

# The legal basis for rights-based conservation in Liberia

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## Historical conservation law and practice: “fortress conservation”

Ever since the first national park was established in the United States (Yellowstone), conservation orthodoxy has been focused on the idea of wilderness being free of all human presence except for occasional visitors (tourists, scientists and state enforcement agencies): *‘an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain’* in the words of the 1964 US Wilderness Act.

The Shoshone, Absaroka and other indigenous communities who had lived in and around Yellowstone for thousands of years – until the creation of the Park shut them out – would not have thought of themselves as mere ‘visitors’ and would have perceived a landscape rich in human presence, history, livelihoods and cultural significance.

Public perceptions of conservation still largely assume that reserves or national parks must be state-owned and -managed, without any regard to pre-existing customary land rights. That model (sometimes known as *‘fortress’* or *‘guns and fences’* conservation) subsequently became commonplace across the globe, with colonialism invariably providing the means of replication. Despite a unique history that avoided the colonial legacy, Liberia has not been immune from following the dominant conservation orthodoxy in its established parks and reserves. This is reflected by the history, enabling legislation and management of Liberia’s first national park, Sapo, which was designated in 1983.

It is important that although the preceding paragraphs are a rapid historical appraisal of protected area orthodoxy in national law and practice, *customary* laws and practices (including those bearing on conservation outcomes) have been dominant for rural communities globally and are still alive and well for billions of people today, including

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in Liberia. There are many examples of where customary laws have in effect ensured sustainable stewardship of collective community resources, including in Liberia. Examples of use and management practices regulated by custom in Liberia include the following:

- a. customary rules controlling access and use of community land and resources by strangers (including ‘stranger father’ rules on the gradual integration of strangers into communities);
- b. bush schools, sacred or ceremonial areas subject to rules controlling access and use, women’s forests, subsistence hunting grounds sufficient in size for game to regenerate;
- c. areas valued for medicinal herbs and/or other non-timber forest resources
- d. low intensity “swidden” (rotational) forest agriculture on fallow cycles that allow considerable biodiversity recovery; and,
- e. other special areas of habitat where particularly valued species live.

The above-mentioned customary rules and practices are an important reminder that Liberian communities should not be judged as inevitably destructive of their environment. In one experience among many, one of the authors of this paper spent time with members of a community in Sinoe County who knew of a Pygmy Hippopotamus habitat on their lands and spoke with pride about its presence and with sadness that the unwelcomed activities of an oil palm concessionaire were threatening to damage the site. Conservation policy and practice (whether developed and implemented by government or NGOs) would therefore do well to learn about customary practices (which change from region to region and over time), and to research the drivers by which those customs and practices are

eroded or interfered with, and explore ways to encourage and preserve them in such a manner that also meets communities’ legitimate development aspirations.

There are also factors that may incentivise short-term, extractive community decision-making, despite the value they may place on the environment and the wildlife they share it with. One of those is when communities perceive their land rights to be insecure and their land and resources at risk of being taken from under them (whether that’s for concession development or fortress conservation). An important enabling condition for providing communities with the time and space to make more long-term sustainable decisions is therefore the sense that their land and resource ownership rights are secure (in law and practice).

In the context of high levels of poverty and an often complete lack of development support, communities (or individuals therein) may decide to ‘cash in’ and invite logging or concessionaires, or undertake unsustainable types of hunting, logging or artisanal mining. Even then, the legal and practical solution is not to take the land away from them (which would be unlawful except in the most exceptional circumstances), but instead begin with a recognition of their existing interest in and/or right to the land and then ask the question: “what support do the communities need to make sustainable decisions for their lands and their communities?”. This will ultimately centre on delivering the development and technical support communities need to make sustainable decisions and undertake their own environmental stewardship measures, thus achieving the same conservation objectives, but on a win-win basis as contrasted with an adversarial or confrontational approach.

## Modern conservation law and practice: *rights-based conservation*

Conservation science (as summarized above), policy and law have however been the subject of a concurrent paradigm shift in recent decades towards a *rights-based* conservation model. This is visible from the policies of established conservation organisations like the World Wildlife Fund (*WWF*) and multiple resolutions of the World Parks and World Conservation Congresses (*WPC* and *WCC*) of the International Union for Conservation of Nature (*IUCN*). The rights-based model seeks to achieve conservation objectives in a manner that facilitates a win-win for conservation and communities. Under this model, the assumption of state appropriation and management of lands has been replaced by respect for the pre-existing land rights of communities.

In essence the legal change that the rights-based conservation model represents is that the conservation, use, or even designation of land (as an environmentally protected area) is no longer conflated with the land's tenurial status. In other words, landscapes can be subject to conservation measures (and if necessary and proportionate, legally enforceable conservation regulations) regardless of whether the land in question is owned by a private individual, a community, or the state.

Similarly, the management and land-use planning arrangements are no longer the preserve of the state, but can be a collaborative arrangement. While

there has been a delay in putting the science, law and policy of rights-based conservation into practice, it is increasingly prevalent, as demonstrated by examples in Tanzania, South Africa, Australia, Botswana, Canada, Guyana and Brazil.<sup>i</sup>

International law relating to human rights and conservation has been one of the heralds of this paradigm shift towards a rights-based conservation model. International human rights law<sup>ii</sup>, backed by equivalent developments in international *environmental* law<sup>iii</sup>, provides that indigenous peoples and other highly land-connected communities have a right to collectively own and effectively control the lands and natural resources that they have traditionally occupied, possessed, used or acquired. This includes a right to restitution of lands from which they have been previously evicted or excluded in order to create protected areas for environmental conservation.

In 2017, the African Court of Human and Peoples' Rights (*the African Court*) made judgment in a case in which the Ogiek people of the Mau forest complex in Kenya were contesting their eviction from ancestral lands following the designation of those lands as environmentally protected forest reserves. The Ogiek sought restitution of their forest on the grounds that they were best able and willing to protect it, whereas in their response the

Kenyan government asserted that the exclusion of the Ogiek from the forest was necessary to ensure its protection. In its judgment the African Court restated the general legal principle of human rights law that any *'interference with the rights and freedoms guaranteed in the Charter shall be necessary and proportional to the legitimate interest sought to be attained by such interference'*.<sup>iv</sup> Applying this principle to the facts of the case, the African Court found that the Kenyan state had not substantiated its claim that the Ogiek population was 'inimical to the environment', and found that 'the purported reason of preserving the natural environment cannot constitute a legitimate justification for the [Kenyan state's] interference with the Ogieks' exercise of their cultural rights'.<sup>v</sup>

The judgment is reflective of the current state of conservation science, which has demonstrated that environmental outcomes in areas protected by their traditional inhabitants are often better than the environmental outcomes for protected areas where all human presence has been excluded (see previous chapter).

## Rights-based conservation in Liberian law

Liberia's 2018 Land Rights Act (the *LRA*) has reflected the paradigm shift in conservation science and law (and to a significant extent also reflected in the 2016 National Wildlife Law) in that it allows for a Protected Area to be located on community land and *continue* being community-owned rather than appropriated by the state. This legislative change has put Liberia in the vanguard of the move to implementing a progressive, rights-based approach to conservation.

Co-existent with the LRA, the other key laws in force relating to conservation, protected areas and community rights, include the following:

- An Act Creating the Forestry Development Authority (*FDA*), 1976
- Environment Protection Agency Act of Liberia, 2002
- Environmental Protection Law, 2002
- Protected Forest Area Network Law, 2003
- National Forestry Reform Law, 2006
- Community Rights Law with Respect to Forest Lands, 2009
- National Wildlife Law, 2016

The FDA's authority to create and establish protected areas originates in Section 4 of the Act Creating the FDA (as amended), with the procedure for doing so now detailed by the National Wildlife Law, 2016 (the *NWL*). No law stands alone, and so that procedure would of course need to be implemented in a manner consistent with other applicable law, including the *LRA*. Although it is understood that there are plans to revise the *NWL* to ensure consistency with other laws, in its current form the *NWL*, like the *LRA*, does provide for conservation to take place on land without that land being necessarily expropriated from its current owners (whether that is private or customary land).

## The National Wildlife Law

Included in the list of objectives of the *NWL* is to “provide for a representative network of conservation areas on state land, private land and community land”.<sup>vi</sup> The list of FDA functions includes “enabl[ing] local communities to identify areas and provide necessary support to them to develop the capacity and institutional structures to manage wildlife areas for conservation and livelihood needs”.<sup>vii</sup> In multiple places the law acknowledges the need for community consultation, participation, taking account of community rights and needs, with the FDA's authority to transmit a proposed protected area to the President being predicated on indicating “the prior, free, informed consent of the community where Community Forest Lands are affected”<sup>viii</sup>. Included in its mandate to “conserve forest resources and services within the protected Forest Area Network” the FDA is obliged by the *NWL* to:

- “b. *Promote community-based participation in the management of the Protected Forest Area Network and wildlife management areas and forests on community forest lands...*

- c. *Support communities to establish and maintain community-based forest management that meets their livelihood needs while accomplishing conservation objectives*<sup>ix</sup>

There are at least 18 different kinds of protected areas envisaged by the *NWL*. In broad terms, they can be divided into (a) protected areas created by legislative action (including ‘National Parks’, ‘Strict Nature Reserves’ and ‘Multiple Sustainable Use Reserves’ (*MSURs*) among others) or (b) by regulation (including ‘Communal Forests’, ‘Community Resource Management Areas’, and ‘Community Wildlife Management Areas’).<sup>x</sup>

## The *NWL* expressly envisages that protected areas created by regulation may be permanent or temporary<sup>xi</sup>.

However, in theory there is nothing to stop the legislature from also creating temporary protected areas by enacting legislation with a sunset clause. Similarly, while the protected areas that most explicitly relate to communities are listed in those created by regulation (which states that such areas may be established at the request of communities<sup>xii</sup>), there is nothing in principle to prevent communities from requesting the establishment of protected areas on *community-owned* land whose creation would necessitate legislative action.

In summary, the substance of the *NWL* is entirely concerned with conservation and wildlife management and regulation, meaning that protected area creation has no legal implications for how the land in question is owned, but is instead focused mainly on how that land is used and managed. Protected areas on community land, community-based management and joint forest management of protected areas are all provided for by the *NWL*.

The use and management regime for each protected area is defined by its management plan, which has the status of a formal NWL regulation.<sup>xiii</sup> The FDA is mandated to prepare management plans “in collaboration with affected communities”.<sup>xiv</sup> Since the NWL specifies that no activities may be undertaken in a protected area that are not in compliance with the management plan, it would be important for communities to be clear what would be in a management plan before it gives or withholds its consent to the establishment of a protected area in the first place, otherwise it would be indicating its consent in a manner that is *not* informed (contrary to the requirements for informed consent in both the NWL and the LRA).

It is of course entirely open to a community to continue or enhance the protection of its lands under self-made rules and governance, without seeking government assistance and without adopting any formal protected area status. However, if they want to explore those formal options, as well as the protected area types already detailed above, the NWL provides a number of other protected area types that communities may wish to adopt or which conservation agencies could explore with communities.

Those options include ‘*Traditional Protected Areas*’, which are areas managed by communities but recognised by the FDA as ‘traditional’ categories of protected area, and reflects some of the kinds of customary law and practice commonly found in Liberia such as bush schools, sacred society bush and other areas.<sup>xv</sup> In addition, management zones within protected forest areas also provide some flexibility for communities to work with conservation agencies (governmental or non-governmental) to find a management regime that suits them. Zones anticipated by the NWL include ‘*protected zones*’, ‘*ecological or closed zones*’, ‘*multiple-use zones*’, ‘*cultural (or traditional) use zones*’, and ‘*traditional protected area management zones*’.<sup>xvi</sup>

## The Land Rights Act

The principal section of the LRA in relation to protected areas is Article 42 (see box 1.). In simple terms, this provision states that Protected Areas *previously* established by the Forestry Development Authority (FDA) shall be and shall remain Government Land. *New* Protected Areas can be established either by request of the Community, or by the request of the Government following good faith negotiations with the community.

Provided the community is content to have a Protected Area on their Customary Land, it will remain Customary Land and can be used by the community so long as the use is consistent with the conservation and management provisions of national law. The option for a Community to zone a part of its Customary Land as a Protected Area is also highlighted in the list of categories in Article 38(1). Land designated as a Protected Area – regardless of who owns it – cannot then be sold, leased or granted as a Concession.

While Article 42(3) provides that Protected Areas on Customary Land shall continue to be owned, conserved and managed by the community, there is nothing in the LRA to prevent communities entering into collaborative management and conservation arrangements with the FDA and/or another conservation collaborator (e.g. a conservation NGO) as is also envisaged by the NWL. The statement and intent of the law in providing for customary land to be set aside for conservation is not therefore aimed at a land-owning community being ousted by the government from their land or restricted from managing such protected areas themselves or jointly.

#### Box 1

##### **Article 42: Protected Land**

1. All Land gazetted by the Forestry Development Authority (FDA) or any successor as Protected Areas shall be and remain Protected Areas within Government Land; Other land previously designated but have not been gazetted as the Effective Date of the Act shall be negotiated between the FDA and the Community based on provisions 2 and 3 of this article.
2. A portion of Customary Land may be set aside as a Protected Area by the Government: (i) at the request of the Community; or (ii) upon the request of the Government following good faith negotiations. If the negotiations are unsuccessful, the Government reserves the right to exercise its rights of Eminent Domain as provided in Constitution of Liberia, Article 54 of this Act and any other applicable Liberian laws.
3. Every Protected Area in a Customary Land shall be and remains owned by the Community and conserved and managed by the Community for the benefit of the Community and all Liberians.

Recognizing the possibility that the Government could try but fail to negotiate a mutually acceptable agreement for the establishment of a Protected Area on an area of Customary Land, Article 42(2) of the LRA provides that in such a situation the Government could consider resorting to compulsorily acquiring the land from the non-consenting community. However, there are strict constitutional and human rights treaty-law requirements on whether, and if so how, land can be forcibly acquired by Governments, to ensure fairness and due process. This would have to be very much a last resort and only used in exceptional circumstances, to avoid being overruled by legal challenge. It is worth considering therefore what measures the government could take, short of expropriation, to protect ecosystems and wildlife in a manner that *maintains* the underlying land ownership of a community where negotiations have failed to reach agreement on the establishment of a protected area. Two such options are provided for in the Environment Protection Agency Act of Liberia, 2002 (the *EPA Act*), and the Environmental Protection Law, 2002 (the *EPL*), in terms of ‘*Environmental Restoration Orders*’<sup>xvii</sup> and ‘*Environmental Easement Orders*’<sup>xviii</sup>.

Environmental Restoration Orders can be issued by the EPA in order to require any person (which can include a community) to, among other things, restore the environment and prevent damage to the land or the environment (including flora and fauna on it). The latter are a more stringent step, in that the EPA can enjoin a Court to issue an Environmental Easement Order “to facilitate environmental conservation and enhancement by imposing certain obligations on the use of land for the benefit of the environment”. It would be reasonable to suppose that such orders would be temporary, lasting only as long as is reasonable, and could be continued, amended or revoked (including by application from a third party). In legal parlance an ‘easement’ refers to “a right of use over the property of another”, such as a right of way.<sup>xix</sup> Such orders would of course have to be used in a manner consistent with the LRA, and this interface

has yet to be tested. At a minimum they would have to be deployed in a manner that respects the human rights law conditions of necessity and proportionality.

Other intermediate options are provided for in the NWL. Those include the option for the FDA to impose regulatory steps restricting land use in terms of hunting, agriculture and other activities where harmful (including by use of a permitting regime), and by declaring certain plants or animals to be classed as protected species (which prohibits hunting, capture, harassment and trade).

**Perhaps the most draconian step the FDA could take (short of expropriating land) would be to *impose* a protected area on land owned by another (including a community), which would mean imposing a land management and use regime, without disturbing the underlying land ownership.**

The legality of such an action is doubtful because it would clearly violate the LRA, which is the most recent and specific legislation on land ownership and the rights thereof, including the community’s right to give or withhold FPIC to any act on its land (a right also recognised by the NWL and CRL).

Even if such an imposed protected area were to be legal, it would, on the human rights law principles of necessity and proportionality, have to consist of the least onerous (least restrictive) measures necessary to achieve the state’s legitimate environmental objective. This means that any such imposition must interfere *as little as possible* with community land use and management rights and interests (e.g. preserving their ability to meet their essential subsistence and cultural needs). For the same reason the imposition would ordinarily be a temporary one (or susceptible to an application to amend or revoke made by the community) in order to give the community the

chance to develop the capacity and structures needed to recover use and management of the land sustainably to themselves (with third party support where needed) in accordance with what can then become an agreed (rather than imposed) conservation or protected area regime. Those measures may be a variation of the same protected area type as that which was originally imposed, or another conservation regime, depending on the measures needed.

In practice however, a well-informed community is likely to voluntarily accept a degree of regulation and limitation on the use and/or management of portions of their Customary Land, in preference to the imposition of conditions or (in the worst case) land ownership and possession being taken from them wholesale. This is especially the case if the limitation being considered is the least onerous possible. However, it is important to note that a negotiation premised too soon or too coercively on a “protect it or lose it” binary choice would be deemed oppressive and not qualify as a good faith negotiation. A coercive approach would of course not be consistent with the communities’ right under the LRA to give or withhold their *Free, Prior and Informed Consent* (“*FPIC*”) to third party use of their land, and nor would it comply with equivalent *FPIC* provisions in the *NWL*.

## Expropriation

Although the starting point in the *LRA* is that customary lands are owned by communities, as outlined above it is contemplated that there may be occasions where in the last resort the government may, on the basis of a legitimate environmental conservation public interest objective, seek to impose a protected area by expropriating the land from the community. Expropriation would of course only be appropriate and lawful providing *all* the legal procedural requirements on the use of eminent domain were observed, including those in the *LRA*<sup>xx</sup>,

the Constitution<sup>xxi</sup>, and other applicable law. Those requirements include:

1. **Public purpose** – expropriation must be for a legitimate public purpose, defined by the *LRA* and the Constitution as including “*the security of the nation in the event of armed conflict or where the public health and safety are endangered or for any other public purposes*” (emphasis added). Environmental conservation would ordinarily be considered a legitimate public purpose.;
2. **Last resort** – the Government must first have made reasonable and good faith efforts to meet the intended public purpose in the least draconian (least restrictive) means of achieving that purpose.;
3. **Reasons** – expropriation must be justified by the Government giving reasons for such expropriation to the Community, in advance, in a language and manner they can understand, and with sufficient notice for the community to seek legal counsel and contest the expropriation in court.;
4. **Compensation** – there must be prompt *and* prior payment of *just* compensation to the Community owner of the Customary Land being expropriated by the Government.;
5. **Appeal** – it must be possible for the Community to freely challenge the expropriation or the compensation in a court of law with no penalty for having brought such action.;
6. **First refusal to reacquire** – when property taken for public use ceases to be so used (including where the land is not used for the purpose for which it was acquired for a period of five or more consecutive years), the Government must give the community from whom it was taken the right of first refusal to reacquire the property.

In addition to the above, African Charter jurisprudence provides that so-called *qualified* rights (including the right to property) may only be lawfully interfered with where that interference is necessary and proportionate with the aim of achieving a legitimate objective in a democratic society.<sup>xxii</sup> In *Endorois* the

Commission stated that ‘*any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible*’.<sup>xxiii</sup> In other words “necessity” inevitably includes “proportionality”, since if actions go further than needed (i.e. are *disproportionate*), those actions also go beyond what is strictly necessary and would therefore be unlawful.

## Protected Areas pre-dating the LRA

The fact that the LRA provides that *pre-existing* Protected Areas are Government Land may be a cause of concern to some communities where those Protected Areas were established on what would otherwise have been Customary Land and where there is community dissatisfaction arising from the dispossession of their customary lands and forests.<sup>xxiv</sup>

However, the situation in law may well be more complex if this situation were ever to be subject to challenge in the courts. This would be the case for example if the community in question were able to demonstrate – as the Ogiek successfully did in their African Court case – that they retain a right of property owing to their long-standing possession, use and occupation under customary law, which was disrupted only involuntarily. In human rights law, even when *actual* possession of traditional lands and natural resources has been lost against the wishes of indigenous and other highly land-connected communities, their right to property (and to regain possession of that property) remains enforceable, as long as they retain a continuing relationship to the land: actual possession is not a requisite condition for right to restitution.<sup>xxv</sup> “As long as that relationship [“their unique relationship to traditional lands”] exists, the right to recover those lands remains applicable”.<sup>xxvi</sup>

An alternative argument based in the common law ‘doctrine of native title’ would be to assert that they held a pre-existing property right cognizant under Liberian law (whether derived from customary law, statute or otherwise). Non-deprivation of property has been the subject of constitutional protection ever since Liberia’s first constitution of 1847. Where it can be shown that a community’s pre-existing property right was not *lawfully* extinguished by subsequent legislative instruments gazetting the land as a protected area, the legal implication would be that their right of property survived gazettment and would continue to deserve protection by today’s constitution. Enforcement of such a right would not be time-barred by any statute of limitations because (i) under Liberian law statute

of limitation may not be pleaded against or by the Government; and (ii) in any case the deprivation of the enjoyment of the property right would be a continuing one. There is now ample jurisprudence of this type of claim in other common law countries, including the US, South Africa, Australia, Botswana, Canada and Tanzania among others.<sup>xxvii</sup>

It should be emphasized that since there are provisions in Liberian constitutional and statutory law that recognize customary land ownership, the burden is likely to be shifted to the Government or other third party claiming that a community has no title or any other protected interest in the land which it has occupied or retained a continuing relationship with for generations.

## Proposed Protected Areas

Given Liberia's policy of ensuring the environmental protection of 30% of its land area, there is likely to be a strong emphasis on further protection measures given that Liberia's existing protected area network adds up to 4.1% of its land area.<sup>xxviii</sup> While Article 42 is clear that any such protected areas proposed on community land would have to be the subject of good faith negotiations with the communities in question, the legal position is less immediately clear on the status of 'Proposed Protected Areas' ("PPAs").<sup>xxix</sup>

PPAs are defined quite broadly in the 2006 National Forestry Reform Law (NFRL) as areas 'that the Authority has identified as suitable for designation as a Protected Area under an approved National Forest Management Strategy pursuant to Chapter 4 of this Law.' In theory, regardless of whether those PPAs were proposed (but not gazetted) prior to the LRA or after it, according to Article 42 of the LRA they cannot be gazetted as Protected Areas without prior negotiation with communities to explore the possibility of locating those areas on Customary Land that remains in community ownership.

However, the definitions section of the LRA states that 'Government Land' –

*Means the land owned by the Government including land used for the buildings, projects, or activities of the Government, including, but not limited to, lands on which the ministries, agencies, parastatal bodies, military bases, roads; ports, airports, public schools, public universities, public hospitals, public clinics, public libraries, public museums and public utilities. Government Land also includes Government Protected Areas, and Proposed Protected Areas as of the Effective Date of this Act.* (emphasis added)

At first glance this provision sets up an inconsistency with Article 42, by begging the question whether PPAs are indeed Government Land per the definition above, or whether they remain community land per the provision in Article 42(1) that 'land previously designated but have not been gazetted as the Effective Date of the Act shall be negotiated between the FDA and the Community based on provisions 2 and 3 of this article'.

In general terms there is a strong argument that a substantive legislative provision that is expressly to the point (in this case Article 42) would trump a general 'definitions' provision where there is an apparent inconsistency. On this basis, the most reasonable interpretation of the LRA as a whole would be that if any PPA was merely identified (but not designated – i.e. not gazetted) prior to the LRA coming into force, then it remains Customary Land. It could therefore only be 'upgraded' to being a full Protected Area subject to a process that is compliant with Article 42(2) and (3), whose outcome could be a Protected Area on land that remains under community ownership.

This interpretation would also be consistent with LRA Article 33(3) which provides that "any interference with or use of the surface of Customary Land require the Free, Prior and Informed Consent (FPIC) of the Community". This position is reflected in the context of forests (a key ecosystem likely to be the focus of

most PPAs) by the Community Rights Law with respect to Forest Lands of 2009 (the CRL). The CRL highlights forest communities' rights to own the forests on their customary lands and places a limitation on third party (including government) interference with community forest rights by demanding that any such interference be subject to the community's free, prior and informed consent.<sup>xxx</sup> As outlined above, the NWL also requires any new protected area proposed to the President to be subject to the FPIC of communities concerned.

**One argument that could be raised in favour of attempts to establish protected areas *without* recognising the customary lands rights of communities would be to claim that where the land has previously been the subject of a presidential proclamation designating it a National Forest, it has ever since then been Government Land.**

The NFRL definition of 'Protected Area' includes 'National Forests', and LRA Article 42 states that land gazetted as protected Areas 'shall be and remain Protected Areas within Government Land'.

It should be noted that there is significant overlap between land areas designated as National Forests and PPAs, with the Krahn-Bassa PPA being a case in point. National Forests – amounting to some 1.4 million hectares – were gazetted mostly in the 1960s following a forest inventory supported by the German Technical Cooperation Agency (GTZ). The purpose was to identify lands that should remain forested, not just for conservation purposes, but also to ensure a supply of commercially exploitable timber – essentially a permanent forest estate. The law governing the establishment of Government Forest Reserves (as they then were called), was the 1953 'Act

for the Conservation of the Forests of the Republic of Liberia', which at section vi states:

*'All such Government Forest Reserves shall be created and established by presidential proclamation after all rights and claims of the original owners have been heard in a court settlement. Upon the adjudication of all such rights and claims and the proclamation of these reserves, all rights, title, and interest in them shall be vested in the Government'* (emphasis added)

The argument that National Forests are exclusively Government Land would however need to demonstrate (a) that the proclamation as National Forests lawfully extinguished all pre-existing customary land rights, meaning that no community rights or interests survived; and (b) that no interests in or rights over the land have been recognised or acquired since the proclamation. On both counts that argument would be a house built on swampy ground.

While the proclamations purported that 'all rights and claims of the original owners have been duly adjudicated and satisfactorily settled' through a judicial procedure, as observed by Liz Alden Wily in her forensic investigative 2007 report 'So Who Owns the Forest': *'National Forests...were proclaimed as national property in 1960 without evidence that customary ownership (even as registered in fee simple Aborigines Deeds) was properly dealt with through compensation payments as constitutionally required.'* It is therefore highly unlikely that the Government could demonstrate that the rights, interests and claims of the original customary land owners were indeed 'adjudicated and satisfactorily settled' through a judicial procedure. By comparison, there is ample evidence of actual continuity of occupation, possession, and use of those lands under customary law regardless of the National Forest proclamations.<sup>xxxi</sup>

The argument that National Forest proclamations failed to settle pre-existing rights, interests and claims, and the de facto continuation of the exercise of those by communities, would be supported

by the human rights jurisprudence cited above that indigenous peoples and other highly land-connected communities have a right to collectively own the lands and natural resources that they have traditionally occupied, possessed, used or acquired, and thereby a right to restitution of lands from which they have been dispossessed in the establishment of protected areas.

Also supportive of the existence of community land rights over lands in National Forests is the 2009 Community Rights Law with Respect to Forest Lands (CRL), which fundamentally overhauled the legal framework on community rights with respect to forest land ownership and management. As well as recognising community ownership of forest resources on customary lands the CRL provided 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>xxxii</sup> Cementing the CRL’s status and preventing any assertion that the community rights recognised by it are undermined by contrary provisions in the 2006 NFRL, section 9.1 states unequivocally that where there are conflicts of law existing between the NFRL and the CRL, the CRL takes precedence.

## Conclusion

Since existing protected areas in Liberia are relatively small in number and area, government agencies and the larger conservation NGOs (who are typically the most active proponents of new conservation measures including protected areas) have a chance to learn from and avoid making the mistakes made in other countries that have been the cause of conflict and egregious human rights violations.

As well as the firm legal basis for respecting community land rights as set out in the LRA and CRL, that legislation combined with the major environmental and wildlife conservation laws (the NWL, EPA Law, and EPL) taken together provide an array of available options (ranging from the least restrictive to the most restrictive measures) as well as important procedural safeguards on when and if so how conservation measures can be put in place. Those procedures prioritise good faith negotiations between communities and government with a view to reaching a voluntary consensus on the conservation measures that would be most appropriate. Institutionally, government conservation agencies – the FDA and EPA – in conjunction with the Liberia Land Authority (*LLA*) where land rights are concerned, are mandated first and foremost to take a supportive and capacity building approach to meeting conservation and wildlife objectives, complemented by an array of regulatory tools for proportionate and judicious use. In summary, the prospects for a transition to rights-based conservation in Liberia are very bright indeed.

## Footnotes

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- i For a summary of the legal models for rights-based conservation in some of these jurisdictions see for example: Lomax, T and Dilke, A, “*It is the way we live that conserves*”: *Legal models for rights-based conservation* (FPP News article, 2017) at <http://www.forestpeoples.org/en/rights-based-conservation-cultural-identity/news-article/2017/it-way-we-live-conserves-legal-models>
- ii "See for example: *Xákmok Kásek Indigenous Community v. Paraguay*, Inter American Court of Human Rights (“IACtHR”), Judgment of August 24, 2010. Series C No. 214; *Kaliña and Lokono Peoples v. Suriname* IACtHR Judgment of November 25, 2015. Series C No. 309; *Centre for Minority Rights Development and Minority Rights Group International (on Behalf of the Endorois Welfare Council) v. Kenya*, Communication 276/2003, African Commission on Human and Peoples’ Rights (“ACHPR”) (2010) – hereafter referred to as “the Endorois case”; *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, African Court of Human and Peoples’ Rights (“ACTHPR”) Judgment 26 May 2017, Application No. 006/2012 – hereafter referred to as “the Ogiek case”.
- The issue has also been dealt with by various UN Treaty bodies, including in the Concluding observations of the UN Committee on the Elimination of Racial Discrimination (“UNCERD”), see for example: Botswana. 23/08/2002. UN Doc. A/57/18, paras.292-314; Ethiopia. 20/06/2007. UN Doc. CERD/C/ETH/CO/15, at para 22; Sri Lanka. 14/09/2001. UN Doc. A/56/18, paras. 321-342; Namibia. 19/08/2008. UN Doc. CERD/C/NAM/CO/1; Botswana. 4/04/2006. UN Doc. CERD/C/BWA/CO/16, at para 12; Congo. 23/03/2009. UN Doc. CERD/C/COG/CO/9, at 13; as well as by the UN Human Rights Committee, see for example the Concluding observations of the Human Rights Committee: Australia 28/07/2000. UN Doc. CCPR/CO/69/AUS, at paras. 10 and 11. The issue has been dealt with at length in the Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, in relation to Indigenous Peoples and Conservation, 29 July 2016, UN Doc. A/71/229.
- iii The world’s cornerstone international treaty on environmental law, the UN Convention on Biological Diversity (CBD), via its articles (notably Article 8(j) and 10(c)) and decisions of its regular ‘Conference of the Parties’ (“COP”) recognises the valuable contribution to conservation from indigenous peoples’ and local communities’ ways of life and requiring state parties to protect and integrate the rights and way of life of indigenous peoples and local communities into biological conservation measures. See *inter alia* Decision VII/28 on Protected Areas, adopted by the COP 7 (2004), at para 22; Decision X/31 ‘Protected Areas’ of the 10th Conference of the Parties (“COP”) (2010) at paras 31 and 32(c). See also Decision XI/24 of CBD COP 11 (2012) which requested parties to “Strengthen recognition of and support for community-based approaches to conservation and sustainable use of biodiversity *in situ*, including indigenous and local community conserved areas” (emphasis added).
- iv The *Ogiek* case, at para 188. Emphasis added
- v *Ibid.*, at para 189
- vi National Wildlife Law, 2016 (NWL), at s. 2.1(e)
- vii *Ibid.*, at Section 3.1.2(q)
- viii *Ibid.*, Section 5.4.1, and see *inter alia* the following sections: 5.2 (on taking into account community needs and rights); 5.3, 5.4.4 and 5.4.6 (on consultation with forest-dependent communities); and 2.1(g) 3.1.2(m)-(o) (on promoting participation of local communities).
- ix *Ibid.*, Section 5.2.2
- x *Ibid.*, at Sections 5.3.1. and 5.3.2.
- xi *Ibid.*, Section 5.4.2(1)
- xii *Ibid.*
- xiii *Ibid.*, Section 5.9.1

## Footnotes

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- xiv *Ibid*
- xv *Ibid*, Section 5.3.3
- xvi *Ibid*, Section 5.10
- xvii Section 40 and 41 of the EPA Act, and Sections 90 *et seq.*, of the EPL
- xviii Section 42 EPA Act
- xix Per the definition in Black's Law Dictionary, accessed January 2021.
- xx See LRA Article 54
- xxi See 1986 Constitution of Liberia, Article 24
- xxii See *Endorois* case at paras 211-215, and *Ogiek* at para 129. Emphasis added
- xxiii *Endorois* case, at para 214
- xxiv See LRA, at article 42(1)
- xxv See *Sawhoyamaya Indigenous Community, Merits, Reparations and Costs, Judgment, 2006 Inter-American Court of Human Rights (ser. C) No. 146*, at para. 128, and *Endorois* case, at para. 209 (*supra* at note ii).
- xxvi Per the *Xákmok Kásek* case (*supra*, at note ii), para 112, summarising the Inter-American Court's jurisprudence
- xxvii The argument for asserting customary property rights even in respect of previously established protected areas would also derive legal support from African regional human rights law, as well as international human rights and environmental law - See above, and at endnotes (ii) and (iii).
- xxviii Liberia's existing protected areas are: Sapo National Park, the East Nimba Nature Reserve, the Lake Piso Multiple Use Reserve, the Gola National Forest Park, and the Grebo-Krahn Forest Park
- xxix The authors understand there to be 11 Proposed Protected Areas (PPAs) currently under consideration: Wonegezi Forest, Foya Forest, Cestos-Senkwehn Forest, Wologizi Forest, Grand Kru-River Gee Forest, Gbi Forest, Zwedru Forest, West Nimba Forest, Margibi Mangrove, Bong Mountain, and Kpo Mountain.
- xxx See CRL Section 2.2
- xxxi An additional (though probably unnecessary argument) would be to cite the law of prescription, relying on the fact that whatever the legal effect of the proclamation of land as National Forests at the time, the land's continued use and occupation over decades by communities would itself give rise to a property right or interest over the land.
- xxxii See CRL, at Section 2.2. Section 2.3 further includes in the list of lands classified as Community Forest Land 'Forest Land and customary land as are recognised by this law'. Customary Land is recognised and defined in the section 1.3, and confirms that 'To be recognised as customary land, it is not necessary for the land to have been registered under statutory entitlements'.