

# Included or Excluded: An Analysis of the Application of the Free, Prior and Informed Consent Principle in Land Grabbing Cases in Cameroon

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## Abstract

Even though the principle of free, prior and informed consent (FPIC) is soft law, the need to respect, protect and fulfil the rights to be informed and to be involved in development projects is strongly backed in international legal instruments including *inter alia* the *ILO Convention 169 Concerning Indigenous and Tribal People in Independent Countries* (1998) and the *UN Declaration on the Rights of Indigenous and Tribal People* (2007). These instruments do not only appear to be the most comprehensive and advanced international legal instruments that deal with indigenous peoples' rights in terms of the FPIC, but also signal an addition to the growing body of international human rights law that serves to ensure the realisation and protection of the substantive environmental and other human rights of indigenous people, particularly in the context of land grabbing activities that have the potential to negatively impact on their rights. Such rights include, for example, the rights to be informed and to participate in decision-making processes with respect to development projects, including land grabbing activities. This implies an obligation on states party to such international agreements to ensure that indigenous people are informed about and are actively involved in both the negotiation and the implementation of land grabbing deals. However, because the latter often takes place against the background of non-transparent transactions which are inimical to the rights and interests of indigenous people, one may wonder why the principle of FPIC is not applicable during land grabbing transactions.

Focusing on Cameroon, this article examines instances of land grabbing in the country in order to support this hypothesis. This is done by focusing specifically on the application of the principle of FPIC. The arguments in the article are inspired by international law in which the application of the principle in the context of land grabbing serves not only to protect the rights and interests of indigenous people but is also conducive to fostering and reinforcing the land governance regime of host countries involved in such deals. To this end, the article concludes that because the principle embodies aspects of procedural rights such as the rights to information and participation, which are often conspicuously lacking during land grabbing contracts, its application in and during land grabbing might be useful to set the basis for the recognition, promotion, and enforcement of local communities' rights in Cameroon.

## Keywords

Cross-border insolvency; companies; list of persons who may seek a stay of a winding-up order; grounds for challenging a winding-up order.

## 1 Introduction

The principle of free, prior and informed consent (FPIC) as a right is strongly supported by international and regional legal instruments which are discussed in detail below. To be sure, FPIC is perceived to be an emerging and important standard necessary to facilitate, promote, protect and ensure the rights to access to information and public participation of local communities<sup>1</sup> in a development context, including land grabbing.<sup>2</sup> For this reason, local communities often endeavour to rely on FPIC and the protection it brings to claim their rights to access to information, self-determination, consultation and public participation during land grabbing activities which have the potential to negatively impact on their rights-based entitlements.<sup>3</sup>

This article investigates whether instances of land grabbing in Cameroon that often occur on land inhabited by local communities include or exclude local communities' rights to access to information and public participation, as required by FPIC. Although this article relies on the legal framework of FPIC, it acknowledges the difficulty of governing by way of consensus,

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<sup>1</sup> Okara 2013 CAR 17; Tamang "Overview of the Principle of Free, Prior and Informed Consent" 3; Portalewska 2012 <http://tinyurl.com/hxhtkg8>. In this article the term "local communities" is used in the broad sense to include indigenous people.

<sup>2</sup> Land grabbing has been defined as "... the acquisition of vast portions of land, often through non-transparent and exclusionary land acquisition deals whether purchased or leased that negatively impact on the rights and interests of local communities and affected stakeholders. Such land deals are usually concluded between a foreign investor, which can either be a private company or a foreign government or a financial institution, and the government of a host country, and is often directed towards the eventual production of food crops and increasingly biofuels. This practice can lead to the usurpation of the rights of ownership and use of land of local communities and it can negatively impact on a whole range of social, economic and environmental and related rights and interests. It is this usurpation of rights (both ownership and of use) that is termed land grabbing". See Ashukem *Rights-based Approach* 37.

<sup>3</sup> Greenspan 2014 <http://tinyurl.com/zszh8lt> 5; Triggs "Rights of Indigenous People" 124. For a detailed understanding of the impacts of land grabbing activities on people's rights-based entitlement, see Ashukem *Rights-based Approach* 76-83.

because it would be an outrage for a state to relinquish its governing powers to the public.<sup>4</sup> Thus, the focus of the article is not on the general debate about FPIC and the inherent challenges its enforcement and respect could present during land grabbing.<sup>5</sup> Rather, it focuses on the core elements of the principle distilled below, and analyses these against the backdrop of land grabbing activities in Cameroon. The article proceeds firstly by providing a brief description of the principle and defining the term local community, while making a connection between them. Secondly, the article examines the legal basis of FPIC as a right in relevant international and regional law. Based on the description of FPIC and its legal basis in international and regional law, the article distils relevant benchmarks for the principle. Thirdly, the article investigates the legal framework of Cameroon to determine if this embodies aspects of FPIC distilled from the international and regional legal frameworks. It then critically examines land grabbing practices in the country and sets these practices against the distilled elements of FPIC in an effort to determine whether they adhere to the dictates of FPIC, so as to make a contribution on the topic. Lastly, the article concludes with brief recommendations.

## 2 The meaning of FPIC

The basic principles of FPIC are to ensure specifically that local communities are not coerced or intimidated, that their consent is well sought and freely given prior to the commencement of proposed development activities, that they have full and appropriate and reliable information about the scope and impacts of these development activities, and that they have the choice to ultimately give or withhold their consent.<sup>6</sup>

While the element of "free" implies no coercion, intimidation or manipulation, "prior" implies that consent is obtained in advance of the commencement of an activity.<sup>7</sup> This implies that prior consent for the approval of a proposed development project must be sought at an early stage of a development or investment plan and not only when the need arises to obtain approval from the community.<sup>8</sup> Prior consent is associated with the decision being made, and includes the time necessary to allow local communities to understand and make informed decisions during

<sup>4</sup> Fuo 2015 *AHRLJ* 190; Lewis, Freeman and Borreill *Free, Prior and Informed Consent* 1.

<sup>5</sup> For details on these challenges see Cariño and Colchester 2010 *Water Alternatives* 433; Owen and Kemp 2014 *Resources Policy* 95.

<sup>6</sup> Ward 2011 *NWJIHR* 54; Goodland 2004 *SDLP* 66-67.

<sup>7</sup> See Anderson *Free, prior and informed consent* 16.

<sup>8</sup> Anderson *Free, prior and informed consent* 16.

public participation/negotiation processes. This relates to the time needed to understand, analyse, and to evaluate the proposed activity in accordance with native customs and traditions.<sup>9</sup>

"Informed" means that local communities have to be provided with all relevant information that relates to an activity, and the information must be objective, accurate and presented in a manner and form understandable to the local communities. To "inform" in FPIC relates to the right to access to information and therefore stresses the importance of the right of local communities to be informed about development projects; and the information must be provided before the commencement of an activity. This is because prior information serves as a prerequisite for giving meaningful and free consent to a development project.<sup>10</sup> By contrast, the provision of information after the implementation of a project has the potential to nullify the effect of the exercise of the right to freely give or withhold consent, and would be an instance of lack of transparency and accountability in relation to the management of development projects, including land grabbing cases.

"Consent" implies that local communities have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions. Consent in FPIC appears to be the most important element, because at its core is the right of local communities to engage, negotiate, and choose whether to give or withhold consent.<sup>11</sup> It has been stated that in some circumstances a development project such as a land grabbing activity may be stopped if local communities decide not to continue negotiating or to withhold their consent.<sup>12</sup> Furthermore, the fact that consent has to be free means that it must be given voluntarily and free from bribery, bias or reward.<sup>13</sup> Free consent must not at any time be influenced by external timelines or expectations. Instead, local communities should have the right to determine the process, timeline and decision-making structure to the extent that it has the potential to provide for transparent and objective information and the free giving of consent.

Having provided an exposé of the meaning of FPIC and the rights it embodies, it remains to make a connection between FPIC and local communities. This discussion serves to argue for its importance and the

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<sup>9</sup> See Laughlin et al *Guidelines on Free, Prior and Informed Consent* 19.

<sup>10</sup> Ward 2011 NWJIHR 18; Goodland 2004 SDLP 66-67.

<sup>11</sup> Ward 2011 NWJIHR 20.

<sup>12</sup> Ward 2011 NWJIHR 20.

<sup>13</sup> Ward 2011 NWJIHR 18; Goodland 2004 SDLP 66-67.

broad application to local communities during land grabbing activities. The next section provides an understanding of the term local communities and how such communities could claim the rights embodied in FPIC during land grabbing activities.

### **3 Defining local communities**

There is no commonly accepted definition of the term "local communities".<sup>14</sup> This article is therefore free to define the term as:

A group of people living in a given geographical area by reason of their ancestral lineage, and sharing common cultural and traditional characteristics, and having a strong relationship to their land, which serves as an important sacred ground for spiritual and traditional rituals and cleansing and on which they practise diverse economic activities such as hunting, food and cash crops farming, and pastoral farming, among other activities.

For a community to be considered a local community the people must have common cultural and traditional characteristics. They must also have an ancestral claim to their land that establishes a certain measure of permanence as a condition for, and a way of life, as well as a means to claim property rights in the land that they customarily inhabit. The above characteristics epitomise the value and composition of most if not all traditional African communities, including those in Cameroon, who from time immemorial have traditionally used and occupied land based on native laws and customs, on which they engage in diverse farming practices. They consequently exhibit a close relationship with the natural resources they depend upon, a phenomenon which is a marker of indigenous and tribal people's way of life. The terms "indigenous people" and "local communities" are practically synonymous, and for this reason they are often paired together, as in the *UN Declaration on Environment and Development* (1992). This presupposes that indigenous people and local communities should as a matter of right be accorded similar protection, and that any right granted to indigenous people, as is the case with FPIC, should in principle be extended to local communities as well. The reason for this is that indigenous people are a subset of local communities, and "communal law and indigenous law are so closely intertwined that it is almost impossible to deal with one without dealing with the other".<sup>15</sup> Thus, it is apposite to view the concept of FPIC as part of the broader international law of political participation, the right to self-

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<sup>14</sup> Fach date unknown <http://tinyurl.com/hzgvtyr> 4.

<sup>15</sup> See the South African Constitutional Court case of *Tongoane v Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 45.

determination,<sup>16</sup> and the right to development<sup>17</sup> that includes local communities in governmental decision-making. Restricting its application solely to indigenous people could make FPIC inadequate in an African context generally and problematic in the case of Cameroon. In this light it is submitted that FPIC could be fully relevant if applied beyond the context of indigenous and tribal people to include local communities and all other people who may be adversely affected by large-scale land acquisition activities, including land grabbing.<sup>18</sup> However, the term indigenous people will be used here to reflect the exact wording of the relevant legal instruments.

It may be prudent at this stage to reflect on the legal basis of FPIC as a right emerging from international and regional legal frameworks. The relevant international legal frameworks<sup>19</sup> in this context include among others: the *ILO Convention 169 Concerning Indigenous and Tribal People in Independent Countries* (1989) (*ILO Convention*),<sup>20</sup> the *UN Declarations on the Rights of Indigenous and Tribal People* (2007) (UNDRIP),<sup>21</sup> and the *African Charter on Human and People's Rights* (1981) (*African Charter*).<sup>22</sup>

## 4 International and regional legal frameworks

### 4.1 International law

The *ILO Convention* is an international instrument with binding force on member states. It lays the basis for respecting and protecting indigenous

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<sup>16</sup> Greenspan 2014 <http://tinyurl.com/zszh8lt> 5; Wicomb and Smith 2011 *AHRLJ* 422.

<sup>17</sup> See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 *AHRLR* 75 (ACHPR 2009) (*Endorois case*) para 291; art 22(2) of the *African Charter on Human and People's Rights* (1981); Greenspan 2014 <http://tinyurl.com/zszh8lt> 6.

<sup>18</sup> Greenspan 2014 <http://tinyurl.com/zszh8lt> 5-6.

<sup>19</sup> Due to space constraints not all of these instruments will be discussed in this article. Other instruments that make direct/indirect reference to FPIC include: the *Convention on Biological Diversity* (1992) (CBD); the *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (1998) (Rotterdam Convention), enforced in February 2004; the *International Convention on Environmental Impact Assessment in a Trans-boundary Context* (1991) (Espoo Convention); the *United Nations Covenant on Civil and Political Rights* (1966) (CCPR), entered into force 1967; and the *United Nations Covenant on Economic Social and Cultural Rights* (1966) (CESCR), entered into force 1967.

<sup>20</sup> The *ILO Convention 169 Concerning Indigenous and Tribal People in Independent Countries* (1998) (the *ILO Convention*).

<sup>21</sup> The *United Nations Declaration on the Rights of Indigenous People* (2007) (UNDRIP).

<sup>22</sup> The *African Charter on Human and People's Rights* (1981) (*African Charter*), entered into force 1982.

peoples' human rights within the context of development activities such as land grabbing, *inter alia* through the exercise of respect for indigenous peoples' right to FPIC. Although Cameroon has neither signed nor ratified the Convention,<sup>23</sup> and its informing principle - FPIC - is therefore not legally applicable to that state, the Convention remains relevant as a practical tool to be used in the everyday course of good governance. FPIC is explicitly referred to five times in the Convention,<sup>24</sup> which reiteration can be thought to suggest and demonstrate the extent to which adherence to FPIC could be instrumental in advancing respect for and the protection of indigenous peoples' rights when undertaking development activities that impinge on their land rights.

Article 6 bestows the responsibility on state parties to consult with indigenous people through appropriate procedures and in particular through the relevant representative institutions when taking measures that affect them.<sup>25</sup> The Convention requires member states to establish and provide mechanisms by which indigenous people could freely participate in decision-making at all levels, in elective institutions and in administrative and other bodies responsible for deliberating policies and programmes that concern them.<sup>26</sup> Member states are also required to establish mechanisms that would promote the full development of indigenous people's own institutions and initiatives,<sup>27</sup> and to consult with them in good faith and in a form that makes it easy for them to be able to express their opinions.<sup>28</sup> They need to be able to exercise effective control by means of engaging in all decisionary processes relating to their own institutions, their way of life and their economic development, so that they may preserve and develop their cultural identity and, in this context, protect their environment-related rights.<sup>29</sup>

States are required by the Convention to ensure that indigenous people have the right to determine their development priorities and to exercise control over the land they occupy, as this affects their beliefs, institutions and spiritual well-being.<sup>30</sup> States party to the Convention are required to ensure *inter alia* that the economic, social and cultural rights of indigenous

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<sup>23</sup> The only African country that has signed and ratified the *ILO Convention* is the Central African Republic.

<sup>24</sup> Articles 10, 11, 19, 28, 29 of UNDRIP. See further art 6 of the *ILO Convention*.

<sup>25</sup> Article 6(1)(a) of the *ILO Convention*.

<sup>26</sup> Article 6(1)(b) of the *ILO Convention*.

<sup>27</sup> Article 6(1)(c) of the *ILO Convention*.

<sup>28</sup> Article 6(2) of the *ILO Convention*.

<sup>29</sup> Article 5 of the *ILO Convention*.

<sup>30</sup> Article 7(1) of the *ILO Convention*.

people are promoted and respected specifically during land grabbing activities.<sup>31</sup> This suggests that indigenous people have the right to participate in decision-making processes relating to land grabbing in order to be able to determine their own development priorities in a manner that is consistent with their beliefs, customs, traditions and spiritual well-being. They also have the right to participate in the formulation, implementation and evaluation of plans and programmes relating to land grabbing activities which may affect them,<sup>32</sup> and states have a duty to co-operate with them in order to protect and conserve the environment they inhabit.<sup>33</sup>

Article 15 provides for the right of indigenous people to their land, and this right relates to their right to participate in the use, management and conservation of their land and its resources.<sup>34</sup> This implies that indigenous people must not be removed from their land during the course of land grabbing activities.<sup>35</sup> Rather, they must be consulted whenever consideration is being given to alienating their land or to transferring their rights to land that is alien to them.<sup>36</sup> Where the relocation of the community is contemplated (perhaps as an exceptional measure) such relocation should be possible only if it occurs within the context of respect for indigenous people's right to FPIC,<sup>37</sup> and any deviation from this practice must be subjected to formal inquiry, which inquiry is to involve representatives of the relevant community.<sup>38</sup>

Adherence to the practice of FPIC is crucial in the context of the proliferation of land grabbing today, when indigenous people often run the risk of losing their right to land which they have owned, occupied and worked for years, if there is no consultation with them and they are unable to participate in decision-making. States are obliged to conduct development with the participation of and in consultation with the relevant indigenous people, and to take co-ordinated and systematic actions directed towards the protection of such a communities' right to their customary land.<sup>39</sup>

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<sup>31</sup> Article 2(2) of the *ILO Convention*.

<sup>32</sup> Article 7(1) of the *ILO Convention*.

<sup>33</sup> Article 7(1) of the *ILO Convention*.

<sup>34</sup> Article 15(1) of the *ILO Convention*.

<sup>35</sup> Article 16(1) of the *ILO Convention*; art 10 of UNDRIP.

<sup>36</sup> Article 17(2) of the *ILO Convention*.

<sup>37</sup> Article 16(2) of the *ILO Convention*; art 10 of UNDRIP.

<sup>38</sup> Article 16(2) of the *ILO Convention*.

<sup>39</sup> Article 2(1) of the *ILO Convention*.

The UNDRIP also contains crucial guidance for the development of societies that promote and respect equality and the rights of indigenous people, as the non-observance of their rights could lead to the violation of their rights during land grabbing activities. Under article 1 of UNDRIP, indigenous people are guaranteed the full enjoyment of all of the human rights and fundamental freedoms recognised in the *Universal Declaration of Human Rights* (1948) (UDHR). Indigenous peoples also have the right to the full enjoyment of all of the rights established under applicable international and domestic laws.<sup>40</sup> The FPIC encompasses the larger body of human rights generally available and has emerged as best practice in the safeguarding of the rights of indigenous people relating to food, development, property, culture and a healthy environment, among other issues.<sup>41</sup> Their right to FPIC under international law is primarily derived from the right to self-determination.<sup>42</sup> Article 3 of UNDRIP underscores the relevance of indigenous peoples' right to self-determination by requiring them to freely determine their political status and to pursue their own economic, social and cultural development. An expansive interpretation of the right to self-determination would imply the right to participate in the decision-making processes of land grabbing which has the potential to impact negatively on their social, economic and cultural well-being, and thus to secure the enjoyment of their means of subsistence and development.<sup>43</sup>

Under UNDRIP the right to self-determination implies that indigenous peoples have the right to freely participate in decision-making processes that determine matters that affect their rights,<sup>44</sup> and to be able to set terms and conditions for land grabbing activities that may productively address the social, economic, cultural and environmental impacts that may result from such activities. Article 18 requires that the participation of indigenous people must take place through their own elected representatives, who should be chosen by community members in accordance with their own procedures and decision-making institutions. Furthermore, indigenous peoples have the right to freely determine and develop priorities and strategies for the development or use of their lands and resources.<sup>45</sup> States are therefore obliged to consult and co-operate in good faith with the representatives of these institutions in order to obtain the FPIC of

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<sup>40</sup> Article 17(1) of UNDRIP.

<sup>41</sup> Greenspan 2014 <http://tinyurl.com/zszh8lt> 6.

<sup>42</sup> Article 3 of UNDRIP; Cowan 2013 *PRLPJ* 248-249; 255.

<sup>43</sup> Article 20(1) of UNDRIP; Cowan 2013 *PRLPJ* 249.

<sup>44</sup> Article 18 of UNDRIP.

<sup>45</sup> Article 32(1) of UNDRIP.

indigenous communities before implementing relevant development projects as well as before adopting and implementing legislative and administrative measures on land tenure, for example.<sup>46</sup> Consultations with the representatives of indigenous people must take place in good faith in order to obtain their FPIC prior to the approval of any project relating to the development, utilisation or exploitation of minerals, water or other resources affecting their land.<sup>47</sup>

Because land grabbing activities often apply to vast areas of land, they often result in attempts to evict indigenous communities from their land.<sup>48</sup> The need for consultation is especially important here. Thus, article 26 guarantees the rights of indigenous people to own, develop, control and use the land and resources they possess by reason of traditional ownership or other traditional occupation or use, as well as the land and possessions they have acquired in other ways.<sup>49</sup> States are accordingly obliged to give legal recognition and protection to the lands and resources, traditions and land tenure systems of indigenous people.<sup>50</sup> A possible way of recognising and protecting the tenure rights of indigenous people is to observe and promote adherence to their right to FPIC where land grabbing activities are concerned. Article 38 obliges states to take appropriate measures, including legislative measures, to promote the potential of indigenous people to enjoy their fundamental human rights and freedoms.<sup>51</sup>

#### **4.2    Regional law**

The *African Charter on Human and People's Rights* (1981), which is generally referred to as the *Banjul Charter*, reiterates the need for the protection of human rights at the African regional level. Although it does not explicitly refer to FPIC, it recognises and provides for the important rights to self-determination<sup>52</sup> and to development,<sup>53</sup> which are instrumental in fostering respect for FPIC. As already indicated, the right to self-determination guarantees the right and ability of people not only to freely determine their political status but also to freely pursue their economic and

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<sup>46</sup> Article 19 of UNDRIP.

<sup>47</sup> Article 32(2) of UNDRIP.

<sup>48</sup> Article 10 of UNDRIP.

<sup>49</sup> Article 26 of UNDRIP.

<sup>50</sup> Article 26(3) of UNDRIP.

<sup>51</sup> Preamble of UNDRIP.

<sup>52</sup> Article 20(1) of the *African Charter*.

<sup>53</sup> Article 22(2) of the *African Charter*.

social development according to the policy they have freely chosen.<sup>54</sup> It has been argued that the right to self-determination potentially provides an appropriate platform for the protection of people's rights-based interests by means of ensuring their full and effective participation in decision-making in order for them too to benefit from the development of their land.<sup>55</sup> Such participation becomes relevant and necessary especially when land grabbing activities could adversely impact on their rights, including the rights to food, environment, property and equality.

The right to development grants people the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.<sup>56</sup> For this reason the *African Charter* guarantees the right of people to take part in the cultural life of their community,<sup>57</sup> and states are obliged to promote and protect the moral and traditional values of local communities<sup>58</sup> *inter alia* through adherence to FPIC during the implementation of development activities, as was the position of the African Commission on Human and People's Rights in the celebrated decision in *Centre for Minority Rights Development v Kenya (Endorois case)*.<sup>59</sup> In this case the African Commission reiterated and upheld the right of local communities to FPIC and stated that:

[In] any development or investment projects that would have a major impact within the Endorois territory, the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.<sup>60</sup>

It is evident, therefore, that the implementation of FPIC during land grabbing activities is a (direct or indirect) means of protecting and preserving the moral, cultural and traditional values of local communities. The Commission also set high standards for participatory governance as a necessary catalyst to be used to enhance local communities' right to development, while also ensuring respect for their customary law and culture. It has been argued that because the customary land law tenure of

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<sup>54</sup> Article 20(1) of the *African Charter*.

<sup>55</sup> Wicomb and Smith 2011 *AHRLJ* 422.

<sup>56</sup> Article 22(1) of the *African Charter*.

<sup>57</sup> Article 17(2) of the *African Charter*.

<sup>58</sup> Article 17(3) of the *African Charter*.

<sup>59</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International obo Endorois Welfare Council v Kenya* 2009 *AHRLR* 75 (ACHPR 2009) (*Endorois case*). Also see the *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria* ACHPR Comm No 155/96 (2001) (SERAC case); Ward 2011 *NWJIHR* 66.

<sup>60</sup> *Endorois case* para 291.

local communities reflects and embodies aspects of their cultural value, the rules of customary land tenure must be used to seek and obtain local communities' consent before their land and resources could be used by outsiders.<sup>61</sup> This would require, of course, that local communities participate directly or through their chosen representatives during land grabbing decision-making processes in accordance with customary laws and traditions, to enable them to make meaningful decisions in order that they may benefit from the development of their land.<sup>62</sup>

Because access to information is a core component of FPIC, the *African Charter* unequivocally stipulates the right of everyone to receive information,<sup>63</sup> and this places an obligation on member states, including Cameroon, to disseminate information relating to land grabbing practices to local communities when such practices occur.

It follows that FPIC appears to have both substantive and procedural legal status. Substantively, FPIC requires that local communities be enabled to freely pursue their economic, social and cultural development, and to freely dispose of their natural wealth and resources. Procedurally, FPIC requires local communities to be informed, and to actively participate in the decision-making processes determining land grabbing activities. The following elements distilled from international and regional law are components of FPIC necessary to ensure its full and effective realisation. These are:

- the timely provision of information to the local communities, before and not after the implementation of projects;
- the effective participation of local communities in decision-making processes, in good faith and through their chosen representatives;
- such participation must be voluntary, must be untainted by the exertion of unwarranted influence, and must in particular be free from bribery.

It would be helpful if these elements were present in the domestic legal framework of the host country of land grabbing activities in order to ensure that local communities are informed about the envisaged activity and are

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<sup>61</sup> Wicomb and Smith 2011 *AHRLJ* 422-423.

<sup>62</sup> Wicomb and Smith 2011 *AHRLJ* 445; art 13(1) of the *African Charter*.

<sup>63</sup> Article 9(1) of the *African Charter*.

actively involved in its decision-making processes. Whether or not this is the case in Cameroon is investigated below.

## 5 Cameroon's legal framework

The rights to access to information and public participation constitute vital aspects of procedural rights.<sup>64</sup> While access to information requires that people/local communities are informed timeously about development activities and their potential impacts, the right to public participation requires the state to promote, facilitate and ensure the implementation of processes and mechanisms that allow local communities to be involved and to actively participate in decision-making regarding development activities that have a direct bearing on their rights. The following section examines these rights in the legal framework of Cameroon.

### 5.1 Right to access to information

Although the *Constitution of the Republic of Cameroon*, 1996 does not explicitly provide for the right to access to information, the Preamble affirms the country's commitment to the fundamental freedoms enshrined in international law, including for example the UDHR, the *Charter of the United Nations* (1945), the *African Charter*, UNDRIP, and all duly ratified international conventions relating thereto.<sup>65</sup> This implies that one could rely on these international instruments to assert one's right to access to information held by the state that is necessary to protect an infringed right in the context of land grabbing activities.<sup>66</sup>

Law No 96/12 relating to environmental management is Cameroon's main environmental framework law. It provides for the right to information, particularly environmental information, which is necessary to protect one's health and well-being.<sup>67</sup> According to section 7, everyone has the right to be informed of the effects of activities that are detrimental to human health and the environment as well as of measures taken to prevent or offset these effects.<sup>68</sup> This implies that the state has an obligation to provide information to the public about activities such as land grabbing that may

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<sup>64</sup> For a detailed understanding of the right to access to information and public participation, see Ashukem *Rights-based Approach* 119-138.

<sup>65</sup> Para 5 of the Preamble of the *Constitution of the Republic of Cameroon*, 1996.

<sup>66</sup> Ashukem *Rights-based Approach* 232.

<sup>67</sup> Section 6(1) of the *Law on Environmental Management*, Law No 96/12 of 1996 (Law No 96/12).

<sup>68</sup> Section 7(1) Law No 96/12.

detrimentally impact on people's health and the environment.<sup>69</sup> Supplying information of this nature serves to promote the effective implementation of the environmental laws and policies in the country.<sup>70</sup>

## **5.2 Public participation and consultation**

In terms of participatory rights, section 9 of Law No 96/12 provides for public participation<sup>71</sup> and requires that everyone safeguards the environment and contributes to its protection. It also emphasises the fact that decisions concerning the environment shall be taken after consultation with the other actors concerned or through public debate.<sup>72</sup> This implies that to properly safeguard and protect the environment, local communities and interested and affected parties have to be actively involved in decision-making, plans and programmes on activities such as land grabbing taking place in areas where they could be affected. Section 72 reiterates this requirement and obliges the state to encourage and allow for public participation insofar as environmental management is concerned. The state is therefore required to encourage public participation through mechanisms that allow and promote free access to information;<sup>73</sup> to create a consultative mechanism to allow the public to form an opinion;<sup>74</sup> to glean public opinion from public representatives serving on consultative organs on matters relating to the environment;<sup>75</sup> to establish mechanisms that ensure the dissemination of environmental information; and to establish mechanisms relating to the sensitisation, training, research and education of local communities on the environment and environmental issues.<sup>76</sup>

The 1994 Forestry and Wildlife Law<sup>77</sup> and its Decree of Implementation<sup>78</sup> lay down a framework for an integrated and sustainable use of the forest, wildlife and fisheries.<sup>79</sup> Section 23 of the Law provides for the elaboration of forest management plans which must be submitted to the Minister for approval, and compels logging companies to ensure the participation of

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<sup>69</sup> Section 7(1) of Law No 96/12.

<sup>70</sup> Section 7(1) of Law No 96/12.

<sup>71</sup> Section 9 of Law No 96/12.

<sup>72</sup> Section 9 of Law No 96/12.

<sup>73</sup> Section 72(i) of Law No 96/12.

<sup>74</sup> Section 72(ii) of Law No 96/12.

<sup>75</sup> Section 72(iii) of Law No 96/12.

<sup>76</sup> Section 72(iv) of Law No 96/12.

<sup>77</sup> *Law to Lay Down Forestry, Wildlife and Fisheries Regulation*, Law No 94/01 of 1994 (Law No 94/01).

<sup>78</sup> Decree No 95-531-PM of 23 August 1995 (setting the Modalities for the Implementation of Forestry Regulations).

<sup>79</sup> Section 1 of Law No 94/01.

local communities during the preparation of such plans in order to ensure the sustainability of forest resources. The plan also provides a platform for the reaching of agreements between logging companies and local communities with regard to infrastructural activities.<sup>80</sup>

Ordinance No 76/166 of 27 April 1976 laying down the management of state land in Cameroon governs the organisation and management of tenure rights with respect to land allocation for development activities in Cameroon. In fact, the Ordinance clearly stipulates the composition of the Land Consultative Board (LCB) in any area to include a representative of the government, a prefect (a Senior Divisional Officer), the chief and two village elders. Decisions on matters relating to land investment must be made with the participation of all the members of the Board.<sup>81</sup> This implies that an investment activity cannot start in the absence of full and effective consultation and the participation of local communities in the relevant decisionary processes, during the course of which they freely give their consent to the activity's taking place. It also means that the chief and the two village elders are the representatives of the local community who must ensure that proposed development activities on their land must be performed with due regard to their cultural beliefs, customs, traditions and any other aspects of their ways of life.

Having identified aspects of FPIC in the Cameroonian legal framework, this article proceeds to critically examine the Herakles Farms palm oil and the BioPalm palm oil projects as case studies to ascertain whether or not FPIC took place in these cases.

## 6 FPIC and land grabbing in Cameroon

### 6.1 *The Herakles Farms palm oil project; brief facts and assessments*

#### 6.1.1 *Brief facts*

In September 2009 a US firm, Herakles Farms, operating in Cameroon as Sithe Global Sustainable Oil Cameroon, signed a lease agreement with the Minister of the Economy, Planning and Regional Development, Louis Paul Motazé, for 78,083 hectares of land located within the Guinea forest

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<sup>80</sup> Alemagi et al 2013 JSD 9.

<sup>81</sup> Article 12 of *Ordinance Laying Down the Management of State Land*, Ordinance No 76/166 of 1976 (Ordinance No 76/166).

region of West Africa, surrounding five biodiversity hotspots,<sup>82</sup> for a period of 99 years, for the production of palm oil.<sup>83</sup> According to the company the project will be beneficial to the country, particularly as the company is a member of the roundtable of sustainable palm oil that requires adherence to best practice for palm oil production. Herakles Farms also promised to create jobs within the local area and to build and improve infrastructure like roads, schools and hospitals in the area. After signing the agreement, the company began clearing large forest concessions in the area and building palm nurseries, despite numerous controversies concerning the legality of the lease agreement.<sup>84</sup> Under Cameroonian law, it is explicitly provided that the allocation of state land that exceeds 50,000 hectares must be performed by presidential decree,<sup>85</sup> while areas less than 50,000 hectares must be allocated by the Minister in charge of land.<sup>86</sup> However, following incessant pressure from international NGOs as well as resistance from local communities,<sup>87</sup> a 2013 presidential decree reduced the number of hectares from 73,000 ha to 19,843 ha, while increasing the price per hectare to \$6 as opposed to the previous \$1 per hectare.<sup>88</sup>

### 6.1.2 Critical assessments

It is reported that local communities were not made aware of the proposed development,<sup>89</sup> and that their land was leased for the development of the palm oil plantation without their consent,<sup>90</sup> despite the statutory guarantee of the right to access to information.<sup>91</sup> The lack of such information makes it difficult for local communities to demand respect for, the protection of and the fulfilment of their procedural and substantive rights-based entitlements in such cases.

<sup>82</sup> These are: the Korup National Park; the Bakossi National Park; the Bayang Mbo Wildlife Sanctuary; the Nta Ali Forest Reserves and the Rumpi Hills Forest Reserve. Mousseau *Understanding Land Investment Deals in Africa* 5.

<sup>83</sup> A copy of the lease agreement is on file with the author.

<sup>84</sup> Mousseau 2013 <http://tinyurl.com/lvzx4u2>; Fru date unknown <http://tinyurl.com/godggsq>.

<sup>85</sup> Article 7(2) of Ordinance No 76/166.

<sup>86</sup> Article 7(1) of Ordinance No 76/166.

<sup>87</sup> Nguiffo and Schwartz *Herakles' 13th Labour?* 17; Mousseau *Understanding Land Investment Deals in Africa* 7-8.

<sup>88</sup> SEFE 2013 <http://tinyurl.com/z2q3m6u>.

<sup>89</sup> Oakland Institute date unknown <http://tinyurl.com/zbzbj7n>; Nguiffo and Watio *Agro-industrial Investments in Cameroon* 41.

<sup>90</sup> Greenpeace 2012 <http://tinyurl.com/gtzna74> 14.

<sup>91</sup> Provisions of the right to access to information in Cameroon are made in the Preamble of the *Constitution of the Republic of Cameroon*, 1996; ss 6, 7, and 10 of Law No 96/12; ss 4(2), 12, 35 and s 42(1) of *Law to Lay Down Safety Regulation of Biotechnology*, Law No 2003/006 of 2003 (Law No 2003/006). For details see Ashukem *Rights-based Approach* 232-238.

Despite the fact that participatory governance is peremptorily required in the Cameroonian legal framework, it remains doubtful if local communities often participate in decision making at all or if their views are ever taken into consideration during land grabbing activities.<sup>92</sup> For example, it is reported that during the implementation of the Herakles Farm project, representatives of the village of Ebanga expressed dissatisfaction about the composition and function of the Board and the demarcation of the areas to be developed between Ebanga and Ndonga villages.<sup>93</sup> The selection of a few members of a community who were paid large sums of money to consent to the project development does not amount to the free giving of consent by a community, and constitutes a violation of one of the principles of FPIC. It is reported that during the Herakles Farms land deals, the company paid some chiefs and notables large sums of money in order to buy the consent of the community.<sup>94</sup> Thus, it seems that the Herakles Farms land deal was implemented without the prior participation of local communities affected, as required by FPIC.<sup>95</sup> This demonstrates the lack of transparency and accountability in the performance of land grabbing activities in Cameroon, as well as the weakness of the land governance regime in the country.

Furthermore, it is surprising that the presidential decree that ushered in the implementation of the Herakles Farm project did not envisage a participatory approach. One would have expected the president before signing the decree to have at least instructed the local authority of the communities concerned to ensure that the communities were allowed to actively participate in decision-making relating to the project. The fact that there is often a distinct spiritual relationship between local communities and the land they have traditionally owned, occupied or used suggests that there is a right for them not only to continue to own, use and develop the land, but also to be actively involved in matters relating to it when the land is being alienated for use by outsiders. Instead, the local communities of Nguti, where Herakles Farms also acquired land, found themselves in a position where they thought it appropriate to send a letter to the presidency saying that they "noted with dismay that 2,532 hectare of forest including farms have been mapped out ... without our consent" and

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<sup>92</sup> Sciences Po Law Clinic 2011 <http://tinyurl.com/h5dz8we>; art 15 of Ordinance No 76/166; Alemagi *et al* 2013 JSD 9; Cerutti, Nassi and Tacconi 2008 *Ecology and Society* 1-13; Fuo and Semie "Cameroon's Environmental Framework" 85

<sup>93</sup> Sciences Po Law Clinic 2011 <http://tinyurl.com/h5dz8we>; Ashukem *Rights-based Approach* 229.

<sup>94</sup> Mousseau 2013 <http://tinyurl.com/lvzx4u2> 4.

<sup>95</sup> Dupuy and Bakia 2013 <http://tinyurl.com/z6bduxt> 6.

complaining that "the people of Nguti are not well-informed about a project that will affect their lives as well as the lives of future generations".<sup>96</sup> It would have been appropriate to allow the Nguti community to be actively involved in the decision-making process to enable them to express their opinions with respect to the use, management and conservation of their land and its resources,<sup>97</sup> in relation to any activity that had a direct bearing on their rights to tenure and natural resources. This is especially true because the idea that the governed should be engaged in their own governance, including the governance of land matters, is "gaining ground and rapidly expanding in both law and practice",<sup>98</sup> and should consequently inform the formulation and implementation of land grabbing activities in Cameroon, as demonstrated by the *Endorois* case. Yet this did not happen in the Herakles Farms project.

It has been argued that because the customary land law tenure of local communities reflects and embodies aspects of their cultural values, legal recognition and protection have to be granted to customary land rights,<sup>99</sup> and that it follows that local communities being the legal owners of the land in question, have a right to be engaged in the decision-making processes when their land and resources are to be used by outsiders.<sup>100</sup> Under article 12 of Ordinance No 76/166, it makes sense that the chief and the two village elders who are the representatives of the local community (in terms of the composition of the LCB) ought to be present and participate in good faith in the decision-making in order to ensure that proposed land grabbing activities on their land are implemented with due regard to their cultural beliefs, customs and traditions as well as their way of life.<sup>101</sup> Yet, the community were not represented in the decision-making process of the Herakles Farms palm oil project situated where it is likely to negatively impact on the country's rich biodiversity and on the traditional practices of the local communities involved. Lack of local communities' participation is in direct contravention of the precepts of participatory governance contained in the international and regional legal frameworks canvassed above.

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<sup>96</sup> Nguiffo and Watio *Agro-industrial Investments in Cameroon* 41.

<sup>97</sup> Article 15(1) of the *ILO Convention*.

<sup>98</sup> Pring and Noé "Emerging International Law" 11; Ashukem *Rights-based Approach* 127; Paterson "Endless Struggle of Indigenous People" 351.

<sup>99</sup> Article 26(3) of UNDRIP.

<sup>100</sup> Wicomb and Smith 2011 *AHRLJ* 422-423. See further arts 18 and 32(2) of UNDRIP; art 10 of the *African Charter*; art 10(c) of the CBD.

<sup>101</sup> See Wicomb and Smith 2011 *AHRLJ* 46; arts 25 and 26 of UNDRIP.

## 6.2 *The BioPalm palm oil project; brief facts and assessments*

### 6.2.1 *Brief facts*

In 2011 Siva Group, a Singapore based Company called BioPalm Energy Ltd, operating in Cameroon under its subsidiary Palm Resources Cameroon Ltd, signed a Memorandum of Understanding (MoU) with the Vice Prime Minister of Cameroon and Minister of Agriculture and Rural Development for palm oil production on 200,000 hectares of land located in the Ocean Division of Cameroon. The project is located on land previously occupied by four villages, Bella, Nkollo, Gwap and Moungué, the population of which is made up of three major ethnic groups, the Bassa, the Bagyéli and the Bakoko people. The forceful eviction of the people from their land has arguably raised tension between BioPalm and the local inhabitants.<sup>102</sup> This is so despite the fact that, like Herakles Farms, BioPalm committed to setting up its operation in adherence with stringent sustainability policies, principles and criteria for palm oil production as defined by the Roundtable on Sustainable Palm Oil Production.<sup>103</sup>

### 6.2.1 *Critical assessments*

As in the case of the Herakles Farms project, the conduct of the BioPalm project raises issues of accountability and transparency, particularly as information about the project was not disclosed in advance to the local communities, whose land was leased without their consent. Freudenthal, Lomax and Venant notes that the MoU between the government and BioPalm contained a confidentiality clause which neither party wanted to disclose.<sup>104</sup> It could be argued that when agreements contain confidentiality clauses, only rarely do local communities could have information on such agreements.<sup>105</sup> It may be concluded from the fact that the land allocation was decided and the land alienated under cover of a confidentiality clause that this was done with the obvious intention not to disclose the relevant information to the local communities. This is disturbing, considering that Cameroon has ratified an array of international human rights instruments that profess respect for this right, such as the *African Charter* and UNDRIP, among others. The approach adopted in this case illustrates the prevalence of the lack of transparency in land grabbing

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<sup>102</sup> Freudenthal, Lomax and Venant "BioPalm Oil Palm Project" 338.

<sup>103</sup> Freudenthal, Lomax and Venant "BioPalm Oil Palm Project" 338.

<sup>104</sup> Freudenthal, Lomax and Venant "BioPalm Oil Palm Project" 343.

<sup>105</sup> Cotula *Land Deals in Africa* 1.

cases in Cameroon.<sup>106</sup> According to Ngorgang,<sup>107</sup> the lack of transparency and accountability characterising land grabbing in Cameroon appears to be the major cause of the violation of the human rights-based interests of local communities.

With regard to the participation of local communities, it is reported that the demarcation of land for BioPalm by the LCB was extensively flawed due to lack of the local communities' involvement in the process.<sup>108</sup> Freudenthal, Lomax and Venant, who conducted empirical research on one of the sites of the BioPalm project, give as an illustrative example the placement of a land marker behind a house, implying that the owner's house was included in the land concession, an inclusion that the owner himself was unaware of.<sup>109</sup> Also it is reported that some chiefs had close personal links with the company and were paid money in lieu of gaining their communities' consent.<sup>110</sup> As in the Herakles Farms case, this was a clear violation of the principles of FPIC and the participatory right of local communities under international law discussed above.

Even if local communities are involved and participate in consultative processes relating to land grabbing activities, their views are often not taken into account, and a proposed activity may be implemented irrespective of their opinions. The non-consideration of local communities' views during consultative processes is indicative of the fact that the consultation of local communities did not take place in good faith, as required by FPIC. This is evident from the statement of a government official who is quoted as saying: "I did not come to ask the opinion of the populace. The forest is the forest of the state." ("Je ne suis pas venu demander l'avis aux population. La forêt c'est la forêt de l'État").<sup>111</sup> Such comments illustrate the extent to which the right to public participation, which is the core element of FPIC as provided in international and regional law, is violated. Considering the fact that the Preamble of the *Constitution* of Cameroon affirms the country's commitment to duly ratified international human rights instruments, including *inter alia* the *African Charter* and UNDRIP, the government was required to apply this provision in this case through the establishment of procedures relating to public participation in

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<sup>106</sup> Ashukem *Rights-based Approach* 226; Freudenthal, Lomax and Venant "BioPalm Oil Palm Project" 348; Nguiffo and Watio *Agro-industrial Investments in Cameroon* 48.

<sup>107</sup> Ngorgang 2009 <http://www.afronline.org/?p=2908>.

<sup>108</sup> Freudenthal, Lomax and Venant "BioPalm Oil Palm Project" 345.

<sup>109</sup> Freudenthal, Lomax and Venant "BioPalm Oil Palm Project" 345.

<sup>110</sup> Freudenthal, Lomax and Venant "BioPalm Oil Palm Project" 350.

<sup>111</sup> Freudenthal, Lomax and Venant "BioPalm Oil Palm Project" 348; Ashukem *Rights-based Approach* 229.

terms of the use and exploitation of the land resources of local communities.

The lack of the effective participation of local communities in decision-making also runs counter to the right to self-determination and the precepts of FPIC, which entail that local communities be given a chance to freely participate in decisionary processes and to freely make informed decisions in accordance with their customs, beliefs and traditions during land grabbing activities. Land grabbing activities in Cameroon do not adhere to this principle, despite the statutory requirement that a participatory approach be adopted in land-related investment matters. Consequently, the lack of consultation and participation in decision-making processes in land grabbing restricts local communities from making informed decisions about development activities that have the potential to impact negatively on their cultural values and traditions.

## **7 Conclusion and recommendations**

This contribution has clearly shown that adherence to FPIC as provided for in international and regional legal instruments affords local communities an opportunity to be informed, and to be effectively involved in decision-making processes when land grabbing activities occur, while also serving as an appropriate platform to ensure respect for, the protection of and the fulfilment of local communities' rights in that context. Although FPIC is not explicitly referred to in the legal regimes of Cameroon, it has been established that the elements of FPIC, including the rights to access to information and public participation, are present in the Cameroonian legal framework. Thus, on paper the legal regime recognises these rights as vital and necessary instruments needed to protect local communities.

Yet evidence from the land grabbing practices in the country reveals a total contrast of between the requirement of FPIC and what actually happens on the ground. The fact that there is considerable disrespect of the rights to access to information and participation, which are intrinsic features of FPIC, is a clear indication that land grabbing activities in Cameroon do not adhere to FPIC. It has been stated that most land grabbing activities in Cameroon do not seem to follow this principle;

neither do foreign investors nor host governments adhere strictly to this principle.<sup>112</sup>

It has been observed that local communities are rarely informed of land grabbing activities and do not participate in its decision-making processes. This has the potential to undermine local communities' rights-based entitlements when land grabbing occurs in the country. It also demonstrates a lack of accountability and a lack of transparency in land grabbing transactions in the country. The non-respect for the requirement of FPIC is a clear contravention of government's commitments under international and regional law, as indicated above.

Nonetheless, it could be argued that the problem seems to be with a lack of enforcement and implementation rather than with the laws themselves. It is recommended that the government of Cameroon should endeavour to periodically inform the public about land grabbing activities through the media and through official government websites, should create a database of land grabbing activities, should regularly consult with local communities before the implementation of any such project, should create appropriate platforms and mechanisms to promote awareness among local communities, should consult and ensure their effective participation in good faith in decision-making processes, and should refrain from intimidation, coercion and unlawful eviction when implementing land grabbing activities. It is also recommended that the government of Cameroon should sign and ratify *ILO Convention 169*. The ratification of this Convention could lead to adherence to FPIC through the establishment of appropriate platforms that would allow local communities to be informed, to be consulted and to freely participate in decision-making processes relating to land grabbing activities, in the hope of protecting their land-related rights.

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<sup>112</sup> CED 2012 <http://tinyurl.com/hmdo9mw>. For example, during the Chinese rice project in Nanga Eboko, the Mayor of Nanga Eboko, Romain Roland Eto said that the municipality and the municipal administration had not been consulted in the selling of the lands. Ngorgang 2009 <http://www.afronline.org/?p=2908>.

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## List of Abbreviations

AHRLJ	African Human Rights Law Journal
CAR	Centre for Energy, Petroleum and Mineral Law and Policy Annual Review
CBD	Convention on Biological Diversity
CED	Centre pour l'Environment et le

	Développement
FPIC	Free, prior and informed consent
ILO	International Labour Organisation
JSD	Journal of Sustainable Development
LCB	Land Consultative Board
MoU	Memorandum of Understanding
NWJIHR	Northwestern Journal of International Human Rights
PRLPJ	Pacific Rim Law and Policy Journal
SDLP	Sustainable Development Law and Policy
SEFE	Struggle to Economise Future Environment
UN	United Nations
UDHR	Universal Declaration of Human Rights
UND RIP	United Nations Declarations on the Rights of Indigenous People