



**PROTECTED AREAS AND LAND RIGHTS FOR LOCAL COMMUNITIES: A CASE  
STUDY OF LUKI RESERVE (Democratic Republic of Congo)**

**A Mini-Dissertation Submitted by:**

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## Declaration of originality

I, Muyamba Mangu, declare that the work presented in this dissertation is original. It has never been presented to the University of Pretoria or any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

Signed:

Muyamba Mangu

Date:

## DEDICATION

This dissertation is dedicated to God Almighty who made everything possible because of His grace.

To my beloved wife Sophie Ekoko Milambo for many sacrifices and love during all these years; thank you for being there for me. Your support has brought me to where I am at present.

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## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ALPFG	Africa Land Policy Framework and Guidelines
CCPR	Covenant on Civil and Political Rights
CEDAW	Convention on Elimination of All forms of Discriminations against Women
CESCR	Covenant on Economic, Social and Cultural Rights
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
FPIC	Free, Prior and Informed Consent
ICCPR	International Committee on Civil and Political Rights
ICERD	International Convention on Elimination of all Forms of Racial Discrimination
ICESCR	International Committee on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IUCN	International Union for Conservation of Nature
MAB	Man and the Biosphere
NEPAD	New Partnership for African Development
NTFP	Non-Timber Forest Product
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WGIP	Work Group for Indigenous Affairs



## ABSTRACT

Land rights have received some attention as an issue concerning property rights. It has been considered as an important right for the local communities living around or across protected areas. However, the right to land is almost absent from international instruments of human rights. Land rights are not typically perceived to be a human rights issue.<sup>1</sup> Land rights is corporeal hereditament as they are physical or tangible objects incorporated in land while rights to land is incorporeal which fall under property rights. In the same vein, rights to land “broadly refer to rights to use, control, and transfer a parcel of land, and include the rights to: occupy, enjoy and use land and resources; restrict or exclude others from land; transfer, sell, purchase, grant or loan; inherit and bequeath; develop or improve; rent or sublet; and benefit from improved land values or rental income”.<sup>2</sup> Legally, according to Gilbert, land rights fall in the “categories of land laws, land tenure agreements but they are rarely associated with human rights law”.<sup>3</sup> Internationally, there is no treaty or any specific declaration that refers to human rights to land.<sup>4</sup> Even land rights are absent from international instruments of human rights. The African Charter on Human and Peoples’ Rights stipulates in article 14: “the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”<sup>5</sup>. This can be construed to cater for land rights in international law.

Land dispossession has a negative impact on the local communities and on all mankind as it impacts on their livelihood and also has a negative impact on the environment. It is extremely true that local communities also want to share the resources of their land and to benefit from them. The establishment of protected areas is a worldwide practice that intends to defend biodiversity and wildlife from human

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<sup>1</sup> J Gilbert ‘Land Rights as Human Rights: The Case for a Specific Right to Land’ (2013) 115. SUR International Journal on Human Rights 10(18) Available at <https://ssrn.com/abstract=2401190>

<sup>2</sup> EU-UN Partnership in ‘Toolkit and guidance for preventing and managing land and natural resources conflicts: Land and Conflict’ (2012) 17

[http://www.un.org/en/events/environmentconflictday/pdf/GN\\_Land\\_Consultation.pdf](http://www.un.org/en/events/environmentconflictday/pdf/GN_Land_Consultation.pdf)

<sup>3</sup> J Gilbert (n 1 above)

<sup>4</sup> J Gilbert (as above)

<sup>5</sup> African Charter article 14

development.<sup>6</sup> Such a policy tends to neglect the rights of local communities, generally in the practice of protected areas. Most protected areas have followed the conventional and exclusionary approach that was applied at Yellowstone<sup>7</sup> in 1972 and have failed to fully integrate other important factors such as social and cultural issues. The dispossession of land can be considered as a restrictive measure that imposes difficult and most of the time conflicting effects to the people settled around protected areas. The dispossession of land has triggered adverse social impacts on local communities in some cases by disrupting their traditional ways of living and limiting their control of and access to resources.<sup>8</sup> The dispossession of land undermines protection policies through conflicts between protected area managers and local communities. The prohibition of communities from their land without consultation violates the obligations for free, prior and informed consent (FPIC).

This study investigates the human rights implications on protected land of Luki Reserve in the Democratic Republic of the Congo (DRC). It will also explore the DRC land rights framework and their implications on socio-economic rights of local communities such as: the right to food, right to clean water, right to housing, right to health and the right to culture.

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<sup>6</sup> G S M Andrade & J R Rhodes 'Protected areas and local communities: An inevitable partnership toward successful conservation strategies?' (2012) *Ecology and society* 17

<http://www.ecologyandsociety.org/vol17/iss4/art14/>

<sup>7</sup> Yellowstone is a National Park where the World Congress on National Parks was held and become an umbrella concept tying together IUCN's different approaches for conservation

<sup>8</sup> G S M Andrade & J R Rhodes (n 5 above)

## Chapter outline

The chapter breakdown for this dissertation is as follows. Chapter 1 contextualises the research problem with a short introduction of what gave rise to the research, what challenges face indigenous peoples/local community, what questions need to be resolved in dealing with these challenges and what methodology will be adopted.

Chapter 2 provides the theoretical framework for the research. This chapter deals specifically with the definition of terms and the conceptual theoretical literature review. It highlights two theories of indigenous/local community land rights and the relation between land ownership and socio-economic rights.

Chapter 3 examines the socio-economic rights of Luki peoples and the problems they face with their livelihood.

Chapter 4 examines how the DRC legal system has actively engaged in the protection of the rights to land for indigenous/local communities and socio-economic rights related to land ownership.

Chapter 5 outlines the provisions of the international legal framework on indigenous / local communities' right to land through international covenant on political and civil rights, covenant on economic, social and cultural rights, International Convention on Elimination of all Forms of Racial Discrimination, Convention on the Elimination of all forms of Discrimination Against Women, International Labour Organisation Convention No.169 and land rights in African legal framework.

Chapter 6 concludes with recommendations.

## Chapter 1 Introduction

### 1.1 Background

The creation of protected areas remains a worldwide issue that intends to defend biodiversity and natural world from human development.<sup>9</sup> Biodiversity conservation is not always compatible with the economic development, and protected areas deprive native communities of access to land and resources without offering them compensation or alternative livelihoods. This practice of protected areas tends to neglect rights of indigenous and local communities.

Although land rights in the context of property rights have been regarded as an important right for local communities living around or across protected areas, land rights are most of the time absent from the instruments of human rights internationally.<sup>10</sup>

Nowadays, the establishment of big number of protected areas follow the Yellowstone National Park approach that was used in 1872 to create a national park in Yellowstone city in the United States.<sup>11</sup> The Yellowstone National Park approach as approach consists in the “creation of recreation grounds, the preservation and protection of shared and cultural legacy, wildlife, and geologic and ecological systems and process in their natural condition, for the benefit and enjoyment of present and future generation”.<sup>12</sup> However, this approach failed to integrate significant factors such as social and cultural problems.<sup>13</sup> There is also very little interest given to local communities apart from the threat to reserved areas or protected areas. This has been considered as source of conflicts by people living around or across protected areas. It has resulted in a negative social impact on indigenous and local communities in some cases by disrupting traditional lifestyles and restricting their control and access to

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<sup>9</sup> H Zedan ‘From Kuala Lumpur to Montecatini to Brazil’ in UNEP ‘Protected areas for achieving biodiversity targets’ CBD News Special Edition (2005) 1

<sup>10</sup> J Gilbert (n 1 as above)

<sup>11</sup> H Elliott ‘Second World Conference on National Parks’ (1974) 15 International Union for Conservation of Nature and Natural Resources, Switzerland

<sup>12</sup> H Elliott (n 11 as above)

<sup>13</sup> MB Lane ‘Affirming new directions in planning theory: Co-management of protected areas’ (2001) 657 *Society & Natural Resource* 14

resources. This can destabilise protection policies via conflicts between administrators of protected areas and indigenous peoples and local communities.<sup>14</sup>

## 1.2 Research Problem

Increased attention has been paid to land rights as a matter of property rights and this has been seen as an important right for both local communities and indigenous peoples.

It is extremely imperative to note how the lack of land rights impact on the access to socio-economic rights of local communities living around Luki reserve in the Democratic Republic of Congo. In addition, the absence of land rights for the local communities (Luki people) is considered as a significant violation of socio-economic rights such as right to food, clean and safe water, and housing as part of the right to development. Furthermore, resources and Land rights are considered as central for the survival of the local community, as they depend mainly on lands and natural resources for their survival and basic well-being.

However, it is worthy to mention that the process of establishing Luki forest as a protected reserved area was taken without any prior consultation with local communities. When the government fail to associate local communities in the formulation of policies related to the creation and conservation of protected area, this may end up in not considering the needs of local communities. This situation can continue to bring about many problems to do with enforcement of policies and rules regarding conservation. It is, however, clear that the failure to take into account local communities' participation in the formulation of policies related to protected areas, contributes to the deprivation of their rights to land and natural resources in general, and Luki Reserve people in particular. By examining the landless Luki people and their non-participation in the formulation of policies related to protected areas (Luki Reserve), the research seeks to examine how the lack of land ownership rights impacts on the socio-economic rights of local communities living around the Luki Reserve. These rights are linked to the right to food, housing, drinking water and the right to development. It demonstrates how socio-economic rights related to land rights for local communities are not taken into account in the national framework of protected

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<sup>14</sup> G S M Andrade & J Rhodes (n 6 above)

areas in the DRC and to how and what extent local communities are implicated in the protection of biodiversity.

### **1.3 Research Questions**

This study attempts to answer the following questions:

1. What are the socio-economic rights challenges experienced by local communities living around and across the Luki Reserve in the DRC?
2. Are the international and national law of the DRC applicable to the relevant socio-economic rights and rights of local communities and indigenous people living around and across the Luki Reserve in the DRC?
3. To what extent are the socio-economic rights of Luki Reserve local communities taken into account in the DRC's legal framework?

### **1.4 Purpose of the study**

This research aims to promote understanding of local communities' land rights and protection of protected areas in terms of community participation on formulation of policies for people living around protected areas in general and Luki's local community in particular.

The investigation assesses how socio-economic rights of local communities living around Luki Reserve are taken into account in international law and national law of the DRC and the challenges experienced by Luki's peoples.

#### **1.4.1 Specific Objectives**

Three objectives will be followed, namely, to:

1. Investigate if the rights of local communities living around the Luki Reserve are taken into account in the national framework of the DRC.
2. Identify socio-economic rights challenges experienced by local communities living around the Luki Reserve in the DRC.
3. Understand the implication of local communities' land rights on conservation of Protected Areas (Luki Reserve).

### 1.5 Limitation of the study

The research applied a desk review and analysis of documents and treaties. The research is concerned only with people living around and across the Luki Reserve and does not take into account other communities found in Mayombe Forest.

### 1.6 Scope of the study

This study was conducted on behalf of the local community of Luki Reserve, Boma District, Kongo Central Province in the DRC.

### 1.7 Methodology

This research followed a qualitative approach. This mean that an applied desk review<sup>15</sup> and analysis of texts based on unpublished and published documents was used to investigate how socio-economic rights of people living around and across the Luki reserve are protected and promoted in the international and national framework. In order to understand the challenges faced by Luki people, the researcher relied on instruments related to land rights in the DRC as follows: the DRC constitution of 18 February 2018, ministerial decisions, treaties.

### 1.8 Significance of the study

The problem of landlessness in rural areas has been “increasing and land in rural areas comes under much pressure including, population growth, fragmentation, land use conversion, environmental degradation and the impact on natural disasters”<sup>16</sup>. The dispossession of community land by the DRC government impacts negatively on the right to food, housing, health, culture and the right to development of local communities living around and across the Luki Reserve. The study investigates the right to land and the challenges experienced by Luki peoples and their implication on the management of Luki Reserve.

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<sup>15</sup> A desk review according to Kothari is defined as consisting of the gathering of information from secondary sources such as books, journals, the printed press, the internet, publications of government (local and foreign), historical documents and other analytical publications

<sup>16</sup> E Wickeri & A Kahlan ‘Land rights issues in international human rights law’ *Institute for Human Rights & Business*. Available at [https://www.ihrb.org/pdf/land\\_rights\\_issues\\_in\\_international\\_HRL.pdf](https://www.ihrb.org/pdf/land_rights_issues_in_international_HRL.pdf) Access 17/7/2017

## 1.9 Structure

This research comprises six chapters and the chapter breakdown is as follows. Chapter 1 will focus on the general introduction and contextualizes the research problem, research questions and the methodology. Chapter 2 deals with theoretical and conceptual framework for the research. Chapter 3 discusses socio-economic rights of Luki people. Chapter 4 deals with the domestic framework from the colonial time to the present day. Chapter 5 discusses land rights in international legal frameworks. Chapter 6 concludes the dissertation with recommendations.

## 1.10 Definitions of Keys Concepts

To have a better understanding of this mini-dissertation, the following concepts need to be defined such as, local community, indigenous peoples, protected area, land rights and Luki Reserve.

### 1. Local community

According to Sentime,<sup>17</sup> local community is understood as a group of people located in a specific area having the same life style such as culture, customs, social and political organisation as well as their history which is entrenched in their cultural identity and land.

### 2. Indigenous peoples

According to the United Nations<sup>18</sup> Department of Economic and Social Affairs, the term refers to groups among a variety of ethnic groups within a state who experienced forms of systematic discrimination, subordination and marginalisation because of their cultures and ways of life and their mode of production. Indigenous peoples are considered those having a historical continuity with pre-invention and pre-colonial societies that developed on their territories and consider themselves distinct from others now prevailing on those territories or part of them.

#### - Protected areas

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<sup>17</sup> K Sentime 'Management of Congo basin natural resources in the DRC' (2012) Unpublished (Conference on access to land and natural resources in the DRC) University of Kinshasa.

<sup>18</sup> United Nations Department of economic and social affairs 'The concept of indigenous peoples' Workshop on data collection and disaggregation. New York, 19-21 January 2004.



According to Dudley,<sup>19</sup> protected areas are clearly defined as a “geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”. It is a geographical space, land or sea that is specifically dedicated to the protection and conservation of diversity, as well as natural, cultural resources managed by effective legal and other means.

### 3. Land rights

Land rights in a broad way refer to use, control and transfer of a portion of land. It comprises “the rights to occupy, enjoy and use land and resources, restrict, sell, purchase, grant or loan, inherit and bequeath and benefit from improved land values or rental income”.<sup>20</sup>

### 4. Luki Reserve

Luki Reserve was created during the colonial era by the decree no 05/Agriculture department on January 12, 1937 before the independence as a natural reserve. In 1960 following the accession of the country to independence, the management of Luki Reserve was given to the National Institute for Study and Agronomic Research (INERA). Later in 1979, UNESCO recognised Luki Reserve as part of a worldwide network of reserves of biospheres. In addition, Luki Reserve was established as Biosphere Reserve of Luki based on the decree no033/CM/ECN/92 of 14 January 1992. It is important to note that Luki Reserve was declared as protected area in 1979 prior to the United Nation Declaration of the Rights of Indigenous Peoples (UNDRIP). However, the process of declaring Luki Reserve as protected area did not enjoy the participation of the local communities. This can explain why the rights of local communities were not considered in the process of establishment of Luki as protected area.

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<sup>19</sup> N Dudley ‘Guidelines for Applying Protected Areas Management Categories’ IUCN (2008) 8.

<sup>20</sup> J Gilbert (n 1 above)

## 1.11 Literature review

Borrini-Feyerabend et al<sup>21</sup> give guidelines that explore protected area approaches and models that see conservation as fully compatible with human communities as managers, decision-makers, residents, users, caretaking neighbours and in that regard such communities are an asset to conservation rather than a liability. These guidelines offer considerations, concepts and ideas. They do not give a blueprint solution but offer a menu of options to be reviewed by actors and adapted to their circumstances.

Shange<sup>22</sup> argues that human activities threaten the Biosphere of Luki Reserve to be under significant pressures of unsustainable management. The author demonstrates that the political conditions of the DRC has not allowed the government to take appropriate measures to solve the problem of land rights and this will remain the most difficult issue and challenge.<sup>23</sup> He also shows that there is a need to develop sustainable community forest management at the Biosphere of Luki Reserve. Toward that end, he also added that the DRC Government needs to clarify the forest code by showing what it wants to do with its vast forest resources with regard to the forest dependent peoples. The Government recommends the implementation of a policy framework as soon as possible in order to make forest institutions able to function. The management strategy should be an inclusive process in order to promote equity and multiple use of forest resources at local community level as the local community has started to voice their disagreement and disappointment with the forest governing system and are claiming more rights in managing their natural resources through ownership.<sup>24</sup>

Jeremy Gilbert<sup>25</sup> agreed that land rights are perceived to be a human rights issue. This refers to rights to use, control and right to transfer a parcel of land. In addition, that includes rights to occupy, enjoy and use land and resources. Legally, according to Gilbert, land rights fall within the categories of land laws, land tenure agreements or

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<sup>21</sup> G Borrini-Feyerabend et al. 'Indigenous and local communities and protected areas: Towards equity and enhanced conservation. Guidance on policy and practice for Co-Managed Protected Areas and Community Conserved Areas (2004) xv

<sup>22</sup> B R Shange 'Community forest management and policy implication for the Biosphere Reserve of Luki in the Democratic Republic of Congo' (2012) 1

<sup>23</sup> As above

<sup>24</sup> B R Shange (n 16 above) 73

<sup>25</sup> J Gilbert (n 1 above)

planning regulation but are rarely associated with human rights law. Land rights constitute the basis for access to food, housing and development. Without access to land many peoples find themselves in a situation of great economic insecurity. Gilbert argues that in many countries, access and land rights are stratified and based on hierarchical and segregated systems where poorest and less educated do not hold security of land tenure. Control of rights to land has been historically an instrument of oppression and colonisation. In South Africa, apartheid is a strong illustration where land rights were used as a centre piece of the apartheid regime. Land rights have been addressed but not formally proclaimed in the main human rights instruments. Gilbert argues that land rights have been approached from five different angles under international human rights law. They have emerged as an issue of property rights, that is, the ownership over a thing or things, and is associated with the idea of land property. Gilbert makes reference to Article 17 of the Universal Declaration of Human Rights (UDHR) that stipulates: *everyone has the right to own property alone as well as in association with others and no one shall be arbitrary deprived of his property.*<sup>26</sup> As a cultural right for indigenous people, many indigenous communities have stressed that territories and lands are the basis not only of economic livelihood but are also the source of spiritual, cultural and social identity. According to Gilbert, the connection between cultural and land rights has been acknowledged by the Human Rights Committee in article 27 of the International Committee on Civil and Political Rights (ICCPR) which states: *“with regard to the existence of the cultural rights, protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law”.*<sup>27</sup>

The approach is that where land is of central significance to the sustenance of a culture, the right to enjoy one’s culture requires the protection of land.

As an issue of gender equality, land rights are a part of the strategies on poverty reduction and women’s empowerment.<sup>28</sup>

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<sup>26</sup> J Gilbert (n 1 above) 118

<sup>27</sup> J Gilbert (n 1 above) 119

<sup>28</sup> J Gilbert (n 1 above) 124

The connection between housing and land rights seems to be a strong feature of human rights law. It involves both positive and negative aspects. This is positive in the sense that land rights are considered to be an essential element for the achievement of the rights to housing; and it is negative in the sense that land dispossession could be qualified as a forced eviction in violation of the right to housing.<sup>29</sup>

As for access to adequate food, the right to food is strongly affirmed under international human rights law unlike land rights. Article 25 of the UDHR provides that everyone has the right to an adequate standard of living, including food and article 1 of the both International Committee on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR) refers to the protection of economic, social and cultural rights including: the right to self-determination of all peoples. In the same way, the article 11 of the ICESCR make reference to food by affirming the right of everyone to an adequate standard of living including adequate food.

The connection between the right to food and land rights is also an important part of the mandate of the UN Special Rapporteur on the right to food. The current connection between land rights and the right to food according to Gilbert has been clear in the context of large-scale land acquisition known as land grabs.<sup>30</sup> He concluded his work by saying that “a human rights-based approach to land rights is essential to address pre-conflicts, conflicts and post-conflicts situations”. For him, the situation of land issue and agrarian reforms in South Africa, Uganda, Guatemala and Zimbabwe are at the centre of violent conflicts and are key elements in the transition from conflict to peace.<sup>31</sup>

While land rights are increasingly commoditized as an exclusively commercial good, a human rights-based approach to land rights brings another perspective to the value of land as a social and cultural asset, and more importantly, a fundamental right. Land rights are human rights. They represent, not only a very valuable economic asset, but also a source of identity and culture. Land rights are inherently contentious as land is such an important source of wealth, culture and social life. The distribution and the access to land is not politically neutral. Land rights affect the overall economic and

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<sup>29</sup> J Gilbert (n 1 above) 125

<sup>30</sup> J Gilbert (n 1 above) 127

<sup>31</sup> J Gilbert (n 1 as above)

social basis of societies. Moreover, according to Gilbert<sup>32</sup>, the different economic, social and cultural facets of land rights create tension between different interests, notably between the need to protect the landed and providing rights to the landless. A human rights approach might be an important tool to ensure that both the cultural and economic value of land is recognised and thus the right of people over their land are respected as a fundamental right. The work done by Gilbert is relevant to this study as it speaks about the rights to land as the rights that constitute the basis for access to food, housing and development, and as an ingredient for gender equality.

According to Mir et al<sup>33</sup> the authors speak about people's attitudes toward wildlife conservation by arguing that this can significantly affect the success of conservation initiatives. They demonstrated that human conflict with regard to wildlife has existed for centuries, but it has frequently grown in recent decades mainly because of the exponential increase in human population and the expansion of human activities. The increasing resource use at the human wildlife interface has resulted in the intensification of human conflict regarding wildlife.<sup>34</sup> A wide array of human dimensions for example local people's perceptions of the value of wildlife, how they want it to be managed and how it affects or is affected by wildlife, as well as influence wildlife management decisions.<sup>35</sup> To make sure that wildlife management policies are effective and sensitive to local conditions, it is important to understand anthropological factors such as the attitudes of local people, which provide an overview of the cultural and socio-political content of human wildlife conflicts. Assessing local people's attitudes can provide insight on how they behave.<sup>36</sup> This article is also relevant to my research as it speaks about the implication of local communities' land rights on conservation.

Shibia<sup>37</sup> affirms that the creation of protected areas is often considered as a foreign concept and outgrowth of Western conservation needs and values. Imposed and introduced to developing countries by colonial powers and adopted and promoted by developing countries as commitment to various international conventions, modern

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<sup>32</sup> J Gilbert (n 1 above) 129

<sup>33</sup> Z R Mir et al. 'Attitudes of local people toward wildlife conservation: A case study from Kashmir Valley' (2015) 392 *Mountain research and development* 35(4)

<sup>34</sup> As above

<sup>35</sup> As above

<sup>36</sup> As above

<sup>37</sup> M G Shibia 'Determinants of attitudes and perceptions on resource use and management of Marsabit National Reserve, Kenya' (2010) 55

conservation paradigm and establishment of protected areas on local communities met resistance from members of the public. This has resulted in a number of negative consequences including restriction of access to traditionally used resources and disruption of local culture. Local communities are vulnerable to the establishment of protected areas since the move is followed by wildlife policies that restrict access to wildlife resources and their subsequent use. The rapid growth and change in local community values of wildlife as resource shift in land uses and attitudes and patterns of land ownership further make wildlife conservation unfeasible within and outside Marsabit National Reserve. The communities adjacent to Marsabit National Reserve view wildlife as a liability and have a negative attitude towards it and the reserve. Negative attitudes towards wildlife and consequent land use changes will in the long run threaten the conservation and survival of wildlife outside protected areas, the integrity and viability of the reserves and the biodiversity they are established to conserve. The different attitudes, according to Shibia, may be due to socio-economic factors, the level of interaction between local communities and Marsabit National Reserve, and the past experience with the wildlife. The success of wildlife depends on the support of local communities living adjacent to a reserve and for community wildlife conservation. This work is relevant to this study as it shows the importance of people's attitudes and perceptions on resource use and management of protected areas.

Wickeri and Kalhan<sup>38</sup>, in their article, argue that the condition of landlessness threatens the enjoyment of a number of fundamental human rights. In addition, Weckeri and Kalhan argues that "access to land is important for poverty reduction and development and a key to access to numerous economic, social and cultural rights and as a gateway for many civil and political rights".<sup>39</sup> Wickeri and Kalhan also recognise the absence of the right to land in international human rights law. They consider land as a cross-cutting and not simply a resource for one human right in the international legal framework. Other rights are affected by non-access to land (housing, food, health, water and culture). Moreover, access to land affects a broad range of fundamental human rights. The article gives a general idea on land rights issues, is relevant to our research and does not speak about the specific area of Luki Reserve in the DRC.

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<sup>38</sup> E Wickeri & A Kalhan (n 15 above)

<sup>39</sup> E Wicheri & A Kalhan (n 15 above)

According to Andrade & Rhodes<sup>40</sup> many protected areas have followed the approach applied at Yellowstone in 1872 as response to western civilisation to the uncontrolled degradation of biodiversity and ecosystem services. They demonstrated that many parks or protected areas have failed to integrate other important factors such as social, cultural and political issues. In some cases, this has activated adverse impacts on local communities, disturbing their traditional ways of living by limiting their control and their access to the natural resources. This can undermine protection of policies through conflicts between the park managers and the local communities. For Andrade and Rhodes, the success of conservation strategies through protected areas may lie in the ability of managers to reconcile biodiversity conservation goals with the social and economic issues and the greater promotion of compliance of local communities with the protected areas conservation strategies. They believe that the partnerships with local communities and protected areas authorities could promote a win-win outcome. Andrade & Rhodes, however; did not speak on a specific area but it is relevant to the research as it will help to demonstrate the relationship that exists between protected areas and local people of Luki Reserve in the DRC.

In his article, Silori<sup>41</sup> examines the perception of the Bhotiya tribal community on the use and conservation of natural resources in Nanda Devi Biosphere Reserve, north-western Himalaya in India. The objective of his study was the identification of the bottlenecks in the sustainable management of forest resources on Nanda Devi Biosphere Reserve through local community participation.<sup>42</sup> He points out the need to change the top-down approach of nature conservation in the Nanda Devi Biosphere Reserve by involving the resource users at every stage of management to ensure the win-win situation of sustainable conservation of biodiversity of Nandi Devi Biosphere Reserve and better livelihood opportunities for the locals' communities.<sup>43</sup> For him, the opinion of a resource-reliant population has to be counted as an important step of notification and management of protected areas.

In his book on Land Rights of indigenous peoples in Africa, Barume starts by giving the definition of the concept *indigenous* as “referring to born in, something that comes

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<sup>40</sup> G S M Andrade & J R Rhodes (n 6 above)

<sup>41</sup> C S Silori 'Perception of local people towards conservation of forest resource in Nanda Devi Biosphere Reserve, north-western Himalaya, India' (2007) 211 *Biodiversity & Conservation*

<sup>42</sup> As above

<sup>43</sup> C S Silori (n 34 above) 221

from the country in which it is found, native of or aborigine in contrast to foreign or brought in". He also gives a definition of Africa as a "home that belongs to many communities who identify themselves and are being identified by the African Commission on Human and Peoples' Rights as indigenous".<sup>44</sup> Indigenous communities, according to Barume, are characterised as those who experienced subjugation, marginalisation, dispossession, exclusion in simple word as those who are discriminated firstly by colonial power and who are still suffering from modern nations states.<sup>45</sup> Land for indigenous communities cannot only be viewed as a commodity but as a basis for their life as distinct peoples.<sup>46</sup> However, Barume argues that access to land for indigenous communities is still continually being threatened by "building of nations, states, industrial farming, free market management, conservation interests, mining, logging, fishing and other mining activities; thereby putting their very existence in jeopardy".<sup>47</sup> When the right to land is being denied for African indigenous peoples as argued by Barume, they resist. Some have used judicial measures to address the matter, but there is still a long way to go in terms of protection of indigenous peoples' rights to land by African judiciary as constraints and indigenous communities are seeking legal redress to challenge many of constraints.<sup>48</sup> African indigenous peoples, like other indigenous peoples, base their land claims on immemorial and nomadic pastoralists on long occupation and use of specific land areas.<sup>49</sup> Indigenous people's right to land is so important that it is linked to their life and is the incarnation of their culture.

In their book, Mostert et al<sup>50</sup> define land as a finite resource and consider it as crucial for people to access production and shelter. For them, the problem of regulation to access to this resource has been considered as a worldwide challenge to fulfil the interests of all consumers. The problems of "urbanisation, poverty, and land as dead capital and marginalisation of vulnerable groups in development process are known as issues that request a better understanding if appropriate solutions are to be

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<sup>44</sup> A K Barume 'Land rights of indigenous peoples in Africa: With special focus on Central, Eastern and Southern Africa' (2014) 24

<sup>45</sup> Barume (n 42 above) 330

<sup>46</sup> Barume (as above) 330

<sup>47</sup> As above

<sup>48</sup> As above

<sup>49</sup> As above

<sup>50</sup> H Mostert et al. 'Land law and governance: African perspectives on land tenure and title' (2017) 1



requested”.<sup>51</sup> They argue that these challenges are not only limited to the developing world, but anywhere land tenure security is diluted, the unfavourable impact on the business climate and economic activities are felt around the world.<sup>52</sup> The principal function of land law is to ensure the security of rights in land and this has to be protected from arbitrary or involuntary deprivation to ensure the interests of holders. The authors focus on different ways of conceptualising secure landholding in relation to individualisation of titles versus collective or group tenure.<sup>53</sup>

In his book, Gilbert demonstrates indigenous peoples’ relationship to their land and territories over centuries and how they are facing forced displacement and loss of access to their ancestral territories.<sup>54</sup> Indigenous peoples have been cast out from their land since colonisation to the present day. This was due to the desire for natural wealth located in their territories. A deep relationship with land characterises indigenous groups and international law has played a significant role regarding the dispossession of the land.<sup>55</sup> According to Gilbert, indigenous peoples’ attachment to their land and territories is considered as a cornerstone of their social, spiritual and cultural view and for most indigenous peoples, territory provides social identification, spiritual and cultural distinctiveness.<sup>56</sup> The recognition of land rights for indigenous peoples has to be seen as the most pressing issue, and Gilbert analyses the right of indigenous peoples under international law for them to live, own and use their traditional territories. It also provides a comprehensive understanding of the international legal approach to indigenous peoples’ land rights. Gilbert claims that the contemporary rights to land for indigenous peoples under international law can only be totally appreciated when it is regarded in its historical context as having emerged.

In conclusion, this chapter has outlined the general orientation of the study. The introduction and background to the problem have been presented, together with the problem statement, and the purpose and the objectives of this study. In the next chapter, a more in-depth discussion of the literature will be provided.

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<sup>51</sup> As above

<sup>52</sup> As above

<sup>53</sup> Barume (n 42 above) 2

<sup>54</sup> J Gilbert ‘Indigenous peoples’ land rights under international law: From victims to actors’ (2016) 1

<sup>55</sup> J Gilbert (n 52 above) 2

<sup>56</sup> As above

## Chapter 2. Theoretical Framework

### 2.1 Introduction

This chapter focuses on the review of literature related to this study. It gives insights on different arguments that have been put forward by different scholars on land rights and protected areas.

### 2.2 Protected Areas

The World Conservation Union (IUCN) defines a 'protected area' as "an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means".<sup>57</sup>

Dudley defines protected areas as geographical space that is recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.<sup>58</sup>

Bango & Xelelo<sup>59</sup> consider protected areas as the heart of the world's political and economic commitment to conserve biodiversity and other natural and related cultural resources. National Parks, wilderness areas, community conserved areas, nature reserves and antiquities sites are considered as protected areas. These areas are the mainstay of biodiversity conservation and contribute to people's livelihoods.

According to Borrini-Feyerabend et al. the aims of protected areas now include the sustainable use of natural resources, the preservation of ecosystem services and integration with broader social development processes, along with the core role of biodiversity conservation.<sup>60</sup> This social development process gives more attention to respect cultural values as essential associates of biodiversity and to the need to involve indigenous and local communities in management decisions affecting them. Starting from a focus on "nature" that basically excluded people, more and more protected area professionals today recognise natural resources, people and cultures

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<sup>57</sup> T White et al. 'Forest genetics' CAB International, UK (2007) 271

<sup>58</sup> N Dudley (n 18 above)

<sup>59</sup> A Bango & Z Xelelo 'Protected Areas and Community Relationships in the Sub-Saharan Africa: A case study of Dwesa-Cwebe Nature Reserve in the Eastern Cape, South Africa' (2017) 1 Paper presented at the 3<sup>rd</sup> World Conference on New Technologies.

<sup>60</sup> G Borrini-Feyerabend et al. (n 20 as above) 1

as fundamentally inter linked.<sup>61</sup> According to the DRC, protected area is clearly defined as geographical area recognised, consecrated and managed by any effective means, legal or otherwise, to ensure the long-term conservation of nature and the ecosystem services and cultural values associated with it.<sup>62</sup>

### 2.3 Community and Local Community

According to Rhonda & Pitman, it is hard to imagine a more elusive concept than the idea of community. Its elusiveness comes from its multidimensionality. Community can refer to a location (communities of the place) or a collection interest or tie whether in close proximity or widely separated (communities' interest).<sup>63</sup>

Community, according to Bellah and his colleagues is a "group of people who are socially interdependent, who practice together in discussion and decision making, and who share certain practices that both define the community and are natured by it".<sup>64</sup>

Mattessich and Monsey define community as a people who live within a geographically defined area and have social and psychological ties with each other and with the place where they live.<sup>65</sup> Community is a system of values, norms and moral codes which provoke a sense of identity.

A community is a human group sharing a territory and is involved in different but related aspects of livelihoods such as managing natural resources, producing knowledge and culture, and developing productive technologies and practices.<sup>66</sup>

Edwards and Jones, give a geographical definition when they maintain that local community is a grouping of peoples who reside in a specific locality and who exercise some degree of local autonomy in organizing their social life such as a way that they can from that locality base, satisfy the full range of their daily need.<sup>67</sup> Since this definition can apply to a range of sizes, it can be further specified that the members of

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<sup>61</sup> Borrini-Feyerabend et al. (n 20 as above)

<sup>62</sup> DRC Law n°14/003 of 11 February 2014 relating to the conservation of nature.

<sup>63</sup> P Rhonda & R H Pitman 'An introduction to Community Development'. Second edition. Routledge New York (2015) 7

<sup>64</sup> R N Bellah et al. 'Habits of the heart: Individualism and commitment in American life' (1985) 333 Berkeley, CA: University of California Press.

<sup>65</sup> P Mattessich & M Monsey 'Community Building: What Makes It Work: A Review of Factors Influencing Successful Community Building' Wilder Publishing Center (2004) 56

<sup>66</sup> As above n 38

<sup>67</sup> A D Edwards & D G Jones 'Community and community development' Mouton De Gruyter (1976) 12

a “local community” are those people that are likely to have face-to-face encounters and/or direct mutual influences in their daily life. In this sense, a rural village, a clan in transhumance or the inhabitants of an urban neighbourhood can be considered a “local community”, but not all the inhabitants of a district, a city quarter or even a rural town.

A local community could be permanently settled or mobile. The important processes in community life comprise social integration (cooperation to address common needs), social conflict (clashing of needs and wants among individual members or families within the community).<sup>68</sup> For the purposes of this study, communities are considered as entities that exist as cultural units and are not viewed as mere aggregate of individuals. Communities are cultural units that are characterised by a sense of belonging together, willingness to preserve solidarity between them and sharing a common heritage and common destiny. The term is used interchangeably with indigenous because it implies the idea of culture, living together, sharing common values and willing to preserve a certain way of life.

## 2.4 Indigenous peoples

It is not simple to respond to the question: Who is indigenous? The best way to answer this question is to ask indigenous peoples themselves. There is no official definition of indigenous peoples according to the United Nations because it is impossible to capture the full range and diversity of indigenous peoples around the world.<sup>69</sup>

The United Nations gives only criteria that can be used for the identification of indigenous peoples with reference to self-determination considered as a principal criterion. Cobo along with International Labour Organisation (ILO) (Convention No.169 on indigenous and tribal peoples) identified criteria that can be used as guiding principles for the identification of indigenous peoples.<sup>70</sup> The criteria are: “self-identification as belonging to an indigenous people, nation or community; a common ancestry and historical continuity with pre-colonial or pre-settler societies; a special relationship with ancestral lands which forms the basis of the cultural distinctiveness of indigenous peoples; distinct social, economic and political systems as well as

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<sup>68</sup> G Borrini-Feyerabend et al. (n 20 above) 9.

<sup>69</sup> United nations ‘Implementing the UN Declaration on the Rights of Indigenous Peoples ‘Handbook for Parliamentarians no 23 (2014) 11

<sup>70</sup> J M Cobo ‘Study of the problem of discrimination against indigenous populations’ Vol 1 (1981) 476 see [http://www.ilo.org/dyn/normlex/en/1?p=NORMLEXPUB:12100:0:NO:P12100\\_ILO\\_ODE:C169](http://www.ilo.org/dyn/normlex/en/1?p=NORMLEXPUB:12100:0:NO:P12100_ILO_ODE:C169)

distinct language, culture, beliefs and customary law; formation of non-dominant groups within society and the determination to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems".<sup>71</sup> For many governments, the concept indigenous peoples were problematic due to the fact that international law acknowledges that all peoples have a right to self-determination. In the way of avoiding calling indigenous peoples as 'peoples' many other terms were proposed to describe them such as: indigenous populations, indigenous groups, indigenous communities and persons belonging to indigenous populations.<sup>72</sup> This has forced some countries to replace the term people or to clarify that the use of people should not be construed as having any application regarding the collective rights that might be attached to the term under international law.<sup>73</sup>

According to Corntassel<sup>74</sup>, "requiring a standard definition of indigenous peoples may contribute to the exclusion of certain indigenous groups in the region from the need for protection and may also conform to state-centred bureaucratic decision-making practices that are antithetical to most indigenous beliefs systems". However, the failure to set up a commonly agreed term may possibly lead other ethnic groups to position themselves as indigenous peoples in order to acquire expanded international legal status and protections listed in ILO treaty No.169 and in the UDRIP.<sup>75</sup> An example expressed by indigenous peoples who participated at an International Work Group for Indigenous Affairs (WGIP), some participants claimed the status of indigenous when it was clear they were not. Afrikaner participants from South Africa claimed to be indigenous peoples and it caused a great concern among delegations that had more legitimate claims to indigenous status.<sup>76</sup>

The term 'indigenous' in this study refers to groups among a variety of ethnic groups within a state who experienced particular forms of systematic discrimination, subordination and marginalisation based on the basis of their particular cultures and

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<sup>71</sup> United Nations (n 67 above) 11

<sup>72</sup> (as above) 13

<sup>73</sup> As above

<sup>74</sup> J J Corntassel 'Who is indigenous? Peoplehood and ethnonationalist approaches to rearticulating indigenous identity' in C Erni 'The concept of indigenous peoples in Asia' A Resource book (2008) 76

<sup>75</sup> As above

<sup>76</sup> As above

ways of life and their mode of production. Indigenous people believe that the loss of their right to land means the loss of their contact with the earth and the loss of their identity.

## 2.5 Land rights

Although there is no right to land codified in international human rights law, access to land has been understood as fundamental for development and poverty reduction.<sup>77</sup> The debate concerning land rights and the battle against land snatches is connected to the protection of human rights.<sup>78</sup> According to Wickeri and Kahlan<sup>79</sup>, access to land is often considered as a prerequisite for people to access to economic, social and cultural rights and it is linked to civil and political rights. Land is considered a cross-cutting issue and not as a simple resource for only one human right in the international law. There is a number of rights that can be affected when the access to land is restricted (right to house, food, water, work and culture).<sup>80</sup> Land rights normally fall within the categories of land law and land tenure agreement, but are “rarely associated with human rights law”.<sup>81</sup> There is no treaty or any declaration that refers to a human right to land in a specific way under international law. Nevertheless, land rights are key human rights issues, and constitute the basis for peoples to access food, housing, water, work, culture and development.<sup>82</sup> Without any access to land, it is certain that most people will themselves be put in the situation of great economic insecurity.

In general, according to Wickeri & Kahlan, property refers to something that belongs to someone. It is a fundamental liberty of an individual. This right is enshrined in most of the constitutions and plays a role in the development of human norms and values.<sup>83</sup> Historically, according to Gilbert, property rights to land have been identified as one of the central issues that have sparked the development of an emerging human rights system and have been a central feature of the assertion of freedoms against the authoritarian state.<sup>84</sup> The right to property is then noticed as being a very conservative

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<sup>77</sup> CSR ASIA ‘Conflicts over land: A role for responsible and inclusive business’ (2013) available at [http://www.csr-asia.com/report/RIB\\_Asia\\_Land\\_report.pdf](http://www.csr-asia.com/report/RIB_Asia_Land_report.pdf)

<sup>78</sup> As above

<sup>79</sup> E Wickeri & A Kahlan (n 15 above)

<sup>80</sup> E Wickeri & A Kahlan (n 15 above)

<sup>81</sup> J Gilbert (n 1 above) 115

<sup>82</sup> J Gilbert (n 1 above) 116

<sup>83</sup> J Gilbert (n 1 above) 117

<sup>84</sup> As above

right as it protects the right of the landowning and applies only for existing possessions and not addressing the right to obtain land.<sup>85</sup> This right is also viewed as an important tool in fighting discrimination against women.

The right to housing is a fundamental human right, acknowledged in many texts on both the international and regional level as well as in quite a lot of constitutions or national legislative bills<sup>86</sup>. According to Golay and Ozden, a better knowledge of the right to adequate housing and concomitant obligations of governments is an indispensable condition for its concrete realisation<sup>87</sup>. The right to housing is on the whole relevant and land is a critical element and sufficient condition for the enjoyment of this right by individuals and the entire communities.

The condition of landlessness can be viewed as a threat to the enjoyment of other rights protected under the international instruments. According to Wickeri and Kahlan,<sup>88</sup> “the rights to food, water are protected in international framework international framework protects the right to food, water, a right that is not overtly point out in the international covenant on economic, social and cultural rights, but it has been derived from it, health and work”. Access to land is necessary for the realisation of the right to food and to be free from hunger as it is stipulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 11.<sup>89</sup> The right to water, which gives every person the right to adequate, safe, acceptable, accessible and affordable water for personal or domestic needs, depends also on access to land in both rural and urban areas.<sup>90</sup>

Indigenous peoples, according to Gilbert, have argued that their culture will disappear if strong measures are not implemented to protect their right to land.<sup>91</sup> A number of indigenous groups stressed that their territories and lands constitute the basis for their

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<sup>85</sup> J Gilbert (as above) 117

<sup>86</sup> C Golay & M Ozden ‘The right to housing: A fundamental human right affirmed by the United Nations and recognised in regional treaties and numerous national constitutions’ (2014) 37 Available at <https://www.cetim.ch/legacy/en/documents/bro7-log-A4-an.pdf>

<sup>87</sup> As above

<sup>88</sup> E Wickeri & A Kahlan (n 15 above)

<sup>89</sup> As above

<sup>90</sup> As above

<sup>91</sup> J Gilbert (n 1 above) 119

economic livelihood and they are considered as the source of spiritual, cultural and social identity.<sup>92</sup>

Land rights have been recognised as a crucial point within the issue of gender equality as they are dependent on marital status for women and make them vulnerable on land tenure. Women's land rights remain one of the most important issues of social, political and economic contestation in post-colonial Africa.<sup>93</sup> According to Al-Zubaidi *et al*, land has been recognised as key to advancing the socio-economic rights and wellbeing of women and their position in society.<sup>94</sup> It is been known that accessing, control and land ownership largely remain the area of male benefit, entrenching patriarchal structures of power and control over community resources, history, culture and tradition. The lack of serious attention to gender equality underpins the marginalised position of women and destabilises mainstreaming efforts to improve women's rights.

## **2.6 Theories of extinguishable indigenous land rights**

The extinguishment of indigenous peoples' land rights theories as developed by Gilbert<sup>95</sup> was applied in this mini-dissertation to understand how local communities from Luki in the DRC were deprived of their land rights. It is important to notice that the process of extinguishment of land rights of Luki people has followed the same process as the extinguishment of indigenous land rights as it was done during the colonisation process.

The theories of extinguishable indigenous peoples' land rights encompass two aspects of extinguishment of indigenous land rights (see sub-headings 2.6.1 and 2.6.2). According to Gilbert<sup>96</sup>, "the extinguishment of indigenous peoples' land rights through the process of domestication of historical treaties constitute the one aspect of the theories and the other one can be found through the theories of extinguishable land rights for indigenous peoples". The indication to extinguishable rights applies to the recognition by the State authority of an extinguishable right for indigenous peoples to dwell in their traditional land.<sup>97</sup> The reference to the extinguishable right of occupancy

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<sup>92</sup> As above

<sup>93</sup> L All-Zubaidi et al 'Women and land rights: Questions of access, ownership and control' (2013) 5 available at [https://za.boell.org/Sites/default/files/perspectives\\_2.13.pdf](https://za.boell.org/Sites/default/files/perspectives_2.13.pdf)

<sup>94</sup> As above

<sup>95</sup> J Gilbert (n 52 above) 74

<sup>96</sup> J Gilbert (as above)

<sup>97</sup> As above



comes from the 'doctrine of discovery'. Gilbert continues to argue that one of the first references to extinguishable rights of occupancy came through the reference to the doctrine of discovery. The discovery doctrine was based on the assumption that indigenous peoples had rights over their territories before their so-called discovery. These rights were extinguished when the colonial powers arrived. Secondly, it has been admitted that such pre-existing land right contributed to the acknowledgement of a new doctrine on indigenous title that identifies a restricted form of extinguishable land ownership.<sup>98</sup>

### **2.6.1. Discovery: A theory of extinguishable right of occupancy**

The theory of extinguishable right of occupancy deals with the deprivation of the land by coloniser in terms of discovery of territories. This means that the doctrine of discovery was used as colonial tools to justify the expropriation and occupancy of land belonged to indigenous people and local communities.

The very important issue during the colonisation of indigenous territories by colonial power was the existing conflict between the rights of settlers and the rights of indigenous peoples.<sup>99</sup> Even though indigenous peoples lost their sovereignty, this did not mean that their territories were inhabited. For this reason, according to Gilbert, indigenous rights of ownership as opposed to the rights of settlers remain to be defined. The resolution of this as expressed by Gilbert came through what has been called discovery.<sup>100</sup> This theory can be sustained in the case of *Johnson v M'Intosh*<sup>101</sup> of 1823. It drew foundations and justification of the doctrine of discovery. This case was based on a property dispute between two parties who claimed ownership of the same piece of land located in Indian land. The defendant Williams M'Intosh legitimated his title to the Cabot grant (with reference to charter on conquest) and the plaintiff claimed his title through the purchase of the disputed land from the Pinkeshaw Indians.<sup>102</sup> The Supreme Court ruled in favour of M'Intosh asserting the superiority of the title of discoverer over the right of the plaintiff who had bought the land from the

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<sup>98</sup> As above

<sup>99</sup> As above (n 52 above) 75

<sup>100</sup> As above

<sup>101</sup> As above

<sup>102</sup> As above

Indians. This decision was based on the earlier doctrinal position of international law as it was said by the judge that:

*‘The character and religion of inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim ascendancy. To leave them in possession of their country was to leave the country a wilderness. Agriculturalists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from their territory. Excuse, if not justification in the character and habits of the people whose rights had been wrested from them. The potentates of the Old World made ample comprehension to the inhabitants of the new, by bestowing upon them civilisation and Christianity’.*<sup>103</sup>

It is clear, according to Gilbert, that the judge used all the racist formulae of Eurocentric views of the savages and theorist’s justifications of early international law. For example, the right of conquest centred on Christianity and civilisation in conjunction with the agriculturist argument.<sup>104</sup> These were given legal consequences as the court ruled: “however extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned”.<sup>105</sup> This can be considered as the heart of the legal fiction which was to have a very profound impact on the indigenous dispossession.<sup>106</sup> From the ruling of the judge, it has been clear that he admitted that discovery handed title to the discovering nation even though the court implicitly recognized that the country had been inhabited before its colonisation.<sup>107</sup>

## **2.6.2 Contemporary theory of extinguishable indigenous title**

The theory of extinguishable indigenous title is the second component of extinguishable indigenous land rights. In this theory, indigenous title is used to identify

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<sup>103</sup> J Gilbert (n 52 above) 75-76

<sup>104</sup> (as above) 76

<sup>105</sup> As above

<sup>106</sup> As above

<sup>107</sup> As above

both native and aboriginal title.<sup>108</sup> Indigenous title is defined by Gilbert as a right to land along with its resources and is based on the allegation that colonial assertion of sovereignty did not necessarily extinguish indigenous peoples' right to landownership.<sup>109</sup> Indigenous title is considered as the only one right left for indigenous following the domination of colonial power on indigenous peoples or local communities. This is generally defined as "a right for indigenous peoples to the exclusive use and occupation of their ancestral lands until such right is extinguished either voluntarily or by an act of the national parliament".<sup>110</sup> The theory of indigenous peoples predominates in most common law countries.

#### 1. Content and sources of indigenous title

The origins of the indigenous title are found in the indigenous customs and laws despite of the imposition of colonisation on indigenous people.<sup>111</sup> For example, in Canada, the courts have underlined that aboriginal titles are grounded on pre-existing aboriginal laws and on the principle of common law that occupation is proof of possessions.<sup>112</sup> Aboriginal title is understood as a right that has its source in the occupation of land prior to the Crown's assertion of sovereignty.<sup>113</sup>

#### 2. International land and extinguishment

The process of extinguishment, according to Gilbert, has been found in the power of the executive or the legislative. Indigenous title can be openly extinguished by the adopted act or by an act that creates a situation that would ultimately extinguish the title.<sup>114</sup> Grounded on traditional doctrine of separation of powers, it is difficult for the judiciary to review executive or legislative acts of extinguishment based on the requirement of a clear and plain intention.<sup>115</sup> According to Gilbert, the general rule with regard to the extinguishment is that the parliament should adopt the valid act that

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<sup>108</sup> (as above) 83

<sup>109</sup> As above

<sup>110</sup> (as above) 84

<sup>111</sup> (as above) 85

<sup>112</sup> As above

<sup>113</sup> As above

<sup>114</sup> (as above) 93

<sup>115</sup> As above

exhibits clear and plain intention to extinguish indigenous title.<sup>116</sup> The obligations of plain and clear legislative intention is a familiar feature of most of the jurisdictions acknowledging indigenous title and would be determined by an objective test and not in the state of mind of legislators.<sup>117</sup> Furthermore, extinguishment has been achieved implicitly through legislative act intended to regulate the use of the land.

According to Gilbert, extinguishment is a discriminatory practice from two levels: it is only applicable against indigenous title and no other rights to land ownership are extinguishable. With regard to this, it is crucial for indigenous title to be submitted to the same level of protection against expropriation. The fact that indigenous entitlement can be extinguished by other deeds is clearly discriminatory since it assumes that indigenous title is inferior and subordinated.<sup>118</sup> However, extinguishment of the right to land for indigenous peoples is a relic of colonial conception of discovery which is contingent on the vision that colonial law had the inherent effect of extinguishing any other form of land tenure.<sup>119</sup>

## Conclusion

This chapter gives insight into different concepts and arguments that have been put forward by different scholars on land rights and protected areas.

The DRC has an obligation to give adequate recognition to indigenous peoples and local communities' rights to land and resources. In addition, the Government should guarantee appropriate consultation and ensure community participation in programs and policies that affect their land and resources. Such acknowledgement ought to incorporate indigenous people groups' desired land tenure rights that reflect universal human rights guidelines. Any limitation of these rights should arise only from the most urgent and compelling public interest. After adequate consultation, participation and negotiation of a fair amount of compensation and other remedies can be decided on.

Having established that local communities are concerned with land rights, the next chapter examines the socio-economic rights of local community of Luki.

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<sup>116</sup> (as above) 94

<sup>117</sup> As above

<sup>118</sup> (as above) 103

<sup>119</sup> As above

## Chapter 3 Reserve of Luki and socio-economic rights of local communities

### 3.1 Introduction

The Democratic Republic of Congo (DRC) is the second biggest country on the African continent with 2,345 km<sup>2</sup>. The population is about 70 million. It is located in Central Africa, bordered by ten countries: Angola, Burundi, Central African Republic, Congo Republic, Rwanda, Sudan, South Sudan, Tanzania, Uganda and Zambia. The DRC was made famous by the explorers Stanley and Livingstone.<sup>120</sup> However, the DRC has also been known as a place of brutality and violence due to its past history of civil unrest. The DRC has the world's second largest river by volume and the world's second largest rainforest - "18% of the planet's remaining tropical rainforest".<sup>121</sup> The DRC forest resource represents 70% of the country's vegetation cover and makes it the most biodiversity rich country on the African continent. Despite diversity and abundance of natural resources, the DRC's forests have become one of the world's most threatened ecosystems.<sup>122</sup>



Figure 1: The location of the research area, that was conducted at the Reserve of Luki in the southwest of the DRC. Source: WWF2009.

<sup>120</sup> B R Shange (n 21 above) 35

<sup>121</sup> As above

<sup>122</sup> As above

The Reserve of Luki is found at the bottom of the Congo Central Province at about 120 m to the Atlantic Coast, 30 km from the City of Boma and 150 km from Matadi. According to Lubina quoted by Shange<sup>123</sup>, Luki is located between 5°30' and 5°45' latitude south, and between 13°07' and 13°15' longitude.<sup>124</sup> The altitudes vary between 151 and 500 m above sea level. The population of Luki consists mostly of Yombe tribe divided in four groups: Sumba-Kitutu with 3,955 inhabitants; Sukuti 717 inhabitants; Kimbuya 142 inhabitants and Kiobo 26 inhabitants.<sup>125</sup> The management of the Luki Reserve is under UNESCO's supervision. The structure that governs the Luki Reserve is composed of various entities such as: the Ministry of Environment, Conservation and Tourism; the Ministry of Scientific Research; Local government and volunteers. The primary idea of this site was "the establishment of an agricultural and forest research station as this site is also considered ecologically rich with high value of forest biodiversity and constitutes an island forest ecosystem that is surrounded by local communities living by grace of agricultural activities".<sup>126</sup> Luki Reserve is well recognised internationally under the UNESCO program of Man and the Biosphere (MAB) and it is a strategic and important site for the demonstration for better relations between human and nature.<sup>127</sup>

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<sup>123</sup> B R Shange (n 21 above) 39

<sup>124</sup> UNESCO Program of Man and Biosphere. Available at <http://www.unesco.org/mabdb/directory/biores.asp?mode=all&code=zai+02> date of access 22 April 2018

<sup>125</sup> as above

<sup>126</sup> As above

<sup>127</sup> As above



**Figure 2: The rain forest Luki Reserve in Kongo Central Province.**  
**Source: WWF 2015**

The objectives for managing Luki Reserve are: the preservation of natural and cultural variety; the establishment of a form of management as site for experimentation of the sustainable management of forest ecosystem and being a site for scientific research of forestry diversity, environment and training people on forest resource management.<sup>128</sup> All these objectives sound good, but their implementation on the ground is difficult. The non-implementation of these objectives contributed to unsustainable management of natural resources of Luki. According to Shange<sup>129</sup>, the population of Luki is estimated at 5,244 inhabitants divided into four local groups: Sumba-Kitutu (3,955 inhabitants), Sukuti (717 inhabitants), Kimbuya (142 inhabitants) and Kiobo (26 inhabitants) including 3,841 MAB personnel living in the Reserve. Luki is the name given to the lowland forest that forms the Mayombe forest patch near the DRC's Atlantic coast situated in the Luki River basin.<sup>130</sup> Local communities living

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<sup>128</sup> Ministère de l'Environnement, Conservation de la Nature, Eaux et Forêts et Ministère de la Recherche Scientifique et Technologie 'Convention de Collaboration relative à la Gestion de la Réserve Forestière de LUKI' 7 October 2006

<sup>129</sup> B R Shange 'Community forest management and policy implications for the Biosphere Reserve of Luki, DRC' (2012) 41

<sup>130</sup> T Liyanda et al 'Birds of the Man and Biosphere Reserve of Luki, Bas-Congo province, DRC' *The journal of biodiversity data* Vol 11(5) (2015) 1755

around Luki Reserve are forest people and they recognise themselves as indigenous people in the area. From their way of living, local communities around Luki Reserve rely on land as source of living and as their existence through hunting, farming, making medicine from roots and leaves, and housing. Most people living at Luki Reserve speaks Yombe as their maternal language. Socio-economic activities around Luki are dominated by agriculture and sale of non-timber forest products (NTFP) for local communities to make a living.



**Figure 3: Water source at Luki Reserve**  
Source: WWF 2015

Both traditional and modern economic activities are carried out. The traditional activity is mainly shifting slash and burn cultivation (plantain, bananas, cassava, taro, maize, groundnuts and yam; cultivated fruit trees: mango, avocado, etc.). The population is also involved in hunting, fishing and gathering, even in the Reserve's central area. Small livestock (goats, pigs and sheep) and poultry raising are widespread in the villages. With regard to energy, the gathering of fuel wood and charcoal-making are popular activities to supply the towns of Boma and Matadi. Agriculture is the main economic activity. However, the Luki Reserve faces problems due to illegal forest



exploitation for example for fuel wood and house construction, carbonisation, hunting and fishing. The local community lives in deep poverty characterised by the non-access to land, the lack of adequate food, the absence of adequate health programmes, lack of education, lack of adequate housing and safe drinking water.

### **3.2 Socio-economic rights of Luki people in the DRC**

The Constitution of the Democratic Republic of Congo provides for socio-economic rights in Chapter Two of the Bill of Rights, section 34,36,43,47 and 48.<sup>131</sup> These rights are related to property, work, education, health, food and housing. These rights are enumerated as policy for the government and there is no possibility to lay a charge against the Government for non-implementation of these human rights, which depends on availability of resources.

The forest of the DRC plays an important role like any other country in the developing world to sustain both urban and rural community livelihood. In terms of sustainable development Congolese forests and forest dependent people have a considerable role to play in the forest sector. The Luki forest is considered by the local community as an important element that sustains their existence. The forest gives them all that are necessary to make a living and especially the spiritual connection with their ancestors.

According to the Constitution of the Democratic Republic of Congo, “the State exercises permanent sovereignty over land. This comprise: soil, subsoil, water, woods, air space, rivers, lakes, maritime space, sea and continental shelf”.<sup>132</sup> Nevertheless, due to the lack of information by local communities on the value that forests provide to both environmental and human well-being, the non-justifiability of socio-economic rights and the lack of the resources by the government, socio-economic rights of Luki peoples are not taken into account. An empirical observation of socio-economic rights of Luki people in the DRC shows that the rights to housing, food, education, clean water for indigenous and local communities of Luki Reserve are not taken into account by the government of the DRC.

Local communities’ land rights are considered as the basis for them to access food, clean water and housing. For their development and without access to land, local communities’ peoples of Luki Reserve find themselves in great economic insecurity.

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<sup>131</sup> Constitution of the DRC, 2006

<sup>132</sup> As above

The non-access to land contributes to the disappearance of their culture. The situation of landlessness impinges on the realisation of socio-economic rights of Luki peoples. The rights to housing, food, and clean water are inscribed in many human rights instruments. For example: Article 11(1) of the International Covenant on Economic, Social and Cultural Rights stipulates that the 'State's Parties shall 'recognise the rights of everyone to adequate housing, food, water and clothing and the continuous improvement of the standard of living conditions'.<sup>133</sup>

Article 27 of the Convention on the Rights of the Child specifies in paragraph (1): "State's signatories recognise the right of every child to a standard of living adequate for the physical, mental, spiritual, moral and social needs of the child". It also provides in paragraph (3) that, in accordance with domestic conditions and according to their means, State's Parties shall take appropriate measures in assisting parents and other persons responsible for the child to implement this right and, where necessary, they will provide material assistance and support programs, particularly in nutrition, clothing and shelter.<sup>134</sup> Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination stipulates in paragraph (e): "State's Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, ethnic origin or colour in the enjoyment of economic, social and cultural rights".<sup>135</sup>

The Universal Declaration of Human Rights in Article 25 paragraph one provides the "right of every individual to a standard of living for the health and well-being of himself and his family and this includes food, clothing, shelter and medical care and all necessary social services".<sup>136</sup>

The connection between the right to housing and land rights can be seen in a positive way as land rights are seen as an essential right for the accomplishment of the rights to housing. Dispossession of land could be seen in a negative way as forced eviction and violation of the right to housing.

Land right in the Covenant on Economic, Social and Cultural Rights refers to the improvement of "production, conservation and to the distribution of food by expanding

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<sup>133</sup> ICESCR, art 11.

<sup>134</sup> CRC, art 27(1) & (3)

<sup>135</sup> ICERD, art 5(e)

<sup>136</sup> UDHR (as above 85) art 25

agrarian systems to accomplish development and the utilisation of the natural resources".<sup>137</sup> The landlessness of Luki people directly affects the realisation of their right to food. Without land, it is tremendously difficult for local communities to access food and this affects their right to food. The realisation of the right to food, housing and cultural life is deeply embedded in the recognition of local communities' rights to access and use their lands.

It is easy to establish the relation between the right to land and the right to food as land produces harvests for the livelihood and commercial need. The Democratic Republic of Congo, the second largest country in Africa, hosts half of all Africa's forest, about 70% of people live in rural areas, while around 40 million people depend on farming for their livelihood.<sup>138</sup> The right to food is understood to be one of the rights that oblige the government to provide food for their people, but also the access to the resource need to produce food which includes equitable distribution of arable land.<sup>139</sup> The right to food is strongly affirmed under international human rights law. In article 25 of the UDHR, it stipulates that everyone has the right to an adequate standard of living.<sup>140</sup> Article 11 of the ICESCR makes a special reference to food by expressly affirming the right of everyone to an adequate standard of living and including having adequate food.<sup>141</sup> Article 11(2) (a) requires States to improve methods of production, conservation and distribution of food; in particular reforming agrarian systems to achieve the most efficient use of natural resources. Article 11(2) (b) requires the implementation of an equitable distribution of world food supplies.<sup>142</sup> Access to land/land right constitutes an essential right of local communities of Luki because land provides food, firewood, and also materials for building houses. The situation of landless Luki people constitutes a big problem as they cannot have access to enough food, firewood, water for subsistence farming and they cannot enjoy their cultural rights. This situation puts the local community in food insecurity and exposes them to different diseases. The right to culture covers in particular the right of everyone alone,

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<sup>137</sup> ICESCR, art 11.

<sup>138</sup> New Agriculturalist 'Country Profile-Democratic Republic of Congo' (2009) available at <http://www.new-ag.info/en/country/profile.php?a=641>

<sup>139</sup>D Lötter 'People, poverty and the need for a rights-based approach to land policy reform in Africa: A study of the importance of socially and environmentally focused land policy coordination in Africa to achieve the rights to food, health and housing. The case of the DRC and the Kingdom of Lesotho' (2015) 26

<sup>140</sup> CESCR General Comment No.12, article 11

<sup>141</sup> CESCR General Comment No.12, article 11(2)(a)

<sup>142</sup> CESCR General Comment No.12, article 11(2)(b)

or in association with others or as a community. These include the enjoyment of cultural goods and resources.

Without land and the knowledge that comes mainly from use of the land, local community cannot survive. Many local communities believe that land is not only an issue of property, but also the source of spiritual, cultural and social identity. Gilbert argues that land rights for indigenous peoples are a subsistence rights because of the connection that exists between their rights to use their land and their survival. Without their land, they would not have access to means of livelihood.<sup>143</sup> The lack of access to land for Luki people has cultural and economic impact on traditional rites, hunting, fishing, natural medicines, and others forms of expressions. The non-enjoyment of the forest and nature's gifts such as rivers, flora and fauna has been considered a problem for cultural rights of the local community. The non-access to land and the livelihoods has a cultural and economic impact because they are not allowed to hunt and fish. The Local community problems include: non-recognition of land rights; discrimination against them in land ownership, the protection of traditional ancestral and agricultural lands including pastoralist and hunter-gatherer communities, and failure to implement laws protecting the rights of Luki peoples.

However, land rights for indigenous and local community is also provided in ILO Convention 169, adopted in 1989, it is an extraordinary visionary instrument to guarantee that indigenous peoples enjoy human rights without discrimination, control their own development and take part in the decision-making processes that affect their lives. ILO convention 169 has been ratified till now by only 22 countries from which one African State (Central African Republic).<sup>144</sup> This implies that numerous indigenous peoples in the African continent are not legally capable to claim their rights. However, ILO convention 169 remains the main international legal instrument which deals specifically with the rights of indigenous peoples.

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<sup>143</sup> J Gilbert (n 52 above) 173

<sup>144</sup> The list available at:

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312314:NO) , accessed 10 April 2017

ILO Convention 169 includes: “rights to participate in the formulation of legislation; certain rights to internal autonomy, including economic, social and cultural development; respect for certain aspects of indigenous customs or customary laws; rights to lands and territories, including use rights, traditional economic activities and the use of natural resources; protection from relocation and; broad based cultural rights religious, linguistic and educational”.<sup>145</sup>

The ILO convention 169 makes provisions related to lands, territories and resources. On one hand, Article 13 (1) of ILO convention 169 stipulates: In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.<sup>146</sup> On the other hand, article 14(1),(2) and (3)<sup>147</sup> recognises indigenous peoples’ collective rights of ownership and possession over the land that they traditionally occupy and this article stipulates:

“(1) The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

It makes provision for a protective approach based on the manner of land use, ownership and occupation in accordance with traditional or customary forms of use, ownership and occupation.<sup>148</sup>

(2) Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

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<sup>145</sup> F MacKay ‘A guide to indigenous peoples’ rights in the international labour organisation’ (2003) 12 available at <https://www.forestpeoples.org/sites/default/files/publication/2010/09/iloguideiprightsju102eng.pdf>

<sup>146</sup> ILO Convention No.169 of 1989, article 13(1)

<sup>147</sup> ILO Convention No.169 of 1989, article 14

<sup>148</sup> SG Barnabas ‘The Role of international law in determining land rights of indigenous peoples: The case study of Abuja Nigeria and a comparative analysis with Kenya’ (2017) 302

(3) Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned”.

Article 15(1) of the ILO convention 169 stipulates that Indigenous peoples have the right to ‘participate in the use, management and conservation of natural resources pertaining to their lands and the right to have these resources ‘specially safeguarded’.<sup>149</sup>

Considering the above provisions related to the ILO convention 169, it will be difficult for the LUKI people to fully enjoy the realisation of indigenous peoples’ rights owing that the DRC has not yet ratified the convention C169 that promotes the respect for diversity and the realisation of an inclusive and sustainable development in the Luki community.

In conclusion, socio-economic rights of Luki people are not taken into account by the DRC Government. The non-access to land for Luki people has an impact on the realisation of their socio-economic rights and contributes to the disappearance of their culture. In addition, it has an impact on the fulfilment of the rights mentioned in the Universal declaration of Human Rights article 25(1) regarding a standard of living for the health and well-being of individual and his family and this includes food, clothing, shelter and medical care. The situation of landlessness has effect on the realisation of socio-economic rights of Luki peoples. The next chapter focuses on the land rights in domestic framework.

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<sup>149</sup> ILO Convention 169, article 15(1)

## Chapter 4 Land rights in the DRC

### 4.1 Introduction

This chapter focuses on Congolese land rights from the colonial period to the present day. It provides an overview of the main legislative development and addresses the reform of lands tenure system which has been taken place in the country.

### 4.2 The colonial period

The current situation related to ownership and control of land started since the Democratic Republic of the Congo became a private property of King Leopold II of Belgium. The Congo Free State suffered for many decades of land dispossession and large areas of land were declared as private property of King Leopold II and enormous areas were granted to European companies. Congolese peoples were considered as squatters on their own land when Europeans first arrived.<sup>150</sup> The DRC land was then the property of lineage or descent groups, and the land chief exercised authority over land allocation. The indigenous systems regarding the land were transformed by the colonial power of the Congo Free State and Belgium Congo in which the land law system was established to favour the exploitation of the country's natural resources by Belgian authorities.

According to Musafiri, before Congo Free State was founded in 1885, there were two types of land: land occupied by the indigenous peoples - local communities governed by the custom - and land occupied by European traders and missionaries by virtue of contracts signed with Bantu, Nilotic or Sudanese chiefs.<sup>151</sup> These agreements which were concluded with indigenous peoples or communities for the occupation of the land were abolished by the Administrator General in the Congo at the time the territory was proclaimed Congo Free State.<sup>152</sup> As a consequence, the Congo Free State recognised the right of indigenous peoples to own land occupied collectively or individually in accordance with traditional practices and subject to custom. The land acquired by European traders and missionaries was recognised under state law as valid contracts; the remaining land or empty land became part of the state domain, a part that was

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<sup>150</sup> C Long 'Land rights in the Democratic Republic of Congo: A new model of rights for forest dependent communities' in K Helliker & T Murisa 'Land struggles and civil society in Southern Africa' (2011) 281

<sup>151</sup> P N Musafiri 'The dispossession of indigenous peoples' land rights in the DRC: A history and future prospects' (2008) 3

<sup>152</sup> As above

under private ownership.<sup>153</sup> According to Long, all land considered as without a holder was declared property of the state.<sup>154</sup> The legislation of 1885 referred to the customary rights of indigenous peoples and their right to occupation, but this was not further defined and this right was always subject to a decision of the Belgian administration.<sup>155</sup> Congolese peoples were allowed to occupy land but only Europeans could own it. Vacant lands belonged to the state with the land that was occupied by native peoples under the authority of their chiefs and continued to be governed by the customary laws and customs of the lineage groups.<sup>156</sup> The issue of vacant land was not also clearly defined. Even if it was private land, concessions were issued by the State, and the administrators who took such decisions were in theory expected to respect native land rights. This rarely happened and local peoples had no redress for their land dispossession

From 1908, the Congo Free State formally became a colony of Belgium.<sup>157</sup> This means Belgium took over the control of the Congo from King Leopold II. At that time, the rules of land tenure and the rights to ownership did not change in any substantial way. According to Long, “the decree adopted in 1906 was supposed in formally way to correct some of the extremes of the Congo Free State, by delimitation of lands occupied by the autochthon peoples. However, the practical implementation of this decree merely led to the cultivation or direct occupation of recognised persons, which made it possible to exclude fallow land and forest areas owned or used by peoples for other purposes”.<sup>158</sup> This situation ipso facto disregarded hunting, gathering practices of many communities and specially for so-called pygmies and it failed to recognise traditional practices of land tenure and in general way the rights to common resources.<sup>159</sup>

According to Barume, quoted by Long<sup>160</sup>, the decree created Virunga Park, and this can be considered as the best example of another category of land that had a

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<sup>153</sup> As above

<sup>154</sup> C Long (n 138 as above)

<sup>155</sup> As above

<sup>156</sup> As above

<sup>157</sup> C Long (n 138 as above) 282

<sup>158</sup> As above

<sup>159</sup> P N Musafiri ‘The Dispossession of indigenous land rights in the DRC: A history and future prospects’ Forest Peoples Programme (2009) 4

<sup>160</sup> As above



substantial impact on local people protected areas.<sup>161</sup> The establishment of a number of national parks in which only research activities were allowed was considered as effective dispossession of the local communities and source of conflicts.

### 4.3 The post-independence period

#### 4.3.1 The period of independence

From the first years of independence in 1960, the new country maintained the existing land tenure system inherited from the Belgian colony. In 1966, the previous legislation inherited from colonisation, was swept away by the ordinance-law No.66-343 of 7 June 1966, the so called “Bakajika law”.<sup>162</sup> This law gave the State entire ownership of rights of all land, forest, and mineral resources and cancelled any concession or title granted before independence on 30 June 1960.<sup>163</sup> The land law No.73-021 adopted in 1973 reinforced the Bakajika Law and gives total ownership of the land to the State. This land law called ‘*Loi Fonciere*’ makes the State the sole owner of the soil and subsoil of which it has exclusive, inalienable and imprescriptible ownership.<sup>164</sup> Under this law according to Musafiri, 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.<sup>165</sup> This law allowed individuals to become landowners in order to obtain private rights of enjoyment on land belonging to the private domain of the State.<sup>166</sup> The land law was amended in 1980 and undermined most preceding formal recognition of customary rights. Article 53 of the land law of 20 July 1980 brought all land back into the State domain and stipulates: the soil is the exclusive, inalienable and imprescriptible property of the State.<sup>167</sup>

#### 4.3.2 The land right in the third Republic to present day

It is true that over the last 20 years, the DRC has been burdened with civil and political conflicts and these conflicts have a close relationship with land rights.<sup>168</sup> Local communities of the DRC have lived interdependently and many Congolese people feel

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<sup>161</sup> As above

<sup>162</sup> P N Musafiri (n 139 as above) 6

<sup>163</sup> (as above) 7

<sup>164</sup> As above

<sup>165</sup> As above

<sup>166</sup> As above

<sup>167</sup> Law No.73-021 of 20 July 1973 as amended on 18 July 1980, article 53

<sup>168</sup> D Lötter (n 133 as above)

a strong attachment to their land. At a local level, when it is possible, the customary land rights of local communities compete with nature conservation and resource exploitation for example mining, oil, forestry; infrastructures, projects, and commercial and industrial scale agriculture. In many cases it is true that commercial interests are in breach with the rights of local communities when it comes to land use allocation. The recent forestry code No. 011/2002 and the 2014 Law No. 14/003 on nature conservation show a positive change in language by recognising that land rights for community exist and they can play an important role in nature conservation, but this is not the case. According to United Nation Security Council,<sup>169</sup> from the time of the cessation of the hostilities in 2002, the United Nations Security Council Expert Panel on Illegal Exploitation of Natural Resources in the DRC undoubtedly recognised the dangers that uncontrolled re-activation of the natural resources in the DRC would present. The panel also contended that, the capture and control of valuable natural resources are still key factors in the continued insecurity in the DRC.<sup>170</sup> This demonstrated that the issues regarding land tenure (land ownership, access to and control of land) remain fundamental to peace and policy processes. From 2002, the government of the Democratic Republic of the Congo has taken a number of actions to amend the previous land tenure system. This referred mainly to the mines registry office and forest registry office. As the peace negotiations were ongoing, external actors and donors persuaded the government of the DRC to adopt new legislation with regard to natural resources (particularly on forest and mining resources) as a condition for them to continue with their support. The World Bank also adopted the same position. The adoption of both Forest and Mining Codes in 2002 was considered as key for the relaunch of the Congolese economy by the donors. However, the adoption of these two codes could have major implications for land use and land tenure in the DRC.<sup>171</sup> The constitution of the DRC adopted and enacted in 2006 re-confirmed State control on land and resources but with a little difference to the Bakajika Law. The Congolese State exercises permanent sovereignty over lands and resources rather than being proprietor. Article 9 of the DRC constitution stipulates: “the State exercises permanent sovereignty over the Congolese soil, subsoil, water resources and woods,

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<sup>169</sup> UN Security Council ‘Final report of the panel of experts on the illegal exploitation of natural resources and others forms of wealth of the DRC’ S/2002/1146 (2002) 28

<sup>170</sup> U N Security Council (n 169 as above)

<sup>171</sup> C Long (n 131 as above) 286

air space, rivers, lakes and maritime space as well as over the Congolese territorial sea and the continental shelf".<sup>172</sup> In its Article 34, the constitution recognises that private property is sacred and this article stipulates: "the State guarantees the right to individual or collective property acquired in accordance with formal law or customary".<sup>173</sup> On the other hand, the constitution is ambiguous regarding the definitions of these rights, the forest and mining codes that describe the details of the law does not address it and this gives the impression that the land law of 1973 amended in 1980 still stands in the DRC, and there are no concrete actions taken to discuss the matter.<sup>174</sup> According to Long, there is, however; considerable unwillingness from the DRC government to openly discuss the implications of each of these codes for land tenure and land rights or to initiate a significant discussion.<sup>175</sup> This situation can be perhaps explained by the idea that land managed extensively has rarely worked to the benefit of the local peoples and especially for the poorest.<sup>176</sup>

#### 4.4 The forestry system in the DRC

The forest authority in the DRC is the Ministry of the Environment, Nature Conservation and Tourism and forests are classified in three categories:<sup>177</sup>

1. *Forests subjects to strict legal conditions laid down in classification order. In this category, when the rights of use are concerned, they are given throughout a specific purpose, especially for ecological nature.*
2. *Protected forests. This category does not have a classification order and are subject to a less restrictive legal regime as far as the rights of use are concerned.*
3. *Permanent production forests, 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.*

The Congolese forestry system has also made a provision regarding the establishment of an institution specialising in advising the government with regard to the management of the forests. The forest code envisages three main mechanisms in which

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<sup>172</sup> Constitution of the DRC (n 125 as above), article 9

<sup>173</sup> Constitution of the DRC (as above), article 34

<sup>174</sup> C Long (n 138 as above) 287

<sup>175</sup> As above

<sup>176</sup> As above

<sup>177</sup> DRC Forest Code No.011/2002, article 4

communities can be involved in managing Congolese forests.<sup>178</sup> These are: the advisory councils, the granting and planning process and the national and provincial forestry plans. These mechanisms will be of use to defend and protect the rights of forest peoples.

The DRC Forest Code No.011/2002 is considered as the most hotly contested legislation of the moment. The DRC Forest covers an area of two million square kilometres of which half are closed high rainforests and the rest are open forests and wood savannah.<sup>179</sup> The DRC forests are crucially important as a resource for human inhabitants and according to the World Bank an estimated 35 million people (70% of the national population) reside within and are dependent on forests to some extent.<sup>180</sup>

A current Forest Code No.011/2002 was adopted in 2002 by an interim government. According to Counsell, it provided a skeletal legal framework for the management of the DRC forests. The Forest Code includes the broad definitions of different forest management objectives such as industrial timber production, nature conservation and community use.<sup>181</sup> The Forest Code introduced innovations such as legal protection of traditional users' right, the right of local people to manage community forests, mandatory sustainable management plans for production forests, revenue sharing with local governing bodies, social responsibility clauses attached to concession contracts, expanding the protected areas network and the promotion of the environmental services.<sup>182</sup> According to Counsell, the Code is considered as a first building block in what was essentially an almost complete legal vacuum. However, the framework of the Congolese Code is flawed in important ways.<sup>183</sup> The code sets out the basis for industrialisation of the DRC forests but does not make provision for hunter-gatherer communities. It will be worse to continue with a legal vacuum.<sup>184</sup> The flaws in the Code can be rectified through development of appropriate implementation decrees and through the establishment of appropriate structures because as they exist now, they will continue to affect the lives of millions of Congolese.<sup>185</sup> The Code has various

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<sup>178</sup> DRC Forest Code No.011/2002, article 29

<sup>179</sup> S Counsell 'Forest governance in the Democratic Republic of Congo: An NGO perspective' (2006) 7

<sup>180</sup> (as above) 15

<sup>181</sup> DRC Forest Code No.011/2002, article 10

<sup>182</sup> As above

<sup>183</sup> As above

<sup>184</sup> (as above) 17

<sup>185</sup> As above

weaknesses while it makes provisions about community forests and the retrocession of a certain amount of taxes to local communities. The Code on the other hand serves above all the legal basis for development of the country's forest estate as an industrial commodity than a source of sustenance and livelihood for the majority of Congolese people. It sets out that the Forest Code will promote conflict between the industrial forest sector and the local communities.

With the Forest Code of the DRC, it is clear that communities cannot assert ownership rights as they are only permitted to use land for subsistence purposes. Article 7 of the Forest Code declares all forests are state property. Article 1 of the Congolese Forest Code gives definition of forest as any land with trees or bushes that can produce or act as home to wildlife or have an effect on climate or soils, or any land that previously had such vegetation on it.<sup>186</sup> According to article 9 of the Congolese Forest Code, trees in or near villages or in collective fields are collective property of the village or of the owner of the field.<sup>187</sup> The Code does not allow communities to assert ownership rights, it only allow them the user rights for subsistence in all other forests than those who are protected. They can apply for a community concession (with 25 years validity) in accordance with customary law of the forest land according to article 22 of the Forest Code.<sup>188</sup>

The DRC Forest Code (law No.011-22) does not transfer any right concerning land. It only deals with products and services that come from the forest. The Forest Code could be valuable for indigenisation since it takes into account customary use rights through the principle of benefit sharing, the introduction of the concept of local community forest and the encouragement of indigenous and local community participation in forest management. The Forest Code of the DRC has not yet been totally put into practice, and several regulations related to community forest have not been applied.

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<sup>186</sup> C Long (n 138 as above)

<sup>187</sup> DRC Forest Code, article 9

<sup>188</sup> DRC Forest Code, article 22

## 4.5 The mining system in the DRC

According to Musafiri<sup>189</sup>, the main purpose of the law governing the mining sector is to carry out a policy that attracts investors.<sup>190</sup> The previous legislations in relation to mining and hydrocarbons didn't attract investors and this has a negative effect on mining production and public finance. To overcome this, Congolese legislators were sensitive to introduce in 2002 a law that could provide greater incentives. According to Samndong & Nhantumbo, poor governance including corruption, political interference, lack of capacity to enforce the law and obstacles to private sector investment has impeded the mining sector of the DRC.<sup>191</sup> Regardless of some progress in the matter, DRC needs more actions to guarantee good governance, transparency and accountability from the government and mining companies. In doing so, local communities will benefit more equitably from the country's vast mineral resources.

The Mining Code is the main legislation governing mining activities and this has been enacted by law No.007/2002 of 11 July 2002.<sup>192</sup> There are also other legislations that regulated mining activities for example: the decrees No.038/2003 of 2003 regarding mining regulation to implement the Code and other legislation passed by the parliament and the government. According to Lötter<sup>193</sup>, the Code regulates mining, outlines prohibited areas, gives conditions for prospections, environmental evaluations, artisanal mining and site rehabilitation. In Article 6, the Code gives the power to the president of the country to shut down any mining activity where mining is endangering communities or the environment.<sup>194</sup> According to Samndong & Nhantumbo, the holders of mining exploitation permit obtain the right to occupy the land necessary for mining activities, to use the underground water, excavate canals and establish means of communication.<sup>195</sup> The owner of the mine must also comply with specific rules including protection of the environment, cultural heritage, health and safety or construction and planning of infrastructure. In Article 1(19), the Code gives the environmental constraints led by the legislator to require the applicant to submit an

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<sup>189</sup> P N Musafiri (n 139 as above) 11

<sup>190</sup> As above

<sup>191</sup> R A Samndong & I Nhantumbo 'Natural resources governance in the Democratic Republic of Congo: Breaking sector walls for sustainable land use investments' (2015) 30

<sup>192</sup> Mining Code Law No. 007/2002 of JULY 11, 2002

<sup>193</sup> D Lötter (n 133 as above) 32

<sup>194</sup> Mining Code of the DRC, article 6

<sup>195</sup> R A Samndong & I Nhantumbo (n 177 as above) 31

environmental impact assessment and an environmental management plan in support of his application for a permit.<sup>196</sup> Article 281 provides compensation of the occupants of the land deprived of the enjoyment of the land, for any modification that is unfit for cultivation.<sup>197</sup> The Code does not make any reference to the use or management of communal land by local communities.

The Mining Code of the DRC (law 007-2002) stipulates the direct benefits to the country, provinces and the territories from the revenue that comes from the exploitation of minerals resources. Indigenous and local community do not benefit from this and they are not even represented in the local level.

#### **4.6 Agricultural law**

The Agricultural Law No.11/022 of 24 December 2011 came into force on 24 June 2012, and is specific to agricultural concessions.<sup>198</sup> According to Lötter, only 11% of land is available for agriculture and this is a challenge for foreign people to have access to agricultural land but this restrictive nature of law protects local communities' access to land, however; they do not have support to increase agricultural output, therefore, this keeps the country in a state of being food insecure.<sup>199</sup> From the observation, there is a disconnection between land law and land management in practice. Even if economic opportunities and indigenous protections are clear on paper, protection without provision of adequate resources for the local peoples to contribute within the space of agriculture or mining retards the process of development.

The Agricultural Law No.11/022 of 24 December 2011 is in line with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and goes even deeper to explain concisely and precisely the misinterpretation of the rights at the expenses of indigenous and local peoples' benefit. However, the law has some gaps. For example, there is an absence of provision dealing with the representation of indigenous people from local to national level and no clear provision to ensure judicial assistance to indigenous and the local community. The law still needed a good step about the protection of the rights of indigenous and local community. The next desired step is

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<sup>196</sup> Mining Code DRC (n 181 as above) article 1(19)

<sup>197</sup> Mining Code (as above) article 281

<sup>198</sup> D Lötter (n 133 as above)

<sup>199</sup> As above

the implementation of the legislation and the involvement of indigenous peoples in this process of implementation.

#### 4.7 Customary land tenure and opportunity for reform

Colonial legislation was too vague and imprecise in its approach to indigenous peoples and the local community. The principle of *terra nullius* (the principle of nobody's land or the land that is not in possession or control of another) of the colonial power argued that there was no human presence on the land, this principle served the interests and ambitions of colonial power that wanted sufficient land and space to fulfil their mission.

The current land tenure has been viewed as a legacy of colonial era, the post-independence laws dispossessed indigenous people and local communities of their land. The formal law transferred land ownership to the state. The DRC's land tenure law, the forest code and the constitution which followed the colonial period, remain just equivocal concerning local communities' land ownership. Customary land rights in the DRC are vulnerable as they have no clear legal recognition and do not have the same value as land titles granted by the State. The majority of local communities have no protection of their land rights. The missing link in the agricultural law No.11/022 of 24 December 2011 is the recognition of local community land rights protection. However, in the light of aforementioned agricultural law, the local community can only extract limited resources related to food in its forest. This implies that only a concession can really open the door to logging, despite of article 112 of the Forest Code, which stipulates that: "In addition to rights of use, local communities have the right to proceed logging in their forests".<sup>200</sup>

#### Conclusion

While land remains for the majority of the Congolese peoples the basis for subsistence, something they can own, but for indigenous and local community, land issues lie much deeper. They consider land as essential for spiritual development. Everything they get from the land is a gift from their gods. Losing their land means a loss of contact with the earth and a loss of their identity. Land is not only an asset with economic and financial value but is also a very important part of their lives. Up to know, the DRC government does not have any document which clearly recognise land rights of local

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<sup>200</sup> Forest Code (n 173 as above) article 112



community but only recognise the right to land rather than considering land rights as a human right canvassing the right to food, water and housing. From the above mentioned, the DRC Government should:

1. Ensure indigenous and local community have the right to access land and forests because without land tenure, the efforts to improve the livelihood of this category of people will not be sustainable.
2. Make sure that indigenous communities benefit from the pending Community Forests Regulation and will be able to access user rights that can not only contribute to their livelihood but allow them to maintain their culture and traditions.
3. Ensure that indigenous men and women are included in all participatory processes, obtain the necessary information and are given the opportunity to voice their opinion and exercise their right to free, prior and informed consent.
4. Promote local community representatives in negotiation processes that can be held accountable. Local communities usually lack the institutions that could represent them. At the same time, capacity development at the local level should include leadership development.

The next chapter will discuss the international framework on socio-economic rights with regard to indigenous people and local community.

## Chapter 5 Land Rights in the International Legal Framework

### 5.1 Introduction

The need of giving access to land in order to facilitate the fulfilment of human rights has been taken into account in several international instruments and documents<sup>201</sup>, but no international right to land is explicit in the international legal framework. Additionally, the obligation of states towards individuals and land access has not been given adequate attention. However, a review of the international human rights framework as it stands makes it clear that while it is not wholly defined, land rights are invoked in a number of key areas, suggesting that further consideration by the international community is necessary. Explicit rights to land have been developed in two key areas of international human rights law; the rights of indigenous people and the rights of women. Land access and use is habitually attached to the spiritual, cultural and social identities of peoples. As such, land rights have been more fully developed in the sphere of indigenous rights.

This chapter examines the way in which indigenous peoples' rights to land, territories and natural resources are protected under international law, regional and other instruments.

### 5.2 United Nations Declaration on the Rights of Indigenous Peoples

Since 1971, the United Nations focus on the issues regarding local communities and indigenous peoples when Jose R. Martinez Cobo<sup>202</sup> was appointed by the United Nations Sub Commission on Prevention of Discrimination and Protection of Minorities to perform the study on the problem of discrimination against local communities and indigenous peoples.<sup>203</sup> In 2007 the work ended with the adoption of the declaration of the United Nations on the Rights of Indigenous Peoples (UNDRIP). This took many years of intense work by working group on indigenous peoples and the ad hoc working group on the draft declaration to draft a declaration and get it adopted by Human Rights Council in 2006 and later by the United Nations General Assembly in 2007. According

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<sup>201</sup> June 11, 1976, General Principles: Land; Voluntary Guidelines of the Food and Agriculture Organization of the United Nations (FAO), adopted 127th Session of the FOA Council, November 2004, Guideline 8B (Access to resource and assets: Land); see also discussion, *infra*.

<sup>202</sup> Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,

<sup>203</sup> A K Barume (n 42 as above) 254

to Barume<sup>204</sup>, “even though the declaration is not a legal but the fact that the United Nations Declaration on Human Rights is compatible with the international law and its progressive development and more importantly the goals and the principles of the Charter ensures that it will play a dynamic and lasting role in the future of specific indigenous peoples relations and the international law in general”. With regard to the declaration, the right to lands, territories and resources have a vital place to play for indigenous peoples and several articles of the UNDRIP address indigenous peoples’ land rights.

Article 8(2)(b) and (c) lay down effective mechanisms for the prevention and the redress of dispossession of lands, territories and resources as well as the prevention of any form of forced transfer which has the aim or effect of violating their rights.<sup>205</sup>

Article 10 provided against forced removals and stipulates that:

Indigenous peoples shall not be forcibly removed from their lands and no relocation shall take place without the need for free, prior and informed consent of the concerned indigenous peoples and this require their agreement and fair compensation with an option to return.<sup>206</sup>

Article 25 gives indigenous peoples the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations.<sup>207</sup>

Articles 26 and 27 recognises the right to lands, territories and resources including their right to own, use, develop and control these lands, territories and resources and urges the states to also give legal recognition and protection to these, with respect to customs, traditions and land tenure systems of indigenous peoples.<sup>208</sup> The right in Article 3 is also very important as it gives indigenous peoples the right to determine and develop priorities and strategies from them to exercise their right to development. Particularly, it gives the right to be actively involved in developing and determining

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<sup>204</sup> A K Barume (n 2 above)

<sup>205</sup> UNDRIP article 8 paragraph 2(b)&(c)

<sup>206</sup> UNDRIP article 10

<sup>207</sup> UNDRIP article 25

<sup>208</sup> UNDRIP articles 26 and 27

health, housing and other economic and social programmes affecting them and far more possible to administer such programmes through their own institutions.<sup>209</sup>

All African countries officially supported the United Nations Declaration on the Rights of Indigenous Peoples and many commits to implement the UNDRIP at national level through domestication into their national law and policies. The Democratic Republic of Congo has a draft law on the rights of indigenous peoples.<sup>210</sup>

In the DRC, local communities still face the problem related to poor implementation of laws and policies. Legislative implementation texts and budgets are still missing. This leads to a lack of recognition of indigenous peoples' identity. There are also difficulties for indigenous and local community to participate in law enforcement mechanisms. The indigenous peoples' rights to lands, territories and resources and the right to Free, Prior and Informed Consent (FPIC) have a prominent place through the Declaration and in spite of the fact that it is not legally binding for the signatories, it is becoming a standard setting document to which civil society organisations in the DRC progressively allude to.<sup>211</sup>

### **5.3 The International Covenant on Civil and Political Rights and Indigenous Peoples' Right to Land**

This Covenant is always considered as the most important international instrument that protects the rights of indigenous peoples through its two articles 1 and 27 that make two major provisions for the protection of indigenous peoples' rights to lands.

Article 1 in its paragraphs 1, 2 and 3 stipulates:

All peoples have the rights of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development; all peoples may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international law. In no case may a people be deprived of its own means of subsistence and the states parties to the

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<sup>209</sup> UNDRIP article 23

<sup>210</sup> International Expert Group Meeting on the theme Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: The role of the Permanent Forum on Indigenous Issues and other indigenous specific mechanisms (article 42) 25 - 27 January 2017, New York

<sup>211</sup>International Work Group for Indigenous Affairs (IWGIA) 'Country technical notes on indigenous peoples' issues: Democratic Republic of Congo' (2012) 11

covenant shall promote the realisation of the right of self-determination and shall respect that right, in conformity with the provisions of the Charter of the United Nations.<sup>212</sup>

Luki people with regard to the article 1 of the ICCPR are fully entitled to participate in the making decision which directly affects them for instance the issues of access to their resources.

The right to self-determination is recognised by almost all international instruments including the Charter of the United Nations; the two Covenants and the African Charter.<sup>213</sup> The issue regarding self-determination is the most dynamic and evolving issue in international law

and has become part of political relations around the world.<sup>214</sup> All other human rights are believed to come up from the right to self-determination because the protection of human rights against government abuses depends entirely upon who governs.<sup>215</sup> From this, self-determination can be understood as a right in itself and it can be additionally considered as the route through which every single right can be ensured.

Article 27 of the ICCPR stipulates:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their religion, or to use their own language.<sup>216</sup>

According to Barume,<sup>217</sup> this article can be viewed as the most important one of protection provided by international law and comes from a connection founded between indigenous peoples' right to lands and their cultures. He also defines culture as a "complex whole which includes knowledge, beliefs, art, law, customs and other habits acquired by man as a member of society".<sup>218</sup> In paragraph 7 of the Covenant on Civil and Political Rights' (CCPR) General Comment 23 in Article 27 of the ICCPR

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<sup>212</sup> ICCPR article 1

<sup>213</sup> A K Barume (n 42 above) 267

<sup>214</sup> V J G Baloyi 'Indigenous peoples and their rights: With special reference to their land and the rights to self-determination in international law. A comparative study within the South African land rights context' (2000) 46

<sup>215</sup> As above

<sup>216</sup> CCPR article 27

<sup>217</sup> A K Barume (n 42 above) 271

<sup>218</sup> As above

explicitly connects indigenous peoples' rights to lands and their right to culture. This article stipulates:

*With regard to the exercise of the cultural rights secured under article 27 of the ICCPR, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. The right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of these rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.*<sup>219</sup>

#### **5.4 The International Covenant on Economic, Social and Cultural Rights and Indigenous Peoples' Right to Land**

Ratified in 1966, the Covenant protects economic, social and cultural rights of all members of the human family. According to the article 1 of the International Covenant on Economic, Social and Cultural Rights, the covenant aims to ensure the protection of economic, social and cultural rights this include the right to self-determination of all peoples<sup>220</sup>. The right to self-determination considered as a collective right is the right "held by all members of an indigenous community as a group and must be exercised in conformity with the principles of justice, democracy, respect for human rights equality, non-discrimination, good governance and good faith"<sup>221</sup>. Luki peoples' rights to self-determination is inalienable and indivisible because it is interdependent and interrelated to all other rights in the Universal Declaration. Although all right in the Universal Declaration of human rights are understood to have equal status, the right to self-determination has been described as a fundamental right without which the other human rights of indigenous and local communities cannot be fully enjoyed. The right is intrinsically tied to local communities' rights over land and natural resources. The DRC has ratified both treaties, the ICCPR and the ICESCR and has a prime responsibility and duty to respect, protect, promote and implement human rights for local communities living around and across Luki reserve.

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<sup>219</sup> CCPR, General Comment 23, paragraph 7 on article 27 UN.Doc.HRI/GEN/1 at 158 (1994)

<sup>220</sup> ICESCR, article 1

<sup>221</sup> UNDRIP, article 43(3)

Article 2(2) and 11(1) is inclusive of the relevant articles for indigenous peoples and their land rights.

Article 2(2) speaks about the non-discrimination and provides:

The states parties to the present Covenant undertake to guarantee that the rights listed in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>222</sup>

The General Comment No.20 regarding Article 2(2) of the ICESCR gives clarification for the Committee to understand its provisions, scope and state obligations. Paragraph 8 of the General Comment states:

The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.<sup>223</sup>

Article 11(1) of the ICESCR speaks about adequate housing and stipulates:

The states parties to the present Covenant acknowledge the right of every person to an adequate standard of living for himself and his family, comprising adequate food, clothing and housing, and to the continuous improvement of living conditions. The states shall take appropriate steps to guarantee the realisation of this right, recognising to this effect the essential importance of international co-operation grounded on free consent.<sup>224</sup>

The General Comment No. 4 makes clarification by providing that:

The right to housing should not be interpreted in a narrow or restrictive sense but be seen as the right to live somewhere in security, peace and dignity.<sup>225</sup>

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<sup>222</sup> CESCR, article 2(2)

<sup>223</sup> CESCR, General Comment No. 20, Non-discrimination in economic, social and cultural rights, article 2(2). UN. Doc.E/C.12/GC/20 (2009).

<sup>224</sup> CESCR article 11(1)

<sup>225</sup> CESCR, General Comment No.4 on the right to adequate housing, article 11(1). U.N. Doc.E/1992/23, paragraph 7 & 8 (1991).

From the concept of adequate housing, the Committee believes that besides taking into account a number of factors: economic, social, cultural, climatic, and ecological, other aspects of the right must be taken into account including legal security tenure.<sup>226</sup> The Committee adds that, every person should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.<sup>227</sup> The Committee urges state parties to take pressing measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection in genuine consultation with affected persons or groups.<sup>228</sup>

### **5.5 The International Convention on Elimination of all Forms of Racial Discrimination and indigenous peoples' land rights.**

Article 1 of the International Convention on Elimination of all Forms of Racial Discrimination (ICERD) adopted and opened for signature and ratification by United Nations General Assembly on 21 December 1965 and entered into force on 4 January 1966 is considered a relevant article for indigenous peoples' rights. The article stipulates: "the term racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms".<sup>229</sup> Regarding the General Comment No.18, the Human Rights Committee has shed more light on the scope of the concept discrimination which forces states parties to take positive measures in order to reduce or eliminate conditions that causes or help to perpetuate discrimination prohibited by the Covenant.<sup>230</sup> According to the General recommendations XXIII of the Committee on Elimination of Racial Discrimination, the non-recognition of indigenous peoples' rights to land was explicitly referred to as amounting to an act of racial discrimination.<sup>231</sup> The Committee calls upon states to recognise and to protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.<sup>232</sup>

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<sup>226</sup> As above

<sup>227</sup> As above

<sup>228</sup> As above

<sup>229</sup> ICERD, article 1 (1965) into force in 1966

<sup>230</sup> ICERD, General Comment No.18 on article 1

<sup>231</sup> CERD, General Recommendation XXIII rights of indigenous peoples. U.N. Doc. A/52/18, annex V at 122

<sup>232</sup> As above



## 5.6 The Convention on the Elimination of all forms of Discrimination Against Women and indigenous peoples' land rights.

Land rights are issues also mentioned in the international legal framework on women's rights. Adopted in 1979, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is considered as one of the six core international human rights instruments. This instrument does not speak directly about indigenous women but its Article 14 constitutes the relevant article for indigenous rural women. Article 14 stipulates in its paragraph 1:

States parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families and their work in the non-monetisation sectors of the economy and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.<sup>233</sup>

The same article in its paragraph 2 provides:

States parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and in particular, shall ensure women the right to:<sup>234</sup>

1. Participate in elaboration and implementation of all development planning
2. Have access to adequate health care and information
3. Benefit from social security programmes
4. Access to education (formal and non-formal)
5. Access economic opportunities via employment
6. Participate in community's activities
7. Access to agricultural credit and loans
8. Enjoy adequate living conditions in relation to housing, sanitation and water supply.

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<sup>233</sup> CEDAW, article 14(1)

<sup>234</sup> CEDAW, article 14(2)

Paragraph 2 also speaks about the rights of rural women in the areas of health, education, etc.; it does not speak about the right of specific women to dispose the property or the land, but this paragraph requires state parties to ensure that women are treated on an equal basis with men owning or administering property. Even CEDAW Convention does not speak about indigenous women's specific concerns This Convention is not a static document but is interpreted and reinterpreted in accordance with the prevailing circumstances and conditions at a given period. CEDAW's monitoring Committee has urged different states to adopt policies and special measures to increase indigenous women's participation in decision making. The Committee in General Comment No.28 has highlighted that "women may be affected by intersecting forms of discrimination including race, ethnicity, religion and belief and has recommended that states parties legally recognise such intersecting forms of discrimination and prohibit the negative effects this has on women".<sup>235</sup> In Africa, practically all the states have ratified the convention but much remains to be implemented in order for indigenous women and their concerns to be given the space they deserve in the work of the Committee, including in the CEDAW review process.<sup>236</sup>

### **5.7 International Labour Organisation Convention No.169 and Indigenous Peoples' Right to Lands**

International Labour Organisation Convention No.169 on Indigenous and Tribal Peoples, adopted in 1989<sup>237</sup>, is considered according to Wickeri and Kahlan as the only one legally binding instrument on States Parties and the only binding international instrument related to the rights of indigenous peoples. ILO Convention No.169 is an instrument that addresses indigenous peoples' land claims and it recognises three different rights, such as: "right to own and possess; right to use and a right to participate in the use; management and conservation of resources".<sup>238</sup> The right to ownership and possession is found in Article 14(1) as proposed by ILO Committee Convention No.169. It speaks about concerned peoples' rights over lands which they traditionally occupied. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. This means that

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<sup>235</sup> General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. Forty-seventh session October 2010

<sup>236</sup> As above

<sup>237</sup> E Wickeri & A Kahlan (n 15 as above)

<sup>238</sup> A K Barume (n 42 as above) 293

“appropriate measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their livelihood and traditional activities”.<sup>239</sup>

The ILO Convention No.169 establishes the right of indigenous peoples in independent countries for them to “exercise control, to the extent possible, over their own economic, social and cultural development,” in a number of areas.<sup>240</sup>

In the Convention, there is a section on land, which compels States Parties to identify land that was traditionally occupied by indigenous peoples and guarantee ownership and protection rights.<sup>241</sup>

According to Wickeri and Kahlan, the Convention No.169 also requires the provision of legal procedures to “resolve land claims, establish rights over natural resources, protect against forced removal, and establish the right of return and compensation for lost land through either land (of at least equal quality and quantity) or money”.<sup>242</sup>

International Labour Organisation Convention No.169 guarantees indigenous peoples’ rights of ownership and possession over lands that they occupy and those they recently lost unfairly or without their free and informed consent.<sup>243</sup>

The right to use is been assumed as being restricted and not guaranteed and has been defined by other scholars as the right to enjoy a thing “belonging to another and take to the fruits thereof”.<sup>244</sup> ILO Convention No.169 provides the usage of lands more what is considered as their land or lands that they use together with other peoples. The right to participate in the use, management and conservation of resources is very important as it implies that indigenous peoples should be consulted regarding the development of their traditional land. ILO Convention No.169 remains the only instrument that guarantees indigenous peoples’ right of ownership over their ancestral lands.<sup>245</sup>

In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples, which states that “indigenous peoples have the right to the

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<sup>239</sup> ILO Convention No.169, article 14

<sup>240</sup> (as above), article 7

<sup>241</sup> (as above), article 14(2)

<sup>242</sup> E Wickeri & A Kahlan (n 15 as above)

<sup>243</sup> A K Barume (n 42 as above) 295

<sup>244</sup> As above

<sup>245</sup> A K Barume (n 42 as above) 296

lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”<sup>246</sup>

The Declaration, while not binding, states that indigenous people have a right to own and develop resources on their land, a right to legal recognition of indigenous lands by states, and a “right to redress ... 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.”<sup>247</sup> Both the Convention and the Declaration emphasize participatory dialogue and the need for free, prior, and informed consent with respect to decision-making about lands occupied by indigenous peoples<sup>248</sup>, especially where the relocation of peoples from land is under consideration.<sup>249</sup>

## 5.8 Land Rights in African Legal Framework

In Africa, there are a number of instruments and institutions relevant to indigenous peoples generally and to their lands in particular<sup>250</sup>, these are: the African Charter on Human and Peoples’ Rights, the African Commission on Human and the Peoples’ Rights and other organisations with economic focus such as among others, the New Partnership for African Development (NEPAD).

The African Charter adopted in Kenya by the Heads of the States and governments came into force on 21 October 1986.<sup>251</sup> Moreover, the African Charter is almost the only instrument of human rights enunciating the rights of peoples, including communities within states.<sup>252</sup> According to Article 19 of the Charter, “all peoples shall be equal; they shall enjoy the same respect and have the same rights. Nothing justifies the domination of one people by another”.<sup>253</sup> From the guidelines of the African Commission on Human and Peoples’ Rights, Article 17 requires states to take “overall policy and specific measures for the promotion of cultural identity as a factor of mutual

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<sup>246</sup> United Nations, Declaration on the Rights of Indigenous Peoples, art. 26(1), Sept. 13, 2007, available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [Hereinafter Declaration on the Rights of Indigenous Peoples]. The Declaration was adopted by the General Assembly but is not legally binding on state parties.

<sup>247</sup> (As above n 246) art. 26(2), 26(3) & 28.

<sup>248</sup> (As above n 246) art. 10, 28, 29, 32.

<sup>249</sup> See also discussion *infra*, “The Right to Housing.”

<sup>250</sup> A K Barume (n 37 as above) 311

<sup>251</sup> As above

<sup>252</sup> As above

<sup>253</sup> ACHPR, article 19

appreciation amongst groups and communities".<sup>254</sup> It is also noticed that the African Charter, in Article 20, which speaks about self-determination can be considered as pertinent protection of indigenous peoples' right to lands, since it encompasses the right to self-governance, autonomy and control over resources as it was presented by African Commission in a Legal Advisory Opinion on the United Nations Declaration on the Rights of Indigenous peoples.<sup>255</sup>

In Article 21, the African Charter retains the right of all peoples to freely dispose of their wealth and natural resources and in Article 22 it provides for all peoples the right to their economic, social and cultural development and these obligations have been used by the African Commission on Human and Peoples' Rights to boost the protection of indigenous peoples' rights to land.<sup>256</sup> The most known cases are those of *Endorois v Kenya* and *Ogiek v Kenya*.

In the *Endorois* case (case number 276/3 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya, the Complainants alleged violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people. The African Commission finds that the Respondent State is in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter and recommended that the Respondent State should<sup>257</sup>:

1. Recognise rights of ownership to the Endorois and return Endorois ancestral land.
2. Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.

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<sup>254</sup> ACHPR, article 17

<sup>255</sup> ACHPR, article 20

<sup>256</sup> A K Barume (n 42 as above) 312

<sup>257</sup> The 46th Ordinary Session of the African Commission on Human and Peoples' Rights held from 11th – 25th November 2009 Banjul, Gambia

3. Pay adequate compensation to the community for all the loss suffered. (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the reserve.
4. Grant registration to the Endorois Welfare Committee.
5. Engage in dialogue with the Complainants for the effective implementation of these recommendations.
6. Report on the implementation of these recommendations within three months from the date of notification

From the Ogiek case (case number No. 006/2012 African Commission on Human and Peoples' Rights v Republic of Kenya)<sup>258</sup>. The applicant African Commission on Human and Peoples' Rights. In this case, the commission received a communication from the Centre for Minority Rights Development joined by Minority Group International both acting on behalf of the Ogiek community of the Mau Forest. The case concerns the eviction notice issued by Kenya Forest Service in 2009 which required the Ogiek community and other settlers of the Mau Forest to leave the area within 30 days. The applicant alleged the violations of articles 1,2,4,8,14,17(2) and (3), 21 and 22 of the Charter. The court holds that the respondent has violated article 22 of the Charter and the respondent failed to recognise the Ogieks, like other similar groups as a distinct tribe, leading to denial of access to their land in the Mau Forest and the consequential violation of their rights under article 2, 8, 14, 17(2) and (3), 21 and 22. The Court also alleged that the respondent has violated the article 1 of the Charter by not taking adequate measures to give effect to the rights enshrined under article 2,8,14,17(2) and (3),21 and 22 of the Charter.

Another most commonly known example is one of Ogoni Peoples in Nigeria (Communication 155/96 : Social and Economic Rights Action Centre (SERAC) v. Nigeria (2001) AHRLR 60 (ACHPR 2001) where the Government of Nigeria violated Article 21 of the Charter by permitting the exploitation of oil which devastated the well-being of Ogoni peoples and with regard to this the African Commission makes a link

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<sup>258</sup> African Commission on Human and Peoples' Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017) Available at : <http://www.african-court.org/en/index.php/56-pending-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details>

between the right to life of Ogoni people and that is also protected under Article 4 of the Charter with effects that the oil exploitation had on their lands.<sup>259</sup>

According to Feiring, the African Union, the African Development Bank and the Economic Commission for Africa in 2010 adopted the Framework and Guidelines on Land Policy in Africa.<sup>260</sup> The Framework is said to reflect “a consensus on land issues; and serves as a basis for commitment of African governments in land policy formulation and implementation and a foundation for popular participation in improved land governance”.<sup>261</sup> Feiring argues that the Africa Land Policy Framework and Guidelines (ALPFG) acknowledges the specifically marginalised position of indigenous peoples, in expressing that: “beyond the frequently acknowledged inequalities due to race, class and gender, the marginalisation of particular ethnic groups with respect to access to adequate land remains a perpetual source of conflict. The marginalization of certain categories of indigenous people such as the San of Botswana; the Herero of Namibia; the Bakola, Bagyeli and Batwa of the countries of Central Africa; and the Ogiek of Kenya, has become contentious. Land policy reforms must also address these concerns”.<sup>262</sup>

The establishment of the African commission played an interesting role regarding the right of indigenous populations/communities through different mechanisms that include the examination of states parties’ periodic reports, but till recently, there were no mechanism to enforce the decisions taken by the commission. This situation shows the need to establish the African human rights court. From April 2005, during the 37<sup>th</sup> session of the African Commission on Human and Peoples’ Rights, a resolution was taken and adopted for the creation of an African Court on Human and Peoples’ Rights to sit in Arusha in Tanzania.<sup>263</sup> This was a very good idea for the implementation of the rights of indigenous populations/communities and the first indigenous case brought to this court was in the Ogiek case (case number No. 006/2012 African Commission on Human and Peoples’ Rights v Republic of Kenya).<sup>264</sup> In this matter the court delivered provisional measures to ensure the right of Ogiek people of the Mau in Kenya

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<sup>259</sup> A K Barume (n 42 as above) 313

<sup>260</sup> B Feiring ‘Indigenous peoples’ rights to lands, territories, and resources’ International Land Coalition, Rome (2013) 48

<sup>261</sup> As above

<sup>262</sup> B Feiring (n 242 as above)

<sup>263</sup> A K Barume (n 42 as above) 139

<sup>264</sup> As above

not to be evicted by the Kenyan Government while the case remains before the court.<sup>265</sup> The court holds the respondent responsible for the violation of article 22 of the Charter and the respondent failed to recognise the Ogieks, like other similar groups as a distinct tribe, leading to denial of access to their land in the Mau Forest and the consequential violation of their rights under article 2, 8, 14, 17(2) and (3), 21 and 22. The Court also declared that the respondent has violated the article 1 of the Charter by not taking adequate measures to give effect to the rights enshrined under article 2,8,14,17(2) and (3),21 and 22 of the Charter.

There are also African sub-regional organisations that could help to protect and promote the rights to land of indigenous populations/communities and the most relevant is the Southern African Development Community (SADC).<sup>266</sup> This organisation makes reference on its Article 3.2(g) of the Protocol on Forestry, and says: “states parties shall co-operate to promote respect for the rights of communities and facilitate their participation in forest policy development, planning and management with a specific attention to the need of protecting traditional forest-related knowledge and develop adequate mechanisms to ensure the equitable sharing of benefits derived from forest resources and traditional forest-related knowledge without prejudice to property rights”.<sup>267</sup>

Another institution that developed rules that could contribute to the protection of indigenous communities’ rights to land is the New Partnership for African Development (NEPAD). This organisation has introduced the African Peer Review Mechanism, an instrument that can help to ensure that “policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the African Union’s Declaration on Democracy, Political, Economic and Corporate Governance”.<sup>268</sup> Another regional organisation is the Economic Community of West African States (ECOWAS) who has also a legal instrument that speaks about the rights to culture, environment and non-discrimination but this instrument does not contain specific thing about the protection of indigenous

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<sup>265</sup> A K Barume (n 42 as above)

<sup>266</sup> As above

<sup>267</sup> SADC Protocol on forestry, article 3.2(g) Available at [www.fire.uni-freiburg.de/GlobalNetworks/Africa/Protocol%20on%20Forestry.pdf](http://www.fire.uni-freiburg.de/GlobalNetworks/Africa/Protocol%20on%20Forestry.pdf)

<sup>268</sup> A K Barume (n 42 as above) 319



communities' rights to land.<sup>269</sup> These instruments (SADC, NEPAD and ECOWAS) have make a strong point on the promotion of the rights of communities and indigenous peoples right to land and their participation in forest policies development and to ensure equitable sharing of benefit derived from forest resources and traditional forest related knowledge without prejudice to property rights.

With regard to the DRC, a wide range of international and regional instruments with regard to indigenous and local communities has been signed and ratified by the Democratic Republic of Congo. The DRC has in addition ratified a number of UNESCO conventions of importance to indigenous peoples.<sup>270</sup> It is also party to the eight core ILO conventions.

The constitution of the DRC in Article 215 stipulates that:

The international treaties and agreements, regularly concluded, have, on their publication, an authority superior to that of the laws, under reserve for each treaty and agreement, of the application by the other party.

From this provision, it is true that all the international instruments ratified by the DRC could have a great significance for indigenous and local communities as they are automatically transported in the domestic law. However, as long as the justice system of the DRC is deficient in all respects, and the laws giving effect to the provisions are barely implemented, the provisions proposed by treaties, conventions and other international instruments have virtually no impact on the situation of Congolese people, and even less on indigenous peoples and local communities.<sup>271</sup> It is also noticed that the treaty bodies have likewise been impeded in their monitoring as the Congolese government does not provide its periodic reports regularly.<sup>272</sup>

The following are the international and regional human rights treaties and conventions ratified by the DRC

Instruments	Date
The International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocol 1 (ICCPR-OP1)	1/11/1976

<sup>269</sup> (as above) 320

<sup>270</sup> Convention concerning the Protection of the World Cultural and Natural Heritage; Convention for the Safeguarding of the Intangible Cultural Heritage; and Convention on the Protection and Promotion of the Diversity of Cultural Expressions

<sup>271</sup> IWGIA (n 197 as above)

<sup>272</sup> IWGIA (as above)

The International Covenant on Economic, Social and Cultural Rights (ICESCR)	1/11/1976
The Convention on the Elimination of All Forms of Racial Discrimination (ICERD);	21/4/ 1976
The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol;	17/7/1980
The Convention on the Rights of the Child (CRC) and its 2 Optional Protocols;	27/9/1990
African Charter on Human and Peoples' Rights	9/9/199

The DRC Government has done little for the recognition and the protection of the rights of indigenous groups' and local communities' land rights. According to the International Work Group for Indigenous Affairs (IWGIA) there is a report defining the strategic framework for the preparation of the indigenous development program which has been validated and could represent the first steps for the reframing of national strategies.<sup>273</sup> The legislation regarding the forest code and the mining code gives interests to indigenous peoples and local community but the problem exists in the implementation of the law. The DRC is party to the most important international and regional human rights instruments which, according to the Constitution, should automatically be transposed into Congolese legislation. However, the judicial system is failing and the laws giving effect to the provisions are barely enforced.

The DRC has many non-governmental organisations promoting the rights of indigenous groups. Some of them have been created by indigenous activists, and others support the indigenous peoples. Several of these NGOs have formed larger networks that operate at the national, regional or provincial levels. The majority of these organisations have limited funding. The following are some of the NGOs working to defend the rights of indigenous peoples: La Dynamique des Groupes des Peuples Autochtones(DGPA), specialised in advocacy, documentation and capacity building; Organisation d'Accompagnement et d'Appuis des Peuples Autochtones(OSAPY), specialised in defending and promoting the rights of indigenous peoples; Ligue Nationale des Associations des Autochtones Pygmées du Congo (LINAPYCO), specialised in human rights, community development, women and youth and environmental programs; Foyer de Développement pour l'Autopromotion des

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<sup>273</sup> IWGIA (as above)

Pygmées et Indigènes Défavorisés (FDAPYD); Réseau des Associations Autochtones Pygmées de la RDC(RAPY), network of Indigenous peoples specialised in producing guidebooks in local languages and documents; Le Centre d'Accompagnement des Autochtones Pygmées et Minoritaires Vulnérables (CAMV), specialised in advocacy and publishing Bulletins: Echos des pygmees and Le Forestier.

## Conclusion

In conclusion, communities land rights are protected in international and regional law. Every person shall have a right to own property alone as well as in association with others and no one shall be arbitrary deprived of his property.<sup>274</sup> The rights of the peoples concerned to the natural resources pertaining to their lands include the right of these people to participate in the use, management and conservation of these resources.<sup>275</sup> And finally, the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.<sup>276</sup> The DRC should incorporate the content of the United Nations Declaration on the Rights of Indigenous Peoples in the DRC's land reform framework. The DRC should build a strong consensus driven by an equally firm commitment and political will with regards to land rights of local people. They should also ratify the ILO convention and adopt the fundamental principles of international human rights land with a view to securing local peoples' land rights during the reform process. The DRC should not forcibly remove local communities from their lands or territories without the free, prior and informed consent of the local communities concerned. The DRC government has done little for the recognition and the protection of the rights of local communities regarding land rights. The DRC government have the obligation to respect, protect, promote and fulfil the rights of local communities with regards to the rights to land. The next chapter gives a conclusion and challenges facing indigenous peoples/local community.

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<sup>274</sup> UDHR 1948, article 17

<sup>275</sup> ILO, article 15(1)

<sup>276</sup> ILO, article 14(1)

## Chapter 6 Conclusion and recommendations

### 6.1 Conclusion

The Land rights-based approach is considered as a key element to prevent pre-conflict, conflict and post-conflicts.<sup>277</sup> The situation in South Africa, Zimbabwe, Uganda and DR Congo illustrate that land issues and agrarian reform are often at the centre of violent conflicts and, as such, are key elements in the transition from conflict to peace.<sup>278</sup>

Land rights are inherently controversial because land is an important source of wealth for local communities and indigenous peoples.<sup>279</sup> It is also seen as an important element of economic growth and *ipso facto* impacts on the socio-economic rights of local communities living around and across the Luki Reserve. Land remains for Luki peoples the primary source for the achievement of the right to food, housing and provides a means through which to access various forms of health care and culture.

The mini-dissertation assesses how land rights of local communities of Luki are taken into account from the international law and the national law of the DRC and challenges experienced by Luki peoples. A number of key concepts were defined to understand the problem through theoretical framework. A brief description of the location area of the study and socio-economic rights of Luki peoples (right to food, water, house and the right to culture) has been addressed. The thesis argues that the right to land is an important basis for local communities to have access to food, housing, culture and to self-development. The thesis also argues that the non-access to land by communities and indigenous peoples of Luki will contribute to the disappearing of their cultures.

We have also focused on the DRC land rights from colonial to present days and the international framework. The colonial legislation according to the customary land tenure was vague and imprecise in its approaches to the local community rights to land. The current legislation on customary land tenure is a legacy of the colonial era. The post-independence laws follow the example of the colonial power and dispossessed local communities of their customary rights. The land tenure law of July

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<sup>277</sup> Gilbert (n 1 above) 128

<sup>278</sup> As above

<sup>279</sup> As above

1973, the forest code of 2002 and the constitution of the DRC (2006) remain equivocal about land ownership. Following the independence period, the colonial licensing authorities of land ownership was succeeded by the Land Office who had a sole mandate for allocating land titles within their respective districts and who following the example of their predecessors (colonial authorities) readily and happily brokered local communities' land. Majority of local communities have no protection of their land rights. The lack of legal recognition of communities' customary land entails a corresponding denial of rights due to the lack of legal recognition and continuing violations of local communities' human rights. Customary land rights need urgent recognition and the flaws, contradictions and inconsistencies in the legal framework should be reviewed, corrected or clarified in Congolese land framework. The international and regional instruments protect local communities land rights and argues that local communities and indigenous peoples should not be forcibly removed from their land or territories without free, prior and informed consent of the people concerned.

## **6.2 Recommendation for land reform in the DRC**

With regard to the reform process, the DRC does not have a national land ownership policy. The land law of 1973 has been considered as inappropriate to current national, regional and international issues. The national situation of the DRC is characterised by socio-economic disparities and gaps in the legal system. There is a necessity to reform land for the protection of the rights of private persons, with particular attention to local communities.

With regard to the challenges, we have noticed the unsuitability of the present land system for local communities and land nationalisation has increased the vulnerability of local community land status and consequently contributes to the failure to realise their rights to food, shelter and culture.

Some recommendations are provided in this paper to find a way in which community land rights can be protected at the Luki Reserve. The government of the DRC should:

1. Clarify land tenure and recognise communities' right to ownership of customarily occupied land;
2. Reform the land law taking into account the right to individual or collective ownership of property acquired in accordance with the law or with custom as

- guaranteed under the article 34<sup>280</sup>, of the DRC's Constitution of 18 February 2006 (Private property is sacred and the State guarantees the right to individual or collective property acquired in accordance with law or custom);
3. Recognise collective property and simplify the procedures for communities to access the titles to their land;
  4. The fundamental principles relating to the right of forest communities to land and natural resources, to consultation, to participation and to free, prior and informed consent as contained in the international treaties and agreements certified by the DRC, must be incorporated in the national legal system;
  5. Clarify the Forest Code on what the DRC Government wants to do with its forest resources especially at community level;
  6. Provide clear forest boundaries between community forest land and forest land that belong to Luki Reserve;
  7. Provide clear policies on resource management and technical tools to manage community forest at the Luki Reserve;
  8. Reform forest institution of which objective should meet current challenges posed by community forest management through participation approach; and
  9. Provide clear methods of identification to which land exists for community and recognising their traditional rights to perform traditional environmental knowledge.
  10. Establish a legal framework which takes into account the land rights conferred by custom.
  11. Develop a new land law that clarify the conditions to access to land for indigenous and local communities and which defines the rights applying to the land over which they have usage and guarantees the titles by virtue of which they may enjoy these usage rights.
  12. Strengthen the cultural identity of local communities, in regard to natural resource management and conservation.
  13. The DRC government should ratify the ILO convention No.169 of 1989 concerning indigenous and tribal peoples and should incorporate the content of the international and regional instruments in the DRC's land reform framework.

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<sup>280</sup> DRC Constitution of 2006 (n 125 as above) article 34

Restricting Luki peoples access to natural resources that play a crucial role in their livelihoods such as food, health and culture can in short time favour biodiversity conservation but in the long term, these strategies may possibly fail to preserve biodiversity conservation if the established order of Luki Reserve disregarded the importance of consecutively promoting active local community participation in protected area management. The importance of collaboration in the management to enhance the biodiversity protection in Luki is a key element for long-term success of Luki Reserve.

Considering all this, it is believed that the collaboration between the local community of Luki and the authorities of Luki Reserve will promote a win-win outcome for both local community and biodiversity conservation.

## Bibliography

African Charter on Human and Peoples' Rights

African Commission on Human and Peoples' Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017) Available at: <http://www.african-court.org/en/index.php/56-pending-cases-details/864-app-no-006-2012-african-commission-on-human-and-peoples-rights-v-republic-of-kenya-details>

All-Zubaidi L; Assubuji P & Lucksheiter J 'Women and land rights: Questions of access, ownership and control' (2013)

Andrade G S & Rhodes J R 'Protected areas and local communities: An inevitable partnership toward successful conservation strategies?' (2012) 17 *Ecology and society*

ASIA CSR 'Conflicts over land: A role for responsible and inclusive business' (2013) available at [http://www.csr-asia.com/report/RIB\\_Asia\\_Land\\_report.pdf](http://www.csr-asia.com/report/RIB_Asia_Land_report.pdf)

Aswani S & Weiant P 'Scientific evaluation in women's participatory management monitoring marine invertebrate refugia in the Solomon Islands' (2004) 63 *Human Organisation* 301.

Baloyi V J G 'Indigenous peoples and their rights: With special reference to their land and the rights to self-determination in international law. A comparative study within the South African land rights context' University of Zululand, 2000 46

Bango A & Xelelo Z 'Protected Areas and Community Relationships in the Sub-Saharan Africa: A case study of Dwesa-Cwebe Nature Reserve in the Eastern Cape, South Africa' *World Congress on New Technologies*, (2017) 1

Barnabas SG 'The role of international law in determining land rights of indigenous peoples: The case study of Abuja Nigeria and comparative analysis with Kenya' (2017)

Barume, A K *Land rights of indigenous peoples in Africa: With special focus on Central, Eastern and Southern Africa* (IWGIA: Copenhagen 2010)

Bellah, R N; Madsen, R; Sullivan, W; Swidler, A & Tipton, SM '*Habits of the heart: Individualism and commitment in American life*' (1986) 333 Berkeley, CA: University of California Press



Borrini-Feyerabend, G; Kothari, A & Oviedo, G *Indigenous and local communities and protected areas: Towards equity and enhanced conservation. Guidance on policy and practice for Co-Managed Protected Areas and Community Conserved Areas* (IUCN: Switzerland 2004)

Cobo J M 'Study of the problem of discrimination against indigenous populations' Vol 1 (1981) 476

Constitution of the DRC (2006).

Corntassel, J 'Who is indigenous? Peoplehood and ethnonationalist approaches to rearticulating indigenous identity' in Erni C *The concept of indigenous peoples in Asia* (IWGIA 2009)

Counsell S 'Forest governance in the Democratic Republic of Congo: An NGO perspective' (2006)

CSR ASIA 'Conflicts over land: A role for responsible and inclusive business' (2013) available at [http://www.csr-asia.com/report/RIB\\_Asia\\_Land\\_report.pdf](http://www.csr-asia.com/report/RIB_Asia_Land_report.pdf)

DRC Forest Code N0. 011/2002

DRC Law No.73-021 of 20 July 1973 as amended on 18 July 1980

Dudley N 'Guidelines for Applying Protected Areas Management Categories' (2008)

Edwards A D & Jones D G 'Community and community development' (1976) 12

Elliott H 'Second World Conference on National Parks' (1974) 15 International Union for Conservation of Nature and Natural Resources, Switzerland

EU-UN Partnership in 'Toolkit and guidance for preventing and managing land and natural resources conflicts: Land Conflict' (2012) 17

Feiring B 'Indigenous peoples' rights to lands, territories, and resources' *International Land Coalition*, Rome (2013) 48

Gilbert J 'Indigenous peoples' land rights under international law: From victims to actors' (2016)

Gilbert J 'Land rights as human rights: The case for a specific right to land' (2013) 10 *SUR International Journal on Human Rights* 117

Golay C & Ozden 'The right to housing: A fundamental human right affirmed by the United Nations and recognised in regional treaties and numerous national constitutions' (2014)

ICCPR, article 1

ICESCR, article 1

ICERD, Article 1 (1965)

ICERD, General Comment No.18 on Article 1

ICERD, General Recommendation XXIII rights of indigenous peoples. U.N. Doc. A/52/18, annex V at 122 (1997)

ILO 'Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention' (1989 (No.169) (2013) art 21 *International Labour office*, Geneva

ILO 'Indigenous and tribal peoples' rights in practice: A guide to ILO Convention 169' *International Labour Standards Department* (2009) Geneva.

International Covenant on Civil and Political Rights (CCPR) General Comment 23, paragraph 7 on article 27 UN.Doc.HRI/GEN/1 at 158 (1994)

International Covenant on Economic, Social and Cultural Rights (CESCR) General Comment No. 20, Non-discrimination in economic, social and cultural rights, article 2(2). UN. Doc.E/C.12/GC/20 (2009).

International Covenant on Economic, Social and Cultural Rights, General Comment No.4 on the right to adequate housing, article 11(1). U.N. Doc.E/1992/23, paragraph 7&8 (1991).

International Expert Group Meeting on the theme Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: The role of the Permanent Forum on Indigenous Issues and other indigenous specific mechanisms (article 42) 25 - 27 January 2017, New York

International Labour Organisation (ILO) Convention 169, Indigenous and Tribal Peoples Convention, opened for signature January 27, 1989. See <http://www.ilo.org/ilolex/cgi-lex/vonvde.pl?C169>

IWGIA 'Country technical notes on indigenous peoples' issues: Democratic Republic of Congo' (2012) 11

June 11, 1976, General Principles: Land; Voluntary Guidelines of the Food and Agriculture Organization of the United Nations (FAO), adopted 127th Session of the FOA Council, November 2004, Guideline 8B (Access to resource and assets: Land); see also discussion, infra.

Kothari C R 'Research methodology: Methods and techniques' (2004)

Lane MB 'Affirming new directions in planning theory: Co-management of protected areas' (2000) 14 *Society and National Resources* 657.

Liyanda T et al 'Birds of the Man and Biosphere Reserve of Luki, Bas-Congo province, DRC' *The journal of biodiversity data* Vol 11(5) (2015) 1755

Long C 'Land rights in the Democratic Republic of Congo: A new model of rights for forest dependent communities" in K Helliker & T Murisa 'Land struggles and civil society in Southern Africa" (2011) 281

Lötter D 'People, poverty and the need for a rights-based approach to land policy reform in Africa: A study of the importance of socially and environmentally focused land policy coordination in Africa to achieve the rights to food, health and housing. The case of the DRC and the Kingdom of Lesotho' (2015) 26

MacKay F 'A guide to indigenous peoples' rights in the international labour organisation' (2003)

Mattessich P & Monsey M 'Community Building: What Makes It Work' (2004) 56

Mining Code of the DRC

Ministere de l'Environnement, Conservation de la Nature, Eaux et Forets et Ministere de la Recherche Scientifique et Technologie 'Convention de Collaboration relative a la Gestion de la Reserve Forestiere de LUKI' 7 October 2006

Mir Z R et al. 'Attitudes of local people toward wildlife conservation: A case study from Kashmir Valley' (2015) 392 *Mountain Research and Development* 35(4)

Mostert M et al. 'Land law and governance: African perspectives on land tenure and title' (2017)

Musafiri P N 'The dispossession of indigenous peoples' land rights in the DRC: A history and future prospects' (2008) 3

New Agriculturalist 'Country Profile-Democratic Republic of Congo' (2009) available at <http://www.new-ag.info/en/country/profile.php?a=641>

Rhonda P & Pitman R H 'An introduction to Community Development'. Second edition. Routledge New York (2015) 7

SADC Protocol on forestry, article 3.2(g)

Samndong R A & Nhantumbo I 'Natural resources governance in the Democratic Republic of Congo: Breaking sector walls for sustainable land use investments' (2015) 30

Sentime K 'Management of Congo basin natural resources in the DRC' (2012) Unpublished (Conference on access to land and natural resources in the DRC) University of Kinshasa.

Shange B R 'Community forest management and policy implication for the Biosphere Reserve of Luki in the Democratic Republic of Congo' (2012)

Shibia M G 'Determinants of attitudes and perceptions on resource use and management of Marsabit National Reserve, Kenya' (2010)

Silori C S 'Perception of local people towards conservation of forest resource in Nanda Devi Biosphere Reserve, North-western Himalaya, India' (2007) 211 *Biodiversity& Conservation*

The 46th Ordinary Session of the African Commission on Human and Peoples' Rights held from 11th – 25th November 2009 Banjul, Gambia

UNDRIP, article 43(3)

UNESCO Program of Man and Biosphere. Available at <http://www.unesco.org/mabdb/directory/biores.asp? mode=all&code=zai+02> date of access 22 April 2018

United Nations 'Implementing the UN Declaration on the Rights of Indigenous Peoples 'Handbook for Parliamentarians no 23 (2014)11

United Nations, Declaration on the Rights of Indigenous Peoples, September 13, 2007, Available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

United Nations Department of economic and social affairs 'The concept of indigenous peoples' Workshop on data collection and disaggregation. New York, 19-21 January 2004.

UN Security Council 'Final report of the panel of experts on the illegal exploitation of natural resources and others forms of wealth of the DRC' S/2002/1146 (2002) 28

White T et al. 'Forest genetics' *CAB International*, UK (2007) 271

Wickeri E & Kahlan A 'Land rights issues in international human rights law' *Institute for Human rights and business*. See [http://www.ihrb.org/pdf/land\\_Rights\\_Issues\\_in\\_International\\_HRL.pdf](http://www.ihrb.org/pdf/land_Rights_Issues_in_International_HRL.pdf).

Zedan H 'From Kuala Lumpur to Montecatini to Brazil' in UNEP 'Protected areas for achieving biodiversity targets' *CBD News Special Edition* (2005)