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## CLIMATE CHANGE AND HUMAN RIGHTS IN THE DEMOCRATIC REPUBLIC OF THE CONGO: REDD+ AND THE PROTECTION OF THE RIGHTS OF INDIGENOUS PEOPLES

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### **Abstract**

The Democratic Republic of the Congo has accomplished several milestones in the reducing emissions from deforestation and forest degradation (REDD+) process, but its implementation remains limited. This chapter examines some of the issues faced in the emission reduction programme in Mai Ndombe province, one of the world's most advanced jurisdictional REDD+ programmes, and finds that the current legal and regulatory framework, as well as public policies on climate and REDD+ strategies in the DRC have failed to enhance the realisation and protection of substantive human rights of indigenous peoples and local communities. The implementation of the REDD+ programme is challenged by a legal crisis, which impacts the enjoyment of the rights of indigenous peoples and local communities. This chapter argues that the regulatory framework does not adequately protect indigenous people's land tenure and use, as well as other substantive and procedural rights, including the rights to participation and free, prior informed consent. It then highlights the legal windows available locally to secure traditional forests occupied customarily, including the application of effective compliance mechanisms of the REDD+ programme and the relevant human rights treaties ratified at the regional or international level in the DRC.

**Key words:** *climate change; indigenous peoples; local communities; Mai Ndombe; REDD+; rights-based approach*

## **1 Introduction**

Climate change impacts include extreme weather events (such as floods, cyclones and droughts); increasing temperatures; rising sea levels; changes in precipitation patterns; melting permafrost; receding coastlines; and loss of territory. It has direct impacts on human populations – affecting core rights such as the right to health, the right to an adequate standard of living, the right to work, and the right to culture. The enjoyment of these rights is affected not only by the adverse consequences of climate change,

but also by states' mitigation and adaptation responses.<sup>1</sup> The emergence of reducing emissions from deforestation and forest degradation (REDD+), perceived as a quick and cheap option for taking early action toward limiting global warming to 2°C, has generated significant interest, but it has also sparked concern about potential adverse impacts on indigenous peoples and community rights and livelihoods. The negative impacts include increased centralisation of forest management, inequitable benefit sharing, lack of real participation and lack of free, prior informed consent.<sup>2</sup>

The Democratic Republic of the Congo (DRC) hosts approximately half of the second-largest tropical humid forest in the world. It has a forest cover of around 100 million hectares, with an estimated 40 million people relying on forests for their livelihoods, among which 600 000 to 700 000 are indigenous people.<sup>3</sup> These people who suffer poverty, inequality, weak livelihood conditions and a lack of recognition of collective customary ownership, are regularly exposed to human rights violations, and continue to be neglected regarding forest governance issues.<sup>4</sup> Over the last decade the DRC has been continually active in the ongoing international climate negotiations and has accomplished several milestones towards readiness for the implementation phase of REDD+.<sup>5</sup> The country has attracted pilot investments in the region, while also receiving technical and financial support from multilateral and bilateral donors. It also adopted a national REDD+ framework strategy in 2012, including a REDD+ national fund and national REDD+ social and environmental standards; a national forest monitoring system; and a national REDD+ registry to document information about REDD+ projects in DRC.<sup>6</sup> Despite these important advancements, REDD+ governance in DRC may be limited by several structural shortcomings and deficiencies since they have the potential to affect indigenous peoples' and local communities' livelihoods and rights

- 1 S Jodoin & K Lofts (eds) *Economic, social, and cultural rights and climate change: A legal reference guide* (2013) 5.
- 2 A Angelsen et al *Analysing REDD+: Challenges and choices* (2012) 1-2.
- 3 Indigenous peoples in DRC are known in anthropological literature by different names, including Twa, Batwa, Mbuti, Bambuti, Basua, Efe or Asua. They consider their generic appellation of 'pygmies' as derogative and discriminatory. They are also referred to as *peuples autochtones* in French, which means indigenous peoples.
- 4 ACHPR & IWGIA 'Report of the African Commission's Working Group on Indigenous Populations/Communities: Research and Information Visit to the Democratic Republic of Congo' (2011) adopted by the African Commission on Human and Peoples' Rights at its 49th ordinary session, 2011 21-31.
- 5 Democratic Republic of the Congo's Minister of Environment, Nature Conservation and Tourism (MECNT) 'REDD readiness Plan 2008–2012 R-PP Version Finale (v.3.1)' (2010) 157.
- 6 K Fobissie et al 'REDD+ policy approaches in the Congo Basin: A comparative analysis of Cameroon and the Democratic Republic of Congo' (2014) 5 *Forests* 2403.

by imposing new restrictions on access to valuable resources, by removing decision-making autonomy on resource use and by undermining long-established traditional forest management regimes.<sup>7</sup> Similarly, the fundamental rights of indigenous peoples are routinely violated despite these rights being recognised in several international conventions ratified by the state. The land insecurity creates risks of dispossession and increasing poverty for local communities and indigenous peoples. In the absence of legal clarity on land tenure, discrimination against rural and indigenous women, who lack access to key lands and resources, persists in DRC. Challenges for the effective implementation of REDD+ include the lack of adequate benefit-sharing mechanisms between the state and local communities, weak compliance safeguards standards, lack of effective grievance mechanisms and the exclusion of marginalised indigenous peoples in decision-making processes at both national and local levels.

This chapter analyses the interface of climate policies and mitigation measures with the rights of indigenous peoples and local communities in DRC. In examining the extent of protection available to indigenous peoples and local communities under the climate change regulatory framework in DRC, the chapter finds gaps between the national and regional or international frameworks in relation to the protection of land tenure, and a lack of a prescriptive human rights framework to enhance REDD+ implementation at the local level. It contributes to the reflection on the human rights dimension of climate change in DRC, where the realisation of the rights of indigenous peoples and local communities remains problematic mainly due to insecure tenure, and lack of political will. Against the foregoing backdrop, the chapter calls for a move beyond mere commitment and ‘nice talks’ to achieve effective compliance with regional and international human rights treaties ratified by DRC, with a specific focus on the rights of indigenous peoples and local communities. Following a brief introductory discussion of key concepts in relation to climate change and human rights, the chapter proceeds with the background to REDD+ in DRC and demonstrates how REDD+ interventions have undermined or violated specific rights of indigenous peoples or local communities. It critically examines weaknesses and gaps in the national climate change regulatory framework, including conservation in relation to the rights of indigenous peoples and local communities. The chapter proposes what could be used as an opportunity to secure indigenous peoples’ and local communities’ land tenure and ensure that forest-dependent communities remain the primary beneficiaries of REDD+ initiatives in DRC.

7 R Jesse & A Larson ‘Reducing REDD risks: Affirmative policy on an uneven playing field’ (2012) 6 *International Journal of the Commons* 233.

## 2 Climate change and human rights: Conceptual basis and theoretical analysis

The environment and climate policies have for long been perceived as a human rights-free zone, and most governments are not responsive to address human rights, climate and the environment in an integrated way. The concern about these risks has prompted the enactment of safeguards under the United Nations (UN) Framework Convention on Climate Change (UNFCCC) and the development of safeguards by donor initiatives.<sup>8</sup> Considering its link with the realisation of human rights, the UNFCCC provides consensual and cooperative approaches to address climate change.<sup>9</sup> Bodansky argues that the UNFCCC, like other environmental instruments, seeks consensus building rather than the bindingness of law.<sup>10</sup> Posner demonstrates leading arguments for the preference for a consensual political environment such as allowed under the UNFCCC and not human rights as a conceptual basis for addressing climate change. According to the author, engaging human rights 'would not lead to a desirable outcome',<sup>11</sup> and its usage as a conceptual basis will affect economic development, a critical concern of developing nations.<sup>12</sup> The Paris Agreement, argues Sands, does not contain 'legally-binding

- 8 Under the UNFCCC, the December 2010 COP-16 meeting produced the Cancun Agreement, including a set of social and environmental safeguards for climate mitigation and sustainable forest management activities. While recognised as an important step, many indigenous peoples' organisations have stressed that there is space for improvement to adequately address their concerns and interests in a final legal framework. Indigenous peoples ask for the recognition of key rights: the right to lands, territories and resources; the recognition of traditional knowledge and traditional practices; and respect for indigenous peoples' own governance structure and equitable benefit sharing. The Cancun Agreement only considers the UN Declaration on the Rights of Indigenous Peoples, although this is considered a crucial and comprehensive instrument by indigenous peoples. At the UNFCCC Durban Conference (COP-17) member states agreed to establish a Social and Environmental Safeguards information system.
- 9 EA Posner 'Climate change and international human rights litigation: A critical appraisal' (2007) 155 *University of Pennsylvania Law Review* 1925; EA Posner & CR Sunstein 'Climate change justice' (2008) 96 *Georgetown Law Journal* 1565; also see J Gupta 'Legal steps outside the climate convention: Litigation as a tool to address climate change' (2007) 16 *Review of European Community and International Environmental Law (RECIEL)* 76; M Allen 'Liability for climate change: Will it ever be possible to sue anyone for damaging the climate?' (2003) 421 *Commentary in Nature* 891.
- 10 D Bodansky 'Introduction: Climate change and human rights: Unpacking the issues' (2010) 38 *Georgia Journal of International and Comparative Law* 511 516.
- 11 EA Posner 'Climate change and international human rights litigation: A critical appraisal' (2007) 155 *University of Pennsylvania Law Review* 1925.
- 12 As above.

provisions that require countries to take domestic legal action'.<sup>13</sup> In particular, pointing to the fact that its provision on human rights obligations is embodied in the Preamble, other authors express the probability that the Paris Agreement is not intended to impose a legally-binding human rights obligation on parties.<sup>14</sup> The application of human rights to the subject of climate change is novel and contested,<sup>15</sup> because it is controversial whether a human rights framework and not an environmental law framework is the appropriate conceptual basis for addressing the adverse effects of climate change.<sup>16</sup>

While most of these arguments are welcomed by state governments and private actors globally, in the Congo Basin since the 1990s there has been an increasing realisation in the field of development that the traditional needs-based approach to development is not sufficient. There is the need for a paradigm shift to the rights-based approach to enable individuals (rights holders) to demand and exercise rights and the state and non-state actors (duty bearers) to deliver those rights.<sup>17</sup> A rights-based approach encourages rights holders to claim rights and to be the active players in their own development. According to Sen, the capacity development notion of the rights-based approach empowers individuals (or communities) to demand justice as a right rather than a charity.<sup>18</sup> In terms of development projects, the inclusion and participation of indigenous peoples and local communities is important, not only because it makes development more equitable, but also because it has the potential to guarantee a protected space to the marginalised groups disallowing the monopolisation of development policies and practices by elites.<sup>19</sup> Hamm understands development and human rights as being interdependent. She argues that a human rights-based approach to development recognises

13 P Sands 'Climate change and the rule of law: Adjudicating the future in international law' (2016) 28 *Journal of Environmental Law* 19 22.

14 B Mayer 'Human rights in the Paris Agreement' (2016) 6 *Climate Law* 109 114; R Cléménçon 'The two sides of the Paris climate Agreement: Dismal failure or historic breakthrough?' (2016) 25 *Journal of Environment and Development* 3 8.

15 A Jegede *The climate change regulatory framework and indigenous peoples' lands in Africa: Human rights implications* (2016) 29; M Limon 'Human rights and climate change: Constructing a case for political action' (2009) 33 *Harvard Environmental Law Review* 439; JH Knox 'Linking human rights and climate change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 483.

16 D Hart 'Is climate change a human rights issue?' (2012) 24 *Environmental Law and Management* 76; Bodansky (n 10) 511 516.

17 A Cornwall & C Nyamu-Musembi 'Putting the "rights-based approach" to development into perspective' (2004) 25 *Third World Quarterly* 1415.

18 A Sen 'Human rights and capabilities' (2005) 6 *Journal of Human Development* 151.

19 OHCHR 'High Commissioner's Strategic Management Plan' (2006) 2006-2007.

primarily the legal obligations of members of human rights treaties to development cooperation and development efforts and so goes beyond human rights as the content of development policy.<sup>20</sup> Although the operationalisation of human rights (rights-in-practice) towards economic benefits and social justice has been less evident than the theoretical discourse,<sup>21</sup> this chapter advances that a rights-based legal or regulatory framework coupled with effective compliance and practical application of relevant human rights standards can achieve sustainable benefits for affected marginalised communities.

A human rights framework generally allows for the protection of the environment, and there is mounting evidence that secure community forest land and resource tenure helps promote environmental objectives (including environmental services) and can result in better forest outcomes than the increasingly outdated (and conflict-prone) development and conservation model where community rights are excluded.<sup>22</sup> The evidence illustrates the concerns over the regulatory framework established by the international climate regime, especially in relation to REDD+, which does not adequately protect indigenous peoples' rights to land tenure and use. Environment and climate policies encourage a consensual political approach rather than a prescriptive framework. REDD+ may have implications for human rights,<sup>23</sup> as the protection of forests is critical to combating climate change, and must be done in ways that respect and protect the rights of those who have long depended on those forests.<sup>24</sup>

The emergence of REDD+ has generated significant interest in its potential to mitigate the impact of global warming, but it has also sparked

20 BI Hamm 'A human rights approach to development' (2001) 23 *Human Rights Quarterly* 1005.

21 J Grugel & N Piper 'Do rights promote development?' (2009) 9 *Global Social Policy* 79.

22 A Chhatre & A Agrawal 'Trade-offs and synergies between carbon storage and livelihood benefits from forest commons' (2009) 106 *PNAS* 17667-17670; A Nelson & KM Chomitz 'Effectiveness of strict vs multiple use protected areas in reducing tropical forest fires: A global analysis using matching methods' (2011) 6 *PLoS ONE* e22722; L Porter-Bolland et al 'Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics' (2011) 502 *Forest Ecology and Management*; E Ostrom *Governing the commons: The evolution of institutions for collective action* (2015); A Agrawal 'Common property institutions and sustainable governance of resources' (2001) 29 *World Development* 1649; A Agrawal & E Ostrom 'Collective action, property rights, and decentralisation in resource use in India and Nepal' (2001) 29 *Politics and Society* 485; D Gilmour 'Forty years of community-based forestry' FAO forestry paper (2016) 176.

23 J Quan & N Dyer 'Climate change and land tenure: The implications of climate change for land tenure and land policy' (2008) 2 *Land Tenure Working Paper* 7-8.

24 Jegede (n 15) vii.

concern about potential adverse impacts on indigenous peoples' and communities' rights and livelihoods, such as negative impacts on land and resource rights, increased centralisation of forest management, inequitable benefit sharing, lack of effective participation of marginalised communities and free, prior informed consent. Their rights to land and natural resources are regularly sidelined.<sup>25</sup> In the context of climate change governance, a rights-based approach seeks to ensure that responses to climate change protect, respect and fulfil human rights obligations throughout the various stages of climate responses (including planning, funding, implementation, monitoring and evaluation).<sup>26</sup> Indigenous peoples' lands are intrinsically related to other rights, including their rights to property, to cultural integrity, and free, prior informed consent.<sup>27</sup>

Free, prior informed consent has emerged as a well-established principle in law,<sup>28</sup> in order to protect indigenous peoples (and other local communities) from losing their livelihoods, culture, and sense of people by recognising their rights to give or withhold consent to proposed development (and other) projects that may affect the lands they traditionally own, occupy, or otherwise use. It is a process that requires informed, non-coercive consultations, discussions, negotiations, and meetings between investors, companies, governments and indigenous peoples prior to the development and establishment of projects on customary lands. It is designed to allow indigenous peoples to reach consensus and make decisions according to their own customary systems of decision making.<sup>29</sup> From this perspective, free, prior informed consent appears to be an articulation of the right to self-determination. Subsequently, prior to undertaking any project development, the government or the local company have an obligation to consult indigenous peoples and local communities in advance, on a fully-informed and free basis, based on which those peoples may give or withhold their consent, in relation to planned activities that will affect their

25 UNCHR (Sub-Commission) 'Indigenous peoples and their relationship to land' Final Working Paper prepared by the Special Rapporteur E-I A Daes' (2001) UN Doc E/CN.4/Sub.2/2001/21 para 67.

26 Jodoin & Lofts (n 1) 5-6.

27 IFAD *Land tenure security and poverty reduction* (2008); IFAD *How to do: Seeking free, prior and informed consent in IFAD investment projects* (2015).

28 The principle is affirmed in the UN Declaration on the Rights of Indigenous Peoples.

29 M Colchester 'Free, prior and informed consent: Making FPIC work for forests and peoples' (2010) 11 *The Forest Dialogues Research Paper* 18-19; FAO 'Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition' (2014) *Governance of Tenure Technical Guide 3*; UN-REDD Programme 'UN-REDD Programme guidelines on free, prior and informed consent' (2013); P Anderson 'Free, prior, and informed consent: Principles and approaches for policy and project development' (2011).

rights to their customary lands, territories and other resources. As will be illustrated later, this is not the case in the context of REDD+ planning in DRC, where the pilot projects have been outlined in consultation with the national government but without seeking proper free, prior informed consent from potentially-affected communities.

Indigenous peoples have a distinctive perception of land tenure and use relevant for adaptation and mitigation purposes.<sup>30</sup> The lack of formal recognition of indigenous peoples' land claims makes REDD+ harmful to indigenous peoples. The lack of land rights limits the potential for communities to participate in REDD+ initiatives.<sup>31</sup> For example, where lands claimed by indigenous communities are not yet secured or titled, they could be allocated to private concessions to work on REDD+. According to Sen, all forms of deprivation (including dispossession of land) and social, economic, political, and cultural exclusion directly result in poverty.<sup>32</sup> From a tenure perspective, REDD+ does introduce some new elements – such as rights to the carbon values of forests – as well as specific challenges, including the problem of private speculators interested in profiting from potential carbon markets, who negotiate unfair contracts with local communities. Normally, REDD+ projects are designed to provide fair and equitable access to benefits in a manner that is inclusive, particularly with respect to marginalised and vulnerable groups. Benefit sharing has been defined as the distribution of both the monetary and the non-monetary benefits generated through the implementation of REDD+ projects and programmes.<sup>33</sup> The legal concept of 'benefit sharing', developed under the Convention on Biological Diversity,<sup>34</sup> appears to be increasingly called upon as an inherent component of the human rights of indigenous peoples and local communities that may be affected by traditional forms of natural resource extraction and by nature conservation

30 AO Jegede & M Hansungule 'The impact of climate change on indigenous peoples' land tenure and use: The case for a regional policy in Africa' (2014) 21 *International Journal on Minority and Group Rights* 256.

31 CIHR 'Rights-based approaches to REDD+' Report of a Conservation Initiative on Human Rights Workshop' (2012) 3.

32 A Sen *Development as freedom* (1999).

33 PT Thuy et al 'Approaches to benefit sharing: A preliminary comparative analysis of 13 REDD+ countries' (2013) CIFOR Working paper 108 1.

34 E Morgera & E Tsioumani 'The evolution of benefit-sharing: Linking biodiversity and community livelihoods' (2010) 20 *RECIEL* 150.

measures.<sup>35</sup> In a legal sense, an approach to benefit allocation refers to the way in which the basis for a benefit claim is established (whether by a legislative instrument or contract). Given that carbon is a natural resource intrinsically linked to land, the rights to own or use the carbon resource (referred to as ‘carbon rights’) need to be clear. In fact, the legal basis for establishing benefit claims begins by clearly defining ‘carbon rights’,<sup>36</sup> as well as non-carbon benefits.

### **3 Climate change and human rights in DRC: REDD+ in context**

REDD+ has been through an intensive process of conceptualisation, design and implementation – even if it is still far from realising its fundamental goal, namely, large-scale emission reductions.<sup>37</sup> Voluntary REDD projects have started round the world in the absence of a formal mechanism for REDD+.<sup>38</sup> As home to the second-largest forest in the world, DRC has attracted pilot investments in the region, including from multilateral and bilateral donors as well as from international non-governmental organisations (NGOs), while also receiving technical and financial support of the Forest Carbon Partnership Facility (FCPF), the UN-REDD+ programme, and the Congo Basin Forest Fund (CBFF) of the African Development Bank.<sup>39</sup> It is the first African country to launch a national forest monitoring system and a REDD+ National Registry for the monitoring of REDD+ projects. DRC adopted a National REDD+ Framework strategy in 2012, including a REDD+ National Fund, a national REDD+ social and environmental standards and a REDD+ investment plan.<sup>40</sup>

35 E Morgera ‘From corporate social responsibility to accountability mechanisms’ in PM Dupuy & J Viñuales (eds) *Harnessing foreign investment to promote environmental protection: Incentives and safeguards* (2013) 32.

36 S Chapman & AM Wilder ‘Defining the legal elements of benefit sharing in the context of REDD+’ REDD+ Law Project Working Paper (2014) 5.

37 Angelsen (n 2) 1-2.

38 TAP West et al ‘Overstated carbon emission reductions from voluntary REDD+ projects in the Brazilian Amazon’ (2020) 17 *PNAS* 24188; also see IIED ‘REDD: Protecting climate, forests and livelihoods’, <https://www.iied.org/redd-protecting-climate-forests-livelihoods> (accessed 22 January 2022).

39 PC Gondo ‘A review of forest financing in Africa’, [https://www.un.org/esa/forests/wp-content/uploads/2014/12/Forest\\_Financing\\_Africa\\_Gondo.pdf](https://www.un.org/esa/forests/wp-content/uploads/2014/12/Forest_Financing_Africa_Gondo.pdf) (accessed 22 January 2022).

40 Democratic Republic of the Congo ‘REDD+ Investment Plan (2015-2020)’ (DRC Investment plan), [https://redd.unfccc.int/uploads/3262\\_4\\_redd\\_investment\\_plan\\_eng.pdf](https://redd.unfccc.int/uploads/3262_4_redd_investment_plan_eng.pdf) (accessed 22 January 2022).

The investment plan aims at two major impacts: emission reductions and improved livelihoods, especially through increasing the income of the population among the poorest and most vulnerable worldwide.<sup>41</sup> To this end, the investment plan includes a portfolio of REDD+ programmes across the country that covers major structural and policy reforms, such as land tenure reform to secure rural tenure, and a land use planning policy.<sup>42</sup> It includes an improvement in governance and increases in agricultural productivity that promotes activities in savannahs as well as investments at provincial level to drive a sustainable, inclusive model of rural development and create new socio-economic opportunities for local communities, farmers and smallholders.<sup>43</sup>

The National REDD+ Fund (FONAREDD) was designed as a tool for cross-sectoral coordination, mobilisation of funding and monitoring of the fiduciary implementation of projects related to REDD+ and climate change mitigation in DRC.<sup>44</sup> Since 2013, it has served as a financial vehicle for the implementation of the REDD+ strategy. Both the REDD+ national strategy and investment plan describe the objectives of FONAREDD. The investment plan, evaluated at \$1 078 million over the period 2016-2020, sets out in operational terms of how to achieve this stabilisation objective by identifying activities, sectoral projects, policies and reforms to be implemented to address the various drivers of deforestation.<sup>45</sup> All these objectives are brought together in the Integrated REDD Projects (PIREDD).<sup>46</sup> The investment plan anticipates one PIREDD for each of the 26 provinces.<sup>47</sup> In 2016 the FCPF approved the DRC Emissions Reduction Programme (ERP) for the province of Mai-Ndombe, which covers 12,3 million hectares, including 9,8 million hectares of forest. Logging, livestock and conservation concessions and protected areas account for 30 per cent of the total area of the province, leaving 70 per cent of the territory to the communities.<sup>48</sup> Indigenous peoples constitute 3 per cent of the province's population. According to the Emission

41 As above.

42 As above.

43 As above.

44 The DRC REDD+ National Fund (FONAREDD), <https://www.cafi.org/countries/democratic-republic-congo/drc-redd-national-fund> (accessed 22 January 2022).

45 DRC Investment plan (n 40).

46 'The DRC REDD+ National Fund', <https://www1.undp.org/content/cafi/en/home/partner-countries/democratic-republic-of-the-congo/the-drc-redd-national-fund.html> (accessed 22 January 2022).

47 DRC Investment plan (n 40).

48 Rights and Resources Initiative *Mai-Ndombe: Will the REDD+ laboratory benefit indigenous peoples and local communities? Analysis of the cumulative impacts and risks of REDD+ initiatives* (2018).

Reductions Programme Document (ERPD), Mai-Ndombe is a first step in implementing the country's national REDD+ strategy at jurisdictional level, as a model for green development in the Congo Basin, an important test of climate action on the African continent and for REDD+ results-based payments in high forest cover low deforestation (HFLD) countries.<sup>49</sup> The background to REDD+ in DRC and reflections on negative impacts on the rights of indigenous peoples and local communities are discussed below. Issues such as land tenure and use, carbon rights, compensation and benefit sharing by indigenous peoples have implications for the right to property under the African Charter on Human and Peoples' Rights (African Charter).<sup>50</sup>

### 3.1 A controversial diagnosis on the drivers of deforestation

Shifting cultivation drives the current patterns of forest cover loss according to the REDD+ strategy plan,<sup>51</sup> and the Mai Ndombe ERP identifies slash-and-burn agriculture as the main direct drivers of deforestation and forest degradation in the programme area. The analysis of drivers blames most deforestation on poor shifting cultivators when this does not appear to be supported by the data presented.<sup>52</sup> Indeed, other studies highlight the impact of the expansion of commercial agriculture, illegal industrial logging and mineral extraction driven by global demand.<sup>53</sup> In the absence of reliable information for planning, mainly in relation to human activity and its interaction with the environment, it seems that political decision makers resort to the use of preconceived notions.<sup>54</sup> These preconceived notions include the use of a 'shifting slash and burn agriculture' by forest communities. The preconceived idea is that this type of agriculture has a

49 RA Asare & D Gohil 'The evolution of forest finance in five African countries: Lessons learned from the REDDX initiative in Africa' (2016) 2 10; also see KE Enongene & K Fobissie 'The potential of REDD+ in supporting the transition to a Green Economy in the Congo Basin' (2016) 18 *International Forestry Review* 29.29.

50 Jegede (n 15) 221-223.

51 Stratégie-cadre nationale REDD de la République Démocratique du Congo (2012) 23.

52 Environmental Investigation Agency (EIA) 'Preliminary comments by the Environmental Investigation Agency on the Democratic Republic of the Congo's Emission Reduction Programme Document for the World Bank Forest Carbon Partnership Facility' (2016) 2, <https://www.forestcarbonpartnership.org/system/files/documents/EIA%20Comments%20DRC%20ER-PD.pdf> (accessed 19 September 2021).

53 A Ickowitz et al 'Agriculture and deforestation in the Democratic Republic of the Congo: A synthesis of the current state of knowledge' (2015) Occasional Paper 119; Chatham House *Illegal logging in the Democratic Republic of the Congo* (2014).

54 Ideas and explanations admitted as true by the public or experts of a given domain. These ideas and explanations, though widely popular, often do not lie on any logical basis and are not verifiable in practice.

destructive and irreversible effect on the forest. However, the observation under the Rights and Resources Initiatives (RRI) tenure reference study (ERT)<sup>55</sup> does not allow for a trustful conclusion that the practices (i) prevail at an extensive scale as often suggested by some stakeholders; and (ii) their impact is in such a dimension to necessitate political decisions in the absence of in-depth research sustaining the thesis and its possible impact.<sup>56</sup> Yet, the preconceived idea concerning the impact of shifting and slash and burn farming has led planners, inspired by the REDD+ strategy, to opt for two policy directions that might have consequences for the communities living in the forest and in the savanna.<sup>57</sup> It is essential that the programme be targeted at the correct drivers of deforestation, especially the indirect causes of forest loss, including the issues of insecure tenure, poor governance and policy incoherence. Otherwise, there are risks that the emission reduction programmes will not address the real drivers of deforestation, but rather unfairly blame and place undue restrictions on communities and their forest use activities, and that forest communities at the front lines of forest protection will face unnecessary and unjust limits on their rights and livelihoods and will not have access to the benefits and incentives associated with REDD+.<sup>58</sup>

### **3.2 Lack of free, prior informed consent and effective participation of affected communities**

The principle of participation holds that every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights can be realised.<sup>59</sup> Participation is important in the implementation of projects under the international climate change regulatory framework at the national level. It is important, for instance, in the formulation of the proposal on REDD+, and the development of a benefit-sharing plan. There are relevant norms on participation

55 Rights and Resources Initiative (RRI) 'Étude de référence sur la tenure en République Démocratique du Congo' (2019) [https://rightsandresources.org/wp-content/uploads/2019/05/Etude-de-Reference-RDC\\_RRI\\_2019.pdf](https://rightsandresources.org/wp-content/uploads/2019/05/Etude-de-Reference-RDC_RRI_2019.pdf) (accessed 13 December 2020).

56 P de Wit 'Planification de l'utilisation des terres: Impact sur les droits communautaires' in RRI, *Étude de référence sur la tenure en République Démocratique du Congo* (2019) 114.

57 As above.

58 FPP 'Comments on the Forest Carbon Partnership Facility (FCPF) Emission Reductions Programme Document (ER-PD) on the Mai-Ndombe Emission Reduction Programme in the Democratic Republic of Congo' 2017.

59 L VeneKlasen et al 'Rights-based approaches and beyond: Challenges of linking rights and participation' IDS Working Paper 235 (December 2004) 5.

and inclusion as core principles in human rights that can help address indigenous peoples' claims in respect of rights to lands in a climate change context.<sup>60</sup> Indigenous peoples and local communities can ground the claim for effective engagement in climate change negotiation on the right to participation. They can use this principle in drawing attention to the importance of recognising their land rights, and claiming monetary or non-monetary benefits. In DRC there is a shockingly low level of inclusion and ownership in communities supposed to be implementing REDD+ activities, particularly among women.<sup>61</sup> Local development committees set up to interface with the projects do not properly represent communities, their members are not sufficiently informed of what REDD+ is, and often lack the necessary resources to implement REDD+ activities.<sup>62</sup>

The discussions about the potential impacts of REDD+ have converged in stressing the need for the participation of forest communities within REDD+ projects but have neglected the fundamental question of whether communities wanted REDD+ pilots in the first place.<sup>63</sup> Legitimate concerns about the potentially harmful social effects of REDD+ articulated by indigenous communities were side-lined.<sup>64</sup> Free, prior informed consent is a specific right that pertains to indigenous peoples recognised by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>65</sup> which allows them to give or withhold consent to a project that may affect their rights, including their lands, territories, and resources that they have traditionally owned, occupied or otherwise used or acquired.<sup>66</sup> The right to give or withhold free, prior informed consent

60 Jegede (n 15) 223 225.

61 The Rainforest Foundation 'REDD-Minus: The rhetoric and reality of the Mai Ndombe REDD+ programme' (2020) 1.

62 As above.

63 J Dehm 'Indigenous peoples and REDD+ safeguards: Rights as resistance or as disciplinary inclusion in the green economy?' (2016) 7 *Journal of Human Rights and the Environment* 180.

64 These concerns, including the exclusionary and top-down approach to REDD+, are acute in the context of DRC where the state claims ownership rights over forest lands, disregarding the customary right of people living there. Under such circumstances it is easier for private actors to gain regulatory approval from the national government to implement their future projects.

65 UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295) (2007).

66 UN Declaration on the Rights of Indigenous Peoples, arts 10, 19, 28, 29 & 32.

has been highlighted by indigenous peoples as a fundamental element of the exercise of their right to self-determination.<sup>67</sup> A *Ministerial Arrêté*<sup>68</sup> was adopted in 2017 to set up the legal framework for the right to free, prior informed consent in the context of REDD+ in DRC. However, REDD+ pilot initiatives have been established as a predetermined outcome where proposed projects have been described as a win-win opportunity that will benefit both communities and companies, and in most cases REDD+ developers failed to seek free, prior informed consent before the start of operations, leading to confusion and conflict in the project areas.<sup>69</sup> In the Mai Ndombe emission reduction programme, free, prior informed consent is applied partially and unevenly. Marginalised communities were not included in the design of projects and were poorly informed about the processes that have mainly been conducted in the capital city of Kinshasa.<sup>70</sup>

### 3.3 Lack of recognition of the carbon rights

Carbon rights have been a distinct asset that can be disentangled from the complex bundles of rights associated with land, forests and other natural resources or ecosystem services.<sup>71</sup> In the context of REDD+, the law can play an important role in clearly outlining who owns the carbon stored in trees. Clear land tenure and forest tenure are prerequisites for the effective implementation of REDD+ initiatives, while unclear tenure can create confusion regarding who is responsible for forest conservation and who is entitled to benefits.<sup>72</sup> However, in DRC carbon rights are not explicitly referenced in the country's legislation,<sup>73</sup> and there is no clear definition except in the context of administrative procedural law laid down in a ministerial regulation establishing the approval procedure for REDD+ projects.<sup>74</sup> The state has ultimate ownership rights to all

67 See eg art 20 of the African Charter on Human and Peoples' Rights.

68 DRC 'Arrêté Ministériel' N. 026/CAB/MIN/EDD/AAN/KTT/04/2017 du 8 novembre 2017 fixant le cadre des directives nationales sur le CLIP dans le cadre de la mise en œuvre de la REDD+ en RDC.

69 RFUK 'REDD-Minus: The rhetoric and reality of the Mai Ndombe REDD+ programme' (2020) 9.

70 Rights and Resources Initiative (RRI) (n 55) 25.

71 RRI & Ateneo School of Government *Status of forest carbon rights and implications for communities, the Carbon Trade, and REDD+ Investments* (2014).

72 P Wieland 'Building carbon rights infrastructure with REDD+ incentives: A multi-scale analysis in the Peruvian Amazon' (2013) 43 *Environmental Law Reporter* 10275.

73 A Mpoyi et al 'REDD+ en RDC: Cadre juridique et institutionnel de mise en œuvre de la REDD+ en RDC' (2013).

74 Arrêté Ministériel N 004/CAB/MIN/ECN-T/012 du 12 février 2012 fixant la procédure d'homologation des projets REDD+. In a separate context, that is, the

resources, adjudicating land use rights and revoking these if public interest so demands. Community rights, although weak, are acknowledged in a dual system of tenure and resource rights.<sup>75</sup> The state is the owner of the land, forests, soil and subsoil, and consequently it has the rights to regulate carbon credits. However, it has not yet established a robust legal structure for the international sale of carbon assets. While there are clear legal provisions for private sector access and resource use rights, this is not the case when it comes to community rights, particularly for the regulatory ecosystem services that carbon provides (for example, climate change mitigation).<sup>76</sup> In 1973 the land law provided that a presidential ordinance would regulate the rights of rural communities to use their land.<sup>77</sup> Although the Land Law was revised in 1980, the Ordinance was never drafted – an oversight that has never since been addressed by the various governments.<sup>78</sup> This situation creates a vacuum and legal insecurity that is detrimental to all the communities that depend on the forest for their livelihood.<sup>79</sup> The government currently adjudicates carbon rights using the current legal framework which, as explained below, contains serious gaps and loopholes. As the Carbon Fund prepares to buy emission reduction units,<sup>80</sup> there are concerns that the DRC government will simply choose to nationalise carbon rights as a practical way forward, thereby weakening the prospects of much-needed tenure reform for forest dependent communities. Therefore, there is a need for clarity on carbon rights, and a legal instrument is needed to specify whether and how carbon rights can be acquired or transferred by indigenous peoples.<sup>81</sup>

recently-adopted Nature Conservation Law (Loi No 14/003 du 11 février 2014 relative à la conservation de la nature) a legislative reference to the ‘potential value of forest carbon stocks’ and the need for its consideration by the government under both the national conservation strategy and the national forest programme can be found (art 8) but the provision does not state any legal particularities.

75 IIED ‘REDD+ and rights: Extending carbon rights in the DRC to climate-regulating services’ (2013) Briefing, [https://www.researchgate.net/publication/300132610\\_REDD\\_and\\_rights\\_extending\\_carbon\\_rights\\_in\\_the\\_DRC\\_to\\_climate-regulating\\_services](https://www.researchgate.net/publication/300132610_REDD_and_rights_extending_carbon_rights_in_the_DRC_to_climate-regulating_services) (accessed 18 December 2020).

76 RRI & Ateneo School of Government (n 71) 3.

77 DRC Loi n° 73-021 du 20 juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés telle que modifiée et complétée par la loi n° 80-008 du 18 juillet 1980 (1973) art 389.

78 J Batory & T Vircoulon ‘Les pouvoirs coutumiers en RDC: Institutionnalisation, politisation et resilience’(2020) *Notes de l’Ifri* 12.

79 L Koné ‘Garantir les droits fonciers coutumiers en République démocratique du Congo : Guide Pratique à l’intention des acteurs impliqués dans le processus de la réforme foncière’ (2017) 28.

80 RRI ‘Looking for leadership: New inspiration and momentum amidst crisis’ (2015), RRI4087\_AR2014r11B3.pdf (rightsandresources.org) (accessed 18 December 2020).

81 RRI & Ateneo School of Government (n 71) 5.

## 4 Inadequate national climate change regulatory framework

Weak guarantees in the climate institutional and regulatory framework at the national level have implications for the right to property as guaranteed under the African Charter.<sup>82</sup>

### 4.1 Denial of customary ownership

In DRC forests are owned by the state, which recognises local communities' customary user rights to land and forest resources.<sup>83</sup> Land tenure in DRC has evolved without formal recognition of communities' customary property rights over the forest lands they have occupied and used for generations, although traditional practices and customs remain widespread. While the state claims ownership of all forest lands, in rural areas customary institutions govern forest and land resources in practice.<sup>84</sup> *De facto* customary ownership by local communities and indigenous peoples has continued largely uninterrupted, while statutory law denied forest peoples formal legal title to their traditional lands, and the state exercised *de jure* control over land and forests. Most of the land (70 per cent) in DRC is owned customarily, but without proper recognition of customary rights to land, there is no customary forest legally owned by communities under current law. As in the case of the colonial legislature, post-independence laws have dispossessed communities and indigenous peoples of their customary rights. The legal setting is meant to perpetuate and protect the interests and property rights of the government, foreign companies and investments.<sup>85</sup> The Congolese land law<sup>86</sup> gives the state a free rein as 'sole owner'<sup>87</sup> of the land to dispossess the communities of their land and make the land available to investors in the name of

82 Jegede (n 15) 221-223.

83 A Mpoyi et al 'Le contexte de la REDD+ en République Démocratique du Congo: Causes, agents et institutions' (2013) CIFOR, Document occasionnel 84; SM Mbala & A Karsenty 'Forest revenue decentralisation and profits redistribution in the Democratic Republic of Congo' in LA German, A Karsenty & A Tiani (eds) *Governing Africa's forest in a globalised world* (2010) 160.

84 L Debroux et al 'Forests in post-conflict Democratic Republic of Congo: Analysis of a priority agenda' (2007).

85 IG Shivji 'The rights of people to self-determination: An African perspective' in W Twining (ed) *Issues of self-determination* (1989) 19.

86 DRC Land Law (1973), Loi No 73-021 du 20 juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés, telle que modifiée et complétée par la Loi N 80-008 du 18 juillet 1980.

87 Art 53 of DRC Land Law.

public interest.<sup>88</sup> The collective and informal form of land ownership that characterises indigenous peoples is ineffective in the context of REDD+ in DRC. This is inconsistent with the spirit and letter of the African Charter which guarantees the rights to property. It means that indigenous peoples in DRC are not entitled to the protection of collective rights under the African Charter, as clearly stated in the *Endorois* case.<sup>89</sup> Indigenous peoples and local communities may only acquire enjoyment rights over land within the state's private domain through the so-called 'concession' process<sup>90</sup> or within the community forest concessions<sup>91</sup> provided for by the 2002 Forest Code.<sup>92</sup> Rural communities do not enjoy sufficient legal guarantees to safeguard their customary lands from damages (losses or restrictions) that could result from the state's allocation processes, particularly in the REDD+ process.<sup>93</sup> The 2006 Constitution recognises local communities' land rights and guarantees the right to individual or collective property acquired in accordance with the law or custom. It also recognises customary authority.<sup>94</sup> However, in the absence of regulations or a legal mechanism to secure customary rights held by local communities, these rights remain inapplicable in practice.<sup>95</sup> DRC is in a situation of legal and institutional dualism, with a strong contradiction between the legal and legitimate, the norm and the practice in land appropriation mechanisms.<sup>96</sup> The consequence of this legal situation is that tenure rights are unsecured for indigenous peoples and local communities, leaving them vulnerable to land speculation. Due to insecure tenure, indigenous peoples and local communities face major challenges including poverty, inequality, food insecurity and a poor business climate.

88 P Kipalu et al 'Securing forest peoples' rights and tackling deforestation in the Democratic Republic of Congo: Deforestation drivers, local impacts and rights-based solutions' (2016) 12-17.

89 *Centre for Minority Rights Development & Others v Kenya* (2000) AHRLR 75 (ACHPR 2009) 22 (*Endorois*).

90 See arts 57 and 61 of the Land Law.

91 Art 22 of DRC Forest Code provides statutory opportunities to secure some customary rights over forests and forest lands.

92 DRC Forest Code (2002), Loi n° 11/2002 du 29 août 2002.

93 A Mpoyi 'Amélioration de la gouvernance du secteur foncier en République démocratique du Congo: La mise en œuvre du cadre d'évaluation de la gouvernance foncière' (2013).

94 Constitution of the Democratic Republic of Congo (2006) arts 34 & 207; La Constitution de la République Démocratique du Congo telle que modifiée par la loi n° 11/002 du 20 janvier 2011 portant révision de certains articles de la Constitution de la République Démocratique du Congo du 18 février 2006.

95 DRC 'National REDD+ strategic environmental and social assessment report' 57.

96 E le Roy 'Les pluralismes juridiques' (2003) Paris, Karthala.

In the absence of the proper recognition of indigenous people's collective customary tenure formulated in the national legal framework, the proposed measures to address land tenure insecurity in REDD+ programmes are vague and do not seem to be rooted in actions that will lead to permanent legal recognition of community and indigenous lands, rather towards sanctioning temporary land uses through local development plans ratified by provincial authorities.<sup>97</sup> Globally, when REDD+ was first proposed, indigenous peoples, forest-dependent communities and civil society groups immediately articulated serious concerns about REDD+'s potentially harmful social effects. These included the risk that those living in and around forested areas would be dispossessed of their land if REDD+ promoted a global 'land grab' for carbon sequestration.<sup>98</sup> These concerns are acute in the context of DRC where the state claims ownership rights over forest lands, disregarding the customary rights of people living there.

## 4.2 Weak enforcement of human rights obligations

DRC has legal obligations under international instruments it has ratified, including the International Covenant on Civil and Political Rights (ICCPR);<sup>99</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>100</sup> the Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>101</sup> the African Charter,<sup>102</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>103</sup> and the Convention on Biological Diversity (CBD).<sup>104</sup> The country also voted in favour of the UN Declaration on the Rights of Indigenous Peoples<sup>105</sup> (UNDRIP) in 2007 and signed the African Convention on the Conservation of Nature and Natural Resources.<sup>106</sup> Under the country's Constitution, 'international treaties and agreements which have been duly concluded have, upon publication, precedence over [national] laws, subject to each treaty or agreement application by the other party'.<sup>107</sup> In a pure monist state such as DRC,

97 Environmental Implementation Agency (n 48) 2.

98 T Griffiths 'Seeing "RED"? "Avoided deforestation", and the rights of indigenous and local communities' (2007) Forest Peoples Programme.

99 Ratified 1 November 1976.

100 Ratified 1 November 1976.

101 Ratified 21 April 1976.

102 Ratified 20 July 1987.

103 Ratified 17 October 1986.

104 Ratified 3 December 1994.

105 United Nations Declaration on the Rights of Indigenous Persons (n 61)

106 Signed on 29 June 2008.

107 Art 215 DRC Constitution 2006.

following French constitutional law,<sup>108</sup> once a treaty has been ratified and published 'externally' it becomes part of internal law. At least in theory, no legislative action is needed to lower the second storey level of international law norms to the ground floor level of national law. In line with this tradition, international human rights law is 'directly incorporated' into and made an 'integral part' of national law in most of civil law Africa, either in the Preamble to or elsewhere in the Constitution.<sup>109</sup> According to international law, the provisions of international human rights law should enjoy a privileged status under the DRC legal framework, at least in theory. However, the reality is different in practice.

The DRC government has shown the highest political presence at the international climate negotiations but has invested more in the size of its delegation and side events rather than in the implementation of its obligations under the international regime.<sup>110</sup> For example, the African Charter, which recognises individual and collective rights, is the most effective instrument at the regional level to assess the protection of indigenous peoples' land rights in the context of adverse effects of climate change.<sup>111</sup> However, the DRC land law does not explicitly recognise collective ownership for indigenous peoples and local communities, leaving them vulnerable to land speculation, land grabbing and other forms of land dispossession. In relation to collective rights, in addition to providing in article 24 for the right to a satisfactory environment, other collective rights in the African Charter include the rights to existence and self-determination,<sup>112</sup> free disposal of wealth and natural resources,<sup>113</sup> and economic, social and cultural development.<sup>114</sup> The Mai Ndombe ER Programme, as an example of REDD+ pilot project in the DRC, essentially relies on existing DRC laws to achieve its expected results. However, as discussed earlier, there are serious deficiencies and loopholes in the existing framework that will undermine communities' access to land and resources.<sup>115</sup>

REDD+ is intended to drive social benefits through improved livelihoods (including from carbon payments), clarification of land tenure, and stronger governance of forests arising from 'REDD readiness'

108 Art 55 Constitution of France 1958.

109 F Viljoen *International human rights law in Africa* (2007) 531.

110 Fobissie et al (n 6).

111 Jegede (n 15) 20.

112 Art 20 African Charter.

113 Art 21 African Charter.

114 Art 22 African Charter.

115 Fobissie et al (n 6).

activities. Projects are also required to apply national and international safeguards to minimise social risks from emission reduction activities.<sup>116</sup> The Paris Agreement<sup>117</sup> recognised REDD+ as a key policy instrument for climate change mitigation and explicitly recognised the need to respect human rights in all climate actions. Under this Agreement, state parties agreed that they should have regard to human rights in climate interventions.<sup>118</sup> A social safeguard policy to mitigate negative impacts of REDD+ has been developed under the DRC national REDD+ strategy, but existing requirements on safeguards are not legally binding, making consideration for rights difficult to achieve.

### 4.3 REDD+ and conservation policy threaten forest peoples' rights

DRC is home to 60 per cent of the forests of the Congo Basin and is rich in biodiversity. The conservation of this dense forest heritage is of crucial importance to the Congolese authorities. Approximately 11 per cent of the national territory is currently covered by protected areas,<sup>119</sup> and the Congolese state aims to formally protect at least 17 per cent<sup>120</sup> of the country's surface area soon.<sup>121</sup> However, conservation areas often overlap with territories inhabited and claimed by indigenous peoples and local communities and prohibit access and use of resources by communities that for centuries have lived in harmony and interdependently with these rich ecosystems. The DRC's conservation policy is essentially based on the forest classification process and the creation of national parks and protected areas, a process implemented without addressing indigenous peoples' rights to free, prior informed consent. The policy, which aims to protect biodiversity, threatens indigenous and local communities' rights to their customary forest lands and resources and is not based on the science

116 UNFCCC 'Cancun Agreements' (2011) adopted by the Conference of the Parties, 16th session Cancun, 29 November-10 December 2010, Decision 1/CP.16.

117 Paris Agreement under the United Nations Framework Convention on Climate Change 2015, adopted by Conference of the Parties, 21st session Paris, 30 November-11 December 2015/FCCC/CP/2015/L.9/Rev.1.

118 Paris Agreement (n 117) Preamble.

119 A protected area is a geographically-defined area which is designated or regulated and managed to achieve specific conservation objectives. For a definition, see the Convention on Biological Diversity art 2.

120 According to art 14 of the 2002 Forest Code 'Classified forests must represent at least 15% of the total surface area of the national territory'. During the Conference of the Parties to the CBD in Nagoya, in Japan, in 2011, the Congolese government committed to raising this threshold to 17%.

121 DRC 'Stratégie nationale de conservation de la biodiversité dans les aires protégées de la République Démocratique du Congo' (2012).

that now clearly recognises the key role that ancestral communities can play in protecting and sustaining their ecosystems when they have security of tenure and agree to conservation conditions.

The DRC law prohibits indigenous communities' subsistence activities in national parks and other protected areas, including traditional hunting or fishing.<sup>122</sup> Following the creation of national parks and protected areas, numerous forest communities have been evicted from their customary lands and prohibited access to the forest without compensation. For example, in 2006 the then Ministry of Environment, Nature Conservation, Waters and Forests signed a ministerial *arrêté*<sup>123</sup> establishing a primate reserve, *réserve des primates de Kisimba-Ikobo* (RPKI) in Pinga, North Kivu province. Article 1 of the Ordinance Law of 22 August 1969 on the conservation of nature<sup>124</sup> constitutes the basis for the creation of the RPKI, as it provides that any part of the DRC territory may be established by ordinance as an 'integral nature reserve' when the conservation of nature is of special interest and it is important to protect this environment from any intervention likely to alter its appearance, composition and evolution. The 'public interest' and 'necessity' argument invoked to establish the primate reserve is dubious. Balancing human rights under international law is grounded in the central premise that the adjudication of fundamental rights claims must consider other competing rights or public interests. This means that most human rights are not absolute and there are some circumstances when they must give way for the achievement of other goods or to balance with other human rights. In the *Endorois* case<sup>125</sup> the African Commission on Human and Peoples' Rights (African Commission) noted that encroachment was not a violation of the African Charter, if it is done in accordance with the law. Article 14 of the African Charter indicates a two-pronged test, where that encroachment can only be conducted 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'.<sup>126</sup>

122 DRC Loi No 14/003 du 11 février 2014 relative à la conservation de la nature, arts 70, 71, 77 ; DRC Law (2014) No. 14/003 on Nature Conservation, arts 70, 71, 77.

123 Arrêté ministériel no. 013/CAB MIN/ECN-EF/2006 du 03 avril 2006 portant création d'une réserve naturelle dénommée réserve des primates de Kisimba-Ikobo en abrégé « RPKI ».

124 The Ordinance Law of 22 August 1969 has been repealed and replaced by the Law of 11 February 2014 on the conservation of nature.

125 *Endorois* (n 81) para 211.

126 The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

In its own assessment on whether the restriction imposed upon a right does not override the rights of indigenous peoples to their ancestral lands, the African Commission noted that

any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible. In the present Communication, the African Commission holds the view that in the pursuit of creating a Game Reserve, the Respondent State has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve.<sup>127</sup>

In another seminal case the African Commission stressed that ‘the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.’<sup>128</sup>

In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that *consent* be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate – ultimately results in a violation of the right to property.<sup>129</sup> In the case of the RPKI primate reserve, the test laid out in article 14 was not met because the encroachment was not carried out in the interests of the community as they were not consulted prior to the creation of the reserve, and potential impacts on their livelihoods were not properly explained to them.

The conservation policy as currently applied risks exacerbating the impoverishment of indigenous communities, ironically excluding from or restricting access to the very people who have traditionally inhabited forests sustainably.<sup>130</sup> Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, and John Knox, UN Special Rapporteur on Human Rights and the Environment have reported on human rights and conservation.<sup>131</sup> They stress that human rights obligations ‘apply not

127 *Endorois* (n 81) para 214.

128 *Constitutional Rights Project & Others v Nigeria* (2000) AHRLJ 227 (ACHPR 1999) para 42.

129 *Endorois* (n 81) para 226.

130 Kipalu et al (n 88) 34.

131 Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, A/71/229, 29 July 2016 (UNSR on Indigenous Peoples); and

only to measures aimed at exploitation of resources, but also to those aimed at conservation', and duty bearers have enhanced obligations to respect the rights of 'those who have long-standing, close relationships with their ancestral territories'.<sup>132</sup> They also emphasise the interdependent and indivisible nature of healthy ecosystems and the enjoyment of human rights and, conversely, the essential importance of human rights guarantees for protecting ecosystems, particularly in the case of indigenous peoples.<sup>133</sup> In this regard, they highlight that respecting human rights is not only a legal obligation, but also often is the best or only way to ensure the protection of biodiversity.<sup>134</sup>

Protected areas have the potential of safeguarding biodiversity for the benefit of all humanity. However, these have also been associated with human rights violations against indigenous peoples in many parts of the world, including in DRC. For over a century, conservation was carried out with the aim of vacating protected areas of all human presence, leading to cultural destruction and large-scale displacements of indigenous peoples from their ancestral lands in the name of conservation and causing multiple violations of the collective human rights of indigenous peoples.<sup>135</sup> Conservation protected areas were initially established through the expropriation of the lands and territories of indigenous peoples and local communities. Such protected areas assumed that they should be created and governed by states, and uninhabited and without human use of natural resources. Coercive force was considered legally and morally justified to remove resident peoples and protect biodiversity.<sup>136</sup>

In October 2018 a group of indigenous Batwa, frustrated by their predicament and extreme poverty following their eviction of the Kahuzi Biega forest, decided to return to their ancestral forests. Since then, they have regularly clashed with eco-guards,<sup>137</sup> sometimes resulting in loss of

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/34/49, 19 January 2017 (UNSR Report on environment).

132 UNSR Report on environment (n 131) para 58.

133 UNSR Report on environment (n 131) para 5.

134 F MacKay 'Indigenous peoples' rights and conservation: Recent trends in human rights jurisprudence' (2017) Moreton-in-Marsh, UK: Forest Peoples' Programme.

135 UNSR on Indigenous Peoples (n 131) para 13.

136 S Stevens *Indigenous peoples, national parks and protected areas: A new paradigm linking conservation, culture and rights* (2014).

137 The ecoguards are the Congolese Institute for Nature Conservation (ICCN) paramilitary forces in charge of monitoring flora and fauna in protected areas. It is the term used to designate 'rangers' in the Congo Basin countries. Their salaries are usually financed by multilateral donors who support this model of conservation.

life.<sup>138</sup> On 30 November 2020 a group of Batwa demonstrators went out in the territory of Kabare, in South Kivu, to protest about the lack of land they face since their eviction from the park and against the exactions of the security forces. The demonstration resulted in a clash between Batwa demonstrators and members of the DRC army (FARDC). Four people, three Batwa and one soldier, were killed during the incident.<sup>139</sup>

In April 2019 the World Wide Fund For Nature (WWF) appointed an Independent Panel of Experts consisting of Judge Navi Pillay (Chairperson), Professor John H Knox and Dr Kathy MacKinnon to lead an independent review into WWF's role in connection with alleged human rights abuses in and around protected areas supported by the WWF in Cameroon, the Central African Republic, the DRC, the Republic of Congo, Nepal and India. The alleged abuses included instances of murder, rape, torture and physical beatings committed by eco-guards and other law enforcement agents acting under the authority of governments, which were described in a series of articles published in *BuzzFeed News*<sup>140</sup> in March 2019.<sup>141</sup>

The report stresses that conservation enterprises 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.<sup>142</sup> The DRC-specific findings revealed that 'WWF has not fulfilled its human rights commitments in relation to activities it supports in Salonga National Park'.<sup>143</sup> The WWF has worked in Salonga National Park<sup>144</sup> since 2005. In August 2015 it

138 WRM 'Les riverains autochtones Batwa et le retour sur leurs terres ancestrales dans le Parc National de Kahuzi Biega, Est de la RD Congo' 2020, <https://wrm.org.uy/fr/les-articles-du-bulletin-wrm/section1/les-riverains-autochtones-batwa-et-le-retour-sur-leurs-terres-ancestrales-dans-le-parc-national-de-kahuzi-biega-est-de-la-rd-congo/> (accessed 7 December 2020).

139 Desk Nature 'La société civile exige des enquêtes sur la mort de 3 autochtones pygmées et 1 soldat autour du Parc national de Kahuzi-Biega' 2020, <https://desknature.com/foret-la-societe-civile-exige-des-enquetes-sur-la-mort-de-3-pygmees-et-un-soldat-autour-du-parc-de-kahuzi-biega/> (accessed 13 December 2020).

140 BuzzFeed News 'WWF's secret war: WWF funds guards who have tortured and killed people' 2020, <https://www.buzzfeednews.com/article/tomwarren/wwf-world-wide-fund-nature-parks-torture-death> (accessed 13 December 2020).

141 Report of the Independent Panel of Experts of the Independent Review of allegations raised in the media regarding human rights violations in the context of WWF's conservation work 'Embedding human rights in nature conservation: from intent to action' (2020) November 2020 1.

142 United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) 14.

143 UN Guiding Principles (n 142) 6.

144 Salonga National Park is in Western Central DRC in the central basin of the Congo

entered into a co-management agreement with the Institut Congolais pour la Conservation de la Nature (ICCN),<sup>145</sup> which has authority over national parks in DRC. In DRC conservation policies have been traditionally state-centric and based on the expropriation of lands. Indigenous peoples were displaced, denied self-governance, deprived of access to natural resources for their livelihood and their traditional and spiritual links to ancestral land were disrupted.<sup>146</sup> Marginalised and impoverished indigenous peoples continue to struggle for access to their ancestral territories, resulting in enduring friction and conflict.<sup>147</sup>

#### **4.4 REDD+ as a space for realising land tenure rights**

REDD+ is an opportunity to avoid increased deforestation and forest degradation while also delivering co-benefits such as reducing poverty. It can be an opportunity to improve the legal framework and secure genuine recognition of customary ownership of forest for indigenous communities. The lack of rights and tenure is directly related to poverty and if communities are to benefit from REDD+, the legal framework needs to be improved to secure clear tenure rights for local and indigenous communities. Forest-dependent communities, including indigenous peoples and local communities, can use the community forestry process<sup>148</sup> to secure their lands. Under Decree 14/018 of 2014<sup>149</sup> a local community's forest concession is a forest granted to a community by the state, based on customary ownership, for every form of use necessary to meet its vital needs, subject to the obligation to apply the rules and practices of sustainable management. Community forest concessions for local communities (CFCL) are allocated upon the request of the community, free of charge

river. Covering approximately 33 676 square kilometres, Salonga is the second-largest protected rainforest in the world and the largest forest national park in Africa. It is the habitat for many endangered species, including the bonobo (pygmy chimpanzee), the forest elephant and the Congo peacock. The park was expanded to its current state in 1970, designated a UNESCO World Heritage site in 1984, and added to the List of World Heritage Sites in Danger in 1999.

145 ICCN is the agency with responsibility for protected areas in DRC. It is a public enterprise under the supervision of the Ministry of the Environment, Nature Conservation, Waters and Forests.

146 See eg Concluding Observations on the 8th periodic report of the Democratic Republic of the Congo adopted by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) at its 73rd session (1-19 July 2019).

147 UNSR on Indigenous Peoples (n 131) para 16.

148 The process through which communities can register forest concessions based on their traditional occupation.

149 DRC (2014), Décret no 14/018 du 02 août 2014 fixant les modalités d'attribution des concessions forestières aux communautés locales.

and in perpetuity.<sup>150</sup> CFCL will have benefits of securing customary tenure and enabling indigenous communities to manage their own REDD+ projects. Indigenous peoples and local communities recognised as owners of their lands and forests will prove to be more efficient custodians of the forest biodiversity. Legally-recognised indigenous and community forests are associated with lower rates of deforestation and store more carbon than forests managed by either public or private entities. Where rights are recognised, the difference is even greater.<sup>151</sup> The opportunity of the legal reforms supported by the REDD+ mechanisms can also be used to resolve the uncertainty of the legal dualism and recognise indigenous communities' informal tenure within formal legal framework. The land law should legalise what is legitimate. This means that the legitimate traditional owners of the forests need to see their customary tenure formally recognised through a simplified recognition mechanism.<sup>152</sup>

It is also crucial to capitalise on land use planning,<sup>153</sup> which is part of REDD+ piloting, to secure customary rights in protected areas. Land use planning<sup>154</sup> can influence the zoning of the area to clarify boundaries and establish zones of community access and use in and around the park, to reflect customary rights and to accommodate local needs. There also is some legal opening offered by the 2014 law on nature conservation<sup>155</sup> which provides for limitations to strict conservation. Indeed, the public body in charge of the management of protected areas (ICCN) can, exceptionally, grant exemptions in the protected areas it manages, notably in the interest of public health and security, as well as the food security of the populations living near the protected areas.<sup>156</sup>

150 Art 2(2).

151 RRI 'A global baseline of carbon storage in collective lands: Indigenous and local community contributions to climate change mitigation' (2018) Rights and Resources Initiatives.

152 Kipalu et al (n 88) 42.

153 Land use planning is a systematic and iterative process conducted to create an enabling environment for the sustainable development of land resources to meet the needs and demands of the people. It assesses the physical, socio-economic, institutional and legal potentials and constraints for optimal and sustainable use of land resources and provides decision makers and populations with the opportunity to make decisions on how to allocate these resources. Adapted definition from FAO and UNEP (1999) 'The future of our land: Facing the challenge'.

154 P de Wit 'Land use planning: Impact on community rights, baseline study on tenure in the Democratic Republic of Congo' (2019) 107.

155 DRC (2014), Loi n° 14/003 du 11 février 2014 relative à la conservation de la nature.

156 DRC (2014) (n 155) art 20.

## 5 Conclusion

The chapter analyses the interface of climate policies and mitigation measures with the rights of indigenous peoples and local communities in DRC. What emerges from this analysis is that the DRC regulatory framework does not adequately protect indigenous peoples (and local communities) land tenure and use. In addition to the denial of customary ownership, the failure to put in place adequate legislation at the national level negatively affects a range of land-related rights of indigenous peoples, including the rights to property, participation, free, prior informed consent, self-determination, and rights to enjoy the socio-economic benefits that are set out under regional and international human rights instruments.<sup>157</sup> While both the REDD+ strategy and the Mai Ndombe emission reduction plan identify 'shifting slash and burn agriculture' by forest communities as the major driver of deforestation, other studies and grassroots research initiatives highlight the impact of the expansion of commercial agriculture, illegal industrial logging and minerals extraction driven by global demand.<sup>158</sup> The REDD+ projects reviewed in this chapter did not obtain the free, prior and informed consent of impacted communities for REDD+ activities, leading to confusion and conflict in the project areas. International best practices on participation and inclusion of marginalised communities as well as relevant norms of human rights were insufficiently integrated in the design of the REDD+ programme. Monetary and non-monetary benefits, including carbon rights and tenure security, are not explicitly referenced in the country's legislation. Potential benefits generated through the implementation of REDD+ projects are likely to create confusion regarding the identification of legitimate beneficiaries. The DRC government has demonstrated little commitment towards the implementation of regional and international human rights norms. In fact, political interest and institutional reforms in DRC favours private sector investments in REDD+ programmes, while investment and support for indigenous peoples is marginal.<sup>159</sup> However, in the context of REDD+, insufficient efforts to clarify and strengthen the tenure security of indigenous peoples and local communities will increase communities' vulnerability to land speculation. In addition to that, part 5 showed that conservation policies also threaten forest peoples' rights.

The current legislation is inadequate to protect the land-related rights of indigenous peoples and local communities in the context of REDD+.

157 Jegede (n 15) 279.

158 Ickowitz et al (n 53).

159 Fobissie (n 6).

and is incompatible with DRC obligations under regional and international human rights instruments and rights guaranteed thereunder. A rights-based approach to REDD+ requires engagement with indigenous peoples as rights holders, rather than as project beneficiaries. Filling the gaps of the current REDD+ programmes through compliance with relevant human rights norms and international best standards and practices can help achieve more substantive results. Indigenous communities affected by REDD+ initiatives or inadequately treated during implementation must have access to remedies to protect and enforce their rights. This is essential both to ensure the rule of law and respect for the rights of affected people, but also in the interests of achieving the objectives of REDD+.