

Land Rights and the Forest Peoples of Africa



Historical, Legal and Anthropological Perspectives

O. Overview: Analysis & Context 1. Burundi
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No 3 The dispossession of indigenous land rights in the DRC: A history and future prospects Prosper Nobirabo Musafiri

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Cover photograph: Community members examine a map created from the data they have gathered – phase one of their land claim.
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The Dispossession of Indigenous Land Rights in the DRC:

A History and Future Prospects

Prosper Nobirabo Musafiri

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Acronyms

CERD	Committee on the Elimination of Racial Discrimination
CFS	Congo Free State
DRC	Democratic Republic of the Congo
FPIC	Free, prior and informed consent
HRC	(United Nations) Human Rights Committee
KBNP	Kahuzi–Biega National Park
UN	United Nations

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Introduction

People were living on the territory that currently forms the Democratic Republic of the Congo (DRC) two million years ago.¹ The very first occupants were the Bacwa, Bambuti and Batwa, 'Pygmy' peoples who lived from hunting and gathering. Waves of migration by other groups (Bantu, Nilotes and Sudanese) to this part of Africa took place during the second millennium BC, the last wave occurring between the 7th and 8th centuries BC. These new communities, especially the Bantu, Nilotes and Sudanese (who were farmers and pastoralists), have always belonged to structured societies whose leaders come from a long line of chiefs – chieftainships.



Some of them imposed themselves through their trading power and established empires stretching for several thousand square kilometres, especially in the Western part on the Atlantic coast, the most significant being the Kongo, Luba and Lunda empires, among others. It was with the leaders of these empires that the first Europeans entered into contact and struck up trading agreements in the 15th century.² The newcomers (the Bantu, Nilotes and Sudanese) thus by sheer weight of numbers came to supplant the 'Pygmy' communities (the Bacwa, Batwa and Bambuti) who have remained confined to the equatorial forests to this day.³

Academic research has shown that various Europeans (traders, missionaries, etc) had settled in the territory currently occupied by the DRC well before the Berlin Conference of 1885.⁴ Some had obtained legal titles in due and proper form, giving them the right to occupy the land in question.⁵ Others had allegedly settled there by virtue of certain theories of international law that prevailed prior to the 17th century according to which Africa was deemed to be '*terra nullius*'. This Latin expression means land or territory that belongs to no one, in other words ownerless land on which anyone could settle without the need for legal title. Mugangu Matabaro thinks that:

¹ See, in particular, J Kizerbo (1978) *Histoire de l'Afrique noire*, Paris, Karthala, p 205.

² *Ibid.*

³ They are estimated to number around 100,000 according to a document published at <http://www.forets-du-congo.org/agir/forum/26>

⁴ J Vanderlinden (1976) 'Les titres juridiques des Européens à l'occupation du sol africain avant 1876', in *ARSOM, La conférence géographique de 1876. Recueil des études*, Brussels, pp 183–254.

⁵ *Ibid.*

[w]hile a European was able to invoke legal title over African soil, the latter only constituted such within the limits and according to the terms of the customs of the place. Moreover, Europeans at that time were not so much concerned about acquiring a land title in order to establish their potential right of occupation and the terms governing the exercise of that right as about having the guarantee of security in order to run their business. It was only later that the occupation of land in itself became the main object, especially when the European powers wanted their sovereignty rights to be recognised.⁶

It was at that point that numerous treaties were concluded, either with traditional Bantu, Nilotic or Sudanese chiefs⁷ or between the European powers. Such treaties were characterised by misunderstandings over the nature of the rights thereby transferred: while the Europeans tended to see them as sales agreements, the traditional Congolese chiefs saw them more as authorisation to occupy land. Furthermore, in all these agreements with the traditional Bantu, Nilotic and Sudanese chiefs, the Europeans usually dealt with the dominant ethnic groups to the detriment of minority groups and the indigenous Bacwa, Bambuti and Batwa.⁸ During such negotiations, nobody bothered to find out whether the land was inalienable for the 'Pygmies' or what actual powers the traditional Bantu, Nilotic or Sudanese chiefs had over Congolese territory. In the different treaties, the Congolese assignor is referred to as 'king' or 'chief' which wrongly gives the impression that traditional Congolese political structures were organised into hierarchies like the European ones were. The sovereignty principle upheld by the Europeans wrongly presumed that these traditional chiefs could bind the whole territory [to such agreements]. However, the indigenous communities were outside the sphere of power of the traditional chiefs. It was against this confusion that in 1885 Leopold II, the King of the Belgians, established the *État indépendant du Congo*, Congo Free State, a territory that was made up of the possessions of the *Association internationale africaine*, International African Association, which belonged to him.⁹

This study looks at the problems of land acquisition in the DRC from pre-colonial times to date and shows that the indigenous peoples [*peuples autochtones*]¹⁰ have been dispossessed of the lands they inhabited in the past. Part I provides a historical overview of the main legislative developments and also briefly addresses the reform of the land tenure system which has been taking place since 2002. Part II describes the constitutional guarantees and international instruments relating to the protection of land rights of indigenous peoples that are applicable in the DRC. In the concluding remarks, I make some observations about approaches that would help to provide solutions to the land tenure problems raised.

⁶ Mugangu Matabaro (1997) *La gestion foncière rurale au Congo (Zaire), réformes juridiques et pratiques foncières locales*, Harmattan et Bruylant, Brussels, p 37.

⁷ There are no traditional chiefs in the structure of the indigenous Bacwa, Batwa or Bambuti communities. There are heads of family who are the guardians of their customs and traditions. They are in permanent contact with the world of their deceased ancestors. See U Kern (2007), *Le système légal des Batwa dans la province de l'Équateur, en RDC*, degree dissertation, University of Yaoundé, Cameroon, p 43.

⁸ J Vanderlinden, *op. cit.*, p 205.

⁹ G K Anto (1904) *Régime foncier aux colonies*, 2nd edition, Mertens et fils, Brussels, p 39.

¹⁰ The French terms '*indigène*' ['indigenous'] and '*autochtone*' [literally 'autochthonous'], as used in the DRC before and during colonisation, referred to all communities other than European ones on Congolese territory, in other words the Bantu, Nilotes and Sudanese as well as the Batwa, Bambuti and Bacwa. These days in the DRC, '*autochtone*' usually refers to the Batwa, Bacwa and Bambuti communities (the 'Pygmies').

I History of the Congolese land tenure system

1 The colonial period

Having been given the right to do so at the Berlin Conference (1884–1885), the sovereign of the new Congo Free State (CFS) provided the resources required for exploration and military expeditions. He also organised the CFS in such a way that it would grow in order to cover the interest and debt repayments on the funds devoted to these activities. The Government of the CFS set in place a tough state land policy.¹¹ It decided to institute a land tenure system, in its view simple and clear, which would give property the same legal guarantees as in ‘civilised’ States.¹² On 1 July 1885, an ordinance concerning administration of the Congo in which the broad lines of the land tenure system were established was published. It was supplemented by sovereign decrees of 22 August 1885, 14 September 1886 and 3 June 1906.¹³ These laws meant a change to, indeed a new conception of, the land tenure rights of indigenous peoples in the Congo.

Before the CFS was established on 1 July 1885, there were two types of land: land occupied by the indigenous peoples (*‘autochtones’*), which at that time meant local communities governed by custom,¹⁴ and land occupied by European traders and missionaries (Dutch, Portuguese and British settlers) by virtue of contracts signed with Bantu, Nilotic or Sudanese chiefs.¹⁵ On 1 August 1885, the Administrator General in the Congo announced in an ordinance that from the time of the proclamation of the CFS, contracts or agreements signed with indigenous groups for

¹¹ G K Anto (1900) ‘Politique domaniale et agraire de l’État indépendant du Congo’, in *Institut colonial international*, p 520.

¹² G K Anto, *op. cit.*, p 44 ; Van Der Verken (1925) *Le problème des terres vacantes au Congo belge*, Conférence du Jeune Barreau de Bruxelles, speech given at the formal session of the Colonial Law Section on 12 December 1925, Brussels, p 12.

¹³ Extract from the document appended by Sir Francis de Winton, the first Administrator General of the Congo, to the Congo Free State notification circular addressed to missionaries and merchants:

A sovereign decree will shortly invite all non-natives who currently possess or hold any title over land situated on the territory of the Congo Free State to make an official declaration indicating these lands and to submit for government examination and approval the contracts and titles by virtue of which they hold them. The aim of the decree is to ensure, in forms to be laid down, recognition of the rights acquired and to allow proper organisation in the near future of the land owned by the State.

In the meantime, in order to prevent disputes and abuses, the Administrator General, authorised for that purpose by the Sovereign, has decided as follows:

Article 1: As from the promulgation of this proclamation, no contract or agreement with the natives concerning the holding of any type of title over parts of the land will be recognised by the government or protected by it unless the contract or agreement in question has been drawn up with the intervention of the public officer appointed by the Administrator General for that purpose and according to the rules drawn up by the latter in each particular case.

Article 2: No one has the right to occupy empty land without title or to dispossess the natives of the lands they occupy, empty land should be considered as belonging to the State.

See P Nobirabo Musafiri (2007) *Droit foncier des autochtones et le droit international : cas des Batwa dits « Pygmées » de la RD Congo*, Stämpfli Berne/Switzerland, p 527 and pp 245–309.

¹⁴ In this instance *‘autochtones’* refers to the so-called ‘indigenous’ communities of the time, in other words the ‘Pygmy’ communities and other neighbouring communities, in particular the Bantu, Nilotics and Sudanese.

¹⁵ Vanderlinden (1976) *Les titres juridiques des Européens à l’occupation du sol africain avant 1876*, pp 183–254.

the occupation of land in whatever capacity would no longer be recognised or protected by the government.¹⁶ As a consequence:

- the CFS recognised the right of indigenous peoples to own land occupied collectively or as individuals, in accordance with their traditional practices (extensive farming, grazing and habitation) and subject to custom;
- the CFS registered and brought under State law the land that the European traders and missionaries had acquired as a result of valid contracts entered into before 1 July 1885;
- the CFS affirmed that any remaining land constituted empty land and from then on would form part of the State domain, a part that was under private ownership.¹⁷

The ordinance of July 1885 imported European-style property law to the CFS. The public and private State domains became the source of land tenure law. And so since 1885 two main systems of land ownership have co-existed in the DRC and come into conflict with each other. Colonisation introduced a 'Roman'-style form of land ownership that was sole and exclusive.¹⁸ The pre-colonial legislator considered the 'native' or indigenous peoples to have no land tenure system and any CFS land not occupied by them to be ownerless.¹⁹ However, the Bacwa, Bambuti and Batwa, being semi-nomadic and living from hunting and gathering, often moved around the territory they occupied and that was one reason why the colonial power wrongly characterised such land as empty. It turned it into State property while at the same time asserting that land occupied by indigenous groups was governed by their local customs. In fact, the provisions of the decree of 31 July 1912, which enshrined the provisions of article 713 of the Napoleonic Code and were later transposed to article 12 of the former Book II of the Civil Code, stipulated that 'all ownerless things belong to the Colony, except for respect for customary indigenous rights and what may be said on the subject of the right of occupation'. However, indigenous peoples, other than a few individuals who were registered, failed to take advantage of this legislation from the Civil Code.²⁰ In their case, it was the 1885 concept of empty land which applied.

As a consequence, colonisation led to the expropriation of virtually all land from the indigenous communities in the DRC. Colonial jurists later categorised the rights indigenous peoples were able to have over the territory belonging to the CFS and in so doing provided further justification for State ownership of any land deemed at the time not to be occupied by

¹⁶ P Nobirabo Musafiri (2007) *op. cit.*, p 245.

¹⁷ In other words, land that was not occupied by the indigenous peoples or in the possession of European traders and missionaries.

¹⁸ The ordinance of 1 July 1885, which stipulated that: 'no agreement, covenant or contract which European traders (Portuguese, English, Dutch, etc.) have signed with the natives (the Kongo Kingdom, Kuba Kingdom and Lunda Empire) for the occupation, in any capacity whatsoever, of parts of the land shall be recognised by the government or protected by it'. The two decrees (of 17 October 1889 and 29 September 1891), as well as the four implementation circulars, which for the State constituted application of the principle of domaniality that is universally accepted in all European States, form the basic legislation.

¹⁹ Vauthier, in particular, wrote on this subject that 'when the State affirms its right to property, it finds itself in the presence of nothingness as far as private ownership is concerned, whether the latter be in a collective or individual capacity. Individual ownership in the Congo does not exist, even of village or arable land'. See Vauthier (1909) *Le régime foncier du Congo Belge*, p 13.

²⁰ The Civil Code which introduced western-style individual property applied to Europeans and indigenous groups with special status similar to that of the Europeans (i.e. registered) while other groups ('native' and other indigenous groups) were governed by their ancestral customary laws; see R P E Boelart, *op. cit.*, p 12.

indigenous peoples. Furthermore, the new CFS legislation which put the finishing touches to the colonial structures imposed an individualist conception of land tenure on the indigenous population.²¹

In 1908, the CFS became a colony of Belgium, known as the Belgian Congo. On annexing the CFS, the Kingdom of Belgium committed itself to respecting existing practices in the Congo as well as any legally-acquired rights enjoyed by third parties, indigenous peoples and European settlers. However, colonial land policy proved to be more restrictive.²²

Article 15 of the Colonial Charter, signed on 18 October 1908, involved the Belgian Parliament in the granting of concessions.²³ As far as measures taken by the Congo Administration were concerned, 'the main transfers occurred in Upper Congo, Mayumbe and Katanga, especially to the Katanga Company'.²⁴ The latter was in fact a 'chartered company', in other words a company to which the State granted free possession of certain territories and delegated sovereignty. In return, the company was obliged to examine lines of communication, establish transport links, provide for the needs of the administration and police, and ensure compliance with international obligations.²⁵

The first legislation on land tenure introduced by the Belgian colony, in particular the law of 6 February 1920, regulated the transfer of real estate. It consisted of a better-structured presentation of the various scattered provisions already in existence at the time of the CFS, which mainly concerned registration, measurement and demarcation of land.²⁶ Private ownership of land could only be established by means of a certificate of registration issued by the registrar of land titles acting on behalf of the Belgian colony. It was not possible to register the customary rights of the indigenous population. This is clearly evident from article 36 of the decree, which stipulated that: 'Private ownership of land can only be established by means of a certificate of registration of the title recognised or granted by the colony. The private ownership of mines is governed by specific legislation'. The holders of such property rights were thus secure in their possession of them. In fact, the certificate of registration not only provided clear proof of the right²⁷, as well as any rents and charges involved, but also, if at the time of registration and transfer the registrar of land titles made a mistake, it was the colony that was held responsible.

On 20 July 1920, another decree was issued to regulate the emphyteusis and superficies system. A report by the Colonial Council justified the decree in the following terms:

²¹ J C Mukasa (1967) *Le problème de l'unification et de l'intégration du droit congolais*, pp 5–61.

²² Rubbens (1975) 'La tenure du sol en droit Zaïrois' in *Problème de l'enseignement supérieur et de développement en Afrique centrale*, p 95.

²³ In this regard, see, in particular, L G Kalambay (1998) *Le droit civil de biens*, *op. cit.*, p 43.

²⁴ Mugangu Matabaro, *op. cit.*, p 69.

²⁵ Rapport du Conseil colonial (1920) in *Bulletin Officiel 1920*, p 867.

²⁶ Marlier (1933) *Aperçu sur le régime foncier au Congo belge*, pp 8–9.

²⁷ In Congolese law, the property rights recognised in registration certificates could in principle not be challenged in the courts and tribunals, even if a registration certificate had been drawn up on the basis of a contract of disposal that could be terminated or declared void, because the clauses of the contract relating to those procedures, or the possible existence of a mistake in the certificate, only gave the right to make a claim for damages in a personal capacity, in accordance with article 227 of the Congolese law on land tenure.

When well organised, emphyteusis may suffice, in most cases, to ensure the development of uncultivated State land. It will no longer be necessary to always be obliged to resort to the system of large-scale concessions with absolute title (*en pleine propriété*). It would be wrong for the colony to continue to divest itself permanently of land which belongs to it as ownerless property and only retain within its domain a small portion for times to come. In the emphyteusis system, the duration of which is essentially limited to three generations, the colony will one day retrieve its land, the value of which will be considerable, without having to make any financial outlay.²⁸

It is clearly apparent that this new legislation (the decree of 20 July 1920) was intended to preserve the assets of the Belgian colony by ensuring that agricultural and industrial land was not granted with absolute title and extending the application of emphyteusis; indeed, emphyteusis does not involve the transfer of ownership of the land being leased. According to article 62 of the decree, emphyteusis ‘is the right to enjoy land belonging to another’. By virtue of the right of enjoyment, emphyteutic lessees have the right to the fruits and produce of the land, as well as hunting and fishing rights, the right to extract clay and other similar substances, the right to cut down trees and extract timber. They are obliged, among other things, to develop the land and maintain it, occupy it or have it occupied, and repair all damage to any buildings they have constructed themselves. These rights and obligations, which may vary from one case to another, are determined in the instrument of constitution. However, under the terms of article 78, the maximum duration of enjoyment thereby granted may not exceed 25 years. The law applied solely to registered land; it did not apply to indigenous lands which, as in the CFS, remained subject to local customs.

2 The period of independence

After 30 June 1960, the date of independence, the Congolese land tenure system underwent two main stages, namely:

- retention of the colonial land tenure system (1960–1973); and
- the break with the colonial land tenure system (1973).

2.1 Retention of the colonial land tenure system (30 June 1960)

Under article 2 of the Congolese fundamental law of 19 May 1960 concerning structures in the Congo, all laws, decrees and legislative ordinances, their implementing measures and any regulatory provisions in existence as of 30 June 1960 remained in force as long as they were not specifically rescinded. This meant the virtual resumption of the land system inherited from the Belgian colony.

After the country had attained international sovereignty (1960), a very important law that had numerous repercussions was enacted. This was ordinance-law N° 66-343 of 7 June 1966, the so-called Bakajika law,²⁹ ‘assuring the Democratic Republic of the Congo the entirety of its

²⁸ Rapport du Conseil colonial, *op. cit.*, p 870.

²⁹ Ordinance-law N° 66-343 of 7 June 1966 takes the name ‘Bakajika law’ from the deputy who was responsible for drafting the initial bill.

ownership rights over its domain and full sovereignty in the granting of land, forestry and mining rights throughout the whole of its territory’.

In effect, the Bakajika law nullified all transfers and concessions successively granted by the Congo Free State, the Belgian colony and all licensing authorities prior to 30 June 1960.³⁰ Under this ordinance-law, the State was given the right to take back all land, forestry and mining rights transferred or granted before 30 June 1960 (article 1), even in the case of ownership rights that were held or exercised as subjective rights jointly with the State by third parties (natural persons [*personnes physiques*] or legal entities [*personnes morales*]).

2.2 The break with the colonial land tenure system

Adopted in 1973, law N° 73-021 establishing the general property system, land and real estate system and security interest system, forms the basis of the current land tenure system in the DRC.³¹ This law makes the State the single sole owner of the soil and subsoil of which it has exclusive, inalienable and imprescriptible ownership. Under this law, a Congolese person, as a natural person or legal entity, is only entitled to hold a standard concession or concession in perpetuity or own immovable property (*immeuble*).³² This law has, nevertheless, enabled private individuals, without becoming landowners, to obtain private rights of enjoyment over land belonging to the private domain of the State.

2.3 Management of State land following independence

State land has been managed by the authorities mainly through the establishment of procedures relating to concessions in perpetuity (*concessions perpétuelles*), standard concessions (*concessions ordinaires*), the rules of jurisdiction and procedure, land easements, the rules governing the exchange of land and the penalties applicable to property (land).

a) Concessions in perpetuity

A concession in perpetuity³³ is the right accorded by the State to a natural person of Congolese nationality to enjoy their property (land) in perpetuity as long as the substantive and formal conditions established in the land tenure law of 20 July 1973 are met. It is available only to

³⁰ Ordinance-law N° 66/343 of 7 June 1966, the so-called ‘Bakajika law’, was supplemented by an implementation ordinance inviting the beneficiaries to submit new requests within a specific time period. Any property (land) that was not the subject of a request was declared to be ‘abandoned’ (*biens abandonnés*) by the Planning Minister of the time, in compliance with a law that authorised him to do so.

³¹ *Loi n° 73-021 portant régime général des biens, du régime foncier et immobilier, et du régime de sûreté*. It was modified and supplemented by law N° 80-008 of 18 July 1980.

³² Unfortunately, neither the colonial legislators or those who drew up the 1973 land tenure law clearly defined this institution (the right to hold a concession or own property on land belonging to the State). However, this is of enormous practical use. In effect, Congolese legal theory and jurisprudence give the holder of the right to own property the ability to legitimately enter into a variety of contracts. He can even mortgage the property before the transfer has become effective through the establishment of a certificate of registration (see order RC 265 of the Congolese Supreme Court of Justice of 16 June 1982, *Bull. des arrêts des années 1980 à 1984*, Kinshasa/RDC 2001, p 301). The mortgage is, however, only registered once he has become the owner of the property in question. As a result, without being the owner or having a certificate of registration, the holder of the right to become a property owner is able to offer a mortgage guarantee bond to his creditors. And yet article 263 of the land tenure law stipulates that ‘no mortgage exists if it is not registered in the registration record on the certificate of the property or property right to which it applies’.

³³ Article 80 of the 1973 land tenure law.

Congolese natural persons and consequently can only be assigned or transferred between Congolese natural persons. These types of concession can be sold or given away free of charge. If they apply to uncultivated land, they can only be granted by means of a tenancy agreement (*contrat de location*) with the option of a concession in perpetuity. Such concessions may be terminated for a variety of reasons, in particular expropriation for public use, buy-out by the State if the concession has been purchased, termination by mutual agreement or by the courts, etc.³⁴

b) Standard concessions

A standard concession³⁵ is the right accorded by the State to a natural person or legal entity, of either Congolese or foreign nationality, to enjoy the property for a specific period of time.³⁶ Standard concessions are therefore temporary. Under article 109 of the land tenure law, the following are classified as standard types of concession:

- emphyteusis;
- superficies;
- usufruct;
- the right to use and rent out.

c) Jurisdiction

The granting to private individuals (natural persons or legal entities) of rights of enjoyment over lands that form part of the State domain may be accorded by means of:

- an act passed in Parliament; or
- a contract validated by presidential decree; or
- a contract validated by an order issued by the Minister of Land Affairs; or
- a contract signed by the Provincial Governor; or
- certificates of registration issued by a registrar of property titles.³⁷

³⁴ Article 110 of the above-mentioned land tenure law.

³⁵ Unlike in the case of concessions in perpetuity, the lawmakers have not defined what constitutes a standard concession. They have made do with listing, moreover incorrectly, the different land rights they have classified as belonging to the group of standard concessions.

³⁶ They are limited in time, usually for a maximum period of 25 years which is renewable in accordance with the specific terms of each law (article 70 of the 1973 land tenure law). Renewal is not automatic and may be subject to certain conditions. Renewal is usually guaranteed as long as the land in question is being developed in accordance with the terms of the existing concession. Provision has also been made for a guarantee in the form of compensation in the event of non-renewal.

³⁷ The contract approved in law for units of rural land of 2,000 hectares or more and for units of urban land of 100 hectares or more;

- by means of a contract validated by presidential decree, for units of rural land of over 1,000 hectares and less than 2,000 hectares, and for units of urban land of over 50 hectares and less than 100 hectares;

- by means of a contract validated by an order of the Minister of Land Affairs, for units of rural land of over 200 hectares and less than 1,000 hectares, and for units of urban land of over 10 hectares and less than 50 hectares;

- by means of a contract signed by the Provincial Governor, for units of rural land of 200 hectares or less, and for units of urban land of 10 hectares or less. In the case of rural land of less than 10 hectares and urban land of less than 5,000 square metres (*50 ares*), the Provincial Governor may delegate his powers to a registrar of property titles. See G Kalambay Lumpungu, *Régime Foncier*, *op. cit.*, p 125.

d) Land easements

A land easement is a charge levied on a piece of land for the use of other land. The land on which the easement is established is called the servient land while the one benefitting from it is called the dominant land. An easement may exist, for example, when a piece of land is not served by any public access road, thereby only making access possible by crossing private land. An easement in such cases is an agreed right of way through the private land in question.

e) Penalties

Land occupation of any kind must comply with the 1973 land tenure law and the land must be occupied by the people specified (natural persons of Congolese nationality in the case of concessions in perpetuity and natural persons or legal entities of Congolese or foreign nationality in the case of standard concessions). Those who fail to do so face penalties that may result in the concession contract being terminated or indeed criminal penalties.³⁸

2.4 The fate of land occupied by Congolese indigenous communities after independence

The land tenure law of 20 July 1973 brought all land back into the State domain (article 53).³⁹ However, it promised to settle the question of land in relation to indigenous communities (traditional communities) by means of a presidential ordinance.⁴⁰ In the DRC, the term '*communautés autochtones*' ['indigenous communities'] means the Bacwa, Bambuti and Batwa communities of hunter-gatherers, namely the 'Pygmies', who are extremely marginalised peoples living in the equatorial forests.⁴¹

Unfortunately, to date the introduction of the presidential ordinance establishing the land ownership rights of the indigenous communities in the DRC is a long time coming. Furthermore, the land tenure law unambiguously states that:

once this law enters into force, the lands occupied by local communities become State land.⁴²

The lands in question are those which these communities inhabit, cultivate or exploit, individually or collectively, in accordance with local customs and use.⁴³ These local communities

³⁸ See P Nobirabo Musafiri (2007), *Droit foncier des autochtones et le droit international*, *op. cit.*, p 304.

³⁹ Article 53 of the 1973 land tenure law stipulates that 'the soil is the exclusive, inalienable and imprescriptible property of the State'.

⁴⁰ Article 389 stipulates that 'an ordinance from the President of the Republic shall establish the conditions and terms to which [...] will be subjected'.

⁴¹ During colonisation, the term '*communauté autochtone*' meant the indigenous communities, namely all the non-European communities combined (Bantu, Nilotic, Sudanese, Bacwa, Batwa, Bambuti, etc.). These days, the term '*autochtones*' refers to the Bacwa, Batwa and Bambuti. This interpretation shows that the local or 'indigenous' communities being discussed here should not be confused with the local groups specifically designated under Congolese legislation in the law establishing the territorial and administrative organisation of the DRC. The communities being discussed here (the Bacwa, Batwa and Bambuti) are excluded from the aforementioned territorial and administrative organisation because their chiefs are considered to be heads of family situated outside the political structure of the village and group. See P Nobirabo Musafiri, *op. cit.*, p 345.

⁴² Article 386 of the 1973 law.

⁴³ *Ibid.*

are thus granted rights of enjoyment over them.⁴⁴ The Congolese lawmakers of 1973 most certainly did not intend to bring about the fragmentation of these communities. Rather they gave them a means of subsistence by entrusting them with enjoyment of the land their members needed for their own protection and that of the community; however, at the same time the land in question was brought into the State domain. Any lands inhabited, cultivated or exploited in one way or another by local communities, which up till then came under customary law, entered into the domain of the State and, since then, customary authority has no longer had any say in their allocation or distribution. At the moment, there are two land tenure systems in conflict in the DRC: written law (which tends to apply more in urban areas) and customary law (which tends to apply more in rural and indigenous areas). This paradoxical situation is often the cause of disputes between the State and the indigenous communities over the ownership and thus the assignment of land.

During the 1960–1970 period, 580 Bambuti/Batwa families, in other words between 3,000 and 6,000 individuals, were forced out of the Kahuzi–Biega forest in the eastern part of the DRC in order to establish the Kahuzi–Biega Park. A ‘Pygmy’ widow, who was evicted during that operation, remembers:

We did not know they were coming. It was early in the morning. I heard people around my house. I looked through the door and saw people in uniforms with guns. Then one of them forced the door of our house and started shouting that we had to leave immediately because the park is not our land. I first did not understand what he was talking about because all my ancestors have lived on these lands. They were so violent that I left with my children.⁴⁵

In fact, the system of expropriation for public use⁴⁶ is governed by law. Expropriation is an administrative operation through which the executive obliges a private individual to surrender to it, for public use and in return for compensation, the ownership of immovable property or the right of enjoyment of land. In cases of expropriation for public use, grantees in perpetuity (private individuals, natural persons or legal entities, traditional or local communities, etc.) may be deprived of their rights. Under the terms of the legislation, such expropriations can only be carried out for public use. In other words, the planned operation must be of general interest.

The expropriation procedure begins with a decision, taken either by means of an order signed by the Minister of Land Affairs or, in the case of an order for expropriation of property by zones, by means of presidential decree, to carry out works in the public interest or to put the land in question up for sale. This decision is usually taken following a valuation and survey. The grantee in perpetuity at risk of expropriation is informed of the decision by either registered letter requesting acknowledgement of receipt or a letter delivered personally by messenger for which a signed and dated receipt is required. The grantee has one month from the date of receipt to submit any objections or observations arising from the decision to expropriate and to indicate

⁴⁴ Article 389 of the 1973 law.

⁴⁵ M Colchester (2003) *Salvaging Nature. Indigenous Peoples, Protected Areas and Biodiversity Conservation*, World Rainforest Movement and Forest Peoples Programme, p 34.

⁴⁶ The legal requirements relating to expropriation are determined in the DRC by law N° 77-001 of 22 February 1977 which repealed the decree of 24 July 1956. It establishes the procedure to be followed with regard to expropriation and specifies who is entitled to resort to expropriation, what goods or property can be expropriated and on what grounds expropriation is legitimate. Article 104 of the current land tenure law unambiguously stipulates that the provisions of this law are applicable to concessions in perpetuity.

the price expected and details of any indemnity or compensation he is claiming.⁴⁷ If the authority and the grantee facing expropriation are unable to reach agreement, the matter goes to court, not so that the latter can act as expropriator but in order to check the legality of the administrative procedure, proceed with the settlement of any indemnities and rule on the starting date if the subject of the expropriation has asked it to do so.

For the reasons given above, the law on expropriation for public use requires that any indemnity be paid within four months of judgment and before the transfer has been registered. In order to retain the preliminary nature of any indemnification, the law⁴⁸ establishes that, once the time limit has passed, the subject of the expropriation can bring an action against the expropriator to have it rescinded, without prejudice to any damages that might be applicable. It is clear that for the Twa widow and her family, the system established in law for use in the case of expropriation for public use was not observed. Nevertheless, these Bambuti/Batwa should have been given other lands in compensation or else the State should have paid them an indemnity on the grounds of expropriation for public use. However, nothing of the sort has been done.

3 Reform of the land tenure system

Since 2002, the DRC Government has taken a number of steps to reform the land tenure system. It has thus set up a Mines Registry Office, under the supervision of the Ministry of Mines, and a Forest Registry Office, under the authority of the Ministry of Nature Conservation and Water Resources and Forestry. As for tourist areas, they are managed by the Ministry of Tourism and Hotels.

3.1 The mining system

In the DRC, the main aim of the law governing the mining sector is to operate a policy that is attractive to investors.⁴⁹ The legislation promulgated in relation to mines and hydrocarbons following independence⁵⁰ had not attracted foreign investment. Instead it had had a negative effect on mining production and public finance. The systems in place (mining, tax, customs and charging rates) did not offer sufficient incentives. It seems that to overcome this the Congolese lawmakers of 2002 were keen to introduce legislation that would provide greater incentives. The relevant systems (tax, customs and charging rates) have been organised within the framework of this legislation and include objective, 'fast track' and transparent procedures for the granting of mining and quarrying rights.

The new Mining Code specifies the usual terms applicable to mining and quarrying; it imposes a cadastral grid of the DRC in mining and quarrying areas and sets out the procedure for granting rights concerning the issuing of mining and quarrying titles. It also deals with the rights to make use of mining waste and to carry out small-scale mining, the operation of artisanal mining and

⁴⁷ Article 11 of law N° 77/001 of 22 February 1997.

⁴⁸ Article 18, paragraph 4 of the aforementioned law.

⁴⁹ Law N° 007/2002 of 11 July 2002 establishing the Congolese Mining Code and its implementation measures, published in the mining regulations under decree N° 038/2003 of 26 March 2003.

⁵⁰ Ordinance-laws N° 67/231 of 3 Mar 1967 and N° 81-013 of 2 April 1981.

the obligations incumbent on the holders of mining and quarrying rights, as well as the farming out and transferral (concession and passing on) of mining and quarrying rights, etc.⁵¹

The Mines Registry Office plays an important role in enforcing this new law, especially in relation to the procedures for requesting and granting rights and issuing mining and quarrying titles. It is one of the main innovations of the current Mining Code.⁵² In addition to the Mines Registry Office, the Ministry of Mines has set up a specialist service within the ministry called the *Service d'assistance et d'encadrement de la production minière à petite échelle* (SAESSCAM), Service to support and supervise small-scale mining. It is a public technical service which enjoys administrative and financial autonomy.

3.2 The forestry system

Forests in the DRC are managed by the Ministry for the Environment, Nature Conservation and Tourism. They are classified as follows:

- Listed forests, which are subject to strict legal conditions laid down in a classification order. As far as the rights of use are concerned, they are given over to a specific purpose, especially of an ecological nature.
- Protected forests, which do not have a classification order and are subject to a less restrictive legal regime as far as the rights of use are concerned.
- Permanent production forests, which are taken from protected forests following a public inquiry set up with a view to granting such concessions. They are subject to the rules of use established in law.

All three categories can be subject to easements. Forests are managed by the Ministry of the Environment, Nature Conservation and Tourism which issues orders relating to their grading and downgrading. The DRC forestry system has also made provision for the establishment of an Advisory Council to give advice about the management of forests.⁵³ The Advisory Council is to be made up of approved non-governmental associations and organisations working in the environmental and forestry sectors. While waiting for it to be actually set in place, it would be encouraging if consideration was given to involving other main actors from the forestry sector, in particular representatives of the government and the logging industry in the DRC. This would allow and facilitate interaction between the different actors operating in the forestry sector.

⁵¹ See Heading II of the Congolese Mining Code of 11 July 2002.

⁵² The Mines Registry Office is a public establishment of an administrative and technical nature which has legal personality and enjoys administrative and financial autonomy. It collaborates with other State services from the mining and quarrying sectors, namely: the *Direction des Mines*, *Direction de la Géologie* and the *Service de protection de l'environnement*, all of which come under the Ministry of Mines; it also works in cooperation with the competent authorities, in particular the President of the Republic, the Minister of Mines, the Provincial Governor and the Provincial Head of Division for Mines. In addition to the Ministry of Mines, the Mines Registry Office comes under the supervision of the Ministry of Finance (see the aforementioned Mining Code).

⁵³ The advice provided by the Advisory Council relates to: project planning and the coordination of forestry policy, projects relating to the rules of forestry management, all procedures for grading and downgrading forests, all draft legislation and regulations relating to forests and any issues it deems necessary relating to the Congolese forest estate.

The new Forestry Code envisages three main mechanisms for involving communities in the management of the country's forests:

- the establishment of Advisory Councils,⁵⁴
- the grading and planning process,⁵⁵ and
- the drawing up of national and provincial forestry plans.⁵⁶

These three mechanisms will only be of use in defending and protecting the rights of the forest peoples if the latter are able to contribute, in a meaningful way, to developing such mechanisms and influence the management of the country's forests. Certain safeguards will need to be put in place, in particular:

- the indigenous Congolese communities of the Bacwa, Bambuti and Batwa must have control over their rights and the development of the resources in their forests,
- the most vulnerable communities (the Batwa) must be represented in meetings where decisions are being made, and
- the views of these communities must be taken into account.

⁵⁴ Article 29 of the new Congolese Forestry Code

⁵⁵ *Ibid.*, articles 15 and 16.

⁵⁶ *Ibid.*, article 6.

II Constitutional guarantees and international instruments on the protection of indigenous rights

1 The enforcement of international norms in domestic law

The enforcement of international instruments in DRC domestic law is subject to certain conditions: first, the treaty or agreement in question has to have been properly ratified or approved;⁵⁷ then it has to be published in the *Journal officiel*, the Official Gazette, which in practice amounts to a presidential ordinance.⁵⁸ Another implication of the democratic nature of the country's institutions is that the executive is required to publish all treaties. In other words, the DRC Government must allow the Congolese people, through public opinion, to follow foreign policy and influence its direction where necessary. Since, under article 5 of the Constitution, the Congolese people have sovereignty, they have the right to know how such sovereignty is being exercised at both international and domestic level.

For example, under the International Covenant on Civil and Political Rights, any member of the Twa, Cwa or Mbuti can appeal to the country's domestic courts or the United Nations Human Rights Committee with regard to the violation of their rights by the Government of the Democratic Republic of the Congo.⁵⁹ The same applies in respect of the violation of rights guaranteed by any other international instrument ratified by the DRC.

The legal principles governing the collective rights of indigenous peoples over their ancestral lands are well established in article 5(d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination. The DRC is a signatory of this convention which guarantees '[t]he right to own property alone as well as in association with others'.⁶⁰ The Committee on the Elimination of Racial Discrimination (CERD) aptly pointed out that indigenous peoples have the right 'to own, develop, control and use their communal lands, territories and resources'.⁶¹ CERD has broadly affirmed the land rights of the indigenous peoples of Botswana and Uganda, among others, in its jurisprudence.⁶²

⁵⁷ In the DRC a treaty is deemed to have been properly ratified, in other words agreed, if the country's internal regulations relating to the exercise of treaty-making power, which governs the relationship between States at the level of international law, have been observed.

⁵⁸ Once it has been published, a treaty that has been properly ratified or approved has supremacy over the law. Its application before publication is not prohibited but if it establishes rights and obligations for private individuals, it must be published before it can be deemed binding on them. The administration is thus able to ensure that individuals benefit from the rights laid down in an international agreement but it cannot impose on them any obligations contained in the same instrument if it has not been published. Similarly, it is very unlikely that an individual would be able to successfully make a claim for such rights through the courts before they had been published. It follows that, for the courts and individuals, in Congolese domestic law treaties only take effect once they have been published.

⁵⁹ The Democratic Republic of the Congo is a signatory of the International Covenant on Civil and Political Rights.

⁶⁰ International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965.

⁶¹ CERD, *General Recommendation No. 23: Indigenous Peoples*, 18 August 1997, paragraph 5.

⁶² It has also established the direct connections that exist for indigenous peoples between their lands, culture and economic practices. For example, in 2006, it asked the Government of Botswana to: 'pay particular attention to the close cultural ties that bind the San/Basarwa to their ancestral land; [and] ... protect the economic activities of the San/Basarwa that are an essential element of their culture, such as hunting and gathering practices, whether conducted by traditional or modern means (...)'. CERD, *Concluding observations of the Committee on the*

Box 1

Extracts from the Democratic Republic of Congo Constitution of 18 February 2006

'Reaffirming [...] adherence and our commitment to the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the United Nations Conventions on children's and women's rights [...], as well as international instruments relating to the protection and promotion of human rights.' [Unofficial translation.]

(Preamble, paragraph 5)

'Private property is sacred. The State guarantees the right to individual or collective property acquired in accordance with the law or custom [...]. No one can be deprived of his property other than for public use and in return for fair compensation paid in advance [...].' [Unofficial translation.]

(Article 34)

'If the Constitutional Court, having been consulted by the President of the Republic, Prime Minister, President of the National Assembly or President of the Senate, a tenth of the deputies or a tenth of the senators, declares that an international treaty or agreement contains a clause that is contrary to the Constitution, ratification or approval can only occur once the Constitution has been revised.'

'International treaties and agreements that have been properly entered into, once published, have supremacy over the laws subject, in the case of each treaty or agreement, to its application by the other party.' [Unofficial translation.]

(Articles 216 and 215)

The UN Human Rights Committee has also associated the right for indigenous peoples to enjoy their own culture with territory and the use of its resources as well as social and economic activities such as hunting and the right to live in reserves protected by law.⁶³ It has also associated the cultural rights of indigenous peoples with their access to sacred sites⁶⁴ and their protection against forced relocation.⁶⁵ For the Committee, the exercise of cultural rights by indigenous peoples 'may require positive legal measures of protection'.⁶⁶

Elimination of Racial Discrimination: Botswana, 4 April 2006, UN document CERD/C/BWA/CO/16, paragraphs 12–14. See: General Assembly, *Report of the Committee for the Elimination of Racial Discrimination: Sixtieth Session (4–22 March 2002) and Sixty-First Session (5–23 August 2002)*, UN document Supplement No. 18 (A/57/18), paragraphs 301 and 304, p 49; CERD, *Concluding observations of the Committee for the Elimination of Racial Discrimination: Uganda*, 2 June 2003, UN document CERD/C/62/CO/11, paragraph 14, p 3.

⁶³ HRC, *General Comment No. 23: The rights of minorities* (Art. 27), *op. cit.*, paragraphs 3.2 and 7.

⁶⁴ HRC, *Concluding observations of the Human Rights Committee : Australia*, 24 July 2000, UN document A/55/40, paras. 498–528, paragraph 510.

⁶⁵ HRC, *Concluding observations of the Human Rights Committee : Chile*, 30 March 1999, UN document CCPR/C/79/Add.104, paragraph 22.

⁶⁶ HRC, *General Comment No. 23: The rights of minorities* (Art. 27), *op. cit.*, paragraph 7.

1.1 Concluding observations of CERD on the DRC in 2007

Through their jurisprudence, CERD and the HRC have forcefully affirmed that the property rights of indigenous peoples comprise several features, including:

- the delimitation and demarcation of their lands and territories,⁶⁷
- assurance that the demarcated lands are of sufficient size for their traditional activities,⁶⁸ and
- the granting of land titles.⁶⁹

2 The customary right of collective ownership of land and natural resources

The UN Declaration on the Rights of Indigenous Peoples obtained the DRC's vote when it was adopted by the UN General Assembly on 2 October 2007. It brings together the international standards which guarantee the land rights of indigenous peoples.⁷⁰ It confirms the right of indigenous peoples to maintain and strengthen their spiritual relationship with lands and resources and states that there are close links between the culture of indigenous peoples and their lands, identity and integrity.⁷¹

The African Commission on Human and Peoples' Rights has also clearly affirmed that:

The protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates both to Articles 20, 21, 22 and 24 of the African Charter.⁷²

As far as collective land rights are concerned, it recognised that:

Collective tenure is fundamental to most indigenous pastoralist and hunter-gatherer communities, and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure.⁷³

⁶⁷ See, for example, the HRC, *Concluding observations of the Human Rights Committee : Australia*, *op. cit.* footnote 66, paragraph 506 and following; HRC, *Concluding observations of the Human Rights Committee : Guyana*, 25 April 2000, UN document CCPR/C/79/Add.121, paragraph 21; and CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination : Democratic Republic of the Congo*, CERD/C/COD/CO/15, 17 August 2007, paragraph 18.

⁶⁸ HRC, *Concluding observations of the Human Rights Committee : Australia*, *op. cit.*

⁶⁹ HRC, *Concluding observations of the Human Rights Committee : Australia*, *ibid.*; CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination : Democratic Republic of the Congo*, *op. cit.*

⁷⁰ United Nations Declaration on the Rights of Indigenous Peoples, resolution adopted by the General Assembly ('UN Declaration'), 2 October 2007, UN document A/RES/61/295, article 26.

⁷¹ See the articles of the Declaration referred to in Box 2.

⁷² Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (May 2003), 2005, p 21.

⁷³ *Ibid.*, pp 21–22.

Box 2

Concluding observations of CERD of 17 August 2007⁷⁴

18. The Committee notes with concern that the rights of the Pygmies (Bambuti, Batwa and Bacwa) to own, exploit, control and use their lands, their resources and their communal territories are not guaranteed and that concessions are granted on the lands and territories of indigenous peoples without prior consultation. The Committee recommends that the State party take urgent and adequate measures to protect the rights of the Pygmies to land and:

- a) make provision for the forest rights of indigenous peoples in domestic legislation;
- b) register the ancestral lands of the Pygmies in the land registry;
- c) proclaim a new moratorium on forest lands;
- d) take the interests of the Pygmies and environmental conservation needs into account in matters of land use;
- e) provide domestic remedies in the event that the rights of indigenous peoples are violated; and
- f) ensure that article 4 of Ordinance-law No. 66-342 of 7 June 1966, on the prohibition of racism and tribalism, is not used to ban associations engaged in defending the rights of indigenous peoples. In addition, the Committee invites the State party to take account of its general recommendation No. 23 on indigenous peoples.

(Article 5)

19. The Committee remains concerned that Pygmies are subjected to marginalization and discrimination with regard to the enjoyment of their economic, social and cultural rights, in particular their access to education, health and the labour market. The Committee is particularly concerned at reports that Pygmies are sometimes subjected to forced labour. The Committee encourages the State party to intensify its efforts to improve the indigenous populations' enjoyment of economic, social and cultural rights and invites it in particular to take measures to guarantee their rights to work, decent working conditions and education and health.

(Article 5)

20. The Committee regrets that, as reported by the State party, the Congolese courts have practically no case law on discrimination due to a lack of complaints. The Committee requests the State party to include in its next periodic report statistical data regarding prosecutions initiated and sentences handed down for offences related to racial discrimination, to which the relevant provisions of existing domestic law have been applied. It wishes to remind the State party that the lack of complaints or court action by the victims of racial discrimination may be chiefly due to the absence of relevant specific legislation, unawareness of available remedies or the authorities' unwillingness to prosecute. It requests the State party to ensure that domestic law includes appropriate provisions and inform the public of all legal remedies available with regard to racial discrimination.

(Article 6)

21. The Committee notes with concern that, as recognized by the State party, the Convention and other texts and laws concerning racial discrimination have not been sufficiently publicized in the Democratic Republic of the Congo. The Committee invites the State party to integrate the Convention in programmes in schools and in courses, in particular for judges and prosecutors, staff of the armed forces, police, prison personnel, security forces and the media.

(Article 7)

⁷⁴ CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination : Democratic Republic of the Congo*, *op. cit.*, paragraphs 18–21, pp 4–5.

The Commission also pointed out that indigenous peoples in Africa:

have only, to a very limited extent, legal titles to their land as their customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land.⁷⁵

Lastly, it indicated that the denial of the customary rights of indigenous peoples constitutes a violation of their right to existence, to freely dispose of their wealth and natural resources and to economic, social and cultural development, as stated in articles 20, 21 and 22 of the African Charter on Human and Peoples' Rights.

As far as the close links between land and resources, ways of life and the cultural rights of indigenous peoples are concerned, the Commission has affirmed that:

Indigenous peoples experience cultural marginalisation, which has taken different forms and which is caused by a combination of factors. Loss of key productive resources has impacted negatively on indigenous peoples' cultures, denying them the right to maintain the livelihood of their own choice and to retain and develop their cultures and cultural identity according to their own wishes.⁷⁶

2.1 The right to free, prior and informed consent

There is one particularly important international standard in the area of land rights: the right for indigenous peoples to give or refuse to give their 'free, prior and informed consent' to activities that concern them, including on their land. This principle, often abbreviated as 'FPIC', is widely upheld in international jurisprudence.⁷⁷ The UN Declaration on the Rights of Indigenous Peoples also stipulates that:

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.⁷⁸

Furthermore, indigenous peoples who have had land expropriated without their free, prior and informed consent have the right to restitution of their ancestral lands. The alternative appropriate option is compensation, if possible in the form of lands. CERD especially calls upon States parties:

where [indigenous peoples] have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the

⁷⁵ *Ibid.*, p 21.

⁷⁶ *Ibid.*, p 119.

⁷⁷ For example, CERD has called on States to '[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent', CERD, *General Recommendation No. 23: Indigenous Peoples*, *op. cit.*, paragraph 4(d).

⁷⁸ UN Declaration on the Rights of Indigenous Peoples, article 11(2).

right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁷⁹

The UN Declaration also states the following:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.⁸⁰

In its third Periodic Report to the African Commission on Human and Peoples' Rights, the DRC stated that it guaranteed the right to individual and collective ownership in accordance with law or custom.⁸¹ It also stated that under the country's domestic legislation relating to expropriation for public use:

[n]o one shall be deprived of his property for public use and in return for a fair compensation paid beforehand under the conditions established by the law,

and that:

[n]o one's property can be attached except by virtue of a decision taken by a competent legal authority.⁸²

The DRC also maintained that it:

applies an international policy which consists in allowing each people to enjoy all its riches.⁸³

The DRC's Periodic Report to the African Commission further states that, in line with the guarantees provided in the Constitution,

[t]he State, in fulfilling its responsibilities, takes the cultural diversity of the country into account.⁸⁴

⁷⁹ CERD, *General Recommendation No. 23: Indigenous Peoples*, *op. cit.*, paragraph 5.

⁸⁰ UN Declaration, *op. cit.*, article 28.

⁸¹ Periodic Report of the Democratic Republic of the Congo to the African Commission on Human Rights and Peoples, June 2007, paragraphs 151–155, p.38, available at: http://www.achpr.org/english/state_reports/DRC/DRC_State%20Report.pdf.

⁸² *Ibid.* The possible forms of expropriation for public use are specified in articles 193 to 293 of the 1973 land tenure law and article 12, paragraph 3, of law 77/001 of 22 February 1977 on expropriation for public use.

⁸³ *Ibid.*, paragraph 206, p 49.

⁸⁴ *Ibid.*, paragraph 173, p 41.

According to the same report, the State has established a cultural policy and supports the development of traditional medicine.⁸⁵

However, it should be noted that, in flagrant violation of the rights established in international instruments to which the DRC is a party and the rights established in domestic law, the indigenous Bacwa, Batwa et Bambuti ('Pygmy') peoples of the DRC have been, and continue to be, dispossessed of their ancestral lands, territories and resources. As a consequence, they are poverty-stricken, their state of health and food insecurity have deteriorated and their physical, economic, cultural and spiritual integrity is constantly under threat to the point where their survival as distinct peoples is in peril.⁸⁶

As far as the statements concerning the guarantee of the right to property contained in the DRC's Periodic Report to the African Commission are concerned, it should be noted that the land rights of the Bacwa, Batwa and Bambuti peoples (the 'Pygmies') are not guaranteed under domestic law, be it written or customary.⁸⁷ And yet it is clear that traditionally the Bacwa, Batwa and Bambuti are the collective owners of their lands which they occupy or use in one way or another. However, DRC law does not permit collective property titles and only private individuals can submit a request for title. Furthermore, the procedure for doing so is long and arduous; it is thus not favourable to the aforementioned peoples because they do not have the means to acquire such titles. It is also difficult for them to go to the offices of the urban land administration services, which are situated in the principal towns of major conurbations, thus far from their traditional places of habitation. Lastly, the Bacwa, Batwa and Bambuti are often illiterate and thus unable to fill in the necessary forms and written requests for title.

One of the relevant provisions of the land tenure law stipulates that Congolese lands which have not yet been divided into parcels and those belonging to non-urban communities are governed by customary law. Unfortunately, the customary law of the non-indigenous communities (the Bantu, Nilotics and Sudanese) does not recognise the customary land tenure systems of the Bacwa, Batwa and Bambuti (the 'Pygmies'). As a logical consequence, during 'empty land inquiries' (*enquête de vacance*) or the public inquiry mechanism provided in the Forestry Code,⁸⁸ the lands belonging to these communities are often identified as unoccupied and classified as 'empty land'. They therefore enter into the private domain of the State and are allocated to other occupants.

⁸⁵ *Ibid.*

⁸⁶ See A Kwokwo Barume (2003), *Heading towards Extinction. Indigenous Rights in Africa: The Case of the Twa of the Kahuzi-Biega National Park, Democratic Republic of Congo*, see http://www.forestpeoples.org/publications/heading_twds_extinction_eng.html

⁸⁷ Note that article 53 of the 1973 land tenure law, in its current version, stipulates that the soil and subsoil belong to the State and that article 7 of the Congolese forestry law stipulates that the State is the sole owner of all forests and forestry resources. The State does not therefore recognise the customary land tenure of indigenous peoples and their rights of ownership as sources of legally protectable rights are thus denied to them; see above.

⁸⁸ Article 84 of the Congolese Forestry Code stipulates that forest concession contracts must be preceded by a public inquiry, conducted in the form and according to the procedure laid down in the ministerial order. The aim of the inquiry is to determine the nature and extent of any rights that might be held by third parties over the forest in question with a view to the possible payment of compensation. The amount of compensation is determined by amicable agreement or, failing that, by the courts. The payment of compensation renders the forest free and unencumbered in respect of all rights.

The DRC has neither delimited nor demarcated the lands and territories of the 'Pygmy' peoples and there are no mechanisms within domestic law to ensure that they can give their free, prior and informed consent to any decisions that concern them. Protected areas and concessions are therefore established on their lands and territories without consulting them or obtaining their consent and, what is more, without compensating them in any way.

That is what happened to the family of a Twa widow who were brutally evicted from their environment (the forest) when the Kahuzi–Biega National Park ('KBNP') was established in South Kivu. It was also the case for Pygmy families whose ancestral lands in Beni in North Kivu and in the Ituri district of Orientale Province were taken from them to become logging concessions.⁸⁹

It should also be noted that the African Commission on Human and Peoples' Rights was deeply concerned that the Twa had had their ancestral lands taken away from them to set up the KBNP without their consent and without being given any form of compensation.⁹⁰ The Commission has described the continual insecurity of tenure suffered by these communities in the following terms:

The Batwa/Bambutu have been driven out of their forests, with neither financial compensation nor compensation in terms of other cultivable land. A large number of Batwa/Bambutu thus find themselves landless and live as tenants on the land of others, who can evict them at any time.⁹¹

And reaches the following conclusion:

The Batwa in the north of the Kahuzi–Biega Park have settled on plots of land but these lands, officially unoccupied, may be allocated to someone else by the local authorities. The Batwa have no legal protection once neighbours from other ethnic groups decide to take their land or drive them out of their villages.⁹²

CERD, in one of its Concluding observations, noted with concern that in the DRC:

concessions are granted on the land and territories belonging to indigenous peoples without their prior consultation.⁹³

Neither the State nor logging companies consult local communities, including the Bacwa, Batwa and Bambutu peoples, at the time of allocating a concession or afterwards. This leads to disputes between these groups and the concession holders who disregard their rights and do not inform them of the boundaries of the concessions they have acquired. One example is the conflict that has arisen in the Bas Congo province between the Mbanda sawmill and the community living in

⁸⁹ Réseau des associations autochtones pygmées (2007), *Étude de cas sur le Code forestier congolais et les droits des peuples autochtones pygmées*, January 2007.

⁹⁰ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005), *op.cit.* footnote 72, p 26.

⁹¹ *Ibid.*, p 32.

⁹² *Idem.*, p 23.

⁹³ CERD, *Concluding Observations of Committee for the Elimination of All Forms of Racial Discrimination: Democratic Republic of Congo*, *op. cit.*, paragraph 18, p 4.

the Vungu Bunzi village; another is the conflict between local communities and the SIDEFOR and SAFBOIS logging companies in Orientale province.⁹⁴

In one of its Concluding observations on the DRC in 2003, the African Commission expressed concern about:

reports of ongoing serious violations of the human rights of pygmy/Batwa populations in DRC, particularly in eastern districts, included forced removal from their lands...⁹⁵

The DRC's Periodic Report to the African Commission notes that the State has taken steps to protect 'Pygmy' peoples in the Ituri district of Orientale province in eastern DRC.⁹⁶ However, the reality on the ground shows that they are clearly excluded from decisions that affect them and their lands within the process of converting forestry concession titles.⁹⁷ The law regulating this process stipulates that all titles that existed when the Forest Code became operational must be re-registered and reissued as new contracts in order to be considered legal.⁹⁸ Although the process is already underway, the State has still not carried out widespread and in-depth consultations with indigenous communities to ensure that their rights are guaranteed, even though the process has revealed that many concessions exist on indigenous peoples' lands⁹⁹ and has also shown that there are no measures available to help these communities to find other lands after their lands have been assigned to forestry concession holders. The Bacwa, Batwa and Bambuti populations, the 'Pygmies', in the DRC thus finds themselves dispersed around surrounding villages with no means of subsistence.

The situation is continuing to deteriorate because the regulations for implementing the Forestry Code are currently being drawn up without prior consultation with, or the participation of, the indigenous peoples. There is a strong risk that these regulations will be adopted and that, once implemented, the State will repeat and reinforce the exclusion that has already resulted in these peoples' lands being expropriated without compensation in order to establish protected areas and forestry concessions.¹⁰⁰

⁹⁴ CENADEP (oct. 2007), *La voix du paysan congolais*, 3^{ème} année, n° 9, Kinshasa, pp 10–11.

⁹⁵ African Commission on Human and Peoples' Rights (2003), *Concluding Observations on the Report of the Democratic Republic of Congo*, *op. cit.*, paragraph 3, p 4.

⁹⁶ Periodic Report of the Democratic Republic of the Congo to the African Commission on Human and Peoples' Rights, *op. cit.*, paragraphs 52–53, p 17.

⁹⁷ See CAMV (July 2007), *Le Forestier : Les communautés autochtones et locales, la gestion durable et décentralisée des forêts congolaises*, N° 1, DRC.

⁹⁸ Decree No. 05/116 of 24 October 2005 which set the terms for converting old forestry titles into forestry concession contracts and extended the moratorium in terms of granting titles for forest exploitation.

⁹⁹ Greenpeace (April 2007), *Carving up the Congo*, pp 82–85, available at: <http://www.greenpeace.org.uk/media/reports/carving-up-the-congo>

¹⁰⁰ In 2006, CERD recognised the urgency of the situation: In a letter sent under its early warning and urgent action procedure, it asked the DRC to '[i]ndicate whether legislation or national regulations require that indigenous peoples are informed, notified, consulted and/or prior informed consent is obtained from them before concessions to exploit resources on their land or territory are granted. Are there mechanisms or procedures in place which guarantee that the rights and interests of indigenous peoples are taken into consideration before concessions of this type are granted?'. See CERD, Letter reference NP/JF, dated 18 August 2006, to S.E.M. Antoine Mindua Kesia-Mbe, Ambassador Extraordinary and Plenipotentiary, Permanent Representative, Democratic Republic of Congo Permanent Mission to the United Nations. [Unofficial translation.]

Both the African Commission and CERD have found the lands belonging to the Bacwa, Batwa and Bambuti in the DRC to be under constant threat of encroachment. These 'Pygmy' peoples are facing serious problems in relation to their lands. Multinationals involved in prospecting and mining and infrastructure projects have developed action strategies in the DRC with the aim of exploiting the natural resources of the Congo as soon as conditions allow. That will inevitably lead to the destruction of the forests and thus of the Pygmies' means of survival.¹⁰¹

The DRC is seeking to implement an ambitious forestry reform plan with support from the World Bank, but these reforms are going ahead without the effective participation of indigenous peoples and in violation of their human rights. Even the World Bank Inspection Panel has sharply criticised the lack of consultation with 'Pygmy' peoples during the reforms already introduced.¹⁰²

¹⁰¹ *Ibid.*

¹⁰² The Inspection Panel, *Report No. 40746-ZR*, 31 August 2006, pp 55–54.

Concluding remarks

Measures must be taken to ensure that the Bacwa, Bambuti and Batwa can genuinely participate in decision-making and the management of indigenous lands in the DRC. The DRC Government, public institutions and companies from the private sector who exploit the country's forests must set in place procedures for consulting the 'Pygmy' communities. The capacity of government authorities at both local and national level to work with the Bacwa, Bambuti and Batwa communities must also be developed through the provision of support with mediation and conciliation processes. At the same time, activities to defend their rights should continue to be promoted by and for organisations from the Bacwa, Bambuti and Batwa communities.

The State should, as Erica-Irène A. Daes has suggested, show willingness 'to recognize and protect, to varying degrees, indigenous land rights through constitutional amendments, specific legislation, and sections within more general laws'. She goes on to say: 'A particularly notable example in recent years is the Constitution of Brazil, adopted in 1988. This Constitution incorporates significant provisions calling for the demarcation and protection of indigenous lands'.¹⁰³ The DRC Government could take inspiration from Brazil's example.

A great deal of work needs to be done to translate legal texts. Although the DRC has four national languages (Kikongo, Lingala, Swahili and Tshiluba), none of them is used as a working language in public administration. Since gaining independence in June 1960, the DRC has chosen to use French as its official language. More than 40 years on from independence, all legal texts and official documents are still only drawn up in French. This poses a problem with regard to the accessibility of legal texts for the population in general and for indigenous people in particular. Legal documents therefore need to be translated. Legal texts and regulatory acts currently in force should be disseminated and information campaigns should be organised for the population. Legal texts should also be translated into native languages so that indigenous people can understand them. The DRC authorities should therefore ensure that the Official Gazette is widely published in all national languages so that all citizens have access to legal information and can easily learn about it. If it is already difficult to obtain the Official Gazette in Kinshasa, the country's capital, what must it be like in indigenous and rural areas?

Jurisprudence and legal theory also have a role to play. Judges in the DRC should draw inspiration from the role played by judges in English-speaking countries. Doing so would mean that certain principles of jurisprudence could be judiciously implemented in order to find a solution to the stalemate that currently exists within the country's legal framework.¹⁰⁴ Judges would be able to make law based on solid in-depth arguments put forward in the course of judgment. In other words, jurisprudence would constitute a source of law that they would be obliged to apply. The authors of legal theory¹⁰⁵ should, for their part, regularly provide

¹⁰³ Erica-Irène A Daes (11 June 2001), *Indigenous peoples and their relationship to land*, E/CN.4/Sub.2/2001/21, p 35 § 105.

¹⁰⁴ In contrast to the current situation in the DRC where judges have to first apply the legislation voted in Parliament. It is only when there is no relevant legislation that they can turn to jurisprudence as a secondary source of law.

¹⁰⁵ Academic works containing the views of jurists which have been developed through reflecting on a rule or situation. While not confined to pedagogical discourse, legal theory is an integral part of the teaching of law.

comments on court rulings. They should go on to conduct an independent study into the evolution of Congolese customs with regard to land tenure. Lastly, all such legal theory should be centralised and studied by various specialists from the social sciences and humanities under the supervision of the current documentation service of the country's Supreme Court.

The indigenous Bacwa, Batwa and Bambuti peoples (the 'Pygmies') should carry on and step up their efforts to take the initiative for themselves in developing various projects and programmes to help safeguard their rights over their lands, territories and resources. In particular, they should draw up their own maps of their territories. They would then be able to provide proof and specific details of their traditional land tenure as well as their land use practices. This would greatly help to raise awareness among the population and give it a better understanding of indigenous land tenure; as a result, their rights over the land and its resources could be recognised and then legally protected. An example in point is Cameroon where, following determinations made as a result of community mapping of the area around the Campo Ma'an National Park, a development plan was approved by the Government of Cameroon. This has ensured that the access and use rights of the Bagyéli ('Pygmies') inside the Campo Ma'an National Park have been recognised and protected.¹⁰⁶

In conclusion, the marginalisation of the Bacwa, Bambuti and Batwa indigenous population in the DRC is a reality which ought to hold the attention of the country's authorities and civil society as well as its foreign partners. If this does not happen, the success of land tenure reform in the DRC will be seriously compromised.

¹⁰⁶ See Nelson (2007) *Securing indigenous land rights in the Cameroon oil pipeline zone* http://www.forestpeoples.org/documents/africa/cameroon_pipeline_jul07_eng.pdf; and Nelson and Messe (2008) *Indigenous peoples' participation in mapping of traditional forest resources for sustainable livelihoods and great ape conservation. Report to the United Nations Environment Programme (UNEP)* http://www.forestpeoples.org/documents/africa/cameroon_unep_report_nov08_eng.pdf

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Timeline of historical and legal developments pertaining to land law in DRC

2 million years ago	The territory which is today the DRC was first inhabited by the Bacwa, Bambuti and Batwa
2000 BC	The first wave of migration by other groups (Bantu, Nilotics and Sudanese)
800-900	Last waves of migration by the Bantu, Nilotics and Sudanese
1500-1600	First contacts between Europeans and the Bantu, Nilotic and Sudanese empires
1884	The Berlin Conference
1885	<ul style="list-style-type: none">• Creation of the Congo Free State (CFS) by Leopold II.• 1 July - European land tenure imported by means of an ordinance, later supplemented by decrees dated 22 August 1885, 14 September 1886 and 3 June 1906• 1 August - End of the contracts concluded with the indigenous groups. The earlier contracts are registered and brought under State legislation. The CFS in theory recognises the right of the indigenous communities to collectively own the lands they have traditionally used. From now on empty land forms part of the State domain
1908	The CFS becomes a colony of Belgium. The Kingdom of Belgium promises to respect existing practices and all rights acquired
1912	31 July - A decree is issued stipulating that all ownerless things belong to the colony, except as far as respect for customary indigenous rights is concerned

1920	<ul style="list-style-type: none"> • 6 February - Law on the transfer of immovable property. Private ownership of land can only be established by means of a certificate of registration issued by a registrar of land titles • 20 July - A decree regulating the emphyteusis system is issued. Legislation preserving the assets of the Belgian colony by ensuring that agricultural and industrial land is not granted with absolute title (<i>en pleine propriété</i>) and bringing emphyteusis into general use 		
1960	The colonial land tenure system is retained	580 Bambuti/Batwa families, i.e. between 3,000 and 6,000 individuals, are evicted from the Kahuzi-Biega Forest without being paid compensation or assigned new lands	<p>19 June - Extension of the land tenure system inherited from the Belgian colony</p> <p>30 June - Independence of the Republic of the Congo (it became the Democratic Republic of the Congo in 1965)</p>
1966			<p>7 June - Introduction of the Bakajika Law assuring the DRC the entirety of its ownership rights over its domain and full sovereignty in the granting of land, forestry and mining rights throughout the whole of its territory. It nullifies all transfers and concessions successively granted prior to 30 June 1960</p>
1970			
1973			<p>Break with the colonial land tenure system. A law establishing the general property system, land and real estate system and security interest system (supplemented and modified by a law of 1980) makes the State the single sole owner of the soil and sub-soil of which it has exclusive, inalienable and imprescriptible ownership</p>
1977	<p>Law N° 77-001 of 22 February 1977 on expropriation for public use abrogating the decree of 24 July 1956. This law establishes the procedure to be followed with regard to expropriation and specifies who is entitled to resort to expropriation, what goods or property can be expropriated and on what grounds expropriation is legitimate</p>		
2002	<p>Reform of the land tenure system</p>		



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