¹³ A. Savaresi & E. Morgera, 'Ownership of Land, Forest and Carbon', in Costenbader, n. 85 above, pp. 15–34, at 34; and Global Forest Coalition, n. 23 above, at p. 79.

¹¹⁴ A. Vatn & P. Vedeld, *Getting Ready! A Study of a National Governance Structure for REDD+* (Noragric, 2011), at p. 8. In detail, see Meridian Institute, n. 35 above, at p. 25; T. Chagas, *Non-State Actors and REDD: Issues Surrounding the Participation of Indigenous People and Local Communities* (Climate Focus, 2009), at pp. 7–9, available at: <http://www.redd-oar.org/links/Legal%20Issues%20REDD.pdf>.

¹¹⁵ Okereke & Dooley, n. 14 above, at p. 93.

¹¹⁶ Hoblely, n. 91 above, p. 53.

¹¹⁷ UNFCCC, Adoption of the Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies, UN Doc. FCCC/CP/1996/2, 22 May 1996, available at: <http://unfccc.int/resource/docs/cop2/02.pdf>.

¹¹⁸ Pilot projects, e.g. in Bolivia, led to a cessation of deforestation in the project area but to accelerated deforestation in the rest of the country: see F. Pearce, 'Noel Kempff Project is "saving the forest" by Forcing Destruction Elsewhere', *The Guardian*, 11 Mar. 2010, available at: <http://www.guardian.co.uk/environment/2010/mar/11/greenwash-noel-kempff-forests>.

are often more sustainable than those areas under government management alone.¹¹⁹ Although not appropriate in all settings¹²⁰ and not the panacea for implementing REDD+,¹²¹ community forest management therefore may be one component of good REDD+ governance architecture. Actors will have to let go of the idea that it is possible to restructure international forest governance into a simplified top-down regime, and must be prepared to live with a certain degree of fragmentation as the price for maintaining complexity and coverage.¹²² It has to be acknowledged that there is no single idealized type of governance structure that would be successful in all ecological and social settings.¹²³

7. CONCLUSION

Land and forest tenure, the participation of local stakeholders and access to justice are preconditions for the legitimacy of REDD+. However, in many forest-rich developing countries there are huge deficits regarding these aspects. If REDD finance is pumped into states that fail to observe the basic principles of the rule of law, there is an inherent danger that the profiteers will be found in the national elite of political parties and state authorities while the living conditions of indigenous people and local communities deteriorate. When state institutions are not able to guarantee protection of the rights of forest-dependent people, the REDD+ mechanism itself has to provide for strong 'no harm' safeguards as well as an effective monitoring system and a grievance mechanism. This will increase the operational costs for REDD+ significantly, but it is the only way in which REDD+ can guarantee its own legitimacy.

¹¹⁹ Cf. the references in n. 16 above.

¹²⁰ Hobley, n. 91 above, at pp. 30–1.

¹²¹ B.S. Karky & M. Skutsch, 'The Cost of Carbon Abatement through Community Forest Management in Nepal Himalaya' (2010) 69(3) *Ecological Economics*, pp. 666–72, at 671; Skutsch & Ba, n. 16 above, at p. 269.

¹²² IUFRO, *Embracing Complexity: Meeting the Challenges of International Forest Governance* (International Union of Forest Research Organizations, 2010), at p. 137.

¹²³ E. Ostrom & M. Cox, 'Moving Beyond Panaceas: A Multi-Tiered Diagnostic Approach for Social-Ecological Analysis' (2010) 37(4) *Environmental Conservation*, pp. 451–63, at 460.