

Chapter Nine

Land rights in the Democratic Republic of Congo – A new model of rights for forest-dependent communities?

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In the Democratic Republic of Congo (DRC), land tenure – particularly in the forest zones – is at a critical juncture. The next few years will see major decisions being taken that will have a huge impact on rural peoples' access to land. Although there is not (as yet) a large-scale movement for land reform, and the state is not showing an inclination to review its overall land policy, processes are underway via specific areas of legislative and policy reform that will have a significant effect on tenure and land-use. Indeed, large areas of land are not yet formally allocated to particular uses, and various forms of customary rights hold sway in practice in many regions; this means that there is a real opportunity for the DRC to institute a system of decision-making in relation to land in which the rights of local communities are genuinely taken into account.

However, the government is under intensive lobbying from economic actors interested in the country's extensive mineral, timber and land wealth (RAID 2004, Trefon 2007), and a number of donors and advisors are pushing to have the DRC rebuild its economy through income generated from the allocation of exploitation rights to natural resources¹. These pressures could result in an institutionalisation of the extinction of traditional land rights and a very uncertain future for DRC's rural poor (World Bank 2007).

Within the current formal legislation of the DRC, there is a great deal of superposition (including contradictory features) in the legal-national allocation of rights to land and resources. In turn, this formal legislation is itself superimposed on – and frequently extinguishes – locally-based traditional and customary systems of land rights (further, more than one customary system frequently operates in the same space). The challenge of multiple and inconsistent tenure systems is by no means unique to the Congo. In fact, the same key questions and issues have arisen in discussions of land rights and land-use planning in many other areas of Africa.

However, the situation in DRC is further complicated by the fact that it is slowly emerging from many years of conflict and instability², which followed a grim colonial regime widely acknowledged to be spectacularly corrupt (Wrong 2001, Pottier 2003). Some of the origins of modern-day conflicts over land, particularly in relation to ethnicity and nationality, originated in colonial times and have been

¹ An example of the approach of many donors to DRC's development can be seen in the joint IDA-IMF staff advisory note on DRC's Poverty Reduction and Growth Strategy Paper (World Bank Report No. 39615-ZR): 'The [mining] sector is particularly important because it has the potential to attract private capital in the near future, and to kick-start private sector-led growth'.

² See, for example, the International Crisis Group's website:
http://www.crisisgroup.org/home/index.cfm?id=2829&gclid=CJ_X1On1vp0CFZoU4wodMGhWjA

exacerbated by the more recent conflicts (Putzel 2009). In addition, a large proportion of DRC's territory still remains as tropical high forest, an ecosystem in which there has not yet been a successful example of a modern African state reconciling the needs and rights of its citizens with the demands of external actors to make use of its resources³.

DRC today is still in the process of rewriting its formal legislation and rebuilding a state. Over the last few years, almost every major piece of legislation that affects land tenure has been rewritten. However, this process has not been well co-ordinated and so conflicting and ambiguous land tenure systems remain in force (Ntampaka 2008). Nonetheless, because the system is not yet fully in place, and due to increasing pressure and activism from a number of civil society groups in DRC, there is scope for Congo to become an innovator amongst African forest states and, (as implied earlier), to develop models of recognition of tenure and rights that enable its peoples to determine and direct their own development.

This chapter presents the current situation with regard to land rights in the Democratic Republic of Congo, with specific reference to the processes connected to the forest sector. This focus arises in part from the experiences of the author (who has been working with many outstanding Congolese NGO colleagues in the forest sector for the last seven years), and partly because the forest sector is usefully illustrative of a number of the key issues in land reform within this large and complex nation-state.

The chapter proceeds as follows. I start with a short summary of some of the main issues in current debates on African land reform and land rights that are relevant to DRC's context. The chapter then traces the history of land tenure and land rights in the DRC from the colonial period to the present day. Having explored the origins of the current land rights context, I identify certain ongoing processes around forest policy and legislation in particular. Through examining these processes, and other drivers and pressures on land tenure in DRC, the chapter considers the role of civil society in responding to and influencing land-based change. In particular, the role of external actors, (such as donors and private investors), is noted, in order to assess how civil society can gain traction in influencing the DRC government on land issues.

Common Land Rights Challenges in Africa

In a large number of African countries, the officially recognised land tenure system gives a rather simplified picture, as it misrepresents the enormous complexity (in practice) of land rights. The layers of colonial and post-colonial legislation on land, land-use and resources overlap with a vast range of traditional systems of land ownership and control (Ellsworth 2004). These systems are slowly becoming better understood by decision makers, particularly in relation to dry-land areas, but not with regard to the continent's forest regions.

Key challenges involved in reconciling local customary tenure systems with formal state systems include the following:

- Confusions between private property, common property and open access systems (Alden Wily 2006). Most African land rights systems include some form of common property, which sets clear rules and guidelines on land

³ 'It is true that more than a century of centralised forest management... has not shown evidence of great efficiency in the area of "good management" or of contributing to the well-being of the inhabitants of forest areas' (Author's translation) (Karsenty 1999,147). Also see Odera (2004).

ownership and access rights for a limited group or number of groups of people (Pottier 2005). This is absolutely different to an open access regime, in which everyone has access and no-one has control over that access. The confusion between complex common property regimes and open access systems is frequently used as justification for the extinction of rights (Chapin 2004);

- The challenge of developing systems which take into account the diversity of traditional rights and control of land and natural resources, and the fact that these traditional systems have interacted with and been influenced by colonial and post-colonial formal legal land tenure regimes (Cousins and Claasens 2006, Forest Trends 2002);
- The powers and functions of ‘customary authorities’ (Cousins and Claasens 2006). In the context of forests, this is particularly important, as hunter-gatherer societies which do not have assigned ‘customary leaders’ regularly end up being ignored in favour of more hierarchical neighbouring communities which do (Couillard et al.);
- The dangers of granting individual private titles to land (Quan 2003, Peters 2007), particularly land which is traditionally managed under a type of common property regime⁴; and
- The problems in formal titling of customary lands, even if designed to recognise traditional ownership – unless dealt with extremely carefully, this can strengthen the position of the title holder in relation to all the other people who also have a range of access and use rights to the same lands (Richards 1997).⁵

As will be seen, all these challenges apply in the DRC, along with the additional complexity of conflict and the fuelling of tensions around land and land tenure in the context of Congo’s ‘geological scandal’: its untold mineral and natural resource wealth, which has exacerbated the conflict and the competition for control over land⁶. Indeed, DRC has suffered from its resource curse right from its origins: the term ‘geological scandal’ was first coined by a Belgian colonist expressing satisfaction at the riches he had gained control of via Leopold’s seizure of the Congo (Turner 2007).

History of Land Tenure in the Congo

The colonial period

Modern Congolese problems related to ownership and control of land began when a vast area of territory, which included most of what is now DRC, became virtually the private estate of Leopold II of Belgium. The “Congo Free State” set the scene for

⁴ This has been noted throughout the world, not only in Africa. For example, in the case of Latin America, it has been explained that ‘policies favouring individual resource privatisation have resulted in high environmental and welfare costs’ (Richards 1997,2).

⁵ For a good example of this from the Ivory Coast, where a well-intentioned land reform process that was supposed to recognise customary rights ended up creating further conflicts and power imbalance, see Van den Brink et al. (2006). A succinct account of the dangers of ascribing titles to traditional land rights is given in Nyamu-Musembi (2006) and Pottier (2004)

⁶ See <http://www.fataltransactions.org/What-Where/Fatal-Countries/The-Democratic-Republic-of-Congo-DRC>; and Human Rights Watch (2004).

decades of dispossession, as large sweeps of land were declared property of the Belgian crown and huge areas were given out in concessions to European private companies. The many peoples who lived there when Europeans first arrived were treated as squatters and slaves on their own land (Hochschild 1988).

When the Congo Free State was established in 1885, all land that was considered to be ‘without master’ was declared property of the state (Brausch 1961). Then, as now, there is little if any territory that lies within the borders of modern-day DRC that genuinely was (or is) ‘without master’ and in fact a complex range of traditional rights applied and still apply to its land and resources (Mavunda 2007). The original legislation of 1885 did mention customary rights of the ‘Natives’ and a right of occupation, but this was not defined any further and was always subject to a decision by a Belgian administrator (Brausch 1961).

The result of this was that ‘the whole territory was considered a kind of private property of the king’ (Beke 1994,58). Congo’s land became a mixture of crown lands, belonging to Leopold; concessions, frequently vast, were licensed to private, usually Belgian, companies, (with the State – meaning Leopold – owning 50% of the shares); private land titles; and small areas of land subject to ‘customary rights’. Congolese peoples were allowed to ‘occupy’ land but only Europeans could own land. Private land titles and concessions were issued by the state, and the administrators who took such decisions were, in theory, expected to respect ‘native land rights’⁷. In fact, this rarely happened and Congolese peoples had no redress for their dispossession – or for the horrors of slavery and torture to which they were subjected (Hochschild 1998). As Pottier (2004) points out, European concepts of legal tenure (which were assumed to be universal) became central to the land laws of every African colony. In particular, the colonial authorities assumed that the European concept of proprietary ownership covered the full range of customary land rights.

In 1908, when the Belgian state formally took over control of Congo from Leopold’s private state, the rules covering land tenure and rights to ownership did not change in any substantial way. A decree passed in 1906 was supposed, at least formally, to correct some of the extremes of the Congo Free State, through the delimitation of ‘land occupied by natives’. However, the practical implementation of this decree resulted in only the land actually under cultivation or occupied directly by people being recognised – so fallow land and the areas of forest lands owned or used by people for other purposes were excluded (Beke 1994). This completely ignored the hunting and gathering practices of many communities and in particular the semi-nomadic peoples collectively known as ‘pygmies’, ‘Batwa’ or ‘Bambuti’; and it failed to recognise the customary systems of land tenure and rights to common resources (Nobirabo 2009). As we will see, this pattern is still being repeated in DRC today.

In 1925, a decree creating Virunga National Park was the first example of another category of land that had a substantial impact on local people: protected areas. In 1934, the National Parks Institute of the Belgian Congo (IPNCB) was established to oversee the burgeoning number of national parks (Harroy 1993), which numbered seven by the end of the 1930s. Within park boundaries, no human activity other than research was permitted. Hence, land rights and user rights of local people were effectively extinguished in these areas and national parks have been flashpoints for conflict over land ever since their initial creation (Barume 2000).

By independence in 1960, some five million hectares of land was ceded to European owners through cessions or concessions (Mavunda 2007). ‘Customary land’

⁷ For a detailed explanation of colonial land legislation, see Nobirabo (2009).

included merely small areas of land around villages, settlements and cultivated fields – other land was considered as ‘vacant and so the property of the state.

Overall, as USAID and WRI (2001) have noted,

The colonial powers of Central Africa left an unstable and flawed foundation upon which to build a modern State. Economic structures privileged foreign investment and extractive industry, and little was done to build local governance institutions and the capacity of citizens to participate effectively in policy making.

Land rights post-independence and in the Mobutu era

In the first tumultuous years following independence, the new state maintained the existing land legislation, but in 1966 previous legislation was swept away by the ‘Bakajika Law’⁸, which asserted state ownership of all land, forest and mineral resources, and cancelled any concession or title granted before independence on 30th June 1960.

In 1973, this was reinforced with a land law which reasserted total state ownership of the land⁹. This land law, “*Loi Foncière*”, amended slightly in 1980, undermined most previous formal recognition of ‘customary rights’. Its only reference to customary rights was to suggest that these rights could apply to land which was occupied or cultivated by local communities¹⁰. The details as to what specific rights people could enjoy on this customary land were supposed to be indicated by presidential decree, but such decree was never forthcoming. The rest of the legislation, based – as it explained in the preamble – on existing colonial legislation, set up the conditions by which concessions of state land could be allocated to economic actors. Although the purported objective of declaring land to be the property of the state was to regain local Congolese control, in effect the control remained in the hands of a very limited number of Congolese people (Askin 1990, Wrong 2001). And in those hands, the pattern of ceding large areas of land for private aggrandisement, established in the era of Leopold, appeared to continue with no substantive change throughout the 1970s and early 1980s (CIFOR et al. 2007).

As Daley and Hobley (2005,22) indicate:

Where states hold radical title to land (whether in whole countries, as in much of Africa...), rights may be notionally allocated for the wider public good through the granting of leases or concessions to foreign investors or transnational corporations (for mining, logging, tourism etc.), yet questions frequently arise about who actually benefits from these arrangements.

⁸ Bakajika Law 1966 : Ordonnance – loi N° 66 / 343, 7th June 1966 assurant à la république Démocratique du Congo la plénitude de ses droits de propriété sur son domaine et la pleine souveraineté dans la concession des droits fonciers, forestiers et miniers sur toute l’étendu de son territoire (*Law assuring to the DRC full property rights over its domain and complete sovereignty in the concession of land, forest and mining rights over its whole territory*. Author’s translation).

⁹ The Land Law of 1973 (Loi No 73-021 du 20 juillet 1973 portant régime général des biens, régime foncier et immobilier et régime des sûretés), Article 53 states: ‘Le sol est la propriété exclusive, inaliénable et imprescriptible de l’Etat’ (*The land is the exclusive, inalienable and imprescriptible property of the state*. Author’s translation).

¹⁰ Articles 387-9 of the Loi Foncière.

In this regard, Wilson (2007) argues there are structural reasons why those that actually benefit will almost invariably constitute national political and economic elites. And this has proven to be the case in parts of Congo, as van Acker (2000,6) explains, ‘the law created the possibility to turn economic assets into political ones that could be used to reward loyal clients of the state’.

In other economic sectors as well, even when new legislation was passed, it tended to retain the shape of colonial legislation and did not challenge the prevailing models of power, land tenure and control. Mining, for example, was subject to a number of new laws¹¹, but these were not substantially different to what went before. Importantly, forests remained governed by a colonial forest code from 1949¹², which did recognise ‘indigenous domain’ in certain categories of forest – but this was then annulled by the changes in land legislation detailed above. In 1973, some of the protected areas set up in the 1930s were further extended. Peoples living in these areas, particularly in Kahuzi-Biega and Virunga in the east, were evicted from their homes and have lived ever since on the fringes of their neighbours’ lands (Barume 2003).

By the outbreak of the first wave of conflict to strike Congo in 1996, the formal situation was that communities had almost no rights to land at all, and large concessions for forestry activities, mining and agriculture were allocated to national and foreign-owned businesses: this duplicated the situation as it existed on the eve of independence in 1960. In practice, at a local level, customary systems – somewhat changed and some would say distorted by interaction with the colonial and then post-colonial states – operated in most areas (Leisz 1998); and many rural communities are still astonished even today when they are told that the land that they consider to be theirs is actually, in formal legislation, not¹³.

Land Rights in the Third Republic¹⁴ – Present-day DRC

The cease-fire in 2002 marked the end of a conflict in DRC that, by that date, had claimed over three million lives, (by 2009, according to some estimates, this grim figure reached 5.4 million – International Rescue Committee 2008 – and it continues to climb) The UN Security Council Expert Panel on Illegal Exploitation of Natural Resources in DRC clearly recognises the dangers that uncontrolled re-activation of the natural resources sectors in DRC would present¹⁵, and the capture and control of valuable natural resources is still a key factor in the continued insecurity in DRC

¹¹ See, for example, the Mining Code of 1981: Ordonnance-loi No 81-013 du 02 avril 1981 portant législation générale sur les mines et les hydrocarbures.

¹² Décret du 11 avril 1949 portant code forestier.

¹³ In a community meeting in Bandundu in January 2009, community members meeting with senior Ministry of the Environment officials told them that if they were here to pretend that the community land was the property of the government, they had better never return to that community again (M Yela, personal communication).

¹⁴ In the DRC, since independence, there have been three constitutions, (and one transitional constitution during the war years). The first in 1960 established the DRC as an independent state – the First Republic. The second in 1974 changed the country’s name to Zaire and established the Second Republic. The most recent, replacing a Transitional Constitution that operated between 2003 and 2006 is the Constitution of 2006. Hence, Congolese citizens describe this period in their post-colonial history as the Third Republic.

¹⁵ UN Security Council Resolution 1457, January 2003, New York.

(Grignon 2009). Thus ownership, access to and control of land (and the natural resources associated with them) remain central to peace *and* policy processes. However, as we shall see, there has been reluctance on the part of the state (and of the donors supporting it) to address wholesale, issues of land tenure and to reform the system of recognition of land rights.

At the same time as the peace negotiations were going on, donors and external actors were encouraging the existing Transitional Government to institute new legislation, particularly in relation to natural resources¹⁶. Indeed, the passage of this legislation, particularly concerning forest and mining resources, was made a condition for the continued release of donor support, at least in the case of the World Bank¹⁷. Thus a Forest Code¹⁸ and a Mining Code¹⁹ were both passed in 2002 by the unelected Transitional Government. Both were seen as key by donors and by the government itself for the ‘relaunch’ of the Congolese economy²⁰ and both could potentially have major implications for land use and land tenure. As Trefon (2007,101) explains:

The World Bank’s position — shared by other major actors such as the European Union, the United States and Belgium — is that stability in post-election DRC will be largely contingent upon improved management of the country’s outstanding natural resources. There is an emerging consensus that this wealth could help kick-start the formal economy and could be a basis for reconstruction if major changes in the political economy of the country are implemented along with increased transparency and accountability. State control over natural resources, in partnership with responsible private sector actors, could thus contribute to sustainable peace and development.

In 2006, a new Constitution was enacted. This reiterated state control of land and resources, but had a slightly different nuance to the Bakajika Law that had gone before²¹. In particular, the Congolese State now exercises ‘sovereignty’ over lands and resources rather than being ‘proprietor. The Constitution also recognises individual and collective property rights, obtained either through formal law or customary law²². Some civil society groups are exploring the ways in which this change in tone might serve as a legal basis for claiming land rights, particularly for those evicted from national parks during the Mobutu era. However, the Constitution is vague about the definitions of such rights and the Codes that lay out the details of the law do not address it. The Land Law of 1973 still stands, with its 1980 amendments, and although a process to develop a new land law has been mooted, no concrete

¹⁶ See, for example, the Aide Memoire from the World Bank Mission de Suivi Sectoriel, 15th-27th April 2002.

¹⁷ World Bank, Report and Recommendation of the President of the IDA to the Executive Directors on a Proposed Credit of SDR \$360.4 to DRC for an Economic Recovery Credit, May 17, 2002, Washington DC.

¹⁸ Loi no 011/2002 portant Code Forestier.

¹⁹ Loi no 007/2002 du 11 juillet 2002 portant Code Minier.

²⁰ See for example Malele (2007,9): ‘La politique nationale en matière de gestion des ressources forestières vise à promouvoir une exploitation forestière basée sur un rendement soutenu et accru, appuyé par une industrie forestière forte et performante en vue d’accroître la contribution du secteur au développement socioéconomique du pays’.

²¹ Constitution of the Democratic Republic of Congo, Article 9: ‘L’Etat exerce une souveraineté permanente notamment sur le sol, le sous-sol, les eaux et les forêts, sur les espaces aérien, fluvial, lacustre et maritime congolais ainsi que sur la mer territoriale congolaise et sur le plateau continental’.

²² Article 34: ‘L’Etat garantit le droit à la propriété individuelle ou collective, acquis conformément à la loi ou à la coutume’.

action has been taken. Texts of a Nature Conservation Code and an Agriculture Code are being considered at present, which may also have an impact.

There is though great reluctance on the part of the government to openly confront the implications of each of these codes for land tenure and land rights²³ or to launch a full-scale discussion. This may be because relevant decision-makers are in agreement with the following sentiments expressed by Brown et al. (2003,2):

Land reform in such a context (land managed extensively and often still in relative surplus) has rarely worked to the benefit of local communities, especially the poor. Given prevailing circumstances within the sub-region, even a reformist government might be forgiven for hesitating to take on such a bold agenda.

On the other hand, there are a number of other factors that might make decision-makers hesitate and each of these is worth exploring in the balance of this section.

Of great significance is the question of 'surplus'. In certain parts of the country, land is (by any standards) not in surplus and is a strong source of local conflicts²⁴. These conflicts are, in addition, being exacerbated by debates around ethnicity and nationality²⁵. Country-wide, in order to appreciate whether the presumption of 'surplus' applies, it is important to consider how specific land is used by the people residing there. According to the current literature, forest areas in the Congo Basin where families are living and dependent upon forest-based livelihoods range from as little as 0.5 to 3 hectares of cultivated land per household in some agricultural communities, (this is usually associated with an additional 15-520 km² of hunting area used by the same families), while hunter-gather communities may use between 120-4831 km² of land to meet their livelihood needs²⁶. Thus what appears to be unmanaged land (i.e. 'without master') is rarely if ever so, and even though land may be being managed extensively, large areas are required to maintain existing communities.

Another aspect of land tenure that the state appears reluctant to engage with is women's access to land. Whether in terms of officially recognised customary law²⁷ or formal law, women are near invisible in discussions about land tenure in DRC and current (and future) steps towards land reform risk continuing to ignore women. This is despite the existence of patterns of matrilineal succession and control of land in

²³ At a recent meeting held in Kinshasa in 2009, which brought together senior officials from the ministries of agriculture, mines, lands, territorial administration and forests, all of the participants from the different ministries expressed surprise and concern that each of their ministries were dealing with land rights and none of them had really considered what those rights actually involved (A Barume, personal communication)..

²⁴ See, for example,

http://www.royalafricansociety.org/index.php?option=com_content&task=view&id=457

²⁵ See Putzel et al. (2008) for a history of the links between land, ethnicity and conflict in Eastern DRC.

²⁶ For a detailed explanation of the origins of these figures and the caveats required when comparing them, refer to Hoare (2007b).

²⁷ In the case of the DRC, the formal recognition of customary rights has relatively limited scope at present. Some authors, such as Mpoyi (2005), suggest that there are sufficient safeguards within the formal legislation to include customary law, which serves as an auxiliary source of law to the formal legislation passed by parliament. However, there has yet to be a successful case in DRC of a community asserting customary rights in the face of a formal land title or an agricultural, forest or mining concession allocated on land to which customary rights may apply.

certain parts of the country²⁸ where the central importance of women in land issues often prevails (Sweetman 2006). Women's activism within Congolese civil society to date has tended to be around issues of sexual violence²⁹ – unsurprising given the current context – and the Congolese women's movement has not yet taken up land as a key issue³⁰. In the most substantial examination of Congolese women's involvement in relation to forests (Malele 2007), land tenure and resource access is not mentioned at all.

A further aspect of land rights that many African states have been nervous about, and which has been the source of much controversy in DRC, is that of indigenous peoples (in the DRC context, these peoples are known as 'Pygmies', 'Batwa' or 'Bambuti'. These peoples tend to be marginalised even more so than many others in Congolese society and are particularly so when it comes to access to and control of land (Barume 2000, Kenrich and Lewis 2001). Groups of forest peoples (and organisations supporting them) have been particularly active and vocal within DRC and official discourse and documentation is changing as a result; but the issue of indigeneity and land rights remains a highly sensitive and contested one at national level. This is considered later in the chapter, in the context of the forest legislation in particular.

In addition, it is worth examining why a state might wish to review land rights. In most countries in Southern Africa, there are fundamental questions about land *reform*, notably changing existing formally-recognised ownership and control of land in a redistributive manner. In the case of DRC, the legislative and policy framework is still being developed, almost no on-the-ground enforcement of existing law is taking place, and – in many parts of the country – communities have a strong sense of ownership and control of land. The debate in Congo at present is between the competing demands of *recognising* existing patterns of tenure, control and use in an equitable way, incorporating local and "customary" models of management, and of enshrining a tenure model that allows major economic actors to have effective control of land in such a way that allows them to generate substantial incomes. Thus the debate is not yet about land reform (as the legislative structure is not yet fully in place) but rather one about what model of land tenure should be established as part of that legislative framework.

Many of the state actors and the international actors supporting the state consider the last option (i.e. a tenure model based on private concessions) to be of critical importance to rebuilding the state. Some of these actors are acting in good faith, genuinely believing in that model of economic development. Others are interested in the astonishing opportunities for personal gain that are available through a concessionary system. Hence, there is insignificant incentive for the state to relinquish its hold on land and the associated resources. Further, DRC is a country in which, in most contexts related to natural resources, 'the legal actors are acting illegally (or inappropriately)' (Sunman 2007,40) and in which there is minimal incentive to change this position.

²⁸ In Bas Congo, land inheritance is by matrilineal succession and women play an important role in decision making over land allocation. However, in any official meeting or discussion with 'community representatives', it tends to be the (male) chief who is invited and not the women from the clans who are part of the traditional decision-making system.

²⁹ See, for example, <http://www.fidh.org/Crimes-of-sexual-violence-in-DRC>.

³⁰ For one of the more comprehensive lists of women's groups in DRC, see http://www.peacewomen.org/contacts/africa/DRC/drc_index.html. It is notable that none of these groups have land or natural resources as an area of work.

Beyond the current forms of land use and management as well as the unwillingness by the state to engage in fundamental reform, there are increasing external pressures on DRC's land and resources. The demand for land for the cultivation of bio-fuels, for example, is becoming increasingly important, with serious interest from a large number of commercial actors in large scale land purchase or concessions³¹. Land for agricultural production is also in great demand, and some investors are increasingly looking towards countries such as DRC for land utilisation³². As one large company that has recently purchased some 100,000 hectares of Congolese land says: 'We are very enthusiastic about ... the implementation of large-scale mechanized farming in the Democratic Republic of Congo'³³. In the weak tenure context of DRC, this could offer major challenges to the rural poor and threaten them with further dispossession. It also provides further incentive to maintain state control of land and by extension state control of profits obtained from issuing concessions.

Mining poses a significant challenge to any discussion about land tenure and rights. As one mining industry website outlines, 'the DRC holds enormous upside and has the potential to become the Saudi Arabia of the mining industry' – the same mining industry which has been guilty of 'high-profile blunders, such as the killing of civilians by overzealous security forces or the provision of support to questionable militias or rebel forces'³⁴. The levels of interest in mining and the sums of money involved are extraordinary³⁵ and this has resulted in a process (around the conversion of mining contracts from titles allocated under the old legislation to concession contracts regulated by the new mining code) that has been highly controversial and, in the view of many observers, unjust³⁶.

In the forest sector, land and resource rights are particularly strongly contested. An estimated forty million people in DRC depend on forests for their livelihoods (CIFOR et al. 2007) and forests are central to the cultural and spiritual life of many Congolese peoples (Peterson 2000). Foreign actors are interested in forest lands for the sake of the minerals underneath them and their potential for agriculture, but are also intensely focused on the forest resources themselves, notably for timber and – more recently – for the potential they present for storing carbon (Hoare 2007a). Climate change may have huge implications for the land rights of forest people in Congo as the debate heats up around the rights to own and control the carbon represented by millions of hectares of forest lands³⁷. As Trefon (2007,109) explains in relation to forest lands: 'There is no clearly defined set of rules in these spaces because in the context of state failure and economic crisis, whoever has the slightest form of power or authority exploits it to maximise personal gain'. In the face of this,

³¹ For example, in July 2009 the Chinese company ZTE Agribusiness announced its agreement with the Congolese government to plant one million hectares of land with oil palm.

³² See, for example <http://news.bbc.co.uk/1/hi/business/8150241.stm>. A range of investors from countries with insufficient agricultural land are looking to sub-Saharan Africa for areas to cultivate food.

³³ See: <http://www.istockanalyst.com/article/viewiStockNews/articleid/3459566>

³⁴ Stephen Bailey (2006). Available at: <http://www.resourceinvestor.com/News/2006/3/Pages/The-DRC--Key-Challenges-and-Success-Strategies-for.aspx>

³⁵ See, for example: <http://www.miningtopnews.com/landmark-elections-could-spark-drc-mining-boom.html>

³⁶ See, for example, <http://www.fataltransactions.org/What-Where/Fatal-Countries/The-Democratic-Republic-of-Congo-DRC>

³⁷ See for example a declaration from indigenous peoples in DRC on REDD: [http://www.rainforestfoundationuk.org/files/Declaration%20Atelier%20Kinshasa%20\(Nov%2018-20\)%20signed%20Eng.pdf](http://www.rainforestfoundationuk.org/files/Declaration%20Atelier%20Kinshasa%20(Nov%2018-20)%20signed%20Eng.pdf)

civil society has been particularly active in a sector that is so close to the lives and livelihoods of many and so under scrutiny from the outside. Because of this, the rest of this chapter will explore the specific case of the forest sector and the way that Congolese civil society has used the spotlight thrown on forests to highlight the core issues of land tenure and land and resource rights.

Forest Legislation in DRC in Context: The Congo Basin Region

In order to better understand forests and their impact on land tenure in DRC, it is necessary to place them within the broader context of the Congo Basin. DRC is a signatory to the COMIFAC Treaty (Commission for Forests of Central Africa), which commits all nine signatory states to a 'Convergence Plan'³⁸ in which they are expected to harmonise their forest policy and legislation. Hence what is happening elsewhere in the region is highly relevant for Congo. Furthermore, as we shall see later, initiatives that are tried out in one Congo Basin country have a great tendency to be cut and pasted into another³⁹. DRC, emerging as it is from years of conflict, is in a situation where its legislation and the 'reform' of its forest sector (along with the resulting impacts on land) are considered to be somewhat 'behind' those of its neighbours. A brief exploration of the situation in those neighbouring countries is thus worthwhile, as some actors believe that DRC's future policy trajectory should be in the same direction.

As we have seen in DRC, much of the current legislation affecting forests in Central Africa is an almost direct descendant of colonial forest and wildlife legislation⁴⁰. The Central African states have a varied colonial legacy, because together they have been subject to colonisation by all the European powers involved in Africa save Portugal. Each of the colonial states, in search of resources (rubber in the case of DRC) (Sakata 2008), implemented legislation that asserted tight controls and restricted access of the peoples living there to their resources for basic subsistence purposes only (Davidson 1978).

Many features were common to all the models of colonial forest management and most of these still persist to today (Colchester et al. 1998). These were: identification of forest lands as being the property of or under the management of the state⁴¹; extinction of any traditional forest rights⁴² other than user rights for basic

³⁸ See: http://www.comifac.org/plandeconvergence/comifac2/docscmif/docs-inst/plan_de_convergence_francais_11_07_04.pdf

³⁹ In particular, Congo Basin countries have been repeatedly advised to 'learn from Cameroon', which has been held up as an example of good forest policy. Greenpeace (2007a) has an interesting alternative perspective on this.

⁴⁰ Similar patterns can be seen in Southern Africa (Murombedzi 2003), Malaysia, (Doolittle 2001) and the Philippines (Minority Rights Group 2002).

⁴¹ This state ownership of forest lands has been a feature of European law for a long time, and consequently was also for Europe's colonies (White and Martin 2002). During the brief period of German colonial rule in Cameroon, all land not titled was deemed property of the state. After the handover of Cameroon to France and the United Kingdom, in the part of Cameroon administered by France, the German system persisted with all 'forests vacant and without master' declared property of the state. In the parts held by Britain, some land was officially left as property of communities, but other areas of forest were declared as Forest Reserves under state management (Smith 2005, Colchester et al. 2006). In the whole of French occupied Central Africa the emphasis on demonstrating that land should be free of owners in order to become property of the state shifted in the 1950s to land automatically being property of the state unless otherwise proven with a 'modern' land title (Karsenty 1999). In the Belgian Congo, land was declared property of the state (Pakenham 1991), as was also the

resources⁴³; and development of a forest management bureaucracy, usually centrally co-ordinated (Smith 2006, Colchester 1993). Following independence, during the 1960s and 1970s, a number of countries revised their forest laws, usually in response to increasing international demand for timber. These revisions were, at the time, heralded as innovative and a real advance on what had gone before⁴⁴. However, it did not take long before flaws in these laws were also identified and the forest sector became identified as increasingly problematic in the region⁴⁵.

Since 1990, there has been another wave of reform in Africa's forest management (Alden Wily 2000, 2002; Odera 2004). In certain cases, this has included a shift in some of the colonial models towards more inclusivity (Segall 2006). From a distance, it may appear that Central Africa's forest policies and legislation have followed, broadly, the trajectory of forest sector development noted worldwide: from export-focussed timber production through technical solutions, to sustainable forest management', and to increasing levels of participation by forest communities⁴⁶. The new forest laws⁴⁷ have been heralded as offering a fresh start and a new opportunity for Central Africa's forests (Texier and Kanté 2005). However, many observers point out that the colonial model which centralises control and excludes local communities is still fairly prevalent in most of the countries concerned (Doumbe-Billé 2004). To take a concrete example from a forest area: in Ituri, in Eastern DRC, there is not one hectare of land that is not subject to one or other customary property regime⁴⁸, yet much of the forest land is described by local decision-makers as being effectively vacant and forest exploitation has taken place there over many years with no reference to forest community rights – and no benefits accruing to those forest communities.

Given their common origins, there are striking similarities between the forest codes and laws in all six Congo Basin countries; they share the following characteristics in addition to those listed above:

- 'Zoning' of the forests into permanent and non-permanent forest estate, and into production and classified forests (Hoare 2006): In Central Africa, as in many parts of the tropics (Gray 2000), the basis of organisation of the forest

case in Spanish-held territory (Clarence Smith 1994). In Cameroon and other areas controlled by the French, (CAR, Gabon and Congo), the forest lands were divided into 'concessions', and leased by the colonial state to private companies or individuals for fixed periods of time, (Hardin 2002).

⁴² Peluso and Vandegeest (2001,802), in discussing forest rights in Asia, explain this as follows: 'By reducing customary practices to circumscribed – and often individualized – sets of Customary Rights, forester and other government authorities attempted to totalize control of resources and land. By doing so, they produced "truths" (and confusions) about political and biological forest and Customary Rights that have continued to hold sway to the present'. The same is certainly true for African forests and customary rights.

⁴³ 'Urban Africans and Europeans had formal access to land and resources through commercial licenses, permits and quotas. In contrast, rural Africans only retained usufruct or use rights, and only as long as these had no commercial value from the standpoint of the modern sector. Thus, subsistence economies were permitted in rural areas, but once a resource of commercial potential was identified, the urban-based State would immediately assert its right to control and exploitation'. (USAID and WRI 2001)

⁴⁴ Schmidhüsen (1979) gives a detailed explanation of how both the Cameroon and Republic of Congo forest laws were seen as an advance.

⁴⁵ For example, see Essamah-Nssah and Gockowski (2000).

⁴⁶ Donovan *et al* (2006:3) give a useful summary of forest sector development in Table 1.

⁴⁷ The dates of the adoption of the new forest codes are as follows: CAR 1990, Cameroon 1994, Equatorial Guinea 1997, Republic of Congo 2000, Gabon 2001, DRC 2002, CAR 2008.

⁴⁸ *Reseau Ressources Naturelles* (2007). 'Evaluation des Impacts Environnementales des Concessions Forestières'. DRC.

law is the division of the forest into ‘zones’ within which different activities are permissible⁴⁹. In most cases, this results in a division between timber production, conservation and community use. In all countries other than DRC, this has been realised through a process of geographical zoning of the forest areas into these various categories – either through an official zoning process as was carried out in Cameroon or *de facto* as in Gabon (Gasana 2001), Equatorial Guinea⁵⁰ and Congo Brazzaville, where timber concessions and protected areas were designated without there actually being a formal zoning process. In DRC, such a process is anticipated (Articles 72 and 73 of the DRC Forest Code), but the zoning has not yet begun – and is the subject of much controversy⁵¹. The process and implications of zoning and land use planning for DRC are revisited later on in the chapter.

- Requirements for concessionaires to develop management plans and meet other management obligations: Most of the laws concerned impose certain management conditions on concession holders⁵².
- In some cases, procedures for certain limited forms of community access to or occasionally control of forest lands.
- Recognition of rights to access by communities for basic, non-commercial needs: In Gabon, all harvesting of natural products from the forest has to be carried out with the prior consent of the Water and Forests administration, except for basic subsistence needs of local communities (Art 14, Chap VI: Arts 252-261). In Equatorial Guinea, the situation is even more strictly limited: all ‘national forests’ are designated strictly for timber production and no activity that may prejudice it can be carried out in these areas (Art 27); although communities can have access, for free or for a ‘symbolic price’, to subsistence areas for cultivation and to tree species required for domestic uses (Art 29).
- Regulations concerning the various statuses of protection forests: In all cases, these exclude any commercial exploitation of forest resources in protected areas and, in most cases, this includes some form of extinction of user and

⁴⁹ This division is identified in Article 10 of the DRC Forest Code, Section 1 (Articles 8-10) of the Congo Brazzaville Forest Code, Article 24 of the Cameroon Forest Law, Article 8 of the Gabon Forest Code and Article 10 of the Equatorial Guinea Forest Law.

⁵⁰ In Equatorial Guinea, a US Forest Service mission held in 2004 (Palmer 2004) identified that: ‘The last update on concessionaire operations was completed in 1998. INDEFOR currently does not have a clear picture of what is taking place or where. Essentially all forested land outside protected areas is under concession. I heard 80 percent of forests are currently under concessionaire contracts. This was difficult to confirm, but based on INDEFOR’s map from 1997 showing concessions, it does not appear that less than 80 percent is under contract for harvest’.

⁵¹ See, for example, the complaint submitted to the Inspection Panel of the World Bank in October 2005 by indigenous pygmy organisations and organisations working with indigenous pygmy peoples: <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/RequestforInspectionEnglish.pdf>

⁵² For example, most laws demand a management plan, (Congo Brazzaville, Article 55, DRC, Article 74, Cameroon, Article 29) and impose conditions such as the negotiation of a ‘Cahier des Charges’ with the government which can include certain social responsibilities of the companies concerned.

traditional rights for local communities in protected areas, up to and including total extinction of these rights⁵³.

In summary, Central African forest policy and legislation appears to remain very much within the colonial model, with its emphasis on central state control, limits on community access and control, and the licensed management of timber production by private operators. As the International Tropical Timber Organisation (2005,26)⁵⁴ points out, ‘the principle of state-owned production forests leased out in concessions and the parallel system of extraction permits for forest products remain unchanged’. And as Nasi et al. (2006,19) explain, ‘one must recognise that the basic tenets of forest management have not really changed and are still largely based on European models “exported” to the tropics in the 50s’.

Even in those countries where new legislation had been developed that supposedly assigns greater rights to communities, the administrative procedures involved are so onerous and complicated that very few communities genuinely have access, and the restrictions on where and how they can have access bear little relationship to the pre-existing traditional land rights.⁵⁵

The Development of the Current Forest Legislation in DRC

The Forest Code has been one of the most hotly contested of DRC’s recent pieces of legislation. Forests cover 60% of the DRC and estimates suggest that some forty million of Congo’s sixty million people depend on forest resources for their livelihoods. Policy decisions about the forest will therefore have profound and lasting impacts on a large proportion of the population. The basis of a forest policy framework tends to be based on the designation of a ‘forest estate’ that incorporates most of a country’s forest lands and is usually managed and controlled by the state, with allocation of land uses, (such as timber production and conservation), within that forest estate. Because of this, forest policy and land tenure are deeply and closely interrelated and each affects the other enormously.

This is an interesting period in DRC’s history. The Forest Code of 2002 is in place; although it has been subject to extensive critiques⁵⁶ and whilst for some groups with a focus on community rights there is a long-term aspiration to change its more problematic articles, there is an apparent consensus at present that the code itself is not up for change. However, a great deal of the accompanying legislation required to make it operational is still under discussion – and civil society is playing a key role in interrogating that process and may yet have a decisive influence on the direction it goes.

Examining the content of the current code in terms of land ownership, Article 7 of the Forest Code declares all forest to be the property of the State. Article 1

⁵³ A particularly striking case of the impacts of protected areas of forest peoples can be found in Barume (2000).

⁵⁴ See ITTO (2005), Status of Tropical Forest Management 2005. Available at: http://www.itto.int/en/sfm_detail/id=1801.

⁵⁵ In Cameroon, the community forestry legislation restricts community forests to 5,000 hectares, an area that is too small for many forest dependent communities’ needs, and the bureaucratic hurdles created are such that communities are not able to gain a community forest title without extensive external support – both financial and advisory.

⁵⁶ See, for example, Barume (2003), Diss (2003), Djeukam (2003) and World Bank Inspection Panel (2006).

defines ‘forest’ as any land with trees or bushes that can produce forest products or act as home to wildlife or have an effect on climate or soils, or any land that previously had such vegetation on it. But, under Article 9, trees in or near villages or in collective fields are recognized to be collective property of that village or the owner of the field. Under the Code, although communities in themselves cannot assert ownership rights, they are in principle permitted user rights for subsistence only in all types of forest other than certain classifications of protected area; and they can apply for a community concession (probably valid for 25 years) based on customary possession of that forest land (Article 22). The challenge for the forest communities of the DRC and the groups working with them is how these articles will be specifically articulated, how the Forest Code provisions overlap with or are superseded by other codes, and how all of this will actually play out in practice.

How Forests are Viewed by Policy Makers: Forests as Sources of Revenue

A great deal of the discussion of DRC’s forests has been around how they are perceived by policy makers. As we have seen above, during the development of the forest code, the donors and government officials concerned were largely seeing forests as sources of timber, and indeed some critics have argued that the Code – with its intense focus on the management of timber extraction – is already flawed. This may well be a product of the fact that, as Huggins and Ochieng (2005,28) explain:

Policy-making, especially on environmental issues, is generally dominated by technical experts: civil servants, many of whom may remain in place even as politicians come and go, draft policy documents. Very often, despite the waxing and waning of particular political ideologies, central narratives remain surprisingly similar.

In DRC, the senior forestry staff in the Ministry of Environment, Nature Conservation and Tourism were almost all already in post during Mobutu’s era. Thus it would be surprising if the prevailing new code was a radical departure from the previous legislative and policy framework, which it is clearly not.

A large part of the new code is highly focussed on the management of forest concessions. Under the new Code, concessions are supposed to replace the old logging titles allocated under the 1949 law and are supposed to include the criteria for management that many of the current Central African forest laws have on paper: management plans, limited concession sizes, long term contracts so that, in theory, logging can be managed on a sustainable rotation, ‘cahiers des charges’ or social responsibility contracts outlining concessionaire obligations to neighbouring communities, and so forth. Just before the adoption of the new Code, in May 2002, the Minister of Environment also issued a ministerial decree which declared a moratorium on the allocation of new concessions⁵⁷. This moratorium was then reconfirmed by a Presidential decree issued in October 2005⁵⁸.

The Presidential decree additionally laid out guidelines for the review of old logging titles and the conversion of those that met the criteria thus identified to new

⁵⁷ Arrêté Ministériel portant suspension de l’octroi des allocations forestières, May 2002.

⁵⁸ Decret no 05/116 du 24 octobre 2005 fixant les modalités de conversion des anciens titres forestiers en contrats de concession forestière et portant extension du moratoire en matière d’octroi des titres d’exploitation forestière.

concessions. This review process was supposed to have involved analytical work by a technical working group (*Groupe de Travail Technique*, GTT), who then forwarded their conclusions to an Inter-Ministerial Commission; the whole process was overseen by an Independent Observer who reported on the process and its respect for the law⁵⁹.

The process, which ended up agreeing to the conversion of sixty-five titles, comprising some ten million hectares of forest lands, raised serious doubts⁶⁰. For example, 107 of the 156 titles under review were allocated to the title holders *after* the moratorium was announced and so should automatically have been declared illegal (Greenpeace 2007b)⁶¹. Secondly, there was no mechanism in place and no clarity about what should be happening with the titles in question during the review process or after the review was over. During the review period, logging took place at a hugely accelerated pace, particularly in those titles which were clearly in breach of the moratorium. At the end of the review, there has been no legal provision made for the closing down of illegal logging operations and there is certainly, at present, insufficient government capacity to manage such a process.

Thirdly, the glaring gap in the whole process was the principle of free, prior and informed consent of the communities concerned. Whilst this principle of consent is not articulated anywhere in the Forest Code, there is supposed to be a 'public enquiry' before the allocation of concessions (Article 10) as well as prior consultation before the classification of forests (Article 15). Added to that, a number of significant external actors in the forest sector have expressed their commitment to respecting the principle of free, prior and informed consent⁶², and a previous Minister of the Environment also said that decisions about the forest should be based on a process of participatory land-use planning⁶³. However, the Presidential Decree outlining the conditions for the legal review of logging titles gave permission to companies to challenge the decision if their logging title was cancelled (which a large number of companies did). Communities, on the other hand, have no right to question a title that is granted and legalised.

The results of the conversion process as viewed on a map⁶⁴ give an idea of how much forest land is allocated to industrial logging at present in the DRC. In all these sites there is an overlap between concessions allocated by the state, frequently to foreign companies, and areas that local people perceive to be owned or controlled by themselves. These overlaps have frequently become the source of substantial conflicts (Greenpeace 2007b).

Currently, there is still a moratorium on the allocation of new concessions, and there is a strong civil society campaign against this moratorium being lifted. At the same time, however, there is intense lobbying from the timber industry to lift the

⁵⁹ The final report of the Independent Observer on the process can be found here: <http://www.rdc-conversiontitresforestiers.org/documents/rapports-et-ateliers/rapport-de-lobservateur-independant/details.html>

⁶⁰ Many critiques have been made of the process and its outcomes, including identification of substantive flaws in the process, the composition of the working groups and the inter-ministerial commissions, and the lack of sufficient information provision to local communities. See, for example, WRI and Agreco (2006, 2007) and Trefon (2007).

⁶¹ See also *Reseau Ressources Naturelles* (2007). 'Evaluation des Impacts Environnementales des Concessions Forestières'. DRC.

⁶² For example, 'all new allocations must be preceded by local consultations and traditional uses must be preserved in all production forests. We agree with you that consultations with local populations, especially indigenous peoples, must follow the principle of free, prior and informed consent', quoted from letter of J. MacIntyre of the World Bank to Global Witness, April 4th 2006.

⁶³ Speech of Minister Bokiaga at the World Bank Spring Meeting, April 2007.

⁶⁴ <http://www.wri.org/map/drc-forest-title-conversion-process-results>

moratorium, backed by some international conservation groups. As well, an international discussion around climate change and the potential for DRC to gain income from “Reduced Emissions from Deforestation and Degradation” (REDD) is raising the stakes in terms of who claims tenure of, and controls, forest lands⁶⁵.

In response to the interest and pressure from all sides, the DRC government has started to make some steps towards addressing land issues within the forest legislative framework. A draft ‘methodological guide for zoning’ has been drawn up, which is supposed to set the blueprint for future forest zoning. The process of developing this has been drawn out and the contents of the final guide are still contested. The application decrees to the Forest Code are still being developed, and presently there are three draft texts waiting for final discussion and approval that concern forests managed by local communities.

What may happen in the end could depend in large part on the role that civil society actors are playing and how their views are taken into account. Indeed, the fact that there is even a discussion about land tenure and land rights within the forest debate in DRC is almost entirely due to civil society action, both Congolese and international.

The Role of Civil Society in Forest Sector Debates

Congolese communities, dispossessed by the Bakajika Law and by many previous years of colonial decision-making that excluded them from asserting ownership or control of land are faced – in their struggle for the recognition of their rights to land – with powerful lobbyists such as mining companies, logging companies, conservation organisations and a range of international governments and organisations. DRC has very little functional infrastructure, very poor communications and a history of suppression of community resistance to governmental policies – from colonial days to the present – in some parts of the country. For such a large country, DRC has a surprisingly small civil society sector and it appears to be relatively weak.

Civil society as understood in DRC these days is a mixture of non-government organisations (NGOs), churches and other religious organisations, trade unions and co-operatives. Its form varies hugely across the country. In Katanga, for example, where mining is a major economic activity, there are some active and articulate trade unions. In the more remote forest areas, the only organisations that might be considered as civil society are the churches – of which there are many operating in DRC. The group on which I concentrate is the non-government organisations. In the case of DRC, they include both intermediary organisations and community-based organisations set up by community members.

Recent years have seen resurgence – or rather, in some cases, emergence – of activism on the part of NGOs who work with rural communities, particularly those who work with forest communities and the indigenous ‘Pygmy’ peoples⁶⁶. The

⁶⁵ See, for example: http://www.whrc.org/pressroom/press_releases/PR-2007-11-30-Bali.htm

⁶⁶ This chapter is using the term ‘Pygmy’, deemed as pejorative by some people, largely because many groups working with communities in DRC and many of the community members themselves define themselves as ‘Pygmy’ – ‘Pygmée’. In discussions with men and women in communities variously called Batwa, Bafoto and Bambuti by their neighbours, people have explained that (for them) it makes little difference which of the words are used – they indicate that Pygmée is the French name for them, Batwa the Lingala name, Bafoto the Mongo name, and Bambuti the Swahili name - and all or none of these terms are equally valid as none of them are in fact their own name for themselves. Some Pygmy activists take the position that they are proud of their culture and history and so use the term in a

growth of NGOs, especially in the east, has been in a context where the state has well nigh ceased to be visible at local level and where it is almost completely incapable of delivering services to its people on the ground. For example, many of the Congolese NGOs run by or working with Pygmy communities who are active in the forest sector today had their origins in the years of war in the Kivus. With the virtual absence of the state, much of the provision of essential services and of emergency relief for displaced people was taken over by international and at times national NGOs. Simultaneously a very strong national human rights movement also appeared. However, at times, there have been gaps in what these organisations offered: Pygmy people in particular were being bypassed, for a whole range of structural and organisational reasons, and the local Pygmy NGOs grew up to fill those gaps.

These groups started off as small local associations, finding resources and time from their own local networks. In due course, some started making connections with international NGOs working on similar issues and hence gained access to funding and information resources. Indeed, for many NGOs in Congo today, there is some real truth in Trefon's statement that 'Congo's civil society initiatives exemplify people-based social organisation driven by pragmatism and the will to survive' (Trefon 2007,111). Having their origins in developing responses to crisis in the absence of a state, some regrettably have become increasingly susceptible to developing agendas consistent with those of funders and allies rather than continuing to respond to their own priorities or those of the communities with whom they work. In other provinces beyond the Kivus, the same pattern has occurred – the appearance of small local groups in response to a particular local challenge in the absence of a state or other external response. Some appear, become active and then disappear again, whilst others, tapping into other connections, grow larger.

Countrywide, there are specific patches of NGO presence and activity, and other areas in which there are no civil society organisations other than the churches, which in themselves form an active network⁶⁷. In addition to the NGOs that have appeared in the provinces of DRC, there are a number of national level groups. Many of these are the initiatives of individual Congolese development professionals, who have had access to higher education and have studied such subjects as law or rural development, and who set up institutions in order to pursue issues or themes that they consider important.

At a national level, there are as well several networks of NGOs that work on natural resource issues generally and are taking up the issue of land tenure more specifically. These are quite intensely divided, with profound differences between them about how closely they should work with the state, with private sector companies and with external actors; more importantly, differences exist in relation to proposed solutions. This, I would argue, is not inherently a bad sign – the fact that groups differ ideologically or on strategy is not unhealthy, and a debate between groups that are well-informed and thrash out differences can be incredibly useful. However, such a situation can become extreme and hence divisive. This has been, at times, particularly visible within the groups working with Pygmy communities. Given the contested notion of African 'indigeneity' (Kenrick and Lewis 2004), there is significant positioning around who is authentically 'representative' of the peoples being represented. At present, very few if any of the groups are representative in any

positive sense. This is not the case in some other countries where indigenous forest peoples have made other choices about their name but it does apply, at present, in DRC.

⁶⁷ In 2004, all the Catholic bishops in the DRC issued a very strong statement about the threats to land rights in forests that the forest concession system poses.

formal sense – they are self-elected spokespeople rather than people emerging from a popular movement. Undoubtedly such groups are raising valid or important matters and indeed, as we shall see, many have had a significant impact on certain national discourses. But to date a group that has leaders chosen by members of its constituent Pygmy community, by either traditional means, (which would be challenging, given that Pygmy communities tend to be acephalous), or by popular vote or some other form of election, has not emerged.

In fact, NGOs in DRC in general are not products of an up-swelling in citizen action; nor are they groups that claim genuinely claim to be representative of poor, marginalised, rural communities, and other constituencies with which they work. In this way, they are therefore open to the many critiques of African NGOs that are well documented by Routley (2009). NGOs serve as sources of income, employment and status for the people involved; they can often be driving an agenda that is not emerging from community consensus; and may well be influenced by the donors that support them. Indeed, some NGOs in the forest sector have ended up as organisations that ‘derive not only their sustenance but also their legitimacy from the donor-community’ (Shivji 2007,31).

In this regard, Trefon (2007,111) suggests that ‘the DRC’s apparently dynamic civil society is still far from being a genuine civil society where people are citizens claiming rights instead of clients seeking access to random benefits in an arbitrary negotiation process’. Nonetheless, many of the groups play a key role in getting issues onto the agenda that are otherwise ignored, and they have been very effective indeed in changing the rhetoric of both their own government and of donors in the forest sector. From personal experience, I can assert that many of the people involved are also very genuinely driven by a vision – for some of ‘helping people’, for others a passion for protecting their forests, for others the quest for justice and equity, and for some, straightforward anger about exploitation, corruption and mismanagement.

So, although the origins and motives of NGOs in DRC could be described as mixed, they are major players and (in the field of forest rights) have had a profound impact; we now explore some of the ways in which this has happened.

Strategies for Change used by Congolese Civil Society Actors

One of the powerful strategies that NGOs have been able to use to push the land agenda is to build on those very links with donors and external actors that have, at times, left them open to criticism from other NGOs and from commentators. The DRC state is one which is highly dependent on donor support and all the major policy initiatives in the forest sector, for example, have been externally funded. The Forest Code was supported by Bank advisors; the development of application decrees has been funded and led by the Food and Agriculture Organisation, with additional support from the Dutch government, the Belgian government and the World Wide Fund for Nature; and the development of the zoning guide was funded and led by USAID.

For the first four years of the development of the Forest Code, the government overseeing it was an unelected transitional government and – even after the 2006 elections – there have been questions as to the accountability of the government to its citizens. External actors have played a key, almost state-like, role in relation to land tenure and concomitant policy decisions. Indeed, the forest and mining sectors have entailed ‘a clear example of an international organisation replacing the Congo state

and making strategic decisions that are normally the prerogative of sovereign states', despite the fact that said external actors (in this case, the World Bank) showed 'a certain lack of basic knowledge of the country's size and logistical handicaps, making policy implementation difficult' (Trefon 2007,102).

Thus in order to influence national policy and actions, civil society actors in DRC have frequently taken the route of targeting donors and international actors, recruiting the support of donors, NGOs and activist groups from other parts of the world to help them open doors propagate their message. Most Congolese activists express dissatisfaction with the fact that this currently appears as the most effective way to have an impact, and many are now exploring how they can work with provincial and national governments to effect change. But in the short term, working on donors and international actors seems the most significant means to bring policymakers to the table.

To take a specific example that indicates a large impact, I explore below the complaint that twelve NGO activists submitted to the World Bank Inspection Panel in 2005.

The World Bank has been especially influential in the DRC since 2002 in the reform of natural resources policies. The release of a US \$15 million 'forest sector tranche' of a World Bank structural credit was made conditional on the adoption of the new Forest Code. Since then, a further two credits have been approved which provide support for reform in the forestry sector. The Bank's funding between 2002 and 2006 of around US \$2 billion represent a significant proportion of total revenues to the central government in Kinshasa. The Bank is bound by internal safeguard policies that are supposed to protect the environment in its client countries, as well as vulnerable social groups, such as indigenous people and those affected by Bank projects. Because of this, the Bank is able to influence the Congolese government in a way that the population of Congo cannot.

After a series of exchanges of letters and face-to-face meetings between the Bank and the activists, in October 2005 twelve members of organisations run by, or working with, Pygmy peoples submitted a written complaint to the World Bank Inspection Panel about the Bank's role in DRC's national forest policy. The complaint⁶⁸ was based on actual and potential harm to the indigenous Pygmy peoples by the forestry sector reform activities supported by the World Bank. One such reform activity included a plan for funding zoning activities, as discussed above. The complainants expressed a fear that if the zoning of the forests occurred without proper participation of indigenous and local peoples, new forest concessions would be assigned without their consent or even knowledge. The complainants also pointed out that the concession system would lead to the revival and expansion of the logging industry without any mechanisms for effective control or for ensuring transparency. Therefore they feared that their rights to lands and resources and their cultural integrity would be violated.

In 2007, the Panel produced its final inspection report on the Bank's interventions in the forest sector and made some extremely damning criticisms of both the Bank and the Congolese government in the process⁶⁹. It is worthy to note that since the submission of the complaint in 2005, both the Bank and the Congolese

⁶⁸The full complaint can be found here :

<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/RequestforInspectionEnglish.pdf>

⁶⁹ The Panel report can be found here:

<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/FINALINVREPwhole.pdf>

government have been paying considerably more attention to indigenous peoples and local communities in their language and in some formal structures. The much-critiqued concession conversion process did include representatives of local communities and indigenous peoples in the discussions, (albeit in a fairly tokenistic manner), and a number of presidential decrees have specifically mentioned indigenous peoples, which is almost a first for the Congo Basin region as a whole. In terms of real impacts on the ground reference the recognition or practical security of land tenure for those peoples or for any other local community, the jury is still out.

Other policy processes are still going on which could have a critical influence on how land rights in forest areas play out in reality; and even when legislation or policy is agreed upon at central level, its actual practical implementation on the ground is quite another matter. There have been limited responses from the Bank, somewhat disappointing ones for the complainants, but there is a nominal action plan in place to address some of the issues. The final conclusion as to the use and value of a formal complaint process of an international institution in trying to influence national policy remains to be drawn, as many of the processes concerned are still underway. The NGOs concerned and their national allies remain actively engaged in tracking and reporting on the prevailing processes, so hopefully we will learn about this as it develops.

During the Inspection Panel process, there was a great deal of criticism of the twelve individuals involved and their organisations. They were accused of not being indigenous at all and not being representative, as we explored above. They were also accused of being manipulated by external organisations who wished to pursue their own extremist agendas and of being puppets who knew nothing about what they were doing and what the consequences might be. Some of the critics making such allegations were within the World Bank itself, which is not that surprising given that it was an institution on the defensive. Other critics were from other parts of Congolese civil society and international NGOs who did not agree with the approach. From my experience, being an eyewitness to much of this process, the decision to use the formal complaint process as a mechanism, the very content of the complaint, the agenda to follow in dealing with the Bank during the process and the follow up, have all been driven by Congolese NGO activists. Other international organisations have supported them with information and resources, but the agenda has been set by the groups themselves.

But here we run into the perpetual challenge faced by so many African civil society groups – how much help, solidarity or support can an African NGO accept from outside before its credibility and indeed its own decisions are compromised? I do not believe that these groups were compromised in this process; nevertheless, the expenditure of time and energy that they had to put into defending their actions, to the detriment at times of being able to use what they were doing to effect more positive change, was a tough calculation that they had to make at the start and which they had to continue to make throughout the process.

Nonetheless, the complaint process did give a clear message to national and international actors in DRC that they were under scrutiny and that civil society could, in certain circumstances, make effective use of legal recourse. Indeed, since the launch of the complaint process, some of the actors concerned have also started to

explore making use of other international grievance mechanisms in order to apply pressure to their government on land rights⁷⁰.

Turning to other aspects of the forest code in DRC, NGOs are being very active in pursuing key issues that still remain to be resolved. After the final decisions of the Inter Ministerial Commission on the conversion of concessions, a number of public demonstrations have been held in Kinshasa to demand that the moratorium on the allocation of new concessions be maintained. And there has been a real division as to whether NGOs should engage in supporting communities to negotiate ‘cahiers des charges’ (social responsibility contracts) with logging companies that have had their titles deemed convertible. Some NGOs argue that this entails accepting a process that was never legitimate and hence it should be avoided. Others argue that it is a reality that communities are facing and so it needs addressing. Yet others suggest that the work with communities on ‘cahiers des charges’ should be around supporting them to refuse to sign any contract if they do not want logging in their area; in the end, the final conversion of a title to a legal concession depends on the company having an agreed ‘cahier des charges’.

It seems then that NGOs are engaging in debate about appropriate strategies in a way that belies the image sometimes presented by outsiders that Congolese NGOs are completely incapable of developing their own approaches. In the current context, there are external actors ready and willing to support each of the three approaches outlined, so the choice between them is not necessarily determined about whether there are resources available to support any of them. Rather, the strategic choices and the pursuit of these choices depends more on what the NGOs themselves believe will work in order to achieve their aims – which, in the case of the many diverse NGOs, is improved respect of the land and tenure rights of forest communities.

In addition to responding to policy and legislation initiatives from the state and external actors, local NGOs are developing actions to directly address land issues themselves. An area in which civil society and NGOs are particularly active is that of mapping. This is part of a broader strategy to put land rights onto the political agenda. It may also serve to test ways in which the recognition of rights by the state can be made concrete, although this in itself has its dangers, given the complexity of those rights (Lavigne Delville 2006). Since 2005, NGOs have been working with forest communities to document their use of land as a means of ‘getting communities on the map’. This means that the production and use of maps ensure that communities are, in the first place, recognised as actually existing. Following that, the maps allow communities to show their presence in the forest and their use and rights to that forest. And finally, the existence of credible maps produced by communities provides them with a strong tool to argue for the need for them to be included in decision making about land and forest use planning. An explanation of the approaches used and the impacts that they have had so far can be seen in Gata et al. (2009).

The key issue in relation to mapping, zoning and land tenure, with which the NGOs are now grappling, is the need to map land *rights* – in such a way that the full complexities and nuances of rights are included and marginalised people are not further excluded. This would need to be done in advance of carrying out any zoning or land use planning. There is real confusion amongst all actors in the forestry sector between zoning – the process of deciding where certain activities or land uses *could* take place and the policy decisions as to what will take place in those areas – and

⁷⁰ See for example <http://www.camv-pygmees.org/> for examples of a group using the UN and the African Commission for Human and Peoples’ Rights.

mapping – recording that which is already in place on the ground. In 2009, the government approved a draft ‘Guide Methodologique’ for forest zoning that makes some small steps towards the recognition of rights, but which is not yet adequately explicit. NGOs are continuing to produce maps, and to work with communities on how the communities themselves can use the maps to affect advances in the recognition of their rights. But they are under pressure because conservation groups and major funders such as USAID do not share their perspectives and are keen to fund and progress a much more ‘traditional’ form of zoning and land use planning that is closer in form to other states in the Congo Basin region, as described above.

Another route by which NGOs are now trying to bring about change and tackle tenure is to engage in work directly with communities in exploring models of community management of forests and land, and to document this and develop it into written text that can be proposed to the state as legislation. The process is, of course, risky – the same mistake could be made as was done in Ivory Coast in the late 1990s (Van den Brink et al. 2006), that is, a failure to recognise that the ambivalences and nuances of customary systems may result in the entrenchment of local and regional elites and the further marginalisation of some groups. But this is where the negotiating power of civil society will be important. There are legal texts under discussion that will regulate the management of forests by communities and they include an Ordinance that defines a community and that lays down how it will be organised.

The local NGOs mentioned above are warning strongly against rushing into such legislation given that the full complexities of the range of systems and models that communities use to organise themselves are not fully understood. The danger is that, as observed by Cross (2002,30) in Malawi, ‘administrative and legislative interventions have generally acted against the interests of customary land users’. The texts, however, are on the table already and are receiving backing from institutions such as the Food and Agriculture Organisation of the United Nations (FAO) who are impatient to see something down on paper. Local groups are lobbying hard for more time to finalise their work and make sure that the final text is one which does pay due attention to the nuances of community management of forests and local tenure and use systems.

Conclusion

In the face of these current major challenges to land tenure and the decisions about use and control of forest lands, the real challenge that DRC’s civil society faces is one of scale. Taking on forest policy, land use planning and the profoundly complex issue of land rights in a post-conflict state is a huge task and, although there are some effective actors amongst DRC’s NGOs, they are few in number and already overstretched.

Congolese decision makers and many of the donors and agencies supporting the DRC government in the development of their policy and legislation have not yet engaged in meaningful discussion about the nuances of land and land rights in the Congolese context. The danger is that without a civil society with a strong enough voice to offer effective challenge, the state will remain trapped in its colonial inheritance which asserts that formalised, legalised titles trump any community or customary rights and that commercial exploitation of natural resources at an industrial scale automatically takes priority over the more nuanced multi-purpose use that most Congolese rural people make of their land and resources to secure their livelihoods.

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