

# A New Era of Customary Property Rights? – Liberia’s Land and Forest Legislation in Light of the Indigenous Right to Self-Determination

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**Abstract:** After the end of Liberia’s civil war in 2003, the country embarked upon the reform of its forest and land legislation. This culminated in the adoption of the 2009 Community Rights Law with Respect to Forest Lands and the 2018 Land Rights Act, which NGOs and donors have described as being amongst the most progressive laws in sub-Saharan Africa with regard to the recognition of customary land tenure. Given these actors commitment to human rights, this article takes the indigenous right to self-determination as a starting point for analysing customary property rights and their implementation in Liberia. This includes the examination of the Liberian concept of the 1) recognition and nature of customary land rights, 2) customary ownership of natural resources, 3) jurisdiction over customary land, 4) the prohibition of forcible removal, and 5) the right to free, prior and informed consent.

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## A. Introduction

The link between land, natural resources and conflicts has increasingly been recognized in the past years.<sup>1</sup> Liberia, whose civil war ended in 2003, was at the forefront of a new peacebuilding approach including not only rule of law reforms but also the reform of its forest and land legislation. The rationale was to prevent further conflict by, on the one side, reducing land disputes. On the other side, tenure security was seen as a pre-condition for investments, while investments were seen as a pre-condition for economic development and stability.<sup>2</sup>

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1 See *Ian Bannon/ Paul Collier*, *Natural Resources and Violent Conflict: Options and Actions*, Washington D.C. 2003.

2 *Michael Pugh*, *The Political Economy of Peacebuilding: A Critical Theory Perspective*, *International Journal of Peace Studies* 10 (2005) p. 23.

Given the UN timber sanctions and the expectation of future government revenue, the forestry sector was prioritised in the post-war reforms. In 2009, the Community Rights Law (CRL) made it possible for communities to establish community forests on their customary land and recognized customary rights to forest resources.<sup>3</sup> As forest resources grow on land, the CRL has an important land tenure dimension and constituted the best way for a community to secure customary land rights in a legally recognised manner. The implementation of the CRL is governed by a 2011 Regulation (CRL Regulation), amended in 2017.<sup>4</sup>

Broader land reform, however, was at stalemate until in September 2018 the Land Rights Act (LRA) was finally adopted.<sup>5</sup> The CRL, the CRL Regulation and the LRA now coexist: the CRL and its Regulation apply only to forest lands; yet, under the LRA, forest lands are classified to be one category of customary land. It currently remains unclear how the overlaps between the different laws will play out in practice and how the Forestry Development Authority (FDA) and the Liberia Land Authority (LLA) will work together.<sup>6</sup> The next steps in the process of implementing the LRA are the confirmatory survey of customary land and the adoption of regulations governing the implementation.<sup>7</sup>

External actors – including donors, international organizations (IOs), and international NGOs (INGOs) – were heavily involved in the drafting processes: A USAID project facilitated the roundtable drafting of the CRL, while a World Bank consultant and INGO experts provided technical expertise.<sup>8</sup> Donors also facilitated regional consultations on the law.<sup>9</sup> The Land Commission developed a draft of the LRA with donors, NGOs, and INGOs providing considerable technical input. Moreover, land titling pilot projects funded by INGOs and donors strongly informed the drafting.<sup>10</sup>

3 Republic of Liberia, An Act to Establish the Community Rights Law of 2009 with Respect to Forest Lands (2009) secs. 1.3, 2.3, 2.2.a.

4 Republic of Liberia, Regulation to the Community Rights Law of 2009 with Respect to Forest Lands, as Amended (2017).

5 Republic of Liberia, An Act to Establish the Land Rights Law of 2018 (Land Rights Act).

6 Interview with Senior Staff of Forest Peoples' Programme on 26 February 2018, paras. 3 ff.; Interview with Senior Legal Consultant in the Forestry Sector on 28 February 2018, paras. 10 ff.; Personal Communication with Senior Legal Consultant in the Forestry Sector on 23 November 2018.

7 Skype Interview with Liberian Land Tenure Expert and Staff of a National NGO on 21 December 2018, paras. 142-4.

8 Interview with a Liberian Land Tenure Expert and Staff of a National NGO on 19 December 2017, para. 132; Skype Interview with Former Staff of a Donor-Funded Project on 23 April 2018, para. 36.

9 Skype Interview with an International Land Expert on 23 May 2018, para. 41; Skype Interview with Lawyer of an INGO on 7 June 2018 para. 7 ff.; The Tenure Facility, A Visual History of Indigenous Peoples' Land Rights in Liberia, <https://thetenurefacility.org/timeline/liberia/> (last accessed on 24 April 2019).

10 The Community Land Protection Program and the land titling program of the Land Tenure Facility.

The Liberian government received heavy applause by donors and INGOs for their new legislation. The CRL was described as ‘the most progressive [law] in the region’<sup>11,12</sup>. Similarly, the LRA has been framed as a ‘landmark victory’<sup>13</sup> and as a ‘cardinal law [which will] be [one of] the propellers for Liberia’s transformation and the pursuit of the pro poor agenda for prosperity and development’.<sup>14</sup> But what does *progressive* mean and do the CRL and LRA both on paper and in practice live up to this progressiveness? The different external actors involved in the drafting process – either by providing funding or technical assistance – commit to human rights in the implementation of their projects.<sup>15</sup> Liberia has also adopted the two human rights Covenants, the African Charter on Human and Peoples’ Rights (Banjul Charter) and voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In such a context and, in order to live up to their own human rights commitments, donors and INGOs should only evoke the notions of progressiveness when the drafting of the laws in question, as well as their implementation on the ground complies with these human rights standards.

The indigenous right to self-determination will thus be used as the normative basis for analysing the progressiveness of the land and natural resources. Ownership of land and natural resources are critical aspects of the right to self-determination, as Indigenous peoples have a close relationship to their lands. Derived from the indigenous right to self-determination, five dimensions of the newly emerging understanding of customary property will be explored: (1) the customary right to land, (2) customary ownership of natural resources, (3) jurisdiction over customary land, (4) the prohibition of forcible removal, and (5) the right to free, prior and informed consent (FPIC).

Both the legal framework and its implementation on the ground are subject of this inquiry. This article draws from more than four months of fieldwork conducted in Liberia in 2017 and 2018. In order to understand the drafting history of both the forest and land legislation at the national level as well as their implementation, I conducted around 40 semi-

- 11 Rights and Resources, *The End of the Hinterland: Forests, Conflicts and Climate Change*, (2009-20) <https://www.illegal-logging.info/sites/files/chlogging/uploads/RRIdoc1400.pdf> (last accessed 1 July 2019), p. 4.
- 12 *Leroy M. Sonpon III*, Land Rights Act finally passed (6 September 2018) Daily Observer; *Hannah N. Geterminah*, SDI commend gov’t for signing Land Rights bill into law, Daily Observer (27 September 2018).
- 13 *James Giahue*, Liberia Passes Landmark Law to Secure Ancestral Land Rights, <https://www.reuters.com/article/us-liberia-landrights-lawmaking/liberia-passes-landmark-law-to-secure-ancestral-land-rights-idUSKCN1M02FG> (last accessed on 1 July 2019).
- 14 Jacob Hillo, as cited in: UNDP Liberia, President Weah Signs Local Government & Liberia Land Rights Acts, <http://www.lr.undp.org/content/liberia/en/home/presscenter/articles/2018/president-weah-signs-local-government---liberia-land-rights-acts.html> (last accessed on 1 July 2019).
- 15 E.g. USAID, *Democracy, Human Rights and Governance*, <https://www.usaid.gov/democracy> (last accessed on 2 July 2019); The World Bank, *Environmental and Social Policies*, <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies> (last accessed on 2 July 2019).

structured interviews with all parties involved.<sup>16</sup> This was complemented by a case study of two community forests, where I interviewed most members of the forest management bodies, local politicians, and other community leaders.<sup>17</sup> Additionally, I tried to visit as many villages – or towns as they are generally called in Liberia - as possible within the two community forests for gaining insights in the implementation of community forestry.

## B. Indigenous self-determination

### *1. Indigenous self-determination under international law*

When considering the indigenous right to land, it is not enough to merely examine property rights. Instead it should be read in light of the right to self-determination. The right to self-determination in modern international law has an external and an internal component. The internal dimension refers to self-determination within the state. Globally, the 2007 adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) marked a watershed in respect of the recognition of the indigenous internal right to self-determination. According to the UNDRIP, the right to self-determination under art 1(1) of the two human rights Covenants applies to Indigenous peoples and includes the right to ‘freely determine their political status and freely pursue their economic, social and cultural development’.<sup>18</sup> The rationale behind this is to enable Indigenous peoples to ‘negotiate freely their political status and representation in the states, in which they live’<sup>19</sup> as a form of ‘belated state-building’<sup>20</sup>. While the UNDRIP is not legally binding, it still has authoritative force and has become ‘the threshold reflecting the minimum standard of international law’.<sup>21</sup> The

16 Those include, amongst others, interviews with staff from national NGOs (8), international NGOs (6), international conservation NGOs (1), the World Bank (3), UNMIL (1), USAID (3), (former) staff of different USAID projects (5), the EU FLEGT Unit (3), the Land Authority (2), the Forestry Development Authority (4), the Environmental Protection Agency (2), the National Bureau of Concessions (1), the National Investment Commission (1), the Liberia Timber Association (2), Liberian lawyers (2), international consultants (2) and anthropologists (2).

17 45 interviews with elders, women leaders, youth leaders, local USAID-funded project staff, members of the Community Assembly, Community Forest Management Body and Executive Committee.

18 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) art 3.

19 *Erica-Irene Daes*, Some Considerations on the Right of Indigenous Peoples to Self-Determination, *Transnational Law & Contemporary Problems* 3 (1993), p. 9.

20 *Ibid.*, p. 9.

21 *Jeremy Gilbert/ Cathal Doyle*, A New Dawn over the Land: Shedding Light on Collective Ownership and Consent, in: Stephen Allen/ Alexandra Xanthaki (eds.) *Reflections on the UN Declaration on Indigenous Peoples*, Oxford 2011, p. 328.

overwhelming support for the UNDRIP is indicative of evolving state practice.<sup>22</sup> The African Group also took this position during the negotiation of the UNDRIP.<sup>23</sup>

Moreover, the African Charter's internal right to self-determination, according to the African Commission on Human and Peoples' Rights (ACHPR), applies to colonised or oppressed people as long as the territorial integrity of the state is not jeopardized.<sup>24</sup> Salomon understands it as an 'enabling right'<sup>25</sup>, which is meant to facilitate the participation of marginalized groups in economic development matters and in shaping the legal and political order more generally. Hence, it is now widely recognized that the internal right to self-determination vests in Indigenous peoples.<sup>26</sup>

The right to indigenous self-determination is an umbrella right with land and natural resource governance constituting an integral component. A self-determination-based understanding of indigenous property thus has to reflect the holistic spirit of the UNDRIP.<sup>27</sup> It goes beyond the mere recognition of indigenous property and has five different dimensions: (1) Right to land: the protection of collective land rights is at the core of the UNDRIP, as most Indigenous peoples can look back upon a history of expropriation and forced eviction.<sup>28</sup> (2) Natural resources: the UNDRIP creates a new regime of property protection, which reads land, natural resources, and culture together.<sup>29</sup>

22 E.g. *Brendan Tobin*, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters*, Milton Park 2014, p. 36.

23 African Group, *Draft Aide Mémoire: United Nations Declaration on the Rights of Indigenous Peoples* (2006), para. 9.3.

24 African Charter on Human and Peoples' Rights art. 20; *Katangese Peoples' Congress v Zaire* (1995) AHRLR 72 (ACHPR 1995), para 6; African Commission on Human and Peoples' Rights, *Advisory Opinion of the African Commission on Human and Peoples, Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (2007) p. 32; *Kevin Mgwanga Gunme et al v Cameroon* (2009) AHRLR 9 (ACHPR 2009), para 197.

25 *Stefan Salomon*, *Self-Determination in the Case Law of the African Commission: Lessons for Europe, Law and Politics in Africa, Asia, Latin America* 50 (2017) pp. 238-9.

26 See also *James Anaya*, *The Right to Self-Determination of Indigenous Peoples in the Post-Declaration Era*, in: Claire Charters/ Rodolfo Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen 2009, p. 85; *Marc Weller*, *Self-determination of Indigenous Peoples Art. 3, 4, 5, 18, 23 and 46(1)*, in: Jessie Hohmann/ Marc Weller (eds.) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford 2018, p. 136.

27 See *Claire Charters*, *Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27*, in: Jessie Hohmann/ Marc Weller (eds.), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford 2018, p. 407.

28 UNDRIP art 26(1).

29 *Federico Lenzerini*, *The Land Rights of Indigenous Peoples' under International Law*, in: Michele Graziadei/ Lionel Smith (eds.) *Comparative Property Law*, Cheltenham 2017, pp. 394, 402-3.

- (3) Jurisdiction: refers to the communities right to make use of their customary legal system and institutions within their territory.<sup>30</sup>
- (4) Prohibition of forcible removal: It is commonly assumed that states have the power to extinguish property rights under certain conditions. Because of the cultural dimension of indigenous property, UNDRIP establishes a higher threshold for such expropriations.<sup>31</sup>
- (5) Right to free, prior and informed consent (FPIC): FPIC is the right of communities to consent to projects or measures affecting them.<sup>32</sup>

## II. *The international law concept of indigeneity in Liberia*

Indigeneity is the pre-condition for the enjoyment of the indigenous right to self-determination. While the concept is controversial, both in Liberia and in many other sub-Saharan African countries, the UNDRIP standards should still be applied in relation to marginalized communities in Liberia for the following reasons: The UNDRIP deliberately refrains from defining indigeneity. Instead, the most important principle for determining the status of a group is their self-identification.<sup>33</sup> While equally no definition of indigeneity exists in the African human rights system, the ACHPR identified the following three characteristics:<sup>34</sup>

- (1) Principle of self-identification
- (2) A special attachment to and use of traditional land, whereby ancestral land and territory have a fundamental importance for the Peoples' collective physical and cultural survival
- (3) A state of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic or dominant model.

The African Commission has stressed that the international concept of indigeneity is 'a term by which to understand and analyse certain forms of inequalities and suppression'<sup>35</sup> suffered by Indigenous groups. This structural understanding of indigeneity has been widely accepted within the African regional human rights system.<sup>36</sup>

30 *Kent McNeil*, Indigenous Territorial Rights in the Common Law, Osgoode Hall Law School Legal Studies Research Paper (2016), p. 2.

31 UNDRIP art. 10.

32 UNDRIP arts. 10, 19, 29(2), 32(2).

33 *Joshua Castellino/ Cathal Doyle*, Who are 'Indigenous Peoples'? An Examination of Concepts Concerning Group Membership in the UNDRIP, in: *Jessie Hohmann/ Marc Weller* (eds.), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford 2018, p. 28.

34 African Commission on Human and Peoples' Rights, *Advisory Opinion on the African Commission on Human and Peoples, Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (2007), para. 12.

35 African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities* (2005), pp. 86-7.

36 *Dorothy L. Hodgson*, *Becoming Indigenous in Africa*, *African Studies Review* 52 (2009), p 8.

Indigeneity is also a controversial concept in Liberia. The colonization of Liberia by the American Colonization Society (ACS), which sent free People of Colour from the US to Liberia in the early 19<sup>th</sup> century, significantly disrupted existing social structures. The new state was characterized by social stratification where not only the origin of its inhabitants mattered but also the colour of their skin.<sup>37</sup> Colonial practices such as the imposition of hut taxes, forced labour, and the introduction of the chieftaincy system were implemented.<sup>38</sup>

Despite this, the separation between settlers and Indigenous peoples was less strict than in other colonial contexts with more exchange and intermarriage between the settlers and the Indigenous population occurring.<sup>39</sup> Ethnographic studies in Grape Cape Mount suggest that settlers were seen as another group to be integrated into local patron-client works.<sup>40</sup> Glebo writer Wallace even argued that education and religion were not imposed by the settlers but requested by the Indigenous population in exchange for the settlers' right to live amongst them.<sup>41</sup>

It should still be kept in mind that the settlers were dominating the politics and economy of the Liberian state. While civilized Indigenes could enter the ranks of the settler elite to some extent, the settlers determined what civilization meant making it an important element of social stratification.<sup>42</sup> It was also used to reject indigenous claims to land and natural resources. Customary property rights along the coast were extinguished through treaties of cession, while customary property and indigenous sovereignty remained largely intact in the Liberian *Hinterland* until the 1920s when Liberia was retrospectively declared to be *terra nullius*.<sup>43</sup> After that, a conflation of sovereignty and property occurred, amounting to the gradual extinction of customary property rights. All undeeded land became public land and customary property rights were reduced to use rights, which were frequently disrespected.<sup>44</sup> The negative impacts of this development for the urban population were exacerbated

37 *Robin Dunn-Marcos and others*, *Liberia: An Introduction to Their History and Culture*, Washington D.C. 2005, p. 11.

38 *M.B. Akpan*, *Black imperialism: Americo-Liberian Rule Over the African Peoples of Liberia, 1841-1964* *Canadian Journal of African Studies* 7 (1973), pp. 232-4.

39 *Amos Sawyer*, *Beyond Plunder: Toward Democratic Governance in Liberia*, Boulder 2005, p. 13.

40 *Mary Moran*, *Liberia: The Violence of Democracy*, Philadelphia 2006, p. 65.

41 *S. Yede Wallace*, as cited Moran, note 41, p. 70.

42 *Ibid.*, pp. 78-9.

43 Eg *Edwin James Barclay*, *First Annual Message*, December 22, 1931, in: D. Elwood Dunn (ed.) *The Annual Messages of the Presidents of Liberia 1848-2010: State of the Nation Addresses to the National Legislature*, Berlin 2011, p. 811; *Charles Henry Huberich*, *The Political and Legislative History of Liberia*, Clark 1947, p. 1227; *Yekutiel Gershoni*, *Black Colonialism: The Americo-Liberian Scramble for the Hinterland*, Boulder 1985, p. 86.

44 Republic of Liberia, *Revised Laws and Administrative Regulations for Governing the Hinterland* (1949) art. 66; Republic of Liberia, *Legal Rules and Regulations Governing the Hinterland of Liberia* (2001) art. 66a; *Liz Alden Wily*, *So Who Owns the Forest?: An Investigation into Forest Ownership and Customary Land Rights in Liberia*, Moreton in Marsh 2007, p. 125; *John D. Un-*

during Tubman's presidency from 1944 to 1971 and his economic open-door policy.<sup>45</sup> Large-scale concessions conflicted with customary governance arrangements on a significant scale. It is thus not surprising that, before the outbreak of the civil war, 60% of Liberia's wealth was in the hands of the Americo-Liberian minority making up just 5% of the population.<sup>46</sup>

Today, the discourse of civilization still exists the political arena and the legal framework.<sup>47</sup> Together with the urban-rural dichotomy, it works along the lines of the international concept of indigeneity: Many rural 'uncivilized' communities still depend on their land for agriculture, hunting, and cultural practices, and have limited access to education, health care, and infrastructure. Hence, they have been and still are confronted with a 'common pattern of human rights violations'.<sup>48</sup>

The principle of self-identification is considered to be the most important characteristic of indigeneity under international law: the decision to identify as Indigenous – or not – lies with Indigenous peoples. Yet, identifying as Indigenous is not only a matter of identity but also of strategy or 'positioning'.<sup>49</sup> For instance, on the Sime Darby and the Equatorial Palm Oil plantations communities partnered with NGOs and INGOs to claim their collective property rights.<sup>50</sup> They emphasized that 'if our people leave from their place, other people will die sooner, because [this place] is where they were born and they are used to that place'.<sup>51</sup> This link between the land and the survival of the community and their way of living is reminiscent of the characteristics of indigeneity and shows that indigeneity has to some extent already been mobilized by communities. Yet, most communities are not familiar with the concept, which prevents their self-identification. This should, however, not preclude communities from enjoying full human rights protection.

Moreover, even if one were to negate the indigeneity of Liberian communities, the Banjul Charter's right to self-determination could still apply. While international law draws a clear line between minorities and Indigenous peoples, the distinction is less evident in the

*ruh*, Catalyzing the Socio-Legal Space for Armed Conflict: Land and Legal Pluralism in Pre-War Liberia, <http://commission-on-legal-pluralism.com/volumes/58/unruh-art.pdf> (last accessed on 7 March 2019), p. 15.

45 Moran, note 41, p. 79.

46 *Benjamin Ahadzi*, Failure of Domestic Policies and Civil War in Liberia: Regional Ramifications and ECOWAS Intervention, in: Kenneth Omeje (ed.), War to Peace Transition: Conflict Intervention and Peacebuilding in Liberia, Lanham 2009, p. 43.

47 E.g. the Hinterland Regulations, which established a distinct legal system for the 'uncivilized' parts of the county, remained in force until the adoption of the LRA.

48 Anaya, note 24, pp. 190-1.

49 *Dorothy L. Hodgson*, Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas, *American Anthropologist* 104 (2002), pp. 1037-1040.

50 *Kieran Gilfoy*, Land grabbing and NGO Advocacy in Liberia: A Deconstruction of the 'Homogeneous Community' *African Affairs* 114 (2014) pp. 192 ff.; Finding from 18 focus group discussions in 8 towns on the EPO plantation.

51 Interview with Youth Leader from the EPO plantation on 22 November 2017, para. 10.

African human rights system with its peoples' rights. The ACHPR has used the terminology of minorities and Indigenous peoples interchangeably in many cases, and the applicability of the peoples' rights does not depend upon the (indigenous) status of a group.<sup>52</sup> The right to self-determination thus not exclusively vests in colonized and Indigenous peoples but applies to peoples more generally.<sup>53</sup> Therefore, irrespective of the self-identification of Liberian communities, the five elements derived from the UNDRIP's indigenous right to self-determination will be the benchmark for exploring customary land rights in Liberia.

### *III. Implementation of the right to self-determination*

While the UNDRIP comprehensively lays out the state's obligations towards its Indigenous population, the question arises how these legal standards should be implemented. The UNDRIP provides that legislative or administrative measures affecting Indigenous people require their free, prior and informed consent.<sup>54</sup> 1) The way Indigenous groups participated in and consented to the legislative reforms and 2) the degree to which Indigenous peoples have the autonomy to set their own priorities in its implementation will thus be explored.<sup>55</sup> The post-war legal reforms in Liberia in the forest sector came about mainly by roundtable approach, as introduced by the international peacebuilders.<sup>56</sup> This encouraged the participation of diverse actors including donors, donor-funded projects, INGOs, industry representatives and national NGOs. But while the CRL was drafted in such a participatory manner, the communities affected by the law did not have access to the reform forum.<sup>57</sup> Instead, their participation was limited to donor-funded 'regional consultations' in four regions of Liberia. Moreover, very little participatory research was done on customary governance arrangements: the drafting of the CRL was largely based on three transect studies, four US-AID-funded pilot community forests in conservation areas, and one, albeit quite comprehensive, NGO report.<sup>58</sup>

Similarly, the CRL Regulation was drafted by a donor-funded consultant and discussed and amended by the Community Forest Working Group comprised of national and international NGOs and donor projects under the leadership of the Forestry Development Authori-

52 *Rachel Murray*, The UN Declaration on the Rights of Indigenous Peoples in Africa: The Approach of the Regional Organisations to Indigenous Peoples, in Stephen Allen/ Alexandra Xanthaki (eds.), *Reflections on the UN Declaration on Indigenous Peoples*, Oxford 2011, p. 499.

53 Salomon, note 23, p. 240.

54 UNDRIP art. 10.

55 See also *Shin Imai*, *Indigenous Self-Determination and the State*, *Comparative Research, Law & Political Economy* 25 (2008), p. 39.

56 United Nations Security Council, Letter dated 28 October 2003 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1343 (2001) concerning Liberia Addressed to the President of the Security Council (2003), para. 160.

57 Interview with Senior Staff of an International Conservation NGO on 20 March 2018, paras. 18, 40, 42.

58 Alden Wily, note 45; Staff of a Donor-Funded Project, note 8, para. 24.

ty (FDA).<sup>59</sup> Subsequently, it was discussed in four regional and one national workshop. Nevertheless, the Regulation shows astonishing overlaps with the Cambodian community forestry decree indicating that the input provided by different actors was actually limited.<sup>60</sup>

As for the land reform, the first study on land tenure was conducted by the Liberian Governance Commission with consultations at the county level. In 2013, the Land Rights Policy was adopted by the President. The Policy was based upon donor-funded regional consultations in different counties and strongly informed the LRA.<sup>61</sup> The LRA was mainly negotiated within the Land Commission – the agency preceding the Liberia Land Authority – and later within parliament.<sup>62</sup> NGOs were not involved to the same extent as in the drafting of the CRL, and rural communities even less so, even though donors argued that they were represented by NGOs.<sup>63</sup> While these NGOs did their best to keep communities involved, their resources were limited, and communities also could not choose their representatives freely. One NGO representative summarized that the way NGOs reached out to communities ‘was not standardized at all and can definitely not be considered as some systematic process of collecting feedback’.<sup>64</sup>

It is also questionable whether regional one or two-day non-recurring regional consultations are an adequate means for ensuring meaningful participation. Most people from rural communities had no access whatsoever to these consultations, given the cost and duration of transportation.<sup>65</sup> Moreover, the question arises whether the highly complex and technical details of a law can adequately be discussed in such a forum, given the time constraints involved and the high levels of illiteracy in rural areas.<sup>66</sup>

Measured by this standard, neither the process of the CRL, its Regulation, nor that the LRA ensured meaningful community participation to the extent that it complied with the right to self-determination and the UNDRIP.

### C. Customary Land Rights in Liberia

In the following, the emerging understanding of customary land rights in Liberia will be explored. This includes the recognition of customary land rights, ownership over natural resources, jurisdiction over indigenous territories, the prohibition of forcible removal, and FPIC.

59 Staff Member of Conservation NGO, note 58, para. 74.

60 Kingdom of Cambodia, Sub-Decree on Community Forestry Management (2003); Interview with Senior Legal Consultant in the Forestry Sector on 18 December 2017, para. 101.

61 Interview with Staff Member of the Liberia Land Authority on 5 March 2018, paras. 94 ff.

62 Ibid, para. 102.

63 Personal Communication with a Member of the EU Delegation to Liberia on 12 November 2018.

64 Land Tenure Expert, note 7, para 60.

65 See also *Diane Russell and others*, Final evaluation of the Land Rights and Community Forestry Programme (LRCFP) (2011), p. 27.

66 Lawyer, note 9, para. 86.

## I. Customary land

In the UNDRIP, the collective right to land assumes a central role.<sup>67</sup> Already before the adoption of the UNDRIP, the collective dimension of the right to property had been confirmed by the ACHPR.<sup>68</sup> Correspondingly, the African Court on Human and Peoples' Rights (ACtHPR) has interpreted the right to property of the Banjul Charter in light of the UNDRIP.<sup>69</sup>

### 1. Recognition of customary land

The first question to be answered is when and how customary property is protected in Liberia. The UNDRIP demands states to give 'due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems'.<sup>70</sup>

The CRL and the LRA share certain legal definitions, especially in respect of the rights-holders addressed therein. Community is defined in both laws as a 'self-identifying coherent social group or groups comprising of community members'.<sup>71</sup> The CRL adds a geographical component by stating that communities reside in 'particular areas of land over which members exercise jurisdiction'.<sup>72</sup> A community member, according to the LRA, is a person (1) who is born in the community, (2) who has at least one parent born within the community, (3) who has continuously lived in the community for at least seven years or (4) who is a spouse of a community member and both spouses live in the community.<sup>73</sup> This certainly shows overlaps with international law: the Liberian legislation takes up both the element of self-identification, as well as the strong tie between communities and their land. In contrast, the criterion of coherence of both the CRL and the LRA may be difficult to fulfil in areas, where, for instance, different ethnic groups use land or natural resources together. Given the massive displacement of people during the war, it could, in the worst case, be used to refuse land ownership to communities. Moreover, the detailed definition of community membership could interfere with indigenous understandings of belonging.<sup>74</sup>

67 UNDRIP arts. 10, 25, 26, 27.

68 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para. 62; *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on Behalf of Endorois Welfare Council) v Kenya* (2009) AHRLR 75 (ACHPR 2009) para. 187.

69 *African Commission on Human and Peoples' Rights v. Republic of Kenya*, African Court on Human and Peoples' Rights (2017) paras. 125-6.

70 UNDRIP art. 27.

71 Community Rights Law sec. 1.3; Land Rights Act art. 2.

72 Community Rights Law sec. 1.3.

73 Land Rights Act art. 2.

74 Ali Kaba and his colleagues show that by-laws regulating who is a community member may vary from place to place (*Ali D. Kaba and others*, Identifying Community Membership in Collective

The procedure for acquiring land rights differs in the two laws: As the CRL was adopted at a time when no consensus on customary land could be found, it skirts the issue of land by stating that the Land Commission shall resolve all matters related to land tenure.<sup>75</sup> Still, the establishment of a community forest constituted the best way to protect customary land rights. Community forests may be established on customary land, and, communities own all forest resources within these community forests.<sup>76</sup> As forest resources are attached to the land, on which they grow, the CRL clearly has a land tenure dimension.

However, this land tenure dimension has remained under-implemented. The CRL regulation has created a legal regime under which the protection of forest land rights is qualified by the need to register as a community forest and subject to approval by the FDA.<sup>77</sup> For getting authorization, communities have to go through the so-called nine steps including a letter of application, the payment of an application fee, the repeated posting of notices, a socio-economic resource reconnaissance survey, demarcation and boundary-cutting, the creation of governance bodies, the adoption of by-laws and a Constitution, and the signing of a Community Forest Management Agreement (CFMA) with the FDA.<sup>78</sup> Upon completion of the nine steps, a Community Forest Management Plan (CFMP) designating, among other things, how the different parcels of forest may be used, must be adopted and implemented.<sup>79</sup> Not only can the procedure take years, but it also comes at a considerable cost. Even though, in theory, communities can freely determine the borders and the use of their community forests, practice indicates that, in many places, they are imposed by the FDA or by logging companies providing financial support for the registration process.<sup>80</sup> According to a staff member of the Liberia Timber Association, it is an open secret that companies are paying for the nine steps.<sup>81</sup> A logging company representative admitted that ‘if I’m helping, I am not helping for free [...], if you wanna go [for conservation, instead of commercial use] then you make sure that you pay me my money back’.<sup>82</sup>

The LRA, which addresses land tenure generally, goes a step further than the forest legislation. It extends the constitutional protection of property to customary land.<sup>83</sup> Customary

Land Tenure: Exploring Linkages and Sharing Experiences in the Case of River Cess County in Liberia, Duazon 2018, pp. 13 ff.).

75 Community Rights Law sec. 2.2.e.

76 Community Rights Law secs. 1.3, 2.2.a.

77 Community Rights Law sec. 2.1.

78 CRL Regulation chap. 2.

79 Which is why the process is increasingly referred to as consisting of 11 steps.

80 *Global Witness, Power to the People? How Companies are Exploiting Community Forestry in Liberia* (2018), pp. 17 ff.; Many communities already stated in their application letter, the first of the 9 steps, that they were partnering with logging companies (e.g. Kongba, Gayepuehole, Marloi & Vambo, Yeablo, Cavalla).

81 Interview with Staff Member of the Liberia Timber Association on 5 January 2018, para. 116.

82 Interview with the President of a Logging Company in Liberia on 9 January 2018, paras. 398-402.

83 Land Rights Act art. 10(1).

land is ‘acquired and owned by a community in accordance with its customary practices and norms based on a long period of occupancy and/or use’<sup>84</sup> and ‘arises by operation of law based on the proven longstanding relationship between the individual Community and the Land’.<sup>85</sup> The identification of customary land is to be carried out according to ‘customs, oral or written history and locally-recognized norms’.<sup>86</sup> There are various ways in which to establish a claim to customary land: 1) by deed, (2) by 50 years of exclusive or continuous use or possession of the land or (3) by recognition by neighbouring communities and/or the customary laws of the community itself.<sup>87</sup> The LRA, and particularly the 50-year requirement, thus set a low threshold for recognising customary ownership.

In order to set and formalize the boundaries of customary land, a confirmatory survey is to be carried out by the LLA. Its absence does not preclude land ownership. Still, the acquisition of legal personality depends upon the creation of a governance structure as prescribed by the LRA. Community members must draft by-laws, establish a Community Land Development and Management Committee (CLDMC), and develop a land use management plan.<sup>88</sup> Even though the failure to do so does not extinguish ownership of customary land, it would considerably impair the community’s capacity to manage their land. Moreover, as illustrated in the case of the CRL above, there is a risk that government authorities extend their competences through the adoption of regulations.<sup>89</sup> The LLA has already initiated the drafting of such regulations.

Despite these rather positive developments, three further provisions of the LRA hamper the recognition of customary land. Firstly, up to 10% of all customary land, depending on the land available, is to be designated as public land ‘at the discretion of the community’<sup>90</sup> during the confirmatory survey. It is unclear whether the community or the LLA has the final say with regard to the amount and location of the customary land to be set aside. This definitely impairs the customary land rights of communities.

The second issue are the so-called tribal certificates. Under the former Public Lands Law, public land could only be sold, if the tribal authority issued a tribal certificate consenting to the sale of the land.<sup>91</sup> After that, the President needed to sign a Public Land Sale Deed to complete the process. In view of the proliferation of dubious tribal certificates after the war, President Sirleaf Johnson put a moratorium on the issuing of public land sale deeds

84 Ibid art. 32(1).

85 Ibid art. 32(5).

86 Ibid art. 34(1).

87 Ibid art. 32(3).

88 Ibid art. 35.

89 Land Tenure Expert, note 7, paras. 142-44.

90 Land Rights Act art. 37(3).

91 Republic of Liberia, Public Lands Law (Liberian Code of Laws Revised) (2000), para. 30.

in 2010.<sup>92</sup> The fate of pending tribal certificates that had not yet been transformed into full Public Land Sale Deeds became one of the most controversial points of the land reform process. Pursuant to the LRA, pending tribal certificates may be validated within the next 24 months following its enactment after a rigid validation process ‘involving the community’<sup>93</sup> conducted by the LLA. It is not clear how community involvement in the validation process will be implemented in practice. Experts estimate that the customary land titling will take several years meaning that the decision about tribal certificates will be taken before the customary land has been demarcated and communities have their governance structure in place.<sup>94</sup> Without the land demarcation, communities will, however, not be able to make an informed decision about the tribal certificates.

And thirdly, protected areas and existing concessions may not be claimed as customary land. In regard to concessions, the land reverts to the community after the expiration of the concession agreement.<sup>95</sup> Yet, many of the large-scale concession agreements have a remaining duration of more than 50 years.<sup>96</sup> Moreover, protected areas that have been gazetted shall be and remain part of government land.<sup>97</sup> Already in 2017, 384.080 hectares were part of protected areas.<sup>98</sup> Large tracts of land thus remain precluded from customary ownership.

To conclude, while both CRL and LRA assert that customary land rights do not depend upon their recognition under statutory laws, *de facto* communities that do not follow the legal procedure have limited to no rights. This understanding of customary land, and especially the CRL, lags behind the UNDRIP’s provisions on indigenous land.<sup>99</sup> But also the LRA’s limitations of customary land tenure in respect of tribal certificates, protected areas, concessions, and the 10% rule raise questions.

## 2. Nature of customary land rights

In many jurisdictions, indigenous property rights do not include the full bundle of ownership privileges and indigenous land may not be sold.<sup>100</sup> This reflects the idea that customary

92 Republic of Liberia, Executive Order No. 67 - Extension of the Moratorium on Public Land Sales (2015).

93 Land Rights Act art. 47.

94 Skype Interview with an International Land Expert on 18 April 2019, para. 122.

95 Land Rights Act arts. 48.1, 48.4.

96 E.g. Republic of Liberia, *An Act to Ratify the Concession Agreement Between the Republic of Liberia and Golden Veroleum (Liberia). Inc.* (2010), art. 3.1.

97 Land Rights Act art. 42.1.

98 Environmental Protection Agency, National Biodiversity Strategy and Action Plan-II 2017-2025 (2017), p. 37.

99 UNDRIP arts. 26, 27, 28.

100 *Kent McNeil Common Law Aboriginal Title*, Oxford 1989, p. 267.

land should be protected for future generations. Pre-LRA legislation pursued a similar approach, prohibiting the sale of customary land.<sup>101</sup>

Both the CRL and the LRA use the language of ownership. However, the CRL was a compromise between actors striving for the full recognition of customary ownership and those envisioning community forestry under governmental supervision. While the CRL speaks of ownership of forest resources, the CRL regulation introduces a time constraint of 15 years for the Community Forest Management Agreements (CFMA), which authorize community forests.<sup>102</sup> Moreover, the FDA has the power to reject community forest authorization renewal applications under certain conditions. As ownership is usually perpetual, the CFMAs are more reminiscent of a lease agreement or license than full ownership.<sup>103</sup> Regarding the transfer of property, the CRL remains silent but the lease approach to community forest lands supports the idea that community forests may not be alienated. However, the CRL allows communities to award logging licenses that remain in force for 25 years.<sup>104</sup>

The LRA addresses ownership more generally. Customary land ownership includes the same bundle of rights as private ownership<sup>105</sup>: the right to exclude others, to possess and use the land, to manage and improve the land, and to transfer portions of the land.<sup>106</sup> According to art 51, customary land may be extinguished by consensus of the community members but no earlier than 50 years after the effective date of the LRA.<sup>107</sup> The 50-year limitation was introduced to prevent land grabs.<sup>108</sup> As international indigenous law emphasizes the strong tie between communities and their land, the sale of collectively owned land is difficult to reconcile with the spirit of the UNDRIP. Still, compared to other jurisdictions and also the forest legislation, the language of the LRA is remarkably clear and powerful, and gives communities considerable freedom of choice.

## *II. Customary ownership of natural resources*

The permanent sovereignty over natural resources is another constituent element of the indigenous right to self-determination as recognized by the UNDRIP and the ACtHPR.<sup>109</sup> Le-

101 Huberich, note 44, p. 1229; Hinterland Regulations art. 66.

102 CRL Regulation sec. 7.6.

103 Senior Legal Consultant, note 61, para. 155; NGO lawyer, note 67, para. 82.

104 Community Rights Law chap. 6; CRL Regulation chap. 10; Republic of Liberia, Code of Forest Harvesting Practices (2017), sec. 2.2.

105 Land Rights Act art. 7(2).

106 Land Rights Act art. 33(2).

107 Ibid, art. 51.

108 Delegation of the European Union to Liberia, The European Union launches 'Land Rights for Liberia' project, [https://eeas.europa.eu/delegations/liberia/22847/node/22847\\_az](https://eeas.europa.eu/delegations/liberia/22847/node/22847_az) (last accessed on 12 November 2018).

109 ACtHPR, note 70, para. 201; UNDRIP art. 26(2).

gal regimes under which resources are the property of the state ‘have a distinct and extremely adverse impact on Indigenous peoples’.<sup>110</sup> The taking of resources without the affected communities’ consent is thus hardly compatible with international human rights law – at least in cases where the extraction of these resources has severe consequences for the community.<sup>111</sup>

Prior to the adoption of the CRL and the LRA, the Liberian state claimed ownership over most natural resources. Minerals and wildlife were excluded from private ownership, and forest resources, except for agroforestry, belonged to the state.<sup>112</sup>

Already the CRL constitutes a departure from this by stipulating that local communities own forest resources in community forests.<sup>113</sup> It is, however, qualified by the requirement to establish a community forest recognized by the FDA.<sup>114</sup> In line with the Constitution, the LRA states that save for mineral resources, all resources on customary land may be used and managed by the community.<sup>115</sup>

While the limitation of governmental sovereignty over natural resources is a positive development, the exclusion of mineral resources from community ownership still falls short of the protection foreseen by international law.

### III. Jurisdiction over customary land

The jurisdictional aspect of indigenous territorial rights assumes a central role within the international indigenous rights framework.<sup>116</sup> According to the UNDRIP, Indigenous peoples ‘have the right to autonomy or self-government in matters relating to their internal and local affairs’.<sup>117</sup> This includes the right to determine the structure of their institutions.<sup>118</sup>

Both the CRL and LRA contain elements relating to jurisdiction. The CRL defines community as a social group ‘residing in a particular of land over which members exercise

110 *Erica-Irene Daes*, Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty over Natural Resources, UN Doc. E/CN.4/Sub.2/2004/30 (2004), para. 43.

111 See also *Stefania Errico*, The Controversial Issue of Natural Resources: Balancing States’ Sovereignty with Indigenous Peoples’ Rights, in: Stephen Allen/ Alexandra Xanthaki (eds.) Reflections on the UN Declaration on Indigenous Peoples, Oxford 2011, p. 366; *Cathal M. Doyle*, Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent, Abingdon 2015, pp. 182ff.

112 Republic of Liberia, Constitution of Liberia (1986) art. 22(b); Republic of Liberia, An Act Adopting a New Wildlife and National Parks (1988), sec. 2; Republic of Liberia, An Act Adopting the New National Forestry Law (2000), sec. 2.1.

113 Community Rights Law sec. 2.2.a.

114 CRL Regulation sec. 2(1).

115 Land Rights Act art. 5(3).

116 Tobin, note 32, n. 53.

117 UNDRIP art. 4.

118 *Ibid.*, art. 33(2).

jurisdiction'<sup>119</sup> and grants them the right to manage their own forest resources. According to the LRA, 'the authority for the development and the management of the customary land shall be vested in the members of the community acting collectively'.<sup>120</sup>

But jurisdiction over customary land is also limited by several factors:

(1) One limitation is the clearly defined governance structure in both CRL and LRA. Under the CRL, communities are required to create a Community Assembly (CA), an Executive Committee (EC) and a Community Forest Management Body (CFMB).<sup>121</sup> This three-tier structure is complex and the functions of each of the three governance bodies are spelled out in detail. Practice shows that, in terms of accountability and transparency, this does not work well: there exists considerable confusion as to the functions of each of the bodies and most community members have very little access to information.<sup>122</sup> Even in the community forest with considerable donor support that I visited, the chief officer of the CFMB secretly signed a Memorandum of Understanding with a logging company. After his dismissal, the governance bodies, due to a lack of sound legal advice, assumed they were bound by this Memorandum and granted a commercial use contract to the company.<sup>123</sup>

The LRA pursues a more streamlined approach, having taken into account the negative prior experiences in the forestry sector.<sup>124</sup> The community members are required to create and establish a Community Land Development and Management Committee (CLDMC) with a clearly defined purview. They must also develop a land use management plan. The highest decision-making body, however, is the 'community acting collectively'.<sup>125</sup> Important land development and management decisions require the approval of two-thirds of the community membership.<sup>126</sup> This potentially gives more space to indigenous jurisdiction. Yet, there is also a risk that the LRA will subsequently adopt regulations that further formalize the procedure for recognizing customary land to the detriment of community self-determination.

(2) Provisions prescribing a certain degree of inclusivity and democratic governance may also act to limit jurisdiction. Yet, The UNDRIP stipulates that institutional structures and juridical systems shall be maintained, developed and promoted 'in accordance with human

119 Community Rights Law secs. 1.3, 2.2.b.

120 Land Rights Act art. 36(1).

121 Community Rights Law chap. 4.

122 E.g. Sustainable Development Institute, *Community Forestry in Liberia: A Review of Challenges, Opportunities and Other Options*, Duazon 2017, p. 5.

123 Interviews with Members of a CFMB, 9 to 19 March 2018.

124 Land Tenure Expert, note 7, para. 124.

125 Land Rights Act art. 36(1).

126 *Ibid.*, art. 36(2).

rights standards'.<sup>127</sup> The CRL prescribes that at least one woman must be represented in the Community Forest Management Body.<sup>128</sup> Under the LRA, all community members shall have equal rights to use and manage community land, regardless of age, gender, ethnicity, religion, and disability.<sup>129</sup> Moreover, individual rights to residential land are protected on customary land, and all community members, irrespective of their gender, have the right to residential land.<sup>130</sup> The CLDMC 'shall consist of equal representation of the following three stakeholder groups: men, women and youth'.<sup>131</sup>

However, quotas – as the only envisioned positive measure – look good on paper, but risk not having the intended effects. Firstly, the presence of women does not necessarily amount to meaningful participation, particularly given the weakness of the CRL's quota: it neither addresses the CA, nor the EC.<sup>132</sup> Evidence shows that women members of the CFMB are often excluded from important meetings and information. In 2018, not a single CFMB had a female chief officer.<sup>133</sup> Women who are not members of the governance structure can access even less information. For instance, a woman in one of the community forests explained that 'our big people, the elders, they are there [in the meetings], they are the discussants. And we, the children, cooperate with them'.<sup>134</sup>

Secondly, there is a risk that these quotas conflict with customary decision-making structures and undermine the legitimacy of the new governance structure. Brown argues that the customary institutions in many Liberian communities are robust enough to govern land in a legitimate and inclusive way.<sup>135</sup> The CRL missed an opportunity to build on women's organizations already existing in many places in Liberia.<sup>136</sup> Whether the LRA will manage to bridge the gap between the requirements of international human rights law and the self-determination of communities remains to be seen.

(3) A third limitation arises from procedural and substantive laws governing community land. Regarding procedural law, both the CRL LRA and the require communities to adopt a

127 UNDRIP art. 34.

128 Community Rights Law sec. 4.2.a.

129 Ibid, art. 34(2).

130 Ibid, arts. 34(4), 39(2).

131 Land Rights Act art. 36(6).

132 In respect of the CRL, a women's quota is neither prescribed for the CA, which usually has around 30 members, nor for the EC with about five members. Only one of the five CFMB members must be a woman. With regard to the LRA one third of the CLFMC will consist of women members, as 'youth' mostly only refers to young men.

133 Forestry Development Authority, Authorized Community Forest Governance Structure Membership Listing, Monrovia 2018 (available upon request).

134 Focus Group Discussion with Women in Margibi on 10 December 2017, para. 92.

135 *David Brown*, Social Dimensions of Land Rights Reform in Liberia: Some Unresolved Issues and Policy Dilemmas, *Development Policy Review* 35 (2017), p. 279.

136 *Mary H. Moran*, *Civilized Women*, Ithaka 1990, p. 166.

constitution and by-laws for their governance bodies.<sup>137</sup> This, in theory, could give space to communities to codify or ascertain their customary land governance rules. However, what usually happens is that forest communities simply adopt a template provided by the FDA and international actors with only minor amendments, if any.<sup>138</sup> While, from a practical perspective, such templates are both cost and time effective, they may also limit the communities' self-determined land governance.

With regard to substantive law, the CRL does not explicitly provide for the application of customary law. However, it could be argued that in the course of drafting the CFMP, it is possible to enact customary land rules:<sup>139</sup> Communities must zone their forests and designate areas for farming, conservation or commercial use. They may also adopt forest use roles for the different zones. However, the CFMPs are so rooted in scientific forestry<sup>140</sup> that it is challenging for communities to acquire the technical know-how and the financial means to fulfil the legal requirements.<sup>141</sup> One Liberian NGO notes that of the eight community forests they regularly work with, only two have decided to allow for multi-purpose use of their forest, while the other six have designated their entire forest for commercial use.<sup>142</sup> In both community forests that I visited, the CFMPs had been written by companies. Communities can thus hardly ascertain their customary land rules within the CFMPs.

The LRA explicitly states that 'any decision taken in respect of Customary Land shall be in accordance with the customs, traditions and practices of the community'.<sup>143</sup> As the LRA grants ownership and thus more rights to communities, there exists a chance that the LRA will allow for substantive customary land law to be ascertained to a greater extent than under the CRL.

(4) The last factor influencing community jurisdiction is that both the FDA and the LLA assume a central role in the settling of disputes. The CRL affords some space to customary dispute resolution. Disputes related to community forests shall be resolved either through

137 Community Rights Law sec. 4.1.j; Land Rights Act arts. 35.1.a, 35.1.d.

138 E.g. Constitutions and by-laws of Beyan Poye, Barconnie-Hammondsville, Gbeor-Gblor, Garwin, Kulu, Shaw & Boe and Sezueplay, Forestry Development Authority, Template: Authorized Forest Community By-Laws, Forestry Development Authority, Template: Authorized Forest Community Constitution (all documents available upon request).

139 CRL Regulation chap. 8.

140 Scientific forestry was developed in 18<sup>th</sup> century Europe and transformed forest into an asset of the state. It entails the 'application of forest ecology in order to achieve the most efficient means of producing timber for commercial ends' and regular conflicts with indigenous and local modes of forest governance (*T.J. Lanz, The Origins, Developments and Legacy of Scientific Forestry in Cameroon, Environment and History* 6 (2000), p. 100).

141 Senior Legal Consultant, note 61, para. 121; Interview with Technical Manager at the Forestry Development Authority on 19 March 2018, para. 52.

142 Sustainable Development Institute, note 123, p. 2.

143 Land Rights Act art. 36(8).

customary dispute resolution mechanisms or the Arbitration Laws of Liberia.<sup>144</sup> However, the 2017 CRL Regulation stipulates that the FDA has ‘jurisdiction over community forestry management’<sup>145</sup> and ‘shall facilitate the resolution of conflicts, upon request by an Authorized Forest Community’.<sup>146</sup> FDA has indeed established a dispute settlement mechanism comprised of the head of the community forestry department, and, if necessary, the Deputy Director.<sup>147</sup> While courts are also competent to hear cases related to violations of the CRL, the regulation certainly enhances the power of the FDA, while failing to specify or implement the CRL’s provision on customary dispute resolution.<sup>148</sup>

The LLA equally has a very broad mandate and is, among others, in charge of developing regulations for settling land disputes.<sup>149</sup> Each county now has a County Land Dispute Resolution Office, whose mandate is not clearly defined yet.<sup>150</sup> While the LLA should apply customary law, the LRA does not provide for communities to develop their own dispute settlement mechanisms.

In sum, both the CRL and the LRA only allow for limited community jurisdiction. How the overlaps between the CRL and the LRA in relation to community jurisdiction will play out is yet to be seen. It is possible that the forest governance structure will become a sub-Committee of the CLDMC. This could improve the flow of information, as important decisions would not only be made by the CA, but also be approved by at least two-thirds of the community members as required under the LRA.<sup>151</sup>

#### *IV. Prohibition of forcible removal*

Most countries consider it to be an expression of the state’s sovereignty to extinguish property rights under certain conditions. Yet, according to the UNDRIP, Indigenous peoples shall not be forcibly removed from their lands or territories unless they have given their FPIC and have received just and fair compensation.<sup>152</sup> The ACtHPR has confirmed that the expropriation of indigenous territories is not only governed by the law on eminent domain, expropriations in the public interest under the condition of just compensation, but that it is also qualified by a requirement of prior consultation.<sup>153</sup>

144 Community Rights Law chap. 8.

145 CRL Regulation sec. 6.1.

146 *Ibid.*, sec. 6.2.f.

147 Interview with Technical Manager of the Forestry Development Authority on 15 January 2018, paras. 518-528.

148 Community Rights Law secs. 7.4, 7.5.

149 Land Rights Act art. 37(8).

150 Republic of Liberia, An Act Creating the Liberia Land Authority (2016) para. 45.4.

151 Land Rights Act art. 36(2).

152 UNDRIP art. 10.

153 ACtHPR, note 70, para. 131.

Previously, all land in Liberia was public land and customary land did not fall under the constitutional protection of property. Expropriations neither gave rise to compensation, nor were they subject to judicial review. This changed with the 2017 CRL regulation stating that the GoL can only extinguish CFMAs by exercising its constitutional power of eminent domain.<sup>154</sup> To date, the Liberian government has not applied eminent domain in relation to authorized community forests.

Under the LRA, the government is explicitly obliged to enter into negotiations with the community in order to lease or purchase land for public use or in the public interest.<sup>155</sup> Only if no agreement can be reached, eminent domain may be exercised. This raises the threshold for expropriations.<sup>156</sup> At the same time, the GoL endorses a broad understanding of public purpose, according to which commercial activities are a sufficient justification for applying the eminent domain provision.<sup>157</sup> This broad understanding of public purpose in Liberia risks turning eminent domain from an extraordinary power into an ordinary one, while the UNDRIP's consent requirement has been watered down to negotiations.

#### *V. Right to free, prior and informed consent*

FPIC is a core component of international indigenous law and is required for relocations, the adoption and implementation of legislative and administrative measures affecting Indigenous peoples, the storage or disposal of hazardous materials on indigenous territory, and projects and proposals affecting indigenous land.<sup>158</sup> While many states practice a flexible weighing of interests, Gilbert and Doyle argue that at least for the cases enumerated in the UNDRIP, FPIC is a mandatory requirement, no matter the severity of the impact of the proposed measure.<sup>159</sup> Liberia is the only sub-Saharan country in which FPIC is both legally required and implemented to some extent.<sup>160</sup>

Two forestry regulations, enacted already in 2007, require FPIC in relation to logging concessions granted by the GoL<sup>161</sup>: One for the negotiation of social agreements, the other

154 CRL Regulation sec. 7.9.b.

155 Land Rights Act art. 50(2).

156 Constitution of Liberia art. 24(a).

157 See *Cummings v. Hughes*, Liberian Law Reports Supreme Court of Liberia (1968); Liberia Land Commission, Land Rights Policy (2013) paras. 5.3.1.3., 5.3.1.4.

158 UNDRIP arts. 10, 19, 29(2), 32(2).

159 Gilbert/ Doyle, note 31, pp. 317-319; E.g. *Mauro Barelli*, Free, Prior and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2), in: Jessie Hohmann/ Marc Weller (eds.) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Oxford 2018, pp. 254, 268.

160 The two Congos have adopted legislation that includes FPIC, but in both countries detailed FPIC procedures are yet to be developed.

161 Government concessions have their legal foundation in the 2006 National Forestry Reform Law and the government granted concessions for forests located on public land irrespective of customary land rights. However, after the introduction of community forestry in Liberia, the government

one for forest land use actions re-designating land for commercial use.<sup>162</sup> In relation to land use actions, the original plan was that the Liberian forests should be zoned with forest areas designated for conservation, commercial and community use.<sup>163</sup> However, this process was never fully completed and no case could be identified in which the government had negotiated with communities.<sup>164</sup> Regarding FPIC in relation to social agreements, Regulation 104-07 holds that concessions may only be awarded once the community has given its FPIC to the negotiation of a social agreement.<sup>165</sup> If the negotiation of the social agreement fails, a satisfactory solution shall be obtained through independent arbitration. Subsequently, the FDA ‘may reconsider’<sup>166</sup> the terms of the concession. Given the wording of the Regulation, it is not surprising that Lamb and her colleagues found no proof of meaningful consultations.<sup>167</sup>

The CLR stipulates that ‘any decision, agreement, or activity affecting the status or use of community forest resources shall not proceed without the prior, free, informed consent of the said community’.<sup>168</sup> Most experts see the nine-step procedure for obtaining community forest status as being the embodiment of FPIC.<sup>169</sup> According to the UNDRIP, however, FPIC must be obtained ‘through their own representative institutions’<sup>170</sup>, while the three-tier community forest governance structure has no roots in customary governance.

Moreover, the ‘free’ in FPIC implies the freedom of choice of communities with respect to the management of the land. Yet, most communities have neither the financial resources nor the expertise for going through the nine steps and are vulnerable to unfavourable offers by logging companies.<sup>171</sup> Additionally, the flow of information to the broader community is a major problem: a woman described the demarcation of the community forest as ‘nobody calls anybody from this town ‘...’ when we see people [cutting the

stopped granting such concessions and commercial use contracts with community forests are now the only way of obtaining a logging license.

162 Forestry Development Authority, Regulation No. 102-07 on Forest Land Use Planning (2007), sec. 61(c)(3); Forestry Development Authority, Regulation No. 104-07 on Tender, Award and Administration of Forest Management Contracts, Timber Sale Contracts and Major Forest Use Permits (2007) sec. 22(j)(1).

163 Regulation No. 102-07 sec. 4.4.b.

164 Personal Communication with Forestry Expert of a National NGO on 31 January 2019.

165 Regulation No. 104-07 sec. 22(j)(1).

166 Ibid sec. 22(j)(2).

167 *Jennifer N. Lamb and others*, Pursuing Community Forestry in Liberia, *Environmental Policy and Governance* 18 (2009), p. 305; see also *Michael D. Beevers*, *Peacebuilding and Natural Resource Governance After Armed Conflict: Sierra Leone and Liberia*, Cham 2019, p. 110.

168 Community Rights Law sec. 2.2.c.

169 Senior Legal Consultant, note 6, para. 69; Technical Manager, note 148, paras. 622ff.

170 UNDRIP arts. 19, 32(2).

171 See also Global Witness, note 81.

forest] we were afraid'.<sup>172</sup> The maps of the proposed demarcation of the community forest had not been posted in most towns as mandated by the CRL, and in the towns where it was posted, no one could read it.<sup>173</sup> However, understanding the boundaries of the community forest is crucial, since it may affect farmland, hunting areas, and cultural sites. It is questionable whether the nine-step procedure actually qualifies as FPIC.

The LRA states that save for concessions granted before the entry into force of the law, 'any interference with or use of the surface of customary land require the free, prior and informed consent (FPIC) of the community'.<sup>174</sup> Important decisions must be made by two-thirds of the community members.<sup>175</sup> The provisions on the CLDMC are broad enough to accommodate customary decision-makers and decision-making processes, rendering it more in line with the UNDRIP than the forestry legislation. The wording of the LRA, however, suggests that the consent requirement does not apply to eminent domain, as well as in the case of permits, concessions, contracts and other rights granted before the entry into force of the LRA.<sup>176</sup>

The reparation of past injustices and ongoing discrimination lies at the very core of the indigenous rights regime.<sup>177</sup> The failure to provide redress for past human rights violations conflicts with art 28(1) UNDRIP, according to which Indigenous peoples have a right of redress for land or natural resources that were taken without their FPIC.<sup>178</sup> This highlights the differing underlying rationales of the Liberian legislation and international indigenous rights law.

In conclusion, the both the CRL's and the LRA's FPIC concepts differ from the requirements of UNDRIP.

#### **D. Conclusion**

The analysis of the Liberian forest and land legislation in light of the indigenous right to self-determination indeed raises doubts regarding its progressiveness.

Regarding the procedural compliance with the UNDRIP, communities had little to no ownership of the legal reform processes. Community forestry is over-formalized to the extent that communities cannot shape its implementation, while the LRA provides more space for community-led implementation.

Regarding the substantive dimension of customary property in Liberia, the imposed procedure for the recognition of the right to forest lands, as prescribed by the CRL, is hard-

172 Focus Group Discussion with Women in Margibi on 10 December 2017, para. 36.

173 Six focus group discussions in Margibi, 7 to 12 December 2017.

174 Land Rights Act art. 33(3).

175 Ibid, art. 36(2).

176 Ibid, arts. 33(3), 50(5), 54(2).

177 See also Gilbert/ Doyle, note 31, p. 298.

178 UNDRIP art. 28(1).

ly compatible with international indigenous rights; the LRA gives a little more leeway to communities. It is remarkable that customary property is framed as full ownership, even though this is qualified by the state's eminent domain prerogative and its ownership of minerals. The jurisdiction communities can exercise over their land and natural resources is characterized by a strong oversight of the government. Customary law and governance arrangements find little recognition. Additionally, the FPIC requirements of both the CRL and the LRA, rather than constituting actual consent as required by the UNDRIP, more closely resemble meaningful consultations.

Hence, the human rights compliance of the legal reforms and their implementation is mixed, and the actors involved missed an opportunity to create a sound human rights foundation in the reforms.<sup>179</sup> Instead, Liberia is another example for a post-war legal reform process, in which the human rights agenda was seen as an obstacle to 'restoring a stable governance structure and [as preventing] actors from seeking more pragmatic solutions'.<sup>180</sup>

But should donors and other international actors not acknowledge that the Liberian legislation is more progressive than the legislation in many other countries? Labelling the legal reforms as progressive means turning a blind eye to their own and the Liberian government's commitment to human rights. Given their considerable power in Liberia, donors, INGOs and IOs should critically evaluate their own contributions to legal reform processes in terms of their human rights compliance. Based on this, they should make sure that mistakes of the past will be avoided in the implementation of the LRA.

179 See *Michelle Parlevliet*, Human Rights and Peacebuilding: Complementary and Contradictory, Complex and Contingent, *Journal of Human Rights Practice* 9 (2017), pp. 337-8.

180 Office of the High Commissioner for Human Rights, Human Rights Council Holds High-Level Panel on Mainstreaming Human Rights with a Focus on the Contribution of Human Rights to Peace-Keeping, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21242&LangID=E> (last accessed on 2 April 2019).