Land Rights of Indigenous Peoples and Local Communities in the context of REDD+ in the Republic of Congo

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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
CAFI	Central African Forestry Initiative
CBD	Convention on Biological Diversity
CIFOR	Center for International Forestry Research
COP	Conference of the Parties
CSO	Civil Society Organisation
DGM	Dedicated Grant Mechanism
ER-P	Emission Reduction Programme
FAO	Food and Agriculture Organization of the United Nations
FCPF	Forest Carbon Partnership Facility
FPIC	Free, Prior and Informed Consent
FPP	Forest Peoples Programme
HRC	Human Rights Committee
IFAD	International Fund for Agricultural Development
ILO	International Labour Organization
IPLC	Indigenous Peoples and Local Communities
IWGIA	International Work Group for Indigenous Affairs
LDF	Local Development Fund
LoI	Letter of Intent
NDC	Nationally Determined Contributions
PAs	Protected Areas

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REDD+	Reducing Emissions from Deforestation and Forest Degradation, plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks
ROC	Republic of Congo
RRI	Rights and Resources Initiative
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change

1 Introduction

The Republic of Congo (ROC) straddles the equator and covers an area of 342,000 square kilometres, most of which is forest. The ROC's forest area is currently estimated at 22,410,682 hectares, or 65.52% of the national territory.[1] This crucial carbon sink and biodiversity habitat is also the ancestral home of forest Indigenous Peoples and Local Communities (IPLC), who for millennia have relied upon and cared for the lands, territories and natural resources throughout these forest areas. Since 2008, ROC has engaged in the process of Reducing Emissions from Deforestation and Forest Degradation (REDD+), together with conservation, sustainable management of forests and enhancement of forest carbon stocks to help mitigate climate change.[2] The country has ratified the United Nations Framework Convention on Climate Change (UNFCCC) and it ratified the Paris Agreement on 21 April 2017.[3] There are five enabling programs related to REDD+ including land use planning, and support for forest governance.[4] In addition, ROC has proposed an ambitious target in its Nationally Determined Contribution (NDC) to reduce national emissions by 48% mainly through the implementation of the REDD+ mechanism.[5] The Emissions Reduction Program in the Sangha and Likouala districts in northern ROC covers 12.4 million ha of which 11.7 million ha of forest.[6] The REDD+ implementation is currently, and for the next years, mainly driven by the Central African Forest Initiative (CAFI). ROC and CAFI signed a Letter of Intent (LoI) in September 2019 to protect the country's forests and accelerate the fight against

[1] FAO (2010), Evaluation des ressources forestières mondiales, Rome.

[2] ROC (2017), National REDD+ Strategy Investment Plan for the Republic of Congo 2018–2025, 11.

[3] 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 2015FCCC/CP/2015/L.9/Rev.1.

[4] ROC (2017), p. 12.

[5] ROC (2017), p. 11.

[6] ROC (2017), p. 13.

climate change.[7] The LoI includes ambitious commitments to a national land-use policy through a multi-sectoral and inclusive spatial planning process.[8] The agreement will support land use plans for a sustainable management and the protection of peatlands by prohibiting any drainage and drying. Discovered in 2017 in the Congo Basin,[9] these peatlands are vitally important in the fight against climate change, as they contain nearly three years of global greenhouse gas emissions.[10] However, the existing legal framework does not provide a genuine recognition of Indigenous Peoples' collective ownership of customary lands. The IPLC who rely on the forest for their subsistence are not adequately supported. While they hold ancestral rights to large areas of forest land through the country, national land laws in Congo do not protect these rights in full (rather considering that unregistered lands belong to the state) and allow the government to allocate lands that have been under customary use for centuries for other purposes, including for REDD+ pilots projects, without free, prior and informed consent (FPIC) or just and equitable compensation.[11]

As REDD financing is being secured, there are many concerns that the legal and institutional environment for REDD+ will not fully consider the specific needs of vulnerable communities, including the IPLC. The rights of IPLC are not always similar, but in most cases, non-indigenous traditional communities with a collective tradition also enjoy the same rights.[12] As in many other parts of the Congo Basin, the Bantu ethnic farming people and the primarily hunter-gatherer Indigenous Peoples in ROC have long occupied ancestral territories converted into logging concession or protected areas. Many of the problems caused by development projects or conservation initiatives including REDD+ apply to all IPLC, but this chapter considers those problems experienced primarily by Indigenous Peoples. The chapter focuses on the specific rights of IPLC in the context of REDD+ in Congo. Following this introduction, the second Section analyses how tenure insecurity can undermine the realisation of REDD+ benefits for IPLC. The third Section examines the meaning of the legal recognition of Indigenous Peoples in Congo and possible repercussion for them in the context of REDD+. The fourth Section critically engages with peculiar issues that are of human rights significance.

[7] CAFI (2019) Letter of Intent on the establishment of a long-term partnership to implement the Investment Plan of the National REDD+ Strategy between the Central African Forest Initiative (CAFI), and the Republic of Congo.

[8] CAFI (2019), p. 12.

[9] The Guardian (2017), World's largest tropical peatland found in Congo basin.

[10] Dargie et al. (2017), pp. 86–90.

[11] OCDH (2017), Report on the situation of the rights of indigenous peoples: Alarming findings six years after the adoption of the law.

[12] FPP (2013), The Rights of Non-Indigenous 'Forest Peoples' with a focus on Land and Related Rights: Existing International Legal Mechanisms and Strategic Options.

2 Insecure Land Tenure and REDD+

Land tenure is organised within the framework of a complex set of regulations, stemming from the colonial legal frameworks and current administration in Congo.[13] The overlapping nature of several legal frameworks relating to land tenure complicates the understanding of the extent of property rights in Congo. But, the multiplicity of laws and regulations is a source of legal insecurity for land rights holders, including customary land rights.[14]

Statutory laws (including forest and land laws) confer on the state absolute control over land and forest resources.[15] Private property is defined by the Civil Code[16] as the right to enjoy and use property in the most absolute manner, provided that it is not inconsistent with national laws and regulations.[17] However, the land law restricts private land ownership to ownership of the soil only.[18] Indigenous communities in ROC have ancestral relations with their land. Yet, national laws and policies have so far very poorly considered these relations. The land law recognises some collective and customary property rights,[19] insofar as they are not incompatible with registered title deeds.[20] The customary law is not without positive developments, including the recognition of the collective property rights of Indigenous Peoples,[21] and the right to Free Prior Informed Consent (FPIC).[22] Without formal land titles, Indigenous Peoples are expected to retain their pre-existing land rights.[23] However, the land law has taken a step backwards in this area in underscoring legal uncertainty by introducing ambiguous provisions regarding public interest expropriation.[24] In practice statutory law takes precedence over customary law. The land law introduces a new mechanism for the recognition of customary land through the establishment of an ad hoc body established at the local level for the registration of customary land rights.[25]

[13] ClientEarth (2020a, b), p. 16.

[14] ClientEarth (2020a, b), p. 16.

[15] Law establishing the rules of occupation and acquisition of land 2018 n°18-2018 of 13 June 2018, Section 53.

[16] Civil Code 2018 n°21-2018 of 13 June 2018, Section 17.

[17] Land ownership Law 2000 n°17- 2000 of 30 December, Section 4.

[18] Land ownership Law 2000 n°17- 2000 of 30 December, Section18.

[19] Land ownership Law 2000 n°17- 2000 of 30 December, Section 5.

[20] Law on the General principles applicable to State lands and land tenure 2004 n° 10-2004 of 26 March 2004, Section 31.

[21] Law on the promotion and protection of indigenous peoples 2011 n°5-2011 of 25 February 2011, Section 31.

[22] Law on the promotion and protection of indigenous peoples 2011, Section 3.

[23] Law on the promotion and protection of indigenous peoples 2011, Section 32.

[24] Law establishing the rules of occupation and acquisition of land 2018, Sections 23 and 38.

[25] Decree No. 2006-255 of 28 June 2006 on the establishment, attribution, composition and functioning of an ad hoc body for the recognition of customary land rights, Section 1; Decree n°

The public domain is understood to be all real estate belonging to public persons, including any vacant property. In the absence of proof of private ownership, such as title deeds or registration certificate, a land is therefore presumed to belong to the state.[26] The Congolese land administration considers lands that are not 'visibly' occupied and used as vacant and under state ownership. Such 'vacant' lands can be allocated following a vacant land survey.[27] These provisions pose potential problems for Indigenous Peoples who use and access their lands according to traditional practices yet may still find their lands designated as vacant or unproductive.[28] The precarious land tenure system has left communities increasingly marginalised from traditional economic activities and from the decision-making process regarding the use of natural resources. They face growing threat of dispossession due to their marginalisation and insecurity of tenure. As an illustration, the law on public utility expropriation[29] remains vague and unclear as it has not been regulated. The grounds for expropriation in the public interest include economic development grounds, as well as planning operations.[30] These grounds threaten the precarious occupation of customary rights holders. Customary land rights can be translated into registered property titling, based on registration procedures, as defined in legal provisions.[31] The '*mise en valeur*'[32] requirement, means that the land should be 'enhanced' by the applicant through farming, plantations or other productive use of the land.[33] The process for obtaining a land title and therefore the right to private property, has to go through acknowledgment and recognition of the customary land rights.[34] The land then needs to be registered in the names of the right holders or their representative in the case of a collective property.[35] Decrees n° 2006-255[36] and n° 2006-256[37] foresee ad hoc decentralised bodies at local levels to implement mechanisms for the

2006-256 of 28 June 2006 on the institutions, attribution, composition and functioning of an ad hoc body for the identification of customary land rights.

[26] ClientEarth (2020a, b), p. 14.

[27] Law on the General principles applicable to State lands and land tenure 2004, Section 51.

[28] HRC (2011), Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, 10 A/HRC/18/35/Add.5.

[29] Law on the procedure of expropriation for public utility 2004 n° 11-2004 of 26 March 2004.

[30] Law establishing the general principles applicable to the land and property regime 2004 n° 10-2004 of 26 March 2004, Section 21.

[31] Decree establishing, attributions, composition and functioning of an ad hoc body for the recognition of customary land rights 2006 n° 2006-255 of 28 June 2006.

[32] Law on the farming land regime 2008 n° 25-2008 of 22 September 2008.

[33] Law on the farming land regime 2008 n° 25-2008, Section 7.

[34] Law on general principles applicable to State-owned land and tenure regimes 2004 n° 10-2004 of 26 March 2004.

[35] Law on general principles applicable to State-owned land and tenure regimes 2004 n° 10-2004, Sections 38 and 39.

[36] Law on the farming land regime 2008 n° 25-2008 of 22 September 2008.

[37] Decree on the institution, attributions, composition and functioning of an ad hoc body for the recording of customary land rights 2006 n°2006-256 of 28 June 2006.

acknowledgment and recognition of land rights. However, these bodies are slow to become operational, and cadastral mapping of customary landowners is still embryonic.[38] Decentralised bodies do exist at the departmental level, but, most of the communities are not aware of their existence and therefore do not make use of them.[39] Law No. 21-2018 of 13 June 2018, which sets out the rules for occupying and acquiring land, cancels some of the achievements of the decree on ad hoc commissions for the recognition and establishment of customary land rights. Furthermore, contrary to Law No. 05 of 25 February 2011[40] on the promotion and protection of the rights of IPLC in ROC, it does not mention that Indigenous Peoples have specific rights to land.[41] Land allocations and uses do not take into account the customary land rights of IPLC.[42] There is a lot of overlap between resource exploitation activities and community uses, and often communities' use rights are not considered in the contracts signed between the state and private investors.[43]

In the context of REDD+ or social economic development aspirations, the issue of land use for natural resource exploitation has overtaken the customary land rights of IPLC.[44] Rural populations who depend essentially on land have few tools to hold other active stakeholders in land issues accountable. Existing legal frameworks, including the new Forest Code[45] and land tenure regime aim to secure communities' access and usage rights. Recent legal reforms could help secure collective ownership of customary lands, and not only resources. In this regard, the adoption of Law No. 21-2018 of 13 June 2018 seems like a missed opportunity and a step back compared to the law on Indigenous Peoples.[46] The 2018 Land Law establishes a new mechanism for the recognition of customary land. As a result, the procedure for recognising IPLC customary land is becoming more cumbersome and much more expensive. It provides that 'the national territory constitutes an area of land that may be parcelled out to form land'.[47] This provision confirms the government's ambition to create land reserves through expropriation of the IPLP for unjustified motives and illegitimate reasons. In addition, it provides that 'the State, local authorities (. . .) may occupy and acquire customary lands previously recognized by the State'.[48] Such a situation accentuates the precariousness of the occupation or ownership of customary land by indigenous communities. Moreover, the provision stresses that 'no one

[38] Ayari and Counsell (2017).

[39] Ayari and Counsell (2017).

[40] Law on the promotion and protection of indigenous peoples 2011.

[41] Law on the promotion and protection of indigenous peoples 2011, Section 31.

[42] ClientEarth (2020a, b).

[43] OCDH et al. (2020), p. 2.

[44] OCDH et al. (2020), p. 3.

[45] Law on Forestry Code 2020 n° 33-2020 of 8 July 2020.

[46] Law on the promotion and protection of indigenous peoples 2011 n°5-2011.

[47] Law establishing the rules of occupation and acquisition of land 2018 n°18-2018, Art. 2.

[48] Law establishing the rules of occupation and acquisition of land 2018 n°18-2018, Art. 38.

may be deprived of his land ownership except in the public interest (...)'.[49] This increases legal uncertainty for Indigenous Peoples and local communities because the notion of public utility in Congolese law remains vague and unclear.

3 Legal Recognition of Indigenous Peoples in Congo

The African Commission on Human and Peoples' Rights (ACHPR) is of the view that, no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the IPLC in Africa.[50] This is in fact the major internationally recognised approach, advocated by the ACHPR as well as the United Nations bodies dealing with the human rights of Indigenous Peoples.[51] The concept in effect embodies the following constitutive elements or characteristics, among others:

The overall characteristics of groups identifying themselves as Indigenous Peoples are that their cultures and ways of life differ considerably from the dominant society, and that their cultures are under threat, in some cases to the point of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon. They suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalisation, both politically and socially. They are subjected to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. The discrimination, domination and marginalisation violate their human rights as peoples/communities, threaten the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in decisions regarding their own future and forms of development.[52]

In ROC, the Baaka (northern Likouala and Sangha departments), Mbendjele (southern Likouala and Sangha departments), Mikaya (Sangha Department), Luma (Sangha, Cuvette and Likouala departments), Gyeli (north-western West Cuvette Department), Twa (Plateaux department to border with Democratic Republic of Congo) and Babongo (Lékoumou, Niari, and Kouilou departments) are

[49] Law establishing the rules of occupation and acquisition of land 2018 n°18-2018, Art. 23.

[50] ACHPR (2007), Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana, p. 30.

[51] ACHPR and IWGIA (2006), p. 9.

[52] ACHPR and IWGIA (2006), p. 10.

hunter-gatherer communities who identify themselves as Indigenous Peoples.[53] They are distinct from the majority Bantu ethnic groups and represent a small minority of 1.4 to 10% of ROC's estimated population of 4.4 million, primarily of Bantu origin.[54] Although they speak different languages and inhabit different regions of ROC, they share a number of defining features. Unlike the Bantu, who have long been largely sedentary and village-based, until recently, Indigenous Peoples maintained a semi-nomadic way of life, and some still do, their subsistence based on hunting and gathering forest products. Their social structure is typically egalitarian, without a highly defined leadership hierarchy.[55] While the term Pygmy continues to be used in other States of Central Africa, in the ROC, the term carries negative connotations due to its association with an assumption of inferior status and its connection to marginalisation, exclusion and oppression. For this reason, the Congolese Government has a policy against calling people 'Pygmies', and now officially designates such groups as Indigenous Peoples or *populations autochtones*, as stipulated in the 2011 Law on the Promotion and Protection of the Rights of Indigenous Populations and the new Forest Law.[56]

The law, the first of its kind in Africa, is based on the concept of 'Indigenous Peoples' as understood internationally,[57] and by the ACHPR.[58] The adoption in 2011 of the law which allows for the legal recognition of both individual and collective ownership of Indigenous Peoples' customary land,[59] was well acclaimed at the national, regional and global level, as it offered some hope and represented a pioneering approach to the recognition of Indigenous Peoples' rights in Africa. The law distinguishes indigenous populations from other groups of the national population by their cultural identity, their way of life and their extreme vulnerability.[60] The law prohibits the use of the term 'pygmy',[61] recognises Indigenous Peoples' collective and individual rights to their traditionally owned lands and resources,[62] and exempts them from going through complex registration processes, thereby

[53] IFAD and IWGIA (2014), p. 1.

[54] Report of the Special Rapporteur on the rights of indigenous peoples, p. 5.

[55] Report of the Special Rapporteur on the rights of indigenous peoples, p. 5.

[56] The new forest code defines indigenous population as a forest-dwelling population distinguished from other groups in the national population by its cultural identity and way of life; See Law n° 33-2020 of 8 July 2020 on Forestry Code, Section 2.

[57] United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007.

[58] ACHPR and IWGIA (2006), Indigenous peoples in Africa: the forgotten peoples? The African Commission's work on indigenous peoples in Africa; ACHPR and IWGIA (2007), Advisory opinion of The African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples.

[59] Law on the promotion and protection of indigenous peoples 2011 n°5-2011, Section 31.

[60] Law on the promotion and protection of indigenous peoples 2011 n°5-2011, Section 1.

[61] Law on the promotion and protection of indigenous peoples 2011 n°5-2011, Section 1.

[62] Law on the promotion and protection of indigenous peoples 2011 n°5-2011, Section 31.

facilitating easier access to land.[63] In practice, the law remains unenforced, as it took almost eight years to adopt the subsequent supplementing decrees. It remained unenforced until the adoption in July 2019, of a series of Decrees supplementing the 2011 Indigenous Populations Law.[64] Also, there are still some gaps in the implementation decrees, especially the Decree on participation and consultation which does not address Free, Prior, and Informed Consent (FPIC), a prerequisite for REDD+ project.

4 REDD+: An Aid or Hindrance to Rights?

REDD+ offers an opportunity to strengthen the rights of IPLC. It is widely admitted that securing IPLC collective tenure rights would make a substantial contribution to reducing deforestation and forest degradation.[65] But, an analysis of climate change vulnerabilities in the Congo Basin landscapes reveals that forest communities are the most exposed to climate change impacts.[66] Recent studies revealed significant gaps in the implementation of human rights and social safeguards for marginalised communities.[67] A number of issues, as shall be manifest, show that REDD+ may serve as both aid and hindrance to the realisation of rights.

4.1 Potential in REDD+ to Enhance Rights

There is a growing consensus and increasing scientific evidence that tenure security is an enabling factor in reducing deforestation and degradation. More effective forest stewardship by IPLC is usually attributed to their active participation in forest governance, direct benefits from forest products and the desire to maintain the resource for future generations.[68]

The link between human rights and climate change has been recognised by numerous international human rights bodies.[69] The African Commission for Human and Peoples' Rights adopted a resolution on Climate Change and Human Rights, requesting Member States to implement the special measures of protection

[63] Law on the promotion and protection of indigenous peoples 2011 n°5-2011, Section 32.

[64] These include the decrees on: (a) access to social services including healthcare; (b) composition and functioning of the interministerial committee; (c) access to education; (d) granting of civil status (administrative) documents; (e) consultation and participation; (f) protection of cultural heritage.

[65] FAO (2021).

[66] Pongui and Kenfack (2012).

[67] Orozco and Salber (2019).

[68] Bradley and Fortuna (2021).

[69] Wewerinke and Curtis (2011), pp. 141–160.

for vulnerable groups such as children, women, older persons and indigenous communities among others.[70] At the national level in ROC, REDD+ is considered a 'sustainable development tool' and a genuine 'pillar of green economy'.[71] ROC and CAFI reached a new phase in their partnership in 2019, with the signature of a Letter of Intent that presented an overarching commitment to establish a long-term partnership aimed at the realisation of the investment plan of the national REDD+ strategy.[72] The agreement is implemented through eight objectives including the improvement of land tenure security in rural areas, and acknowledgment of and respect for customary land rights.[73] Accordingly, the customary land rights of indigenous communities, as provided by the Indigenous Peoples Law is amenable to alignment with the interests of the IPLC.[74]

ROC has stated its intention to develop national land-use plans, including zoning processes to identify areas suitable for different uses, such as agro-industrial development, through adoption of the law for the orientation of land-use planning and development.[75] According to the National REDD+ Strategy Investment Plan, the land use planning program aims to promote and secure REDD+ investments through sustainable multi-sectoral spatial planning and thus alleviate conflicts of land use.[76] The foregoing signifies that, if fully implemented, existing legislation may help with the realisation of the right to land of the IPLC. It can also assist with the realisation of other rights linked to land such as their subsistence and wellbeing.

4.2 REDD+ as a Threat to Rights in ROC

The REDD+ regime contains many assumptions about the identity, tenure and rights of IPLC who inhabit, use or claim rights to forested lands.[77] The consequences of this are manifold, and include overlapping land uses, which often create conflict, and pervasive disregard of the needs of local communities.[78] National regulations have been adopted to avoid negative impacts on the environment and on the populations

[70] ACHPR (2016) Resolution on Climate Change and Human Rights in Africa, ACHPR/Res.342 (LVIII) 2016.

[71] Pongui and Kenfack (2012).

[72] Letter of Intent on the establishment of a long-term partnership to implement the Investment Plan of the National REDD+ Strategy, adopted 2 September 2019.

[73] Letter of Intent, p. 17.

[74] Letter of Intent, p. 18.

[75] Law No. 43-2014 on territorial planning and development.

[76] ROC (2017), National REDD+ Strategy Investment Plan for the Republic of Congo 2018–2025, 2017.

[77] Tehan et al. (2017).

[78] Orozco and Salber (2019), p. 19.

affected by development projects,[79] but, the planning of sub-national REDD+ projects is based on weak social analysis and fails to detail safeguards and social and rights standards such as FPIC required under national and international laws.[80]

Olawuyi outlines a human rights-based approach to carbon finance as a functional framework for mainstreaming human rights into the design, approval, finance and implementation of carbon projects.[81] Also, Jegede proposes a human rights approach as fundamental in addressing Indigenous Peoples' land issues in climate change context.[82] A rights-based due diligence framework through which human rights issues can be anticipated and addressed and describes the key human rights issues at stake in their planning and execution.[83] These benchmarks characterised by a six-part legal threshold contain practical measures to protect the human rights of community members affected by carbon projects, shifting the focus on human rights from an afterthought to a key component that is considered throughout the lifespan of a project.[84]

In the context of ROC, the lack of a due diligence framework in the development of REDD+ makes it difficult to anticipate the risk for IPLC. The adaptation and mitigation aspirations of Congo face the challenge of a weak human rights impact assessment. Community participation in forest management and decision-making processes is weak, and accountability, particularly in relation to the fight against corruption and conflict resolution, is limited, and communities are in a dire need of effective grievance mechanisms.[85] The institutional and legal framework is a structural predicament to enable the protection of the human rights of IPLC affected by REDD+ projects. Major shortcomings include among others the lack of FPIC and adequate grievance mechanism, and an ineffective judicial recourse mechanism.

4.2.1 Deficit of FPIC

FPIC has emerged as a key principle in international law and jurisprudence related to Indigenous Peoples. FPIC refers to the right of Indigenous Peoples to give or withhold their free, prior and informed consent to activities that will affect their rights to their lands, territories and other resources including their intellectual property and cultural heritage.[86] The right is affirmed in the UN Declaration on

[79] Decree establishing the scope, content and procedures of the environmental and social impact assessment 2009, n° 2009-415.

[80] Feintrenie (2014), p. 1584.

[81] Olawuyi (2016).

[82] Jegede (2016), pp. 18–22.

[83] Olawuyi (2016).

[84] Olawuyi (2016).

[85] FERN (2020), p. 6.

[86] Colchester (2010), pp. 18–19.

the Rights of Indigenous Peoples (UNDRIP)[87] and in the jurisprudence of the international human rights treaty bodies including the Inter-American Court of Human Rights[88] and the African Commission on Human and Peoples' Rights.[89] All peoples have the right to self-determination, a fundamental principle in international law, embodied in the African Charter on Human and Peoples' Rights[90] ratified by ROC.[91] FPIC, as well as Indigenous Peoples' rights to lands, territories and natural resources are embedded within the universal right to self-determination. The normative framework for FPIC consists of a series of international legal instruments including UNDRIP,[92] the International Labour Organization Convention 169 (ILO 169),[93] and the Convention on Biological Diversity (CBD).[94]

According to the Indigenous Peoples Law, when natural resource development activities may affect indigenous communities, a process of consultation with communities, prior to commencement of the development activities is required. The consultations must be conducted in good faith, without pressure or threats in order to secure FPIC.[95] In addition to that, the Congolese Forest Code provides a definition of FPIC,[96] while the Decree No. 2019-201 of 12 July 2019 describes the modalities for consultation and participation.[97] The Forest Code identifies the beneficiaries of FPIC but does not specify who is liable for it.[98] The Decree does not explicitly guarantee the clip in the same terms as the law on Indigenous Peoples, and limits the duration of consultations to only three months[99] and does not give more concrete indications on how to seek and obtain FPIC from indigenous communities.[100]

[87] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on Thursday, 13 September 2007.

[88] Saramaka People v. Suriname (2007) IACHR No. 172 (2007) (Ser. C). See also Kaliña and Lokono Peoples v Suriname, paras 204, 210.

[89] ACHPR (2009), Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2009) AHRLJ 75.

[90] African Charter, Article 20.

[91] Ratified on 9 December 1982.

[92] ROC has voted in favour of UNDRIP.

[93] ROC has not ratified ILO 169.

[94] Ratified on 1 August 1996.

[95] Law on the General principles applicable to State lands and land tenure 2004 n° 10-2004 of 26 March 2004, Section 3.

[96] Local authorities, local communities and indigenous peoples shall express their free, prior and informed consent in the development in the preparation, implementation and monitoring of actions and decisions concerning them in relation to exploitation and sustainable management of forest resources, Section 5.

[97] Decree establishing procedures for the consultation and participation of indigenous peoples in socio-economic development projects and programmes 2019, n° 2019-201 of 12 July 2019.

[98] Decree establishing procedures for the consultation and participation of indigenous peoples, p. 3.

[99] Law on the General principles applicable to State lands and land tenure 2004, Section 5.

[100] HRC (2019), Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Congo from 14 to 24 October 2019, 2020, A/HRC/45/34/Add.1, p. 15.

According to the decree, an advisory commission[101] will conduct each consultation. But, it fails to include the presence of an indigenous representative on this.[102] In addition, the decree does not specify the date on which the consultation opens. There is no indication of whether it is before the signing of the contract between the state and the project developer or after the operations of the promoter have started.

In practice, meaningful prior consultation with forest peoples affected by development projects has not taken place. There are shortcomings with regard to ensuring adequate participation and consultation of project affected persons. The inclusion of IPLC in project design is a particular challenge. The stakeholder definition in the national REDD+ strategy include the administration, the financial and technical partners, civil society (CSO) and IPLC.[103] The document suggests that civil society and IPLC participation will be done through the involvement of CACO-REDD[104] and through the temporary workgroup of the Dedicated Grant Mechanism (DGM).[105] However, the work of these platforms is hampered by internal conflicts and a chronic lack of funding.[106] The CACO-REDD coordination platform faces certain challenges. As a result, tensions and lack of cohesion within the platform hinder progress, differing interests create friction between civil society and Indigenous Peoples' organisations, disconnection between CACO REDD members and their constituencies at national and local level.[107] There are economic considerations and the inclination of NGOs to prefer to advance their own agendas and interests outweigh interest in influencing the REDD+ process. The government is only moderately open to genuinely involving civil society and Indigenous Peoples' organisations.[108] Thus, these platforms are not in a capacity to represent communities in an appropriate manner, and they cannot be considered as legitimate representatives of IPLC. CSOs have also participated in the process of revising forest law and elaboration of forest policies, and other technical meetings on REDD+. However, some CSOs argue that they were not able to participate in the drafting of REDD+ documents but only to validate these documents which were written by

[101] This commission is composed of representatives from four ministries, a local government official, a local elected official, a person representing the project developer and a representative of civil society: Law on the General principles applicable to State lands and land tenure 2004, Section 6.

[102] Law on the General principles applicable to State lands and land tenure 2004, Section 6.

[103] ROC (2017), p. 124.

[104] Consultation Framework for Civil Society Organisations and Indigenous Peoples on REDD+.

[105] To enhance their role in forest management and climate action, self-selected representatives of Indigenous Peoples and Local Communities created the Dedicated Grant Mechanism for Indigenous Peoples and Local Communities (DGM). Through their design and implementation of the DGM, these community leaders are actively working to protect forests and to strengthen their capacity to participate in climate action at local, national and global levels. This is an initiative supported by the World Bank, the Climate Investment Funds, and Conservation International.

[106] HRC (2019), p. 5.

[107] EU REDD Facility (2015).

[108] EU REDD Facility (2015).

consultants.[109] In their views, there was almost no CSO participation in REDD+ meetings that followed (e.g. elaboration of ER-PIN in 2014), hence they had to publish position papers to raise their concerns.[110] As a result, national REDD readiness planning in ROC has so far not engaged with IPLC effectively. Although environmental concerns are mentioned in the legislation, the social impacts of large-scale land deals are not.[111] The decree refers to public hearing, public consultation, and public inquiry procedures, but does not consider FPIC.[112]

4.2.2 Non-Compliance and Ineffective Judicial Recourse

Although access to justice is enshrined in the Congolese Constitution,[113] the enjoyment of this right by indigenous communities is very limited in practice. This is exacerbated by geographical circumstances, as villages are far away from cities where administrative offices and courts are located.[114] It is complicated and costly for communities to initiate or follow up with a legal action. Moreover, the lack of knowledge and information about their rights and relevant administrative, judicial and legal procedures—not to mention the language barrier—further impede access to justice for local communities.[115]

Judicial activism in the forest sector is rare, and the judge's involvement remains limited due to procedural constraints (regime of land and forest resource ownership, on the one hand, special regime for the recording and punishment of forest offenses, on the other hand. There are also substantive constraints, with numerous legislative provisions creating obligations without attaching them to corresponding offenses and penalties.[116] State ownership in the forestry sector therefore translates into a state monopoly on litigation. Yet, the state has a dual legitimacy to act in justice: firstly, as the one responsible for law enforcement and public order, and secondly as the owner of the land, forests and resources.[117]

When the barrier of inaccessibility of the courts is overcome, it is rarely in favour of Indigenous Peoples. The simple reason is that most citizens who can afford to initiate legal proceedings are from the dominant groups in society. An illustration is given by a petition brought before the Constitutional Court by a Congolese citizen in

[109] Satyal (2018), p. 87.
[110] Satyal (2018), p. 87.
[111] Satyal (2018), p. 85.
[112] Law on the General principles applicable to State lands and land tenure 2004, Section 2.
[113] ROC (2015), Constitution, Section 47.
[114] OCDH (2017), p. 31.
[115] Ayari and Counsell (2017), p. 73.
[116] Nguiffo (2020), pp. 107–114.
[117] Nguiffo (2020), pp. 107–114.

2018 by way of an action to declare Section 16 of the Land Law unconstitutional.[118] In this case, Mr. Nongou Elie Jean Pierre questions the constitutional basis for infringement of private property using a procedure other than that of expropriation in the public interest. The applicant argues that Section 16 provides that 'For the constitution of the State's land reserves necessary for the implementation of the national economic and social development plan, a retrocession of ten percent (10%) of the land recognised is returned to the State'.[119] According to him, this legislation establishes 'a new type of alienation of private property to the benefit of the State without fair or equitable compensation'. He also questions the legality of this section in relation to the Constitution which provides that 'no one may be deprived of his property except in the public interest'.[120] The Court found that Section 16 is inconsistent with the Constitution and cannot, therefore, be implemented.[121] The problem is that paragraph 2 of Section 16 remains problematic for customary land holders. However, the petition brought before the Constitutional Court has not specifically targeted the provision. If Indigenous Peoples are not provided with legal assistance, they are unable to raise their own issue before local or national jurisdictions.

4.2.3 Inadequate Grievance Mechanism

The main causes of the most frequent disputes related to REDD+ are, among others, land insecurity, incoherent land tenure policies inappropriate to the context of legal pluralism, inadequate land use planning, the absence of state institutions in rural areas, structural inequalities and the persistence of discriminatory practices against indigenous populations.[122] In the context of ROC, REDD+ can have adverse impacts, including potential conflicts with local communities or cause possible environmental harm. In the absence of proper judicial mechanisms, project affected communities are very often left to non-judicial grievance mechanisms of multi- and bilateral financing institutions or REDD+ projects developers, which are important for ensuring their rights. Grievance mechanisms provide an opportunity for communities to access a mechanism to seek redress for adverse environmental and/or social effects associated with REDD+ projects. However, the existing framework in ROC lacks an effective mechanism to address the complaints raised by IPLC who may have been negatively impacted by a climate project. The lack of awareness of their rights despite the adoption of a law on indigenous populations and access to

[118] Decision No. 002/DCC/SVA/18 of 13 September 2018 on the appeal for unconstitutionality of section 16 of Law No. 21-2018 of 13 June 2018 establishing the rules of occupation and acquisition of land.

[119] Decision No. 002/DCC/SVA/18 of 13 September 2018, p. 3.

[120] Decision No. 002/DCC/SVA/18 of 13 September 2018, p. 3.

[121] Decision No. 002/DCC/SVA/18 of 13 September 2018, p. 6.

[122] FCPF (2014).

information prevents IPLC from accessing effective remedies during the implementation of REDD+ projects.

4.2.4 Lack of Exclusive Right to Carbon

Under regional and international law,[123] communities have rights to the lands and resources they customarily occupy and use. The African charter states that:

> 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.

The African regional human rights systems equally discussed this essential aspect of Indigenous Peoples' land rights. In the Ogiek case[124] for example, the Ogiek indigenous community of Kenya have successfully challenged the denial of their land rights before the African Court of Human and Peoples Rights. The Court found violations of Articles 1, 2, 8, 14, 17 (2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights.[125] In relation to the right to property under Article 14, the Court held that this can apply to groups or communities, and that it can be individual or collective.[126] It interpreted the right in light of Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognises Indigenous Peoples' 'right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership'.[127]

However, like many countries in Central Africa, ROC's Land Law confers ownership of all natural resources above and below ground on the state. It gives the state absolute control over land and forest resources,[128] while restricting private land ownership to ownership of the soil only.[129] As explained earlier in section 2, despite the dual system of rights (de jure rights as issued by the state and de facto rights as based on customary norms) the state holds formal resource ownership and has the power to allocate resources and the prerogative to revoke rights in the public

[123] Collective land rights are guaranteed in the Preamble of the UNDRIP, which affirms that 'indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples'; 'No one shall be arbitrarily deprived of his property', so declares Article 17 of the 1948 Universal Declaration of Human Rights.

[124] ACHPR v Kenya, Application 006/2012, judgment of African Court of Human and Peoples' Rights, issued 26 May 2017.

[125] Minority Rights Group International (2017), Victory for Kenya's Ogiek as African Court sets major precedent for Indigenous Peoples' land rights, Briefing.

[126] ACHPR v Kenya, Application 006/2012, judgment of African Court of Human and Peoples' Rights, issued 26 May 2017, para 123.

[127] ACHPR v Kenya, Application 006/2012, judgment of African Court of Human and Peoples' Rights, issued 26 May 2017, para 126.

[128] ClientEarth, Section 53.

[129] ClientEarth, Section 18.

interest. As a result, Indigenous Peoples' lands are often conceded to private or public business, including logging companies[130] and project developers.

The regulatory framework does not provide Indigenous Peoples and local communities with the security of land tenure necessary to engage in REDD+. Land tenure security is key to bring some clarity on carbon right. There are some dualities between customary land tenure and modern land tenure. The forestry code defines the carbon credit as a unit corresponding to one tonne of CO2 equivalent on the carbon markets.[131] The holders of customary rights and use rights are eligible for carbon credits.[132] For the purposes of carbon credits, a forest is any natural or artificial vegetation formation larger than 0.5 hectares, with trees higher than 3 metres and a tree cover of more than 30%.[133] In community forests,[134] the carbon credits generated belong solely or jointly to the local community and/or the Indigenous People concerned, depending on whether the project is implemented by them or by a third party.[135] The terms and conditions for the commercialisation of carbon credits are to be defined by future regulations,[136] which means the current legal framework is incomplete to secure carbon credits for IPLC.

4.2.5 Weak Benefit Sharing Formula

Lack of recognition of customary land tenure makes it difficult to achieve revenue sharing objectives under REDD+. The existing benefit-sharing mechanism in Congo is the Local Development Fund (LDF) established within the framework of forest concessions. IPLC are still not fully involved in the management of LDF, whose management they find unclear.[137] The LDF is identified as a potential benefit-sharing mechanism for the IPLP, however, it has not yet been tested to assess its performance. In addition, there appears to be a certain confusion between the gross and net benefits of REDD+ that needs to be clarified, as well as the question of the expected level of performance and its implications for financing—whether the benefits dedicated to IPLC are only intended to be redistributed (unconditionally)

[130] Barume (2010).

[131] Forestry Code, Law n° 33-2020 of 8 July 2020.

[132] Forestry Code, Section 180 (3).

[133] Forestry Code, Section 2.

[134] Under Section 15 of the new Forest Code, a community forest is either a natural forest located in the community development series of a managed forest concession; a forest plantation located on the land of a local community or Indigenous People, a forest whose creation and sustainable management is initiated by a local community; or a natural forest located on the land of a local community and Indigenous People, which has been classified for their benefit.

[135] Forestry Code, Section 15 (4).

[136] Forestry Code, Sections 184 and 186.

[137] Final report from technical assistance (2015), Support for the Local Development Fund mechanism in the forest sector of the Republic of Congo, July 2015, p. 15.

or whether they are to be used to support REDD+ activities (part of the revenues of which will be dependent on the level of performance).[138]

4.2.6 Anti-Right Conservation Policy

Protected areas (PAs) in the Republic of Congo are the preferred model for conservation. During the colonial period, they were a political tool to control the territory.[139] After independence, this approach was upheld. However, this model of protected area management, which does not consider customary land and resource rights of communities, has led to conflict and human rights violations.[140] Protected areas are often contested by communities on the ground that they do not provide tangible benefits and infringe on rights enshrined in international conventions, including the right to own and control their lands, territories and resources, and their FPIC.[141]

The conservation model has a long history of disempowering IPLC sometimes to the point of dispossessing them of lands and livelihoods, with the misguided goal of protecting important biodiversity habitats.[142] Since independence, IPLC have suffered a process of gradual land dispossession as the result of the proliferation of nature conservation initiatives, logging concessions, deforestation, oil fields, commercial plantations[143] and infrastructural developments.[144] Far from improving the lives of local people, PAs investments directly affect the land and forest rights of communities, creating 'fortress' conservation zones that diminish, rather than enhance, local livelihoods and biodiversity.[145]

5 Conclusion

IPLC are being increasingly marginalised from mainstream participation in decision-making about use of natural resources and forest governance, and face increasing threats of dispossession, due to longstanding tenure insecurity.[146] The underlying

[138] Final report from technical assistance (2015), p. 15.

[139] Roulet and Hardin (2010), p. 123.

[140] Ayari and Counsell (2017), p. 6.

[141] Gami (2003), p. 40.

[142] 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 (2020), Embedding human rights in nature conservation: from intent to action, p. 95.

[143] ROC (2012), p. 214.

[144] IFAD and IWGIA (2014), p. 8.

[145] Tauli-Corpuz et al. (2020).

[146] Koné and Pichon (2019).

risks of REDD+ investment plan is to provide the Congolese Government with substantial funds to establish state land reserves benefiting investors. In practice, however, the implementation of REDD+ is a delicate experiment. It involves the balancing of multiple objectives including climate mitigation, resource exploitation, land management, land-use planning, agriculture, ecosystem services, biodiversity, and more importantly, the protection of peoples' livelihoods and respect for their fundamental human rights.[147] A human rights assessment is deficit in the development of the national REDD+ strategy and subsequent roadmaps. The right to property has been affirmed as an international human right. But several studies and declarations have highlighted that among the most troublesome manifestations of historical discriminations against Indigenous Peoples has been the lack of recognition of indigenous modalities of property.[148] Inasmuch as property is a human right, the fundamental norm of non-discrimination requires recognition of the forms of property that arise from the traditional or customary land tenure of Indigenous Peoples.[149] Clearly defined property rights at the local level can play multiple critical roles in re-establishing effective commons individual property rights including community ownership.[150] It can play an important place in the context of the implementation of REDD+ in ROC. The REDD+ implementation phase should apply a systematic human rights approach, which requires the recognition and protection of collective and customary land tenure systems and associated rights.

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[147] Campbell (2009), p. 397.

[148] Anaya (2004).

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[150] Mavah et al. (2022), p. 212.

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