

# Free, Prior and Informed Consent: the international context

---

Marcus Colchester

‘Field Dialogue on FPIC in DRC’

The Forests Dialogue

Kinshasa, 23<sup>rd</sup> May 2012



Forest  
Peoples  
Programme

# Self-determination

---

- (1) All peoples have the right to self-determination, by virtue of that right they freely determine their political status and freely pursue the economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources.... In no case may a people be deprived of its own means of subsistence.

**Common Article 1 of ICCPR and ICESCR**

# What is self-determination?

Ted Moses, former Grand Chief  
of the Grand Council

When I think of self-determination,  
I think also of hunting, fishing and trapping.  
I think of the land, of the water, the trees,  
and the animals. I think of the land we have lost.  
I think of all the land stolen from our people.  
I think of hunger and people destroying the land.  
I think of the dispossession of our peoples of their  
land. ... The end result is too often identical: we indigenous peoples  
are being denied our own means of subsistence. ... We cannot give up  
our right to our own means of subsistence or to the necessities of  
life itself.... In particular, our right to self-determination contains  
the essentials of life – the resources of the earth and the freedom  
to continue to develop and interact as societies and peoples.



T. Moses, *The Right to Self-Determination and its Significance to the Survival of Indigenous Peoples*. In: P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination*. Turku: Institute for Human Rights, Abo Akademi University, (2000), p. 155-78, at 162-4.

# UN Declaration on Rights of Indigenous Peoples

---

- Right to self-determination
- Rights to the land, territories and natural resources customarily owned, occupied or otherwise used by them
- Control what happens on their lands
- Represent themselves through their own institutions
- Exercise their customary law
- All of above within framework of State, international human rights and respecting rights of individuals.

# *UN Declaration on Rights of Indigenous Peoples*

---

## *Article 32*

- 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
- 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources...*

**(Adopted by UN GA Sept. 2007)**



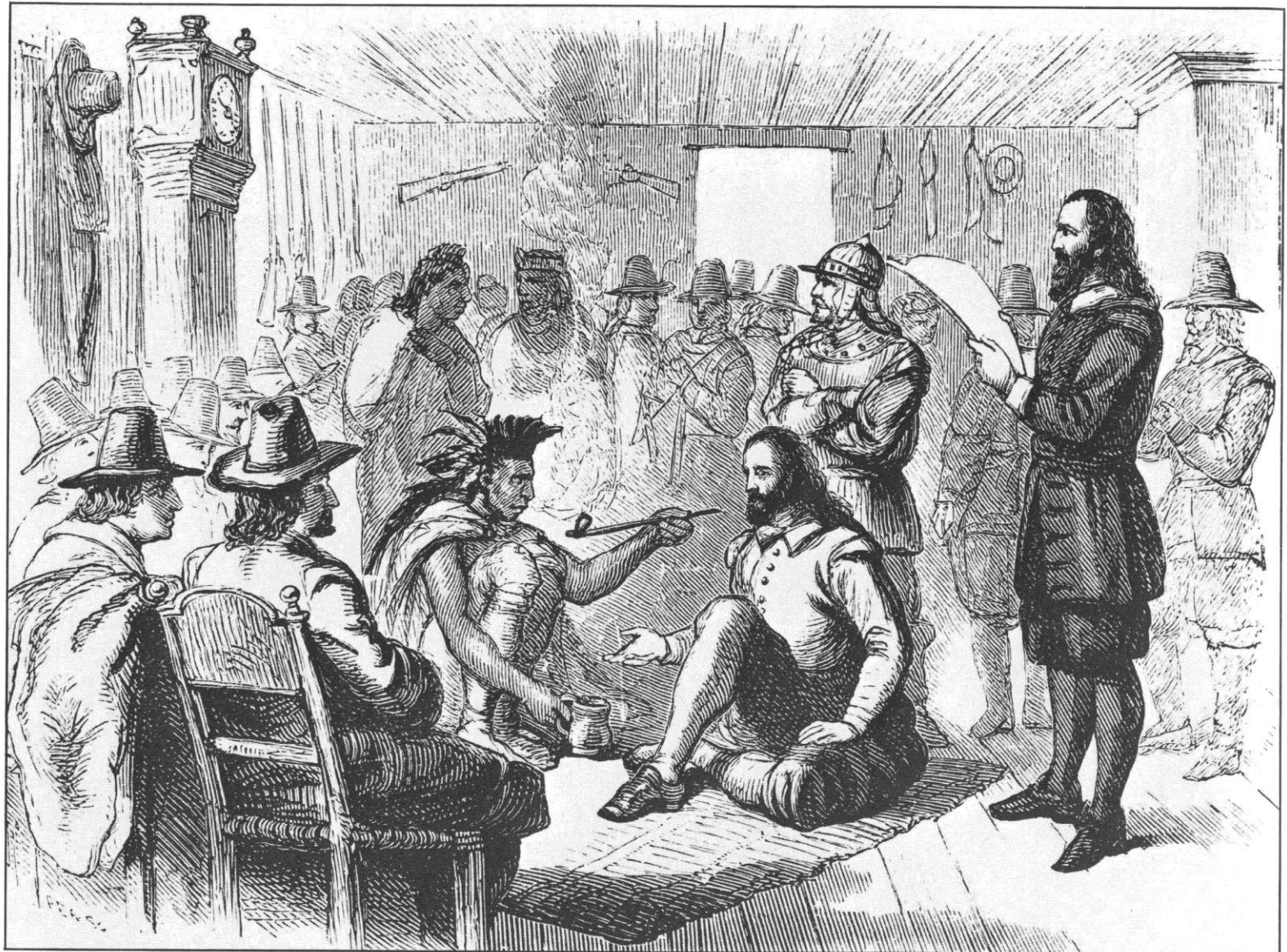
# What does FPIC consist of ?

---

- Right to say ‘yes’ or ‘no’ to proposed developments on peoples’ lands
- **Consent** which is determined in conformity with or with respect for peoples’ cultures, customary systems and practices
- According to people’s own freely chosen **representative** organisations/ institutions
- Without coercion or duress (‘Free’)
- Before the initiation of activities (‘Prior’)
- After the complete sharing of available information on the proposed activities and their implications, according to an agreed process and with adequate time (‘Informed’)



# FPIC: not a new concept



# Evolving standards on FPIC

Private Sector (voluntary certification)	Investors (‘Safeguards’)	IGOs	CBD (1992) Normative	Human Rights (1960s) Binding
FSC (1993)	WCD (2000)			ICCPR / ICESCR self-determination
	EIR (2003)			ILO 169 (1989)
RSPO (2005)	WB FPICon and BCS (2005)		COP Decisions	CERD 1990s- 2000s-2010s
RTRS (2007)	IDB (2006)/ ADB (2009/ EBRD (2008)	UNDG (2008)		UNDRIP (2007)
	IFAD (2009)	UNREDD (2009)	COP Decisions	IACHR (2007/8)
	IFC (2010)	UNREDD Draft Guidance 2010-2		AFCOM Endorois (2010)
RSB (2011)	Equator Banks (2012)	FAO - Voluntary Guidelines (2012)		



# Responsibilities of corporations

---

UN Human Rights Council (*Guiding Principles on Business and Human Rights*): Corporations also have a responsibility to respect human rights. This responsibility exists independently of States' abilities and / or willingness to fulfil their own human rights obligations and does not diminish those obligations. This responsibility of corporations exists over and above the requirement that they comply with national laws and regulations protecting human rights.



# Representation challenges:

some peoples have no chiefs, some more hierarchical





# Challenges to participation

- Status
- Capacity
- Language
- Legal status
- Caste, class, status and gender divisions
- Ensuring women not marginalised





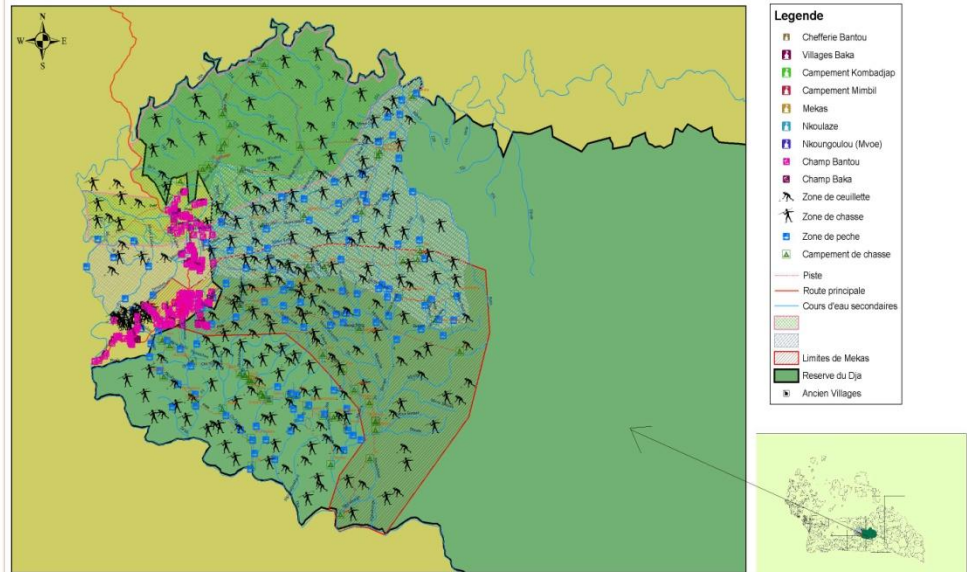
# FPIC over what?

## Community mapping

- Maps can show not just the boundaries of use but also
- Land use zones
- Local names
- Customary rights areas
- Sacred sites
- Historical areas



Carte d'utilisation des ressources forestieres des Baka et Bantou de Nkolmbembe, Mimbil, Mekas et Nkougoulou



Cartographes locaux: Mokomo Dieudonne(Baka); Atyi Jean-Marie(Bantou);  
Djala Luc (Baka)/Megolo Bonaventure (Bantou); Djampene Pierre (Baka);  
Assing Didier Claver(Bantou); Onanas Thomas(Baka); Megata Francois(Bantou)  
Appui logistique: Tamo Jerome; Tchenang William. Realisation: Georges Thierry Handja



10 5 0 Kilometers

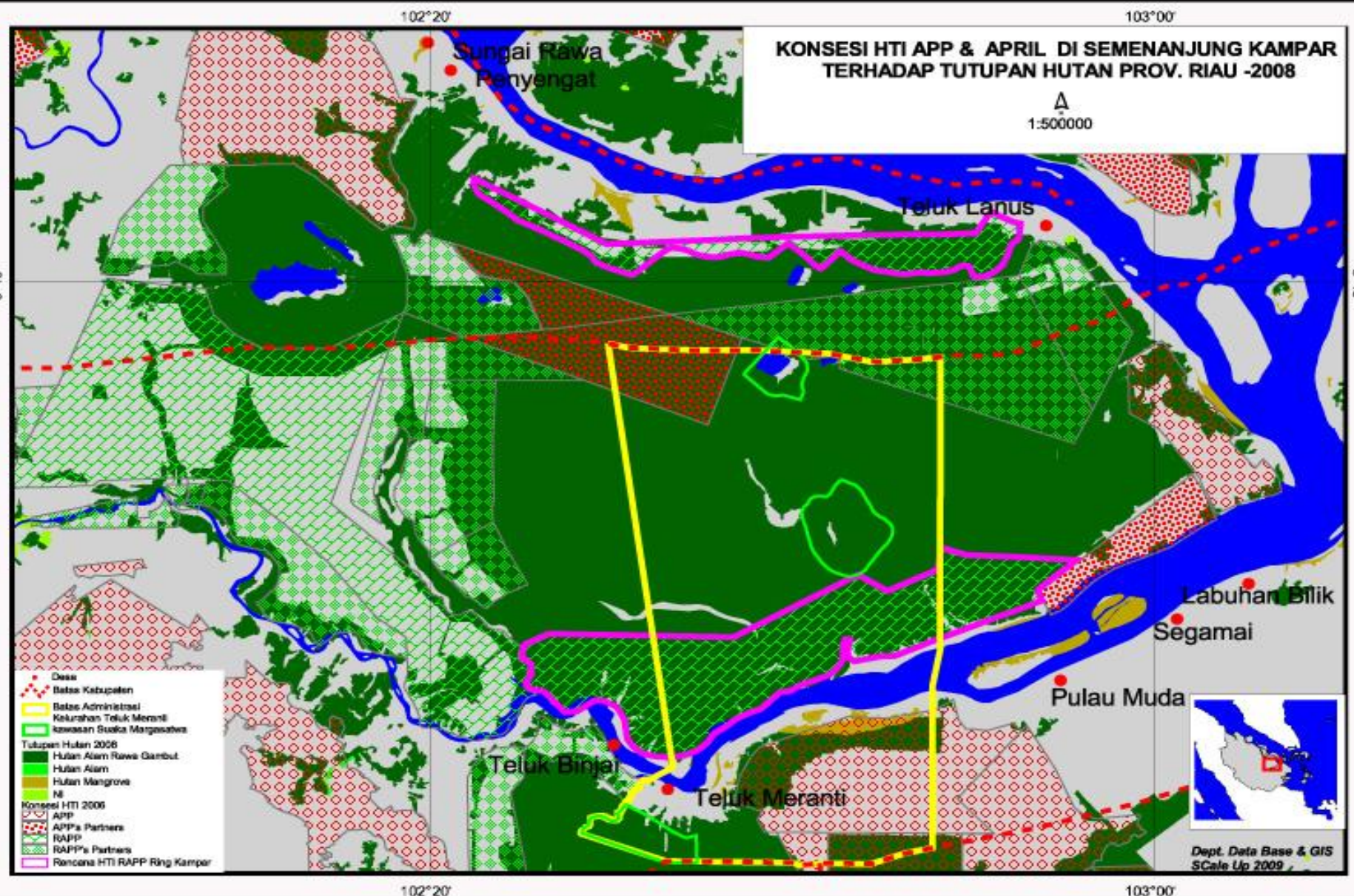


# Free of what?





# Prior to what?





# Consent by what process?

---





# How long does it take?

## Customary rights : customary laws







The Right to say 'No'



# Who provides the information?



# Convention on Biological Diversity

---

REDD should not run counter to CBD... ‘provide benefits for forest biodiversity, and, where possible, to indigenous and local communities, and involve biodiversity experts including holders of traditional forest-related knowledge, **and respect the rights of indigenous and local communities in accordance with national laws and applicable international obligations**’

[CBD COP Decision IX/5. Forest biodiversity at paragraph 2(a)]



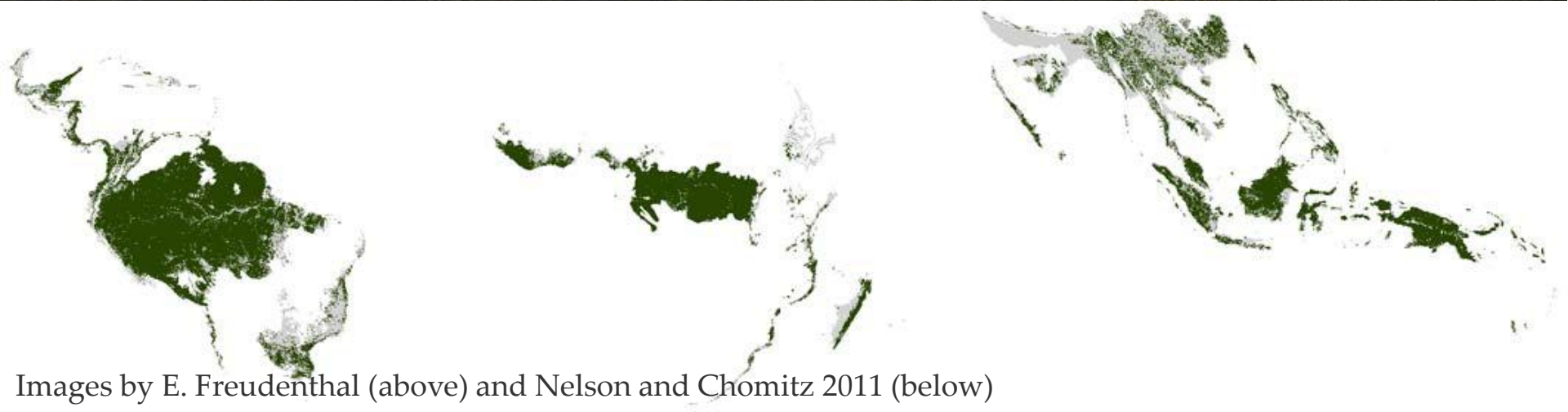
# CBD COP Decision 7.23

---

‘... the establishment, management and planning of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations.’

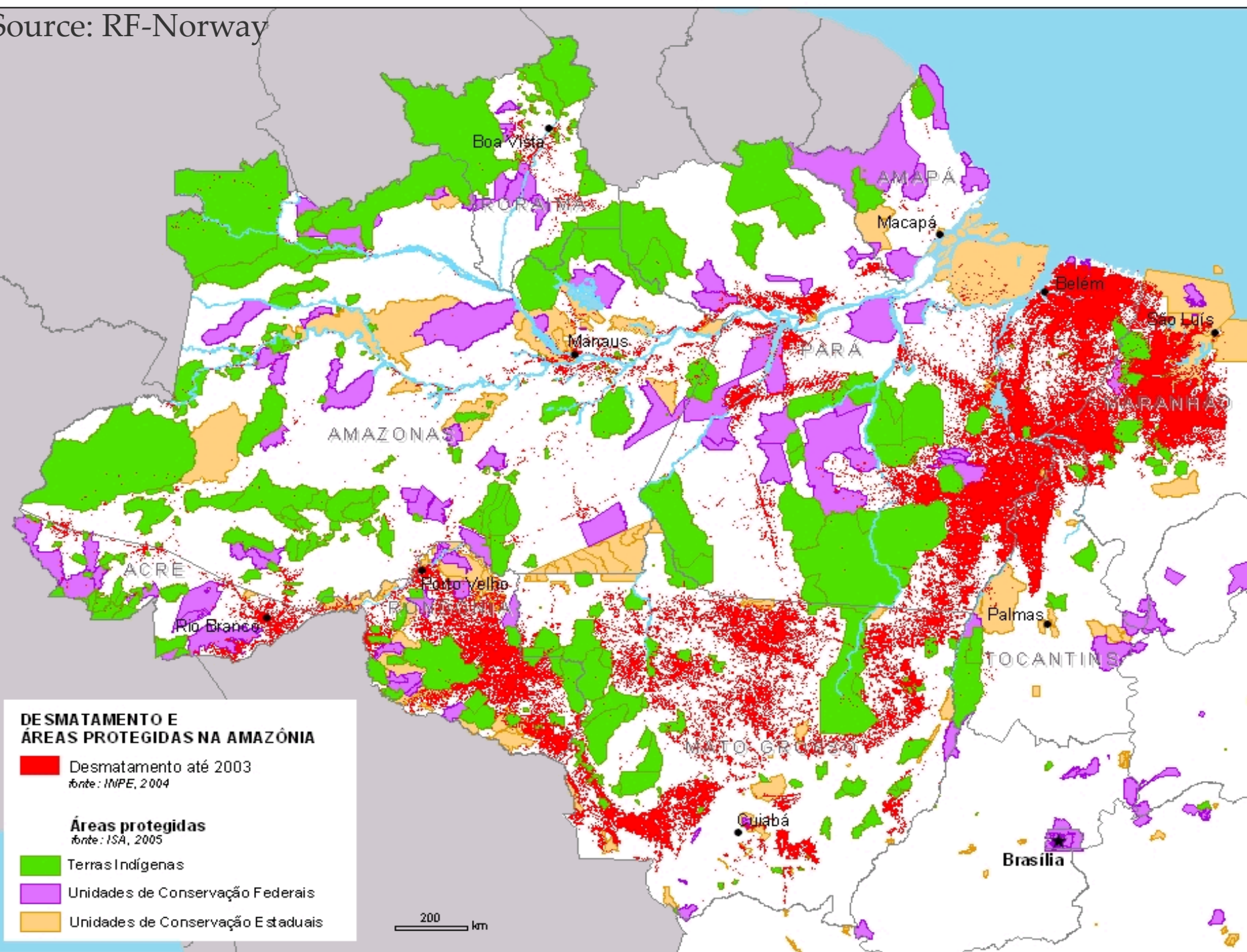


# Is community conservation good for forests?

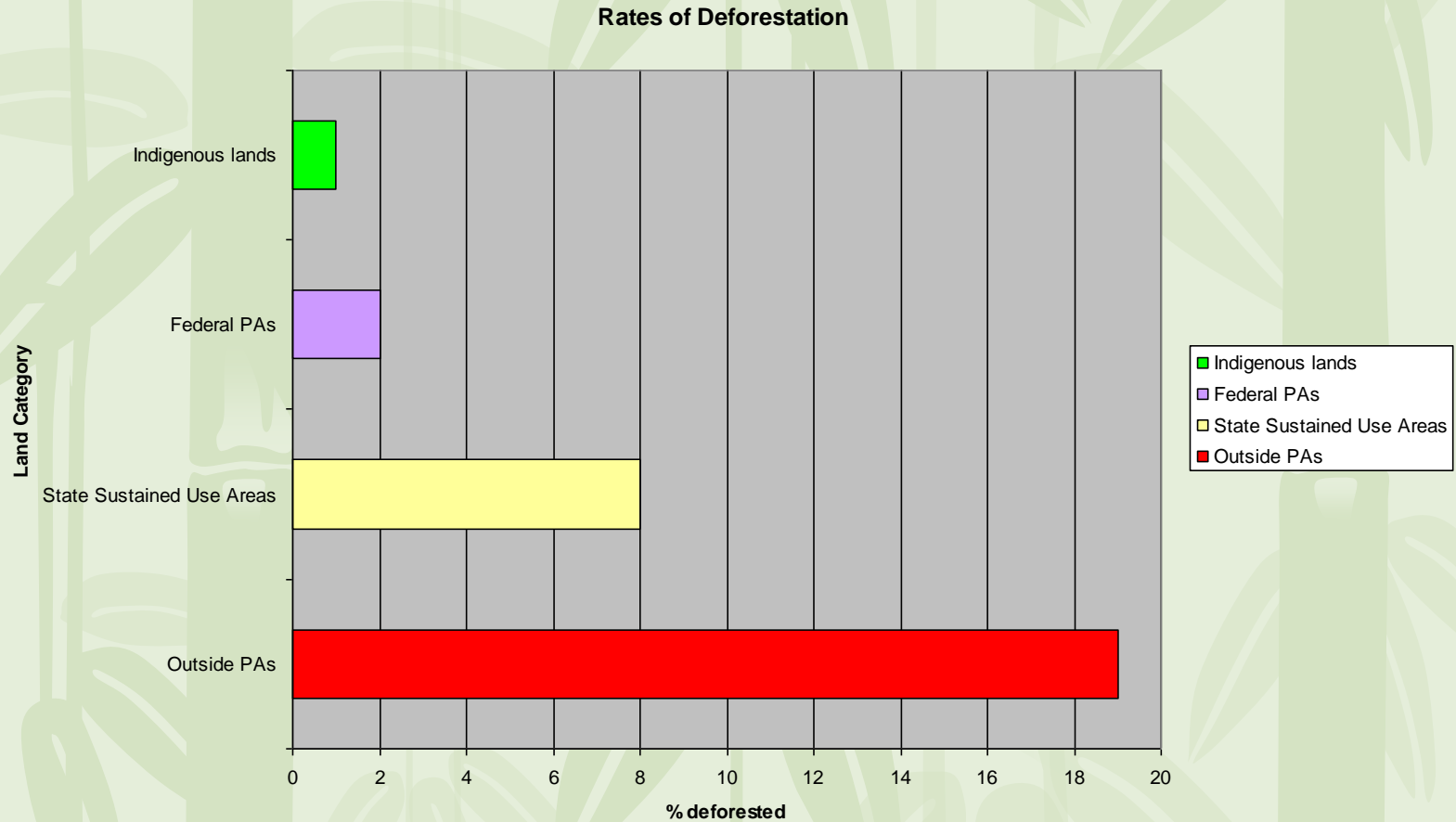


Images by E. Freudenthal (above) and Nelson and Chomitz 2011 (below)

Source: RF-Norway



# Rates of deforestation



# Some of the global evidence for community conservation

---

- **CIFOR (2011)** compared 40 *strict protected areas* and 33 *community-managed forests* in 16 countries.  
Findings: *Community-managed forests* **six times better** than strict protected areas at protecting the forest
- **World Bank (2011)** Comparison based on satellite images of all tropical forest in the world  
Findings: community-managed forests are **much more effective** in reducing deforestation than strict protected areas , especially in less remote areas



# Rights in UNFCCC

	UNFCCC LCA Text	Safeguard Annex
Respect human rights	1/16:I para 8	
'Note' UNDRIP	1/16:III E . para 87	1.2 (c)
Observe international obligations		1.2 (a)
Full & effective participation of Indigenous peoples and local communities	1/16:III c. para 72	1.2 (d)
Free, Prior and Informed Consent		

# Rights in REDD Implementing agencies

	FCPF	FIP Logical Framework	UNREDD	Common Approach	Norway
Respect human rights		Protect rights	UNDG Guidelines for IPs		Yes
'Note' UNDRIP			Implement UNDRIP		Yes
Observe internat'l obligations	FCPF Charter			Para 6 9 <sup>th</sup> June 2011	ILO 169, not clear on Covenants etc
Full and effective participation	OP 4.10 (MDBs)	OP 4.10 (MDBs)	Yes	OP 4.10 at least, yes UNDP	Yes
Free, Prior & Informed	OP 4.10 FPICons		Yes	OP 4.10 FPICons	Yes



# Who has rights to FPIC in Africa?

---

- Most African States have ratified relevant international human rights treaties
- International human rights jurisprudence treats 'tribal peoples' and 'Indigenous Peoples' as having the same rights (eg Saramaka vs Suriname, IACHR)
- **African Charter on Human and Peoples' Rights** accords collective rights including right to self-determination to all peoples not just 'Indigenous Peoples'
- Endorois Decision of African Commission affirms right to FPIC , to customary lands and to remedy

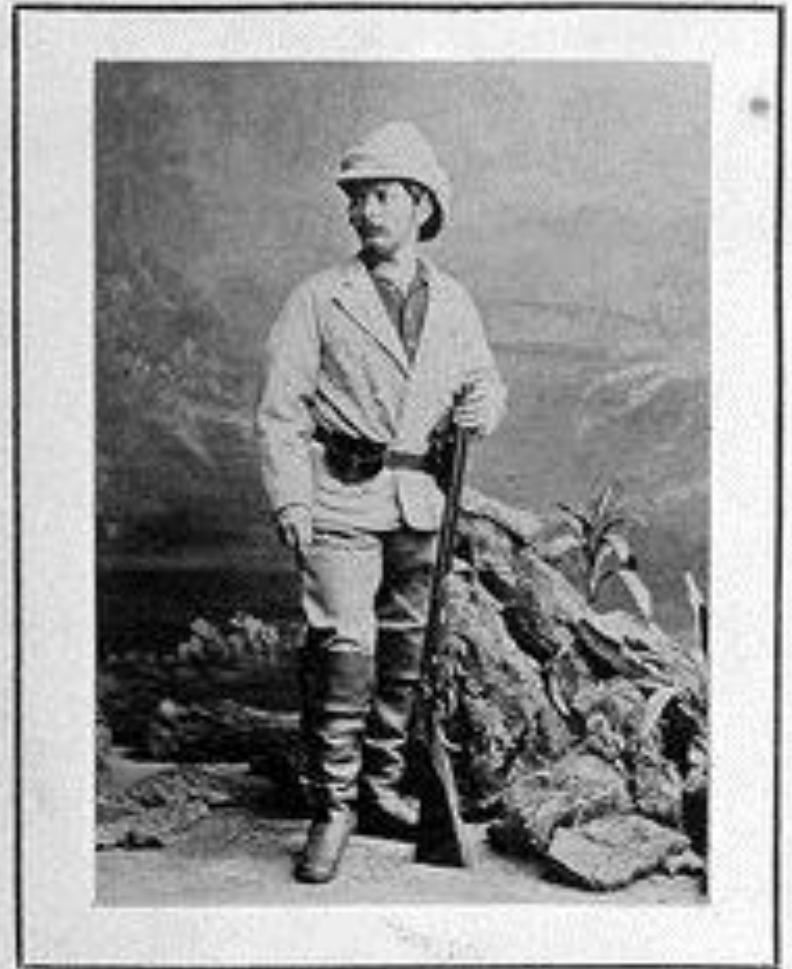
# Sum up

---

- Securing community rights in forests is good for REDD
- Respecting the right to FPIC and to customary rights is mandatory under a variety of binding international treaties
- Respect for rights is required in the safeguard policies of REDD agencies including, most explicitly, UNREDD which requires FPIC
- Effectively respecting FPIC is not easy: we need to learn lessons from experiences



# Lessons from history?

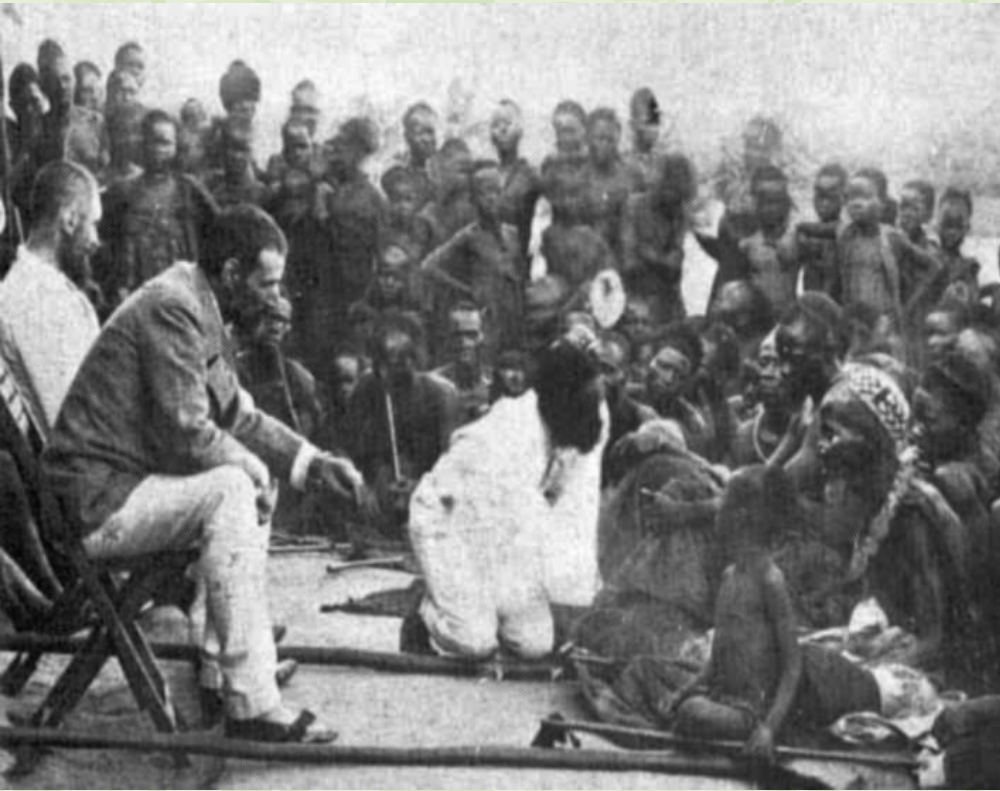


*Henry M. Stanley*

PHOTOGRAPHED BY THE LONDON PHOTOGRAPHIC COMPANY

# Lessons from colonial treaty making

---



- Use of force
- Implications unclear
- Text falsified (fraud)
- Not inclusive
- Some chiefs made decisions to suit their own interests not all their people's
- Colonials broke treaties
- Impunity / No redress
- **Let's not repeat the same mistakes with REDD**





[www.forestpeoples.org](http://www.forestpeoples.org)

Thank you