

**R** RAINFOREST  
FOUNDATION UK

SECURING LANDS, SUSTAINING LIVES

Executive Summary

**IN SEARCH OF LAND  
LAWS THAT PROTECT  
THE RIGHTS OF  
FOREST PEOPLES IN  
THE DEMOCRATIC  
REPUBLIC OF CONGO**

October 2014



**PART OF THE  
UNDER THE CANOPY  
SERIES**



# INTRODUCTION

The aim of this study is to make concrete proposals to contribute to the ongoing land reform process initiated in the Democratic Republic of Congo (DRC), which are designed to ensure that sufficient consideration is given to the rights to land and resources of populations living in forest areas.



Thomas Marent

In July 2012 the DRC's Ministry of Land Affairs launched a process of land reform, with the support of UN-Habitat and other technical and financial partners.

This process includes revising the 1973 Land Code, which is considered to be obsolete and unable to respond to current realities or to the need for change in this sector (REDD+ programs, carbon rights, land use planning, foreign investments, etc.) The government officially established the National Commission for Land Reform (CONAREF) in 2013, thus marking the start of the work on a reform designed to be inclusive, participatory, integrated and innovative.

In order to ensure that the results obtained were meaningful, the methodology of the study implemented a two-phase approach – on the one hand, a critical study of the land and resources legislation in force to assess both the extent to which the rights of the populations in forest areas to land and resources are taken into consideration, and any limitations and inadequacies; on the other hand, the use of the law, jurisprudential solutions, field data obtained from surveys, face-to-face interviews and focus groups in order to put forward realistic proposals for reform aimed at protecting the individual and collective land and resource rights of populations living in forest areas.

It should be noted that part of the study also consisted of examining the recently adopted decree no 14/018 of 2 August 2014 establishing the procedures for granting forest concessions to local communities.

This approach allowed for the contextualisation of the findings, and for practical recommendations to be made.



# FINDINGS

## FINDINGS

As things currently stand, DRC legislation does not recognise any right of property or possession, to either land or resources, for the populations that have traditionally occupied these lands, used them, preserved them and continue to depend upon them for their survival.

The State's exclusive ownership rights over the soil, sub-soil and their resources constitutes a negation of the basic human rights to land and leads to the impoverishment of populations, turning them into "squatters" on their own land.

In the DRC, there is a general problem relating to the promotion and protection of the land rights of communities. All populations in the country have been faced with difficulties in access and maintenance relating to land since the 1966 Bakajika Law was enacted<sup>1</sup>. However, the communities living in forest areas have to deal with further difficulties due to their specific characteristics and their greater dependence on the land and resources.

Based on the information obtained, a critical study of Congolese positive law shows that all land belongs to the State and that, the population in general and, consequently, those living in forest areas, can neither own nor possess the land on which they live, occupy or use. They can only ever have, under conditions that are very difficult to fulfil, rights of enjoyment called "concessions", in exchange for a fee or rent. In so far as concerns the rights to the resources, populations living in forest areas have no right to the oil and mineral resources, nor to certain wildlife resources located on the lands that they occupy. They have only limited rights to the forest resources (timber and non-timber forest products) even though they are heavily dependent upon the forest for their subsistence.



**THE NEGATION OF BASIC RIGHTS TO LAND AND RESOURCES HAS TWO MAIN EFFECTS, NAMELY, IT TURNS COMMUNITIES INTO "SQUATTERS" ON THEIR OWN LANDS AND IT IMPOVERISHES THEM.**

<sup>1</sup> Bakajika Law: The Bakajika Law, enacted after independence from the colonial state, was the first in a series of laws designed to ensure government control of the land and its riches. It gave ownership of all wealth above and below the ground to the state.



# RECOMMENDATIONS

## RECOMMENDATIONS

# 1. RESTORING AND SECURING BASIC LAND RIGHTS

In line with the reality of the situation, international instruments and the new legislative framework of the DRC, it is important that the land reform embarked upon in the DRC leads to the restoration and securing of the basic land rights of the forest populations in general and indigenous peoples in particular.

This calls for the abolition of the State's exclusive ownership rights over the land (as announced by the 2006 Constitution that confers upon the State sovereignty over the land), the creation of a 3rd land domain in which possession can be enforced, the establishing of collective ownership, the recognition and securing of rights of possession and property rights, the expansion and simplification of the conditions governing access to property titles, the establishment of the right to consultation and to Free, Informed and Prior Consent (FPIC) in all decisions affecting community land, and to the compensation of populations linked to the distribution of land.

The study suggests the amendment of the Land Law should include the right for private individuals and communities to be owners.

This presupposes the:

- Removal of the provision according to which the land is the State's exclusive and inalienable property;
- Removal of the provision according to which all land constitutes the State's private domain;
- Inclusion of the fact that populations (including indigenous peoples) can become land owners under the conditions as set forth in the law;
- Inclusion in the law of the obligation for the State to submit to the procedures of land appropriation provided for by the law in order for its ownership to exist;
- Inclusion in the law of the notion of collective ownership.

Once these fundamental bases have been established, additional measures would be required to restore the basic land rights of the populations over the land and to secure the restored rights, as detailed on the next page.



### 1A. TO RESTORE THE BASIC RIGHTS OF CONGOLESE POPULATIONS TO LAND, IT IS RECOMMENDED THAT LAND LEGISLATION SHOULD:

- Divide the land into three domains:
  - The public domain made up of all the lands that, by nature or by intended use, are assigned, either to direct usage by the public or to public services and cannot be disposed of or seized;
  - The private domain of the State and private persons, made up of the plots of land for which the State and private persons have carried out the formalities required for access to property;
  - A domain made up of any land that is not part of the public domain or the private domain, that could be called either national domain, or domain of the nation placed in the custody of the State over which populations have a right of possession and based on which the passage to ownership is organised;
- Remove the requirement for authorisation by the State to occupy or exploit the lands in this domain and the payment of a fee;
- Recognise and secure the right of populations to own land;
- Recognise and protect the populations' possession of the lands in the domain of the nation or national domain;
- Recognise and protect the customary ownership of land;
- Make direct registration of lands that have been traditionally possessed, as a means of accessing land ownership;
- Facilitate the change from customary ownership to certified ownership with a title by instituting mechanisms to provide evidence of customary ownership followed by the establishment of the title without the possibility for the State of challenging such ownership;
- Change the notion of "productive use of land" (mise en valeur) from the condition for maintaining concessions to the condition for accessing land ownership;
- Redefine the notion of "productive use of land" (mise en valeur) as a condition for access to ownership, to include the traditional use of land by forest communities and indigenous peoples;
- Recognise that populations have a right to Free, Informed and Prior Consent (Free, Prior and Informed Consent), and a right to compensation if they are evicted from land that they possess;
- Include the right for populations to be consulted before any transaction relating to the land they occupy, use, or possess in order to obtain their FPIC.

### 1B. TO SECURE THE RECOGNISED LAND RIGHTS:

As a general measure, it is useful to make a distinction between securing possession and securing ownership.

- To ensure greater protection of possession by populations, we have suggested instituting mechanisms to preserve the rights of possessors, in particular possessory actions that protect possession with no regard to the merits against any troubles that affect or threaten it;
- To allow populations living in forest areas to secure the right of ownership that will be recognised for them, the study suggests:
  - Transforming perpetual concession rights into ownership rights, notably titles;
  - Changing the perpetual concession procedure into a procedure for access to ownership title;
  - Reducing the constraints of this procedure to allow it to be used by rural communities by instigating, to the benefit of populations living in the forest and rural areas in general, a simplified mechanism of official certification of ownership.

Alongside these general measures, the findings lead to recommendations aimed at securing rights for indigenous peoples, who historically have been victims of marginalisation, and whose customs and ways of living differ from those of the general population:

- The first recommendation is the ratification and implementation of Convention No. 169 of the International Labour Organization (ILO) relating to the rights of indigenous and tribal peoples;
- The second is the insertion into the texts of the obligation for the State to secure spaces for the benefit of the indigenous peoples over which they have collective ownership and possession rights. In addition, measures should be taken, if required, to protect the rights of indigenous peoples to the lands that they do not occupy exclusively, but to which they have traditionally had access for their subsistence and their traditional activities.





## 2. RESTORATION AND PROTECTION OF RIGHTS TO RESOURCES

Restoring the basic rights of peoples to resources is a matter of ensuring the coherence of the Congolese legal framework without which the reform efforts of the various sectors would not be constructive.

With regard to wildlife, forest, mining and oil resources, the focus must be on measures that allow removal of the obstacles that are preventing populations from making an adequate living from the environment in which they live.

The results of the study have led to suggestions being made based on the distinction between wildlife resources, forest resources and mining and oil resources.

### 2A. TO ENSURE THE PROTECTION AND PROMOTION OF THE RIGHTS OF POPULATIONS FROM RURAL AREAS TO WILDLIFE RESOURCES, THE RESULTS OF THE STUDY SUGGEST:

- Removing the notion of State ownership over all wildlife from Congolese legal texts;
- Removing the need to seek authorisation to hunt unprotected small game;
- Restoring the right to hunt by any means that does not endanger wildlife;
- Abolishing all taxes relating to hunting game, other than protected species, in order to obtain food;
- That only species threatened with extinction or those of special scientific interest should be declared protected species and therefore inaccessible in order to allow populations to continue to carry out their rites and traditions and to obtain food if necessary.

### 2B. TO ENSURE THE PROTECTION AND PROMOTION OF THE RIGHTS OF THE POPULATIONS OF RURAL AREAS TO FOREST RESOURCES, THE RESULTS OF THE STUDY SUGGEST THAT:

- Article 7 of the law that states that the forests are State property be corrected in order to take into account ownership by other entities;
- The right of ownership in community forests should no longer only relate to trees, but to all timber and non-timber forest products;
- The right of ownership in community and planted forests should also relate to game that is not part of a protected species.

### 2C. TO ENSURE THE PROTECTION AND PROMOTION OF THE RIGHTS OF POPULATIONS IN RURAL AREAS TO MINING AND HYDROCARBON RESOURCES, THE RESULTS OF THE STUDY SUGGEST:

- Amending the distribution formula for the mining fee to include those populations living alongside the exploitation sites;
- That the operators should be made responsible for rehabilitating the sites after exploitation, and in particular for dealing with any pollution before, during and after exploitation.



## CONCLUSION

Despite a certain number of recent sector reforms that have drawn increased attention to the land issue (REDD+ projects, forest zoning, extension of protected areas, agricultural reform, community forestry, mining and oil reform, etc.), a lack of co-ordination when dealing with this issue is nevertheless apparent.

However, unless there is a concerted effort to provide greater consistency to the whole of the legal arsenal, any advances envisaged in land management risk being at best limited and at worst inoperative, with the risk of contravening in ways that are harmful to the basic rights of populations to land and resources.



**R RAINFOREST  
FOUNDATION UK**  
SECURING LANDS, SUSTAINING LIVES

233A Kentish Town Road  
London NW5 2JT

Tel: +44 (0) 20 7485 0193  
Fax: +44 (0) 20 7485 0315

info@rainforestuk.org  
www.rainforestfoundationuk.org  
www.mappingforrights.org

Registered Charity No. 1138287  
Registered Company No. 7391285

### UNDER THE CANOPY

A series of special reports by the  
Rainforest Foundation UK.

These reports closely examine issues affecting indigenous peoples and traditional populations of the rainforest. Under the Canopy reports provide recommendations for international and local governments, the private sector, institutions and NGOs to innovate for positive change.

Design by

**999**  
999DESIGN.COM

ISBN: 978-1-906131-15-9

**FULL REPORT**  
by Pierre Etienne KENFACK

