Forest Peoples Programme

Customary land rights in Liberia:
A legal review series

What rights do Liberian communities have in relation to forest carbon?

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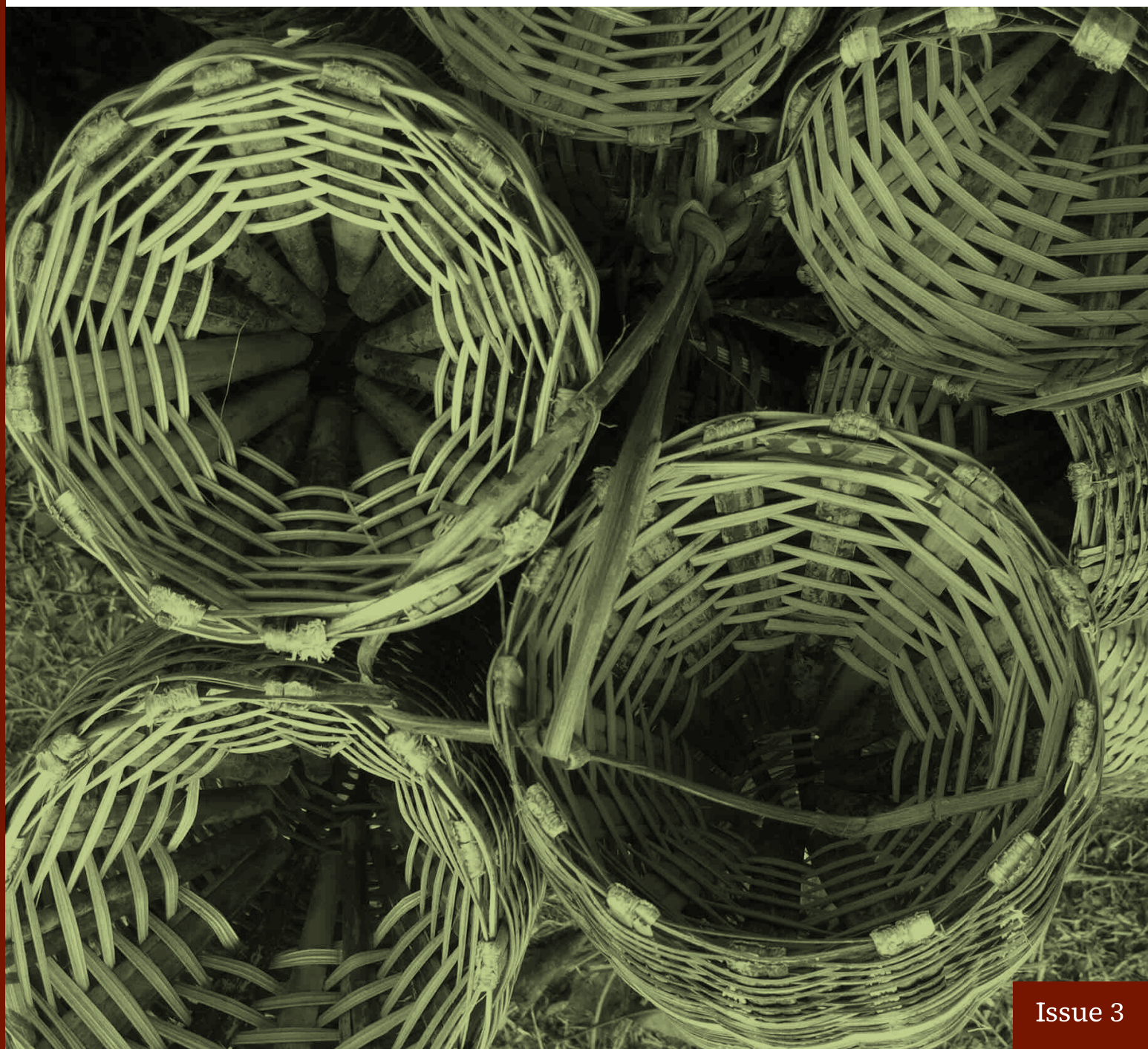
Cllr. T. Negbalee Warner and Tom Lomax



Issue 3

Central to whether and under what circumstances land-based projects can take place is the legal fact of who owns the land and the resources concerned. In the case of Liberia, the Land Rights Act of 2018 (*LRA*) codified the legal recognition of communities' ownership of and rights to manage their customary lands. Prior to the LRA, community ownership of customarily held forest lands and resources was clarified in the Community Rights Law with Respect to Forest Lands 2009 (*CRL*).

The combined effect of these two pieces of legislation is that communities own their customary lands and the forest resources they contain, and those lands and resources cannot then therefore be used or exploited by a third party without the collective permission and agreement of the community concerned.

One of the available tools for preventing and mitigating the climate crisis identified by global climate policy, centred on the Paris Agreement (ratified by Liberia as a party to the United Nations Framework Convention on Climate Change), entails preventing the atmospheric carbon absorbed by forest lands and resources from being re-emitted as a result of deforestation and forest degradation. The other side of this coin is enabling the absorption of atmospheric carbon by carbon-sequestering land uses, including the restoration of forests, re-wetting of peatlands etc. Global climate policy envisages such actions giving rise to marketable 'carbon credits' that can be sold on a carbon market. The proceeds of sale are intended to incentivise those climate change mitigating actions. The market for carbon credits is spurred by carbon-intensive industries wanting to 'offset' their emissions, so that for every ton of carbon they emit in their operations (e.g. burning fossil fuel to make cement), they will pay for a ton of forest carbon to be 'saved' elsewhere in the world for the foreseeable future (by guaranteeing that a ton's worth of deforestation will be prevented from happening for a defined period, e.g. 20-100 years).[i]

Co-authors: *Cllr. T. Negbalee Warner*, Lawyer (member of the Liberia National Bar and the New York Bar Association), Senior Partner at Heritage Partners and Associates, and *Tom Lomax*, Senior Lawyer (England and Wales) and Director, Forest Peoples Programme (FPP).
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Where this revenue-generating opportunity from the sale of carbon credits has arisen or is being discussed, as is the case in highly-forested Liberia, the usual first question is: Who has the right to market forest carbon? As with any new commodity and the potential rush to profit from it, the accompanying public policy question is: How do we maximise the public goods arising in Liberia from the carbon market? This includes how to protect against exploitation by unscrupulous carbon brokers, and to prevent negative unintended consequences such as the dispossession of communities of their forests in order to profit from the carbon dividend, as well as how to maximise pro-poor development outcomes. It is important to note that the UNFCCC framework also envisages alternative sources of non-market private and public sector funding to incentivise climate-smart forest stewardship. This gives rise to similar questions on who is entitled to access that funding and how, but those are not the primary focus of this paper.

Applicable law

In Liberia there is no specific legislative framework pertaining to carbon per se, but there is a well-developed framework of laws relating to land and forest ownership, use and governance. At first pass, the logical starting point for identifying who has the legal right to contract for or market forest carbon is the owner of the forest in question, because how the forest is used (including to what extent deforestation takes place) is generally at the discretion of the forest owner. The value of forest carbon credits is derived from keeping forest standing in circumstances where it would otherwise have been at risk of being chopped down. The locus of that decision – to log or not to log – is therefore first and foremost with the forest land owner.[ii]

Liberian law accommodates three kinds of land owners – communities (in relation to Customary Land), private citizens (Private Land), and the state (Government and Public Land). By comparison with the other categories of land ownership, Customary Land is not evidenced by deed, but instead by competent evidence which can include oral testimony demonstrating a longstanding relationship by a community with the land it is claiming. The LRA provides that communities' communal ownership of Customary Lands entails a bundle of rights, including:[iii]

a. The right to exclude others
b. The right to possess and use the Land and non-mineral resources thereon;
c. The right to manage and improve the Land including planting crops and harvesting forest products directly or through third parties by way of management contracts or similar arrangements; and,
d. The right to transfer portions of the Land through lease or other lawful means consistent with the provisions of this Act.

The CRL confirms the right of communities to own and use community forest resources.[iv] Community forest resources are defined extremely widely by the CRL, to include *'[a]nything practical, commercial, social…or other potential uses…including but not limited to flora, fauna and microorganisms'*.[v] On this basis Communities' forest land ownership extends to ownership of the forest biomass, and therefore ownership of the carbon contained therein. Communities have *'the right to control the use, protection, management and development'*[vi] of those community forest resources as well as a responsibility to manage forest resources in an 'environmentally sustainable manner'[vii], and so measures to protect the

carbon in the biomass of forests and commercialise resulting carbon credits would be squarely within communities' legal prerogative.

As a result, if a private company wanted to market forest carbon in Liberia, the obvious starting point is to approach who they believe to be the legitimate land owner, as evidenced by the fact that this has been the practice by several commercial actors in Liberia to date, including in relation to community land owners. In essence, a deal to market forest carbon is one where the landowner agrees to limit their use of a defined portion of forest land for a certain period (e.g. refrain from logging it for X number of years) in return for payment. Such a deal could indeed be constructed in the form of a lease or similar arrangement, whereby a company seeking to market forest carbon could rent the forest from the forest *owner* in return for payment of rent, and then take steps as the forest *user* to protect the forest from being exploited.[viii] The LRA would entitle a community to undertake either arrangement in relation to a portion of forest in its Customary Land, as a means of exercising the community's '*right to control…the protection of its forest'* (including via a third party management contract or a lease) and in pursuance of its responsibilities to sustainably manage its forest resources.[ix]

It would of course be important for the community to fulfil the requirements of the LRA if it were to consider entering a third party management contract or a lease, in order to generate an income for the community from marketing its forest carbon. In particular, the community would need to first establish its Community Land Development and Management Committee (*CLDMC*), develop a land use management plan, and comply with the other requirements in LRA Article 35 for establishing a legal personality in order to enter into enforceable contracts. In circumstances where there was a contested claim over the land, no contract could be entered into until/unless the contested claim is resolved by agreement of boundaries by the contesting claimants or via the confirmatory survey.[x] The LRA also places several additional conditions on leasing areas of Customary Land to third parties, including the following:

- Leasing Customary Land to a third party would require the approval of at least two thirds of the community membership.[xi]
- The terms and conditions for such a lease can be determined by the CLDMC for land areas less than 50 acres, but for areas over 50 acres would require general consensus of the community membership.[xii]
- The duration of any lease could not exceed 50 years.[xiii]

In order to demonstrate that the forest carbon in community forest areas is sufficiently safe in order to access the carbon market, there is a range of steps a community could take. Those measures could include reforesting or planting agroforestry crops in degraded areas, or implementing forest land use plans that reduce the amount of forest being cleared. Establishing a community protected area is another lawful and viable measure. Establishing community protected areas is permitted by LRA sub-articles 42(2) – 42(5), while the National Wildlife Law also provides several models by which sustainable forest use can be organised and demonstrated (such as *Community Resource Management Areas, Community Wildlife Management Areas, Traditional Protected Areas* etc.). It is important to note that any community protected area cannot be the subject of a lease or concession,[xiv] so any deal entered into with a third party to market forest carbon would need to be via some other kind of agreement, and not via a carbon

lease or concession over a community protected area.

Where a community engages in land-use that achieves long term and effective sustainable forest use *other than* via a formally designated protected area – in other words, even if the primary purpose of the sustainable forest use is subsistence, livelihoods and/or cultural purposes (and not deliberately for sequestering or protecting forest carbon per se) – the sustainable forest use may be considered as an OECM (*Other Effective Area-based Conservation Measure*). The concept of OECMs as a legitimate land-use category for achieving conservation, separate to the traditional concept of protected areas, was developed under the auspices of the UN Convention on Biological Diversity (CBD).[xv] Voluntary Guidelines on OECMs are available to guide this land-use approach,[xvi] and OECMs can be recorded on the World Database on OECMs.

The Revenue Code of Liberia provides for payment of a 10% royalty for carbon credits in the following terms: *'A contractor who has entered into a renewable resource contract and obtains carbon credits must pay a carbon credit royalty equal to 10 percent of the value of the credits'*.[xvii] The Code applies to carbon credits arising from a resource contract with the government, and therefore applies to contracts in respect of state-owned land, over which the government is entitled to grant rights to third parties.[xviii] Given that the purpose of a "royalty" is for an asset *user* to share profit derived from use of the asset with the asset's *owner*, it is fair to say that in this respect Liberian law is simply recognising the landowner as having ownership of or right to carbon on its land, and therefore an entitlement to share in the profits arising from the sale of carbon credits derived from that land by a party contracted for that purpose. By analogical reasoning, a community would also be entitled to demand a royalty (which may be higher than 10% since the percentage is not fixed in law as it is for government royalties) on the value of carbon credits generated by use of community land, payable to it by any third-party contractor they choose to contract with. In addition, tax would of course also be payable to the government by such a community on the income generated by the sale of carbon credits, as per the normal provisions of personal and corporate income tax.

One resource excluded by the LRA from the bundle of rights attendant on community land ownership is 'mineral resources', in light of which the LRA is explicit about the 'Government's constitutional right to extract all Mineral Resources found below the surface of the Land' reflecting Article 22(b) of the Constitution. On the face of it, identifying forest carbon as a

mineral resource defies common sense, because on that basis any naturally occurring element in the Periodic Table could be claimed by the state, which would accord the state a proprietary right over everything, including the food that citizens grow on their land and the soil they grow it in. Thankfully, the LRA supports a common sense approach, by defining Mineral Resources as meaning 'all non-living, natural non-renewable resources'. By defining "mineral" in terms of non-renewability, the LRA excludes forest (and indeed soil-based) carbon from being considered "mineral", since that is a clearly renewable resource, as compared with carbon that occurs in the form of fossil hydrocarbons (such as coal, oil and natural gas) that are nonrenewable.

Any contention that the government owns Liberia's forest carbon on the basis of it being a mineral resource is also precluded by provisions of the Revenue Code, which identifies carbon credits only in relation to agriculture and renewable resources (per Chapter 6), and not in relation to income taxation on natural resources, which is limited to mining and petroleum (Chapter 7). This is supported by precedent in existing agricultural concession agreements between the government and Golden Veroleum and Sime Darby, in which rights to market carbon credits arising from concession operations are reserved by the companies, subject to the 10% royalty, and the absence of any comparable or similar provisions in mining and petroleum concessions. In other words, *Liberian law does not contemplate state ownership of all forest carbon in Liberia,* since state revenue generation from marketing carbon credits is limited to taxation.

Clearly the government reserves the right to regulate trade in any commodity, and could choose to do so in relation to carbon. Any such regulation of carbon would have to be consistent with the Liberian constitution and statutory laws, as well as Liberia's current legal framework clearly providing that the right to market forest carbon belongs to the forest owner,[xix] going beyond regulation to the extent of 'nationalising' ownership of forest carbon into the hands of the state would contravene constitutional protections against state interference with property in Articles 22 and 24 of the Constitution of Liberia (as well as protection of public participation in the management of natural resources per Article 7). Those constitutional protections are reflected in the LRA's provisions that 'any interference with or use of the surface of Customary Land require the Free, Prior and Informed Consent (FPIC) of the Community'.[xx]

Even within the scope of regulating the forest carbon market, the government would need to be mindful of avoiding arbitrary, unnecessary or disproportionate interference with the bundle of rights communities have in relation to the ownership, use, protection and management of Customary Lands (including forest lands and resources and the carbon they contain). Any regulatory interference would need to be the *minimum necessary* for achieving *legitimate* public policy objective(s), for it to be lawful. While conservation is a legitimate public policy objective, the imperative would be to regulate in such a way as to minimise interference with communities' rights, including their proprietary rights and interests over their forest lands and resources. By way of illustration, a regulatory framework that places a blanket ban on *all* hunting and fishing by communities in their forests goes beyond what is strictly necessary to achieve sustainable wildlife management, and so would be a disproportionate regulatory response preventing communities from accessing a vital means of subsistence. In contrast, a regulation that prohibits hunting of the most endangered species, or which prevents hunting in key breeding seasons in order to maintain healthy populations, is more likely to meet

the necessity and proportionality threshold and so be lawful.

One route contemplated by the immediate past Liberian administration for generating government revenue from the carbon market was via a proposed deal with UAE-based Blue Carbon LLC, to market 1 million hectares of forest carbon from a defined 'Conservation Area' that included proposed protected areas (*PPAs*) such as Krahn-Bassa, Foya and Gbi, and existing protected areas including Sapo National Park, among other forest areas. However, as already set out in a separate paper by the authors,[xxi] Liberia's environmental and conservation laws, in combination with the LRA, provide for protected areas to be a *category of land use*, and not determinative of land *ownership*. This means that whereas historically, environmentally protected areas like Sapo National Park were considered Government Land, the present legislative framework allows for new protected areas to be created on Customary Land (or Private Land), *without transferring ownership of the land to the Government* (see Art.42(2) – 42(5) of the LRA). In other words, new protected areas established by communities or private land owners would remain held and managed by communities or private owners respectively, although they could be subject to a third party management contract between the community and a conservation NGO or the government.

As a result, the previous administration's approach per the proposed Blue Carbon deal was legally flawed, as it was predicated on the assumption that the government was entitled to grant rights to Blue Carbon LLC over the Conservation Area, in order to market forest carbon credits.

That could only have been lawful if: (a) the land comprising the Conservation Area was exclusively Government Land, or (b) the community or private landowners had somehow ceded their rights over the land to the government.

In relation to (b) (of communities ceding their rights to the government), the LRA provides that this could only happen with the communities' consent, and without that, the government could only grant rights over the land to a third party such as Blue Carbon by expropriating the land first. Land expropriation can only take place in accordance with strict constitutional safeguards, including the public interest test.[xxii] In this regard, it should be noted that while conservation is in the public interest, if the community concerned was in fact willing to conserve the land (either alone or in partnership with the government or a third party) while retaining ownership of it, expropriation in such case could not be legally justified, as the public interest objective could be achieved without expropriation, rendering it an arbitrary and unnecessary interference with property and therefore unconstitutional.[xxiii]

In relation to (a) (the land being Government Land), a key point is that as regards PPAs, it would be legally mistaken to assume that all PPAs were Government Land, as PPAs are merely areas that have been identified as suitable for environmental protection, and their status as a PPA does not determine their ownership.[xxiv] The result is that substantial areas of land included in identified PPAs by the Blue Carbon deal will in fact be Customary Land owned by communities, who thereby have exclusive ownership and management rights over those forests, not the government. Even in areas designated as National Forests, any blanket assumption that all land areas categorised as being within National Forests are Government Land is on shaky legal ground, and in actual fact, there is good reason to believe that legally

they remain subject to the pre-existing property rights of communities whose customary rights were not effectively extinguished or otherwise acquired by the state.[xxv]

In conclusion, the only way to properly identify who owns the different parts of Liberia's forest lands – and by association, who has the right to market forest carbon from those areas – is by reference to the provisions and procedures laid out by the LRA, whose transitional provisions make clear that, *'until a Confirmatory Survey is completed in respect of Customary Land or if the neighbouring Communities have agreed to their respective boundaries…no action shall be taken to establish the boundaries of Customary Land, Public Land or Government Land'.* Providing the law and due procedure are followed in relation to determining forest ownership, the question of who has the right to market forest carbon should follow suit uncontroversially. However, if the government or another party were unilaterally to market forest carbon 'over the heads of' community land owners, this could be successfully challenged in court.[xxvi]

Footnotes

i Carbon offsetting does not therefore lead to fossil fuel emissions reductions – indeed it is used to excuse continued fossil fuel use.

ii Further, the common law provides that land ownership gives the landowner a legal right to the 'fruits of the land' (which refers to anything profitable arising from the land), hence their entitlement to file a lawsuit to recover the value of those fruits if they are taken by a third party. In common law parlance such a lawsuit would be based on the tort (civil wrong) called 'conversion'.

iii Article 33(2)

iv Sections 2.2 and 3.1

v CRL section 1.3

vi CRL section 3.1(a)

vii CRL section 3.2(a)

viii Except on 'Government Land' (land used for provision of public services and utilities), in principle any of the other three categories of land (Customary, Private, Public) may be made available for lease to a private company. Since Public Land is a residual category – i.e. any land not covered by the other three categories – its extent cannot be known until the ownership of land under those other tenure types has been identified, unless it can be positively proven that there are no competing claims over it whatsoever.

ix LRA Article 33(2)(iii) and (iv), and in accordance with Articles 36 and 49, and per CRL section 3.1(a).

x LRA, article 37(4)

xi *Ibid,* at article 36(2)(a)

xii *Ibid,* at article 49(4)

xiii *Ibid*

xiv *Ibid,* at article 42(5)

xv See Decision 14/8 adopted by the Conference of the Parties to the CBD, 14th meeting, Sharm El-Sheikh, Egypt, 17-29 November 2018 (CBD/COP/DEC/14/8): heps://www.cbd.int/doc/decisions/cop-14/cop-14-dec-08-en.pdf

xvi See IUCN-WCPA Task Force on OECMs, (2019). *Recognising and reporting other effective area-based conservation measures.* (Gland, Switzerland: IUCN): https://portals.iucn.org/library/sites/library/files/documents/PATRS-003-En.pdf

xvii Liberia Revenue Code, section 604(b).

xviii Marketing forest carbon credits would appear to come within the Code's definition of 'Extraction of Renewable Resource Product' as a result of being an 'other valuable commodity from a renewable resource' (600(b)) and 'uncultivated forest' being defined as a renewable resource (600(a)). The Code defines the taxable 'contractor' as someone holding a 'renewable resource contract…with the Government of Liberia' and does not cater to contracts between a contractor and a community or private citizen.

xix With the Revenue Code governing payment of a royalty where the land is state-owned, as outlined above.

xx LRA Article 33(3)

xxi Lomax, T. & Warner, Negbalee T., *The legal basis for rights-based conservation* in Liberia, April 2022

xxii Per LRA article 54, and article 24 of the Constitution of Liberia, 1986.

xxiii *Ibid*, at pages 8 – 9

xxiv *Ibid*, at pages 9 – 10

xxv See for example the case: *Members of Indigenous community "Gran Cumbal" v. SVP Business SAS, Global Consulting and Assessment Services SA, Deutsche Certification Body SAS, COLCX and the Indigenous authority of "Gran Cumbal"* 2023 (see heps://climatecasechart.com/non-us-case/members-of-indigenouscommunity-gran-cumbal-v-svp-business-sas-global-consulting-and-assessment-services-sa-deutsche-certification-body-sas-colcx-and-the-indigenous-authority-of/) in which the appellate court found there to have been a violation of the rights of the claimant indigenous community arising from the fact that a carbon credit contract had been entered into without their consultation and consent.