DRC Scoping Mission
Opportunities in the Current Forest and Land Tenure Landscape to Advance Community Tenure Rights

Mission Report

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1. Introduction

Advancing rights in DRC has become a major challenge. Since 2007, the country has been steadily slipping on Foreign Policy’s Failed States Index, dropping down from seventh to fifth place in 2010. Its human rights record is also among the worst in the world. The rule of law is erratically applied and public goods, including land and forests, are routinely personalized for individual profit or dispensed for patronage.

DRC’s position on the 2010 Heritage Foundation/Wall Street Journal “Freedom of Economic Property” ranking confirms its weak record on property rights as follows: “Despite a new constitution and enhanced attempts at enforcement, protection of property rights remains weak and dependent on a dysfunctional public administration and judicial system. Fighting, banditry, and abuses of human rights threaten property rights and deter economic activity. Courts suffer from widespread corruption, public administration is unreliable, and individuals are subject to selective application of a complex legal code.”

Rural communities have persisted within the unpredictability of this system through constant adaptation, resourcefulness, and a reliance on social networks to navigate an environment of arbitrary and unaccountable governance, extortion by different groups and individuals, and a general lack of state service provision. Tenure rights for communities, as well as customary land tenure, have never captured the sufficiently sustained interests of successive governments. Laws suggesting a shift toward an eventual recognition of customary practices and rights of ordinary rural dwellers, as well as promises of integrating customary institutions into a system of decentralized governance have yet to be acted upon. Ultimately, “the lack of legal definition of ‘customary’ land effectively disenfranchise(s) the Congolese rural masses and left them with insufficient legal protection against land expropriation by powerful elites” (Vlassenroot and Huggins 2005: 118). Successive governments have claimed land and forestry resources as state property. Therefore in the view of the state, any right to these resources must be interpreted as a favour from the state apparatus to rural communities. Most community rights over forest resources are of a derivative character; clear collective rights over land do not exist.

Social identities (gender, age, tribe, ethnicity, clan) in rural communities are invariably linked to the land and land use practices. However, definitions of who belongs and who is excluded are highly fluid and contested notions that play a central role in determining the politics of resource access, management and use. A decade of armed conflict, displacement, and social dislocation has significantly shifted local power structures and indelibly altered the social landscape. In spite of infrastructural and geographic barriers, rural communities are hardly ‘isolated’ as they are often perceived by those in the capital or abroad. Instead, these communities are often deeply connected into regional and transnational commodity chains, social movements and political struggles, creating a rapidly changing rural reality. A primary focal point of these changes is the role of ‘traditional authorities’ and the “chef traditionnel” in governing rural societies. According to Vlassenroot and Huggins, “(c)ontrol over natural resources, including agricultural and pastoral land, was an important currency in political transactions that aimed at ‘buying in’ local elites and preventing the formation of a counter-force” (2005: 117) under the “Zaireanisation” process. There are reports that traditional leaders in the eastern Congo are selling the lands under their jurisdiction (community lands) for personal benefit rather than representing the interests of their communities. Other traditional leaders have continued to exercise an important management function at the local level serving as a legitimate point of interface between communities and the state.

Legal reforms would be required to integrate de facto community land and natural resource management practices and institutions into the state judicial framework. This need has taken on a more important dimension with increased international interest in investing in tropical forest conservation through Reducing Emissions from Deforestation and Forest Degradation (REDD) initiatives. Thus far, conservation

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efforts have been generally detrimental for community rights, with international organizations promoting strategies that consider communities as a threat rather than as an asset for achieving sustained forms of conservation. REDD however constitutes an important new window of opportunity for addressing long term structural issues of community rights over land and natural resources, local land and natural resources management, and local accountability for resource extraction, among other issues. This reform process has started, as will be documented in this report, albeit not without problems in a framework of strong “NGO-ization” and “UN-ization”, weak governance and to some extent an abundance of funding.

Section 2 of this report analyzes the parts of the statutory legal framework that have a direct impact on the community tenure rights. The first law examined, *le Code Forestier* (the Forest Code), maintains that local communities can use forests according to customs and local traditions. Within the *Code Forestier*, areas defined as Protected Forests are available for communities seeking to establish stronger recognition of their claims over forest resources through the establishment of Local Community Forest Concessions (LCFC). The Government of DRC (GoC) is presently developing practical legal tools to implement this provision, though not without controversy. The process of developing the draft proposals for the *Décret* on the Allocation of Local Community Forest Concessions and the *Arrêté* on the Management of Community Forest Concessions highlights the controversy surrounding the establishment of community rights over land and natural resources. The allocation of community managed forestry concessions is the first real opportunity for communities to acquire stronger rights over natural resources. Currently, communities are forced to contend with an inconsistent forest tenure system through which rights are parceled out piecemeal via negotiated deals with commercial sector operators and the government itself. The success of the community concession effort will now largely depend on how these legal instruments can be implemented in a practical and cost-effective manner and will be evaluated on whether communities can actually have some of their legitimate rights recognized.

Other important legal reform initiatives include the new *Code Agricole* (Agricultural Code) which is near approval, in addition to a potential revision of the 1973 *Code Foncier* (Land Code). However, each reform has thus far taken place without the coordination necessary to avoid overlaps or to explore possible synergies between each set of laws. This has, and will likely continue for the foreseeable future to result in a proliferation of institutions with overlapping jurisdictions and which are overwhelmed with different tasks and responsibilities. The enduring centralized decision-making and governance structure continues to be a barrier for these localized institutions to adapt to local needs and realities.

Section 3 assesses a number of ongoing processes and programmes that may be used to advance community tenure rights. Most of these processes are located in the spheres of biodiversity conservation and environmental protection, rather than having local or rural development focuses. Rural communities are regarded as beneficiaries of these programmes, deriving some secondary benefits, but thus far have not been considered as genuine partners to unlock capital vested in land and natural resources for their own benefit. Community forestry is a relatively new concept in DR Congo that awaits now formal recognition through legislation to unfold itself in practice. Recent efforts to have a solid REDD strategy prepared by end the end of 2012 are laudable, but the rights of communities are still weakly addressed in present proposals. While land use planning and zoning approaches deal with issues of strengthening community rights to a limited extent, they are also sometimes used to undermine these rights. Different levels of planning are currently used in a parallel way, even though they are potentially very complementary. In fact, macro-zoning can be applied in a more strategic way to identify priority areas where local land use planning can strengthen community rights.
2. Legal mechanisms and reforms to address community tenure rights

The Democratic Republic of Congo is a “post–war state” that has undergone significant legal reforms since the signing of the Global and All-Inclusive Agreement in 2002. In terms of tenure, efforts towards legal reform have focused on natural resources management including new forest and mining laws that have already been passed by the legislature in addition to agricultural and conservation legislation that are currently in the pipeline. There have even been preliminary conversations regarding the revision of land legislation sometime in the future. This wave of new legislation presents a sharp contrast to prior eras that were marked by the absence of significant natural resource management reforms. A 1967 mining law was the most recent for the sector until this point, having replaced a law that dated back to 1937. In terms of forest legislation, no reforms had taken place since the Forest Code was developed in 1949. The post-independence period up to 1992 was also marked by a strong nationalization of natural resources use and management, the “Zaireanisation”. Key legislative landmarks of the “Zaireanisation" period include the 1966 revisions of the 1947 colonial land law and the 1973 Code Foncier. A common trend between the post-independence law reforms and the newest wave of laws is that they focus almost exclusively on regulating and securing individual and corporate commercial interests while failing to address the tenure concerns of the majority of the Zairian/Congolese people who continued to live within customary systems. For the most part, post-independence land laws have been constructed around the notion that the state owns the land and therefore has the right to alienate it to commercial interests in the form of concessions, entirely neglecting local community tenure systems.

The following sections give an overview of three major law reform processes that are essential to better understanding the current land and forest rights context. These sections also highlight the challenges facing the promotion of a rights-based approach for land and forest management.

2.1. Forest legislation

Le Code Forestier (2002) was a product that was framed to a greater extent by external interests than it was by internal ones. There is little doubt that its adoption was induced as some sort of pre-requisite for accessing funds to reform the sector (with support from the World Bank, among others) and to better regulate uncontrolled timber extraction that occurred during the armed conflict (1997-2002). A second driver for reform was pressure coming mainly from international conservation groups to better protect and conserve the DRC’s forest ecosystems in light of accelerating deforestation. The Congolese government had ratified a number of international conventions and agreements but there were no real efforts to implement these on the ground.

The 2009 World Bank study by Fétiveau and Mpoyi Mbunga provides a good overview of the forest-sector reform process. Progress on law development has been substantial; by 2009, 26 out of a total of 42 texts had been approved, with more scheduled to be passed in 2010. It is striking, however, that the regulations for handling community forestry have not yet all been approved. This delayed focus on community forest management may suggest that the priorities of the main actors in the national discourse on the forestry sector are not particularly aligned with the priorities of the approximately 40 million people that depend on this resource base.

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2 The revisions were called la loi Bakajika (Bakajika law).
2.1.1. Le Code Forestier (The Forest Code) - 2002

2.1.1.1 General

The Code Forestier establishes that the State is the owner of the Congolese forests (Art. 7). The Code and its regulations determine in detail how this resource base must be used and managed, who can access forests, and it establishes zones where different bundles of rights over forests can be allocated. As all legislation in DRC, it follows a coded system where the state identifies the rules, as well as how these rules need to be used and interpreted.

Forests are officially categorized within the Code as:

(i) Classified Forests: managed under a special restrictive exploitation regime with a focus on conservation such as nature reserves, forests in national parks, wildlife and hunting areas;
(ii) Permanent Production Forests: managed under commercial industrial concessions that are auctioned by the state; established on protected forests;
(iii) Forêts Protégées (Protected Forests): cover all other forest areas that do not fall into categories (i) or (ii);

Land rights established over natural or planted forests prevail over forest rights, but the forest code regulates how these forest rights are exercised (Art. 8). This hierarchy of rights is supported by Article 21.

2.1.1.2 Rights of communities

The Code Forestier supports, as a basic principle, that local communities can use the forest according to their customs and local traditions. These use rights cover the entire forest domain, at least as long as the use does not contradict existing legislation. Specific rights of communities to forest resources are determined in function of the official category of the forest area in which the concerned communities are found.

Classified Forests. The rights over the forest base itself are reduced to conditional use rights (*droits d’usage*) for local populations living inside the enacted area. An exception is made for integral natural reserves and national parks (Arts. 38, 39) in which populations cannot exercise use rights. The rights of populations or communities that are or have been displaced or forcibly evicted when reserves and national parks were established in the past are also not clear. In addition, the nature of the use rights does not specifically refer to carbon rights. Public reforestation areas are free of any use right (Forest Code, Art. 40).

According to Article 15, communities have the right to be consulted before an area is designated as a classified forest. This stipulation is rather critical when examining the reclassification of forest lands because the Réseau Ressources Naturelles (RRN), a leading national umbrella NGO on natural resources, has found that most areas identified to become classified forests are inhabited by communities. However, there remain major doubts regarding (i) whether this consultation process is always conducted (ii) whether the prescribed modalities of this consultation process are always followed, and (iii) how the outcome of the consultation process will be handled.

It is also important to highlight that several classified forests were declared in the 1990s, before the Code was adopted, in a dynamic and mobile environment of armed conflict. It is highly unlikely that under these conditions a public consultation process was in fact conducted at all.
Regulates the public consultation process that is compulsory before the issuance of forest concessions. Arrêté 24 however does not apply to the public consultation process required to identify Classified Forests. The legal order suggests that the desired outcome of a consultation is to be a reconfiguration of boundaries that may better be adapted to local populations’ livelihoods (Art. 16). Reactions from different actors to handle this vary from forced evictions to more pragmatic approaches that recognize changes of proposed boundaries, recognition of some forms of human occupation and economic activity.

The ongoing process to increase the total area under classified forest (or protected area) from the actual 8% to the legally established 15% (Code Forestier, Art. 14) needs to be monitored as it may result in negative consequences for the rights of local populations over forest resources. There is a strong lobbying push from international conservation organizations to maximize the total protected area of the country. There is evidence that the 15% rule is being used by conservationists at a regional and local level, out of its national context, to push for a maximum protected area as part of land use planning and zoning in certain areas (the Maringa/Lopori – Wamba landscape under the CARPE project for instance). This absolutist and policed form of conservation that turns forests that are considered as community reserves into "Integral Nature Reserves" is increasingly seen as an instrument to erode community rights over forests.

The management of Classified Forests falls under the mandate of the Institut Congolais pour la Conservation de la Nature (ICCN – the Congolese National Parks Authority), whereas community forestry falls under the stewardship of the Direction Générale des Forêts (DGF - the Forest Management Division), which is part of the Ministère de l’Environnement, Conservation de la Nature et Tourisme (MECNT - The Ministry of Environment, Nature Conservation and Tourism). Both the ICCN and MECNT-DGF appear to have their own divergent priorities, are driven by different actors, all with local forest users caught in the middle.

Permanent production forests are areas exclusively reserved for concessions. Once a concession right has been established, any potentially alternative claim is extinguished (Code Forestier, Art. 23). The local communities have the right to be consulted before the concessions are enacted (or converted from forest titles into concession contracts) (Art. 23). Concessions are established on the basis of Decree 08/09, while the public consultation process is instructed by Arrêté 24/2008 "Fixant la procédure d’attribution des concessions forestières". The latter is devoid of essential details, such as the treatment of the outcome of this consultation; the identification of who pays for the consultation, etc.. Community claims over the forested area can be lodged and are subject to eventual compensation. Agreements can be reached on an informal (amiable) basis or by the courts if the consultation did not result in an agreement. Payment of any compensation purges the concession area of any right (Code Forestier, Art. 84).

While Article 84 of the Code Forestier stipulates that concession consultations with local communities extinguish local claims, Article 44 of the same law appears to contradict this notion. Article 44 states that populations living on the land in a forest concession area continue to exercise their use rights according to their customs, as long as this is compatible with the forest exploitation; agricultural activities are however excluded. The same community rights in forest concessions are reconfirmed in Arrêté 28/2008 (Art. 6) which states that use rights of communities in concessions need to be respected. Annex 2, Article 7, of the same Arrêté indicates that "in case of conflict over use rights of communities in concessions, the concession holder negotiates agreements with these communities". An additional regulation dealing with the community rights in forest concessions is the recently adapted Arrêté 13/2010 "Modèle d’accord
From these alternative laws, it becomes clear that local populations may retain some rights in forest concession areas. These rights are however weak, unclear and contested. If recognized (depending on the law or specific article consulted) the rights accorded to communities by law are limited to some form of use rights. Even these use rights are subject to negotiation and, in the end, will probably result in a situation where it is difficult to support sustainable livelihoods. The extent and nature of these rights are defined through the implementing instruments rather than through clear legal provisions. Implementing instruments are the tools and institutions through which actors can access formally established rights. The instruments of interest in this context include: land use planning and zoning, "cahier de charge", and concession management plans. All these implementing instruments need to be negotiated between the concessionaire and the communities; the strength of the rights will thus depend on the communities’ negotiation capacity.

In order for communities to come out of negotiations with concessionaires with some real gains, their institutions and capacities for negotiation need to be strengthened; all support is required to prepare communities to enter negotiations well-informed. Moreover, there remains a central question on the future of the forests once the concession has expired: do rights return to the state or can communities establish their eventual rights?

Protected forests ‘officially’ cover most of the forested area in DRC and include a wide spectrum of different land uses, such as shifting cultivation, slash and burn agriculture, agro-forestry, hunting, gathering, etc. Most of these areas fall under one or more customary tenure regime. Protected Forests are in fact used and managed by rural populations.

Protected Forests are the main target for communities for establishing stronger rights over forest resources through officially-designated Local Community Forest Concessions (LCFC) (Code Forestier, Art. 22). These rights are titled and leave little doubt on their nature and extent. The draft Decree dealing with the allocation of LCFC, discussed below, includes the modalities for the issuance of such a concession. The Decree considers the rights accorded by LCFC arrangements as being exclusive (see Decree proposal Art. 17), although this specification is not stated in the Code Forestier itself. According to the Decree, community rights within the LCFC framework are considered not to be simple use rights over forests but as commercial rights to exploit the forest. In contrast to industrial forest concessions, LCFC are issued for perpetuity and are mostly irrevocable. However, ‘bad management practices’ can lead to the concession being cancelled by the State.

Not all forests that fall under de facto community use and management can be transferred into a LCFC. The size of such a concession cannot exceed 50,000 hectares, although the size is still being debated. It is important to notice that the proposed maximum concession area is not determined by the territorial expression of a particular community livelihood system. For instance, a community’s livelihood territory may very well exceed the arbitrarily set size of the concession. Different ecological settings and the particularities of the social groups (pygmy groups do not always embrace a territorial concept) can also make this size distinction problematic for communities.

A category in addition to LCFCs is found in formal law to describe community holdings in forest areas. These areas are called Community Forests. However, unlike LCFCs, Community Forests are not titled. According to the law, use rights over to forests are acknowledged, but again do not have a specific protection in law. Community Forests are therefore defined by law, but have no legal protections. Article 112 of the Code Forestier establishes that the government can recognize commercial rights for local community forests but it is not clear whether this provision refers to community forests or to a LCFC. Supplementary regulations outlined in draft Decree, Article 17, provide further guidance on this particular matter and suggest that Community Forests are forests over which communities have established

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6 Model agreement for the creation of a social responsibility clause within a forestry concession contract.
customary rights but which have not been converted into a LCFC; hence only basic use rights are recognized. Further clarification on Article 112 is required before concluding that communities have also acquired a commercial right over these areas. In competition with the Code Foncier and the proposed Code Agricole, these community forest lands are subject to the issuance of agricultural concessions, which would immediately strike out any community rights over these forests.

In brief, part of the forests that fall under a de facto community management and use can be registered as a LCFC with strong rights attached to it. Rights over forests that fall under community management but beyond the LCFC boundaries are much weaker in law, and coincide simply with droits d’usage (use rights). Under the Code Forestier this right is weaker than a surface right or a usufruct right (Art. 42): (i) it is more limited in time; (ii) agriculture can conditionally be practiced but is subject to arbitrary interference of the provincial governor. The Code Forestier also suggests that the MECNT and MdA can use zoning as a tool to regulate agricultural activities on these lands. These agricultural regulations may put yet another layer of land use restrictions in place.

### 2.1.1.3 Community benefits derived from forest management and exploitation

Provisions on the possible benefits that communities can derive from forest management and exploitation are spread over different law texts. Forty percent of the surface tax due by commercial forest operators to the state is distributed to decentralized administrations; 25% to the province and 15% to the “decentralized entity”. It is not clear what the latter category refers to, but there is little doubt that this is a public (forest) institution, and not the local community as sometimes assumed. These revenues are disbursed in a Fund. Revenues are intended to be exclusively used to support infrastructural works in the interest of the community (Code Forestier, Art. 122). However, the definitions of what constitutes the “community” remain ambiguous. There is some room for misinterpretation between local administrative services of public right and local communities of private right in the case they have acquired legal personality.

Benefits that can be derived by the communities themselves from LCFC are discussed in Section 1.1.3 below.

With specific reference to industrial forest concessions, there exist four mechanisms for local communities deriving benefits: (i) as part of the negotiation process of a new concession, (ii) as part of the conversion process of old forest titles into new concessions, (iii) during the negotiation process of the social part of the “cahier des charges”, and (iv) as part of the forest management plan. Arrêté 28/2008 and Arrêté 013/2010 identify benefits for communities as part of the concession contract and the social clauses of the “cahier de charge” of the concession contract, respectively. Industrial forest concession holders have to finance the construction of social and economic infrastructure for communities that live within the demarcated industrial concession area. A special “Development Fund” is to be created for this purpose; the funding amounts are related to the volumes of extracted and transformed wood (2-5 US$ / cubic meter). A “Local Management Committee” including the concession holder and five elected community representatives is to be created to manage the fund. The management positions include a treasurer, a secretary, and several councilors. The fund is to be consigned to the concession holder and a “Local Monitoring Committee” is responsible for auditing the progress on the engagements.

The underlying basic principle of the state forest tenure regime is that most of the benefits that communities can derive from industrial forest concessions (i) need to be negotiated, (ii) can be paid either in cash or in kind, (iii) can only be used according to the conditions established by the state, and (iv) require specific and potentially cumbersome new local institutions for their management.
2.1.2 Décret 2010 - Allocation of Local Community Forest Concessions

2.1.2.1 History

The proposed decree for the creation of LCFC appears to be the first real attempt in the history of the Democratic Republic of Congo to formalize community rights over land or natural resources. This is a major milestone but is still subject to contestation as long as the Decree is not approved by the Prime Minister. The approval procedure itself is being contested since the Code Forestier clearly states that the Decree must be signed by the President and not by the Prime Minister. This particular Decree has several issues that need to be resolved prior to being passed. There are several competing drafts, reflecting the interests and biases of interested international organizations, civil society, and the government, respectively. Without the Decree, the Code Forestier cannot be fully implemented.

The first proposed draft was compiled by the Food and Agriculture Organization (FAO), with financial support from the Belgian Cooperation, as part of a “Community Forestry Project” (Mid-term evaluation report April 2010 available). Early in its implementation, this project developed two texts that responded to the need for having a legal framework in place to create and regulate Local Community Forest Concessions as per Article 22 of the Code Forestier:

- **le projet de décret fixant les modalités d’attribution des forêts aux communautés locales;** (copy available);
- **le projet d’arrêté portant dispositions relatives à la gestion des forêts des communautés locales;** (copy available);

Most informants confirm that these texts were drafted in isolation from public scrutiny before being made available to the larger public in June 2009. In a strongly addressed open letter to the Prime Minister (6th July 2009), the NGO RRN criticized the FAO proposal for failing to reflect the reality of those whose lives the Decree would impact. The proposal was also criticized for having been drafted without including civil society’s perspectives. In fact, the very title of the decree did not respond to Article 22.

The NGO Forest Monitor together with other NGO partners has worked on an alternate legal framework for managing LCFCs since early 2009. After a period of 18 months, their collaborative process resulted in the three following documents, which are considered by civil society as the “consensus” proposals:

- **Elément d’une sous-politique sur la foresterie communautaire en DRC;**
- **Décret fixant les modalités d’attribution des concessions forestières aux communautés locales;**
- **Arrêté Ministériel portant modalités de gestion des concessions forestières des communautés locales;**

In June 2010, civil society actors presented their proposed frameworks to the MECNT Minister, accompanied by a letter that illustrates their participatory process with the involvement of public and private organizations. These “consensus” texts are used for further analysis below.

The MECNT itself, through the Direction Juridique et d’Implication Strategique pour l’Environnement (DJISE - Division for Legal and Strategic Implications for the Environment) has since reworked two of the three consensus texts (**Décret** and **Arrête**) in July 2010 into the following documents:

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7 Project for the development of a decree to establish the modalities for allotting forests to local communities.
8 Project for the development of an order: supporting provisions for the management of local community forests.
9 Key elements of the sub-policy on community forestry in the Democratic Republic of the Congo.
10 Decree to establish the modalities for allotting forestry concessions to local communities. (Translator’s note: Translation note: Not sure whether attribution should be translated to allotment or allocation.)
11 Ministerial Order: supporting provisions for the management of local community forest concessions.
Civil society actors have strongly objected to these alterations, stating that the MECNT cannot unilaterally change ‘consensus’ proposals that were initially drafted as collaborative efforts.

There are specific points of disagreement between the different versions, as well as issues that may need further attention:

- The use of the term “allocation” (attribution in French) in all three versions, as well as in the Forest Code itself indicates that the forest legislation does not necessarily recognize that communities have established historic rights over forest. On the contrary, “allocation” refers to the issuance of a new right;

- Differences between community forests and community forest concessions are clear but contested. It pitches non-titled weaker land use rights under customary law against titled stronger exclusive rights under statutory law. Communities perceive that they have the same rights over the resource whether it is tilted or not;

- The maximum size of the LCFC is determined by law but contested; the FAO version proposed a 10,000ha ceiling, whereas the consensus version also sets the cap at 50,000ha. It can be discussed whether a ceiling should be set at all in case these rights are considered in a livelihoods context;

- The role of the traditional chief is also subject to debate. The consensus version had proposed a laudable attempt to democratize local management structures, although the proposal comes out as being heavy and cumbersome to be realized in practice on a large scale. It suggests mechanisms to potentially mitigate the ability for traditional leaders to abuse their power. The FAO and the DJISE versions maintain a specific role for traditional leaders;

- Providing a legal personality to a community is essential for later exercising commercial rights over forest resources. The FAO version does not recognize these rights and doesn’t provide for the creation of a legal personality for communities. It is also not clear whether the legal personality is of a public or a private character. There also remain differences in opinion on the administrative level where this legal personality can be administratively acquired at the provincial level (through the governor) or at the sector level (through the chef de secteur);

This contentious process indicates that there are major differences in opinion among (i) the government, (ii) civil society, (iii) private and international organizations. There are also indications that models from other countries (Cameroun, Tanzania) could be used as viable models for DRC, although these have proven to have their own flaws.

It also appears that discussions to structure the community forest model in DRC has emerged without making critical links to other ongoing related processes, notably those of decentralisation and the development of the Code Agricole. This has, so far, resulted in a proliferation of local institutions which,

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12 Decree to establish the modalities for allotting forests to local communities.
13 Ministerial Order: supporting provisions relating to the management of community forests and village forest holdings.
at the end of the day, may result in competition and contradictory initiatives and may also create opportunities for corruption.

2.1.2.2 Process analysis to create LCFC

The proposed process for communities acquiring a forest concession is summarized as follows:

1. The community acquires legal personality;
2. The community makes a request to the state;
3. The local forest administration preliminary assesses the request;
4. The request is verified by the same local forest administration;
5. The request can be contested by third parties and finally is approved or disapproved;

There remain doubts whether the community would acquire a public or private legal personality. Should it be determined that a community has a public legal personality, the community forest concession initiative will inevitably have to be harmonized with decentralisation legislation.

The procedures for a community making a request also need more clarification. The community should be able to make a request on the basis of a well-developed and documented file, not just a sketch map that indicates the boundaries of a future concession. The documents to be presented as part of a request should be as complete as possible, and must be the result of some sort of Participatory Appraisal which is facilitated by an NGO or other service provider (in DRC this is called participatory mapping). Apart from mapping they should include a validation of boundaries with all neighbouring communities, with other rights holders (concessions for instance), conflict management and resolution. In fact, in similar processes in other countries, this comprehensive field work is the most important step of the process. If well done, it can significantly reduce following steps, especially the assessment and verification of the request by the public administration. The process of community land delimitation in Mozambique is a good example to demonstrate this. In Mozambique, this exercise is facilitated by a service provider (normally a NGO field team), because communities on their own generally do not have the capacity and skills to do this. In the case that this facilitating team already includes people from the relevant public administrations (the forest services), the necessary validations and verifications can be handled simultaneously; this is much more cost effective.

The method itself needs to have legal weight and recognition to assure its harmonized and streamlined use on a national scale by different service providers. The proposed Arrêté (Art. 43) mentions that “la cartographie participative” (participatory mapping) requires a national guide, but does not give this guide legal recognition. At this moment the guidelines outlined above are just a RRN/Forest Monitor proposal.

The objective of the Preliminary Assessment to be conducted by the local forest administration is also not clear; does it refer to the assessment of the legal status of the community or to the process file of the request itself?

The verification process, also to be conducted by the local forest administration, is designed to ensure that the land claimed by the LCFC process is not claimed by an alternate party, especially a neighbouring community. This process would require additional field work by government officials to verify the validity of the original field work that was required to prepare and make the request in the first place. The proposal suggests that this field work may take up to a month with a possible extension of 2 weeks. This estimate is not realistic, not cost effective and altogether unnecessary if these public instances can be involved in the first batch of field work. The consultation with neighbouring communities is indeed an essential step to avoid future conflict but, in theory, it could and should be done in a much earlier phase, removing the need for an additional administrative step.
While the proposed formalization approach acknowledges the very important possibility of disputes, the plan does not provide any direction for dispute management. The only reference to the public notice of the outcome of the verification process is found in Articles 13 and 14.

In sum, the proposed methodology is, under its present form, probably not an ideal instrument to expediently and cost-effectively secure the community forest rights. The proposed framework also leaves room for it being used in an uncoordinated way over the national territory. Eventual rationalization of the approach will require acceptance from the parties who have developed the proposal. As the history of its development has already shown, it is difficult to give up personal or institutional identity in the common interest, making the desired outcome unlikely. A more realistic option remains then to use the proposal as it is and, on the basis of experience (eg. the 60 LCFC to be registered under the new Forest Monitor project) adjust the methodology.

Other Issues

The size of the LCFC has been subject to frequent debate and controversy. The present proposal to limit the size to maximum 50,000 ha seems to be a compromise between a restricted approach based on actual occupation, and a livelihood approach that recognizes that forest communities use wide spaces for their economic activities. It also assumes the existence of a territorial expression of customary rights which corresponds with Bantu customs but not necessarily with pygmy customs (these groups have no clear territorial boundaries established). Therefore the LCFC framework problematically ignores the possibility that two communities might operate and use the same territory.

This approach has significant implications for the rights of communities over forest resources. In fact, communities can only establish stronger rights over a designated concession area, with the rights protected in formal law. Forests over which communities have presently the same rights but which cannot be converted into a concession will not enjoy legal protection.

Another question that arises is whether the exclusive rights that are recognised over the LCFC concession cannot become at some stage a hurdle for development. For instance, who would be willing to invest on land that is void of any other formally-recognized right? The potentially necessary, but currently absent rights include easement rights and rights of way for other communities and stakeholders. As it is, the system also neglects the possibilities for creating co-titling agreements between different communities to establish contiguous larger areas to better respond to eventual REDD opportunities.

2.1.3 Arrêté 2010 - Management of community forest concessions

These regulations give guidance and instructions on the management of LCFC, and are complementary to the legislation mentioned above. The Arrêté was drafted together with the Décret as part of the same process, and has thus the same history.

The proposed law includes a laudable effort to regularize the functioning of local institutions (Arts. 4-13). Under the present system, the traditional chief continues to exercise major decision making powers, but these do not always turn out to be made to the benefit of the community. There is ample evidence, including from Eastern Congo, that traditional chiefs abuse their powers for their personal benefit. This proposal reduces the de jure decision making powers of (one) chief(s) by instituting (i) a Local Management Committee, (ii) a Council of Elders and (iii) a Community Assembly to handle forest management. If these reforms can be implemented, they may well result in more local democracy and increased local accountability for resources management. The set-up is complex and adds beyond doubt to the proliferation of local institutions that may not necessarily interact with one another harmoniously. For instance, it is not immediately clear how these aforementioned institutions are supposed to interact with others that have emerged from further legal reforms; including, the Conseils Agricoles et Ruraux de Gestion (CARG)14 and Land Committees under the Code Agricole, the Local Management Committee

14 Agricultural and Rural Management Councils.
under Arrêté 013/2010. This becomes more important when these new institutions are considered as entities in the public sphere, rather than in the private sphere. Possible linkages with the decentralisation legislation also may need further investigation.

The establishment of Internal Community Regulations is essential for a number of decisions by these local institutions including: the functioning of the Local Management Committee and the Community Assembly (Art. 5, Art. 13), internal conflict management (Art. 44), and the management of the Community Development Fund (Art. 46).

A LCFC is managed on the basis of a management plan (Art. 14) that needs to be prepared by the community with possible assistance from service providers. A specific guide for the preparation of community management plans needs to be drafted. Again there are opportunities here to make the process more coherent and cost-effective. A simple management plan can easily be prepared as part of the LCFC request process by the same facilitating team. In fact, the preparation of such a management plan as part of the request process may turn it into a good instrument to manage conflicts with neighbours and other rights holders.

A reading of Chapter II on the exploitation of a LCFC calls for the following comments:

- There is a confusing general statement that the management of a LCFC does not coincide with industrial or small scale types of management (Art. 18). However, later articles strongly support small scale commercial (Art. 25) or even industrial (Art. 24) exploitation of these concessions through specialized and licensed operators. The small scale or industrial exploitation of the LCFC by external operators is regulated under a contract (Arts. 19, 25). These provisions present both opportunities and risks for communities to better unlock the capital vested in the standing woody biomass through exploitation. It may well be an open door for frustrated industrial operators to get access to forest resources which they were denied under the conversion process of forest titles.

- In general, the specifications that are given to explore timber from LCFC concessions tend to be too strict and industrially driven for communities themselves, and do not correspond with their present or immediate future capacities (for example last paragraph of Art. 23). This may well force communities into an exploitation partnership with industrial or small scale operators.

- Some state regulations for establishing partnership contracts are foreseen but it needs to be seen whether this will turn out to result in tangible benefits for communities. There is no doubt that such regulations must be in place to balance major imbalances in negotiation power. The proposal will include model contracts, but a question remains whether these contracts have enough legal weight for communities to secure benefits from partnerships. This could have been dealt with at a higher legal level such as in the Decree itself.

- Section 3 deals with the conservation of forest resources on LCFC. There remains some reluctance in certain quarters to handle community conservation under these regulations as a new law is being drafted for this purpose by ICCN. In any case, what is thought to be missing here is a clear statement that the benefits resulting from good conservation will go to communities, even when these are facilitated by service providers or third parties. Article 37 creates doubts rather than providing clarification on this particular issue when it states that revenues from carbon markets are subject to an “equitable distribution”. A clear statement such as “all benefits derived from carbon rights belong to communities” could take away these doubts. Benefits should not be negotiated with obscure third parties or the state. The Forest Code itself
(Art. 113, Para. 2) is clear on the distribution of exploitation benefits but not on the conservation benefits for local communities.

The tool "Participatory Mapping" (Art. 43) also needs further explanation; this can take the form of a national guide with some legal weight. A useful model of a legal outline for participatory mapping would be the Technical Annex in Mozambique. However, the creation and the management of LCFC needs more than only participatory mapping. One should aim at having a coherent tool or package of tools that allows communities, supported by service providers, to tackle several issues at the same time including (i) delimiting and validating a LCFC, (ii) producing a simple forest management plan that is based on a simple forest inventory, (iii) building capacity for community based institutions, (iv) developing mechanisms for conflict management, and (v) establishing a basis for engaging in contractual partnerships with third parties.

The draft regulations create a “Community Development Fund” to channel revenues derived from forest management (exploitation and conservation) to communities (Arts. 46 and 48). Leaving the management of such a fund to the discretion of each local community itself may result in bad practice. The modalities for such management could better be addressed in a national framework. It is not yet clear whether this fund is substantially different from the one that is created for communities receiving benefits from industrial forest concessions.

2.1.4 Analysis for making the package operational

The present legal package to enable a more rights-based approach for communities engaging in forest resources management is a laudable effort which deserves all support. There remain however a number of possible hurdles for practically scaling it up.

As mentioned above, the aim should be to combine a series of essential interventions at the community level. The demarcation of a LCFC alone will not necessarily support efforts to turn local communities into good forest managers. This package needs to be considered as a tool for local capacity building, not just to do the job for establishing the LCFC. International experience has shown that community land delimitation and local land use planning can be instrumental in achieving better levels of local organization and natural resources management. However, this implies that the service provision extends beyond the registration of the concession.

Creating awareness of—and sensitizing local communities to—is an essential part for communities engaging in local forest management, but seems to be missing altogether in the current proposal. Achieving such objectives would require that actors go beyond simply disseminating the existing legislation to communities. To be effective, activities of this nature would need to be well-designed and prepared.

There are still a number of guides that need to be developed before the legal package to establish and manage LCFC can be made fully operational. It is anticipated that the drafting of these guides will take on the form of an inclusive process, with different actors and service providers being able to contribute. It will also require a compilation and analysis of experiences that are already being implemented. The 'learning-by-doing' approach seems to respond well to these needs.

There exist a number of strategic choices that can be considered by policy makers and implementers to make the process of establishing LCFCs more cost effective. The proposed methodology to establish a LCFC can be rationalized along the lines mentioned above. The assessment and verification of a community request can be made part of the field work that is required for a community to initiate such a request. The local forest authorities responsible for these assessments can be integrated into the facilitating team.
International expertise indicates that on-demand requests from communities to register their rights over land or natural resources are not cost effective. A more strategic approach should be considered; for instance, targeting areas that are under threat of destruction or degradation (hotspots) or areas that show a potential for community forestry. Such cluster areas can be identified on the basis of ongoing macro-zoning exercises. Lessons for a more systematic approach can be learned from the RRN-Rainforest experience in the Inongo territoire, Bandundu province where some 150 local communities were targeted as part of a participatory mapping exercise.

The availability of an adequate quantitative and qualitative service provision capacity is essential to scale up LCFC registration and management from a pilot experience phase to a wider coverage. With this in mind, the RRN has taken the lead by conducting capacity-building exercises on the theme of participatory mapping in all the country’s provinces. Some 21 technicians have been trained in the use of ArcView, a similar number in participatory mapping, and some 146 in community facilitation skills. Some limited service capacity is provided by international NGOs such as Rainforest Foundation. The Satellite Observatory of the Central African Forests (OSFAC) is instrumental in training on subjects like satellite imagery interpretation, GIS systems and GPS use. However, there remain considerable future training needs.

Reliable information on the costs of LCFC registration is also not readily available. The recent RRN work in Oshwe (Bandundu province)\(^\text{15}\) financed by RRI may shed some light on the costs at a pilot level; the report relating to this project is currently being prepared. A first approximation for the calculation of possible costs can be made on the basis of (i) the presently proposed methodology as included in the draft *Décret*, and (ii) very rough costs of field work received after discussion with RRN. The *Décret* considers two major field activities that are required for the final registration process: (i) Article 4 that refers to request for a community concession and (ii) Article 9 that refers to the validation of this request by the local administration. The former corresponds with what is called in DRC “participatory mapping” but which in fact is a Participatory Rural Appraisal (PRA) that results in some sort of delimitation of the concession.

Article 9 of the proposed *Décret* gives an idea on the possible field work that must be executed by the local forest administration to validate the request: one month of mainly field work which can be extended with 15 days. After this step, there are still a number of administrative tasks that need to be paid for, but which are comparatively minor. What is not counted here is the possible efforts and time required to resolve disputes in case these appear during the request or validation.

Altogether this may sum up to an estimated $30,000-40,000 USD. Of course these costs can be reduced when considering measures mentioned above. RRN has calculated field work costs of a different nature for the survey of approximately 1 million hectares of forest territory approximating some $160,000 USD. The latter does however not include per diem costs of field technicians, other transport costs, costs of external technical assistance. As an international reference, costs incurred in Cameroon to register a 7,000 ha community forest concessions, and to develop a management plan (probably based on a forest inventory) equalled €90,000. The Mozambican experience indicates costs up to $10,000 USD to delimit and register community lands (covering an area of several ten thousands of hectares) using similar approaches of participatory mapping.

A first opportunity to test on a wider scale the application of the legal provisions is the “*Projet de mise en œuvre des forêts des communautés locales et autochtones en DRC*\(^\text{16}\)” requested by Forest Monitor to the Congo Basin Forest Fund (CBFF). This project is discussed further under section 2.1.

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\(^{15}\) The RRN exercise in Oshwe involved some 7 technicians for 3 weeks of continuous field work at a cost of 20,000US$. Additional costs are incurred during the sensitization and awareness creation efforts, eventual purchase of remote imagery, equipment etc...

\(^{16}\) Pilot project for indigenous and local community forests in DRC.
2.1.5 Status of approval

The single most essential missing ingredient for initiating a programme on community forestry using the concept of LCFC is the passing of the Décret and Arrêté. There is anecdotal evidence that the “consensus version” is being considered by the MECNT as a good draft, but that some amendments will need to be made as yet to streamline it completely with MECNT thinking. It is then probably the duty of civil society to agree or not with these eventual changes. Forest Monitor is informed by senior advisory staff in the MECNT that a final adopted version may be expected before the end of the year.

2.2 Code Foncier 1973

The Code Foncier or Land Code is a 399 Article law that was passed to regulate the concession of state land to individuals and corporate entities. According to the Code Foncier, all land is deemed to be state-owned, falling either under its public (land for public use) or private domain. A concession can be perpetual (for private national citizens) or limited in time (an ordinary concession). Land that is acquired through a concession arrangement needs to be occupied and used (mise en valeur) for a specifically-designated purpose and on a continuous basis. In theory, should the concessionaire decide to change from the designated land use needs in to seek approval from the government (Art. 93). A concession right over land gives access to the forest that covers its surface (Art. 97). The major requirement for maintaining a concession is its use and the payment of the annual land use taxes.

An ordinary concession can take on different legal forms: an emphytéose (a concession for 25 years), the droit de superficie (surface right – 25 years), the droit de l'usufruit (usufruct – 25 years), the droit de l'usage (use right -15 years), and the droit de location (lease right – 3 years). All rights are renewable to different degrees (Art. 109). Most of the rights over land also give automatic access to the forest resources that are located on the land. Land rights are subject to an annual payment to the state, but free concessions can be granted under specific conditions to Congolese citizens. They are restricted, however, to 50 ha agricultural activities in rural areas, 5 ha for commercial use and 1 ha for residential use.

Section 5 of the Code Foncier outlines the procedures for obtaining a concession, including the institutional responsibilities. It requires an enquête préalable17 (Arts. 193-203) to identify whether the requested land is free for use, whether some part is already occupied or used by others, and to establish whether there are local objections to the government’s land allocation.

The table below, which is based on Article 183, reveals the highly centralized levels of approval required for the allocation of different concession areas.

<table>
<thead>
<tr>
<th>Level of Approval</th>
<th>Urban Land</th>
<th>Rural Land</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registrar</td>
<td>&lt; 50 a</td>
<td>&lt; 10 ha</td>
</tr>
<tr>
<td>Provincial Governor</td>
<td>≤ 10 ha</td>
<td>≤ 200 ha</td>
</tr>
<tr>
<td>Minister Land</td>
<td>10 – 50 ha</td>
<td>200 – 1000 ha</td>
</tr>
<tr>
<td>President</td>
<td>50 – 100 ha</td>
<td>1000 – 2000 ha</td>
</tr>
<tr>
<td>Parliament</td>
<td>&gt; 100 ha</td>
<td>&gt; 2000 ha</td>
</tr>
</tbody>
</table>

Articles 369-386 (with some parts modified by 1980 law revision) are interesting in that they translate parts of the "Zaireanisation" process of the early 1970s. These Articles instruct, as a transitional measure, the conversion of the status of the land acquired by individuals and companies under the 1946 law into concessions. Rights over areas in excess of 50 ha in rural areas were reconverted into perpetual concessions for citizens. Other rights, including those held by foreigners, were reconverted into ordinary concessions for a maximum period of 25 years, renewable. However, ordinary concessions could be converted into a permanent concession at a later stage. There does not appear to be a time limit for this

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conversion within the *Code Foncier* and the law has not yet been repealed; therefore in theory, lands that are owned according to titles issued under the 1946 law could still be subject to ‘conversion’.

The customary land rights of some 200 different ethnic groups, totaling a population of in excess of 50 million, are dealt with in three articles of the *Code Foncier* altogether; this alone merits their verbatim reproduction below.

**Article 387** : Les terres occupées par les communautés locales deviennent, à partir de l’entrée en vigueur de la présente Loi, des terres domaniales.

**Article 388** : Les terres occupées par les communautés locales sont celles que ces communautés habitent, cultivent ou exploitent d’une manière quelconque – individuelle ou collective – conformément aux coutumes et usages locaux.

**Article 389** : Les droits de jouissance régulièrement acquis sur ces terres seront réglés par une Ordonnance du Président de la République.

Article 387 claims all community and customary land as state lands; Article 388 recognizes that customary rights include both collective and individual rights and supports to some extent a territorial concept for handling community rights. Article 389 states that customary land use rights need to be regulated under a specific law. The absence of such a law for almost forty years is the single most significant indicator that those in power in the DRC have never taken customary land rights seriously.

The following brief comments can be made on the land Code:

- The code is not in line with the present constitution and needs revision;
- The law is devoid of any provisions to legalise customary land rights;
- The concept of concession is based on the actual use of the land for a specific purpose; there are however no measures in place to monitor and audit this;
- It is likely that a land concession can be established on protected forest;
- The issuance of concessions is remarkably restrictive with regard to the size of the plots that can be allocated at different levels of decision making; there is no doubt about the centralized character of land allocation;
- The law responds to a number of important market dynamics: allocated concessions can be transferred without too much bureaucracy, can be mortgaged and subleased;
- Land administration and management is the responsibility of the state only; there is no role for traditional authorities or customary land management institutions;

The 1973 *Code Foncier* is still in use to this day. Well-informed stakeholders have been known to take advantage of this outdated legislation to alienate land from customary holdings, without the knowledge of the customary land owners (evidence exist for Eastern Congo). This is creating a situation of conflict among different groups.

There are signs now that the *Ministère des Affaires Foncières* (MAF – Ministry of Land Affaires), the institution in charge of land administration, wants to initiate a process of legal tenure reform in the near future. The UN-Habitat has established contacts with the MAF to support this process. It needs to be seen how this will evolve over time. Meanwhile the *Ministère de l’Agriculture* (MdA - Ministry of Agriculture) has already taken initiatives to reform parts of the land legislation under the *Code Agricole* initiative, which will be examined below.
2.4 Code Agricole

The drafting of a *Code Agricole* is a well advanced initiative of the MdA. The major objective of this law is to improve agricultural production by creating a series of enabling conditions, including: the provision of water and energy under favorable conditions, putting into place the necessary infrastructure for agricultural production and transformation, encouraging research, providing producers with training and rural credit, creating favorable fiscal measures for import and export of goods, and increasing access to land. Major intended beneficiaries of this reform are the "*paysannat*" (smallholders) and investors in the agricultural sector. There are indications however that this law may also be instrumental for the commercial sector, including large-scale producers who are driven by high commodity prices due to food crises and to the opportunities created by the bio-energy sector (oil palm producers). The DRC was selected as a case study for the World Bank study on large land acquisitions; however, a copy of the country report was not available for this paper.

The draft *Code Agricole* is a 154-article law that has already been discussed extensively in the Senate (anecdotal evidence indicates some 50 hearings over a period of 6 months) and was ultimately approved by this legislative body. It now awaits discussion and approval in Parliament before it can be signed off.

A significant part of the draft Code deals with the simplifying of the procedures for acquiring and securing access to rural land for agricultural production. In fact, it can therefore be viewed as an attempt to revise (parts of) the 1973 *Code Foncier*. One might question, however, whether the MdA has the institutional responsibility for this revision, without involvement of the MAF. Either way, the proposed law considers land solely through the rather narrow lens of agricultural production.

Even in their limited scope, these revisions are justified by the need to find urgent solutions to the high levels of conflict that occur between different actors, and the increased competition in the search for productive land in certain areas of the country, such as in the east. The draft recognizes that a significant number of existing agricultural concessions are underused or not used at all and need to be re-allocated and used in a more efficient way. The law also encourages that the necessary conditions need to be created to facilitate development of the agricultural sector in remote areas that are less populated. There is little doubt that this colonization policy may produce unwanted consequences for the conservation of the forest resources base. The possible results of opening up new land in remote, formerly inaccessible areas could have major negative impacts on future conservation programmes such as REDD.

The draft Code creates a number of new institutions that will play a role in its implementation:

- **Agricultural Cadastres** at the national and provincial level would be charged with major tasks including; (i) the issuance of agricultural exploitation permits on the basis of the Land Law (this form of right is however not described in the 1973 law), (ii) land administration, (iii) the audit and monitoring of allocated land against its effective use, (iv) maintaining an agricultural cadastral database. Specific regulations will need to be developed for the functioning of the cadastre.

- **Conseils Agricoles et Ruraux de Gestion** (CARG) at different levels (provincial, territoire and secteur) with various tasks to facilitate agricultural production including the securing of land rights.

- **Land Committees** at the sector level (DRC currently has 11 provinces, 45 territoires, 476 secteurs and 261 chefferies, and 5397 groupements; the new decentralisation law extends the number of provinces to 26) with each between 5 and 11 members nominated by the provincial governor with participation of community representatives. The functions of these committees, which would need to be detailed in specific regulations, include:
Handling collective and individual local land claims;
- Participating in public consultations as per the 1973 **Code Foncier**, Articles 193-203;
- Auditing and monitoring, at least once a year, and also at the request of the provincial governor, the actual use of land allocated by the state;

Section 4 of the **Code Agricole** provides more detail on the modalities for land allocation to different categories of agricultural producers. Additional provisions are proposed for the institutional mandates to authorize land allocations; these remain the same as under the Land Code and continue to be strongly centralized. The text also provides criteria for defining land management practices that give legal proof whether land is officially considered to be developed or not. Access to land for smallholders is very restrictive; a family type holding cannot have land in excess of 3 ha; a family holding is reduced to a maximum 1.5 ha.

Most interesting is that the **Code Agricole** is among the first attempts to address customary land rights almost forty years after the **Code Foncier** (see Arts. 52-57). Within the draft law, there is recognition that each local community may have established customary rights over land, either on an individual or collective basis. This confirms the general assertions of the **Code Foncier** (Arts. 388 and 389) but does not add much more detail. The **Code Agricole** institutes the “domaine foncier” (land domain) of the local community, but it is not clear how this will be determined in practice or what rights will be attributed to this status. In other countries such as Burkina Faso, the ‘local’ **domaine foncier** refers to the lands that are transferred from the state **domaine foncier** to a local institution; As a result these formerly state-owned lands come under integral ownership and management of a local institution.

Article 53 establishes that this “domaine foncier” includes all individual land parcels of the community members, as well as reserved lands for agricultural extension, fallow lands, pastures, forests that are regularly used by the local community. The **Code Agricole** therefore supports a territorial approach for recognizing community land rights. On the other hand, subsequent Articles (54, 55) seem to suggest that rights are recognised on the basis of actual use (construction and effective land use for individuals; actual land use, probably agriculture although this is not detailed, and fallow lands from previous years). These ambiguities call for more debate and clarification.

According to Article 56, the de-annexation of individual land from collective community land is not subject to certification, but follows customary rules. These transactions are however documented by the traditional chief who manages these lands and by the chef de secteur who represents the state. The future role of traditional chiefs within this evolving state tenure regime is not very clear.

Within this framework, the inheritance of land that falls under a status of (i) family type (3 ha) or (ii) family exploitations (1.5 ha) is strongly regulated; land parcels cannot be subdivided. This effort to prevent land parceling in rural areas seems to have been inspired by Rwanda’s land policy. While this approach may be justified to some extent in highly populated areas of Eastern Congo, it may be less applicable or relevant in other, less densely populated, settings of the DRC.

Section 5 of the draft Code (Art. 65-71) deals with land conflicts. It dictates that disputants in land conflicts first attempted to resolve the problem through conciliation with the comité foncier. Parties can bring the case to judicial court only after this effort fails. Upon agreement, the award is registered for execution in the tribunal de paix (peace court).

The proposed transitional measures for the implementation of the **Code Agricole** are as follows:

- Agricultural concessions that are not used according to the rules established by the concession contract can be revoked; re-dimensioning is possible;
- All concessions that are issued in violation of the 1973 Land Law are cancelled;
On a concluding note, one can state that there is an urgent need for DRC to have a new cohesive, consultative and integrated land law that can deal with present day challenges in this sector. As a member of the African Union, DRC will be able to benefit from guidance provided under a joint initiative by the African Union, the UN Economic Commission for Africa and the African Development Bank for developing land policy and law. An important guiding principle of this framework will need to be a rights-based approach to recognize, formalize and eventually regulate customary tenure. The new Code Agricole is a first attempt in many years to revise (small) parts of the DRC land legislation. This initiative is laudable but it does not sufficiently respond to the needs of the rural communities.

2.4 Other legislation

There exists other legislation and ongoing law reform processes that may contribute to a more complete understanding on how DRC is dealing with rights of communities and rural dwellers over land and natural resources. For instance, a decentralisation law has been approved but its implementation has been hesitant. In addition, a new mining law exists since 2002 and a new Conservation Law is being prepared. This particular study did not include a revision of these other initiatives, mainly because of time constraints.

2.5 Conclusions

Legal reforms to regulate access and management of natural resources have accelerated since the country returned to peace. The forest sector in particular has taken the lead in recognizing and formalizing community rights over natural resources and new regulations are being prepared as part of the Code Forestier package. The MECNT is taking on an active role to make the Code Forestier operational. Other legal reform initiatives are ongoing but, thus far, there has been little coordination among them. The MdA is leading the revision of parts of the Code Foncier without meaningful involvement of the MAF which has the institutional mandate over land administration. Interaction between the MdA and MECNT on issues of community land rights is not known but appears to be weak or nonexistent.

The legal system in DRC makes it so that all of the mechanisms that are required to implement legal reforms such as the functioning of institutions to manage natural resources must be inserted into legal texts. As a result, there is a proliferation of regulations that instruct administrators on how to deal with most aspects of natural resources management. However, there remain significant gaps in the existing framework to make the system more operational. In addition, there appears to be a considerable gap between the “law on paper” and “the law in practice”. An excellent example to illustrate the gap between law and practice can be found in Article 154 of the proposed Code Agricole: “concessions that are issued in violation of the 1973 Land Law are cancelled”. The implementation of this article alone would require a major regulatory and institutional set up, significant political backing, consensus amongst actors, a capacity to generate awareness and a functioning legal system, all of which are presently absent in DRC.

The question thus arises: what real impact can legal reform have under the present socio-politico-economic conditions of the DRC?

In an encouraging sign of progress, the legal reform processes seems to be open for participation of civil society. Several regulations of the Code Forestier that are discussed above were shaped with input and, in some cases, under pressure from civil society groups such as RRN. The reform processes also invited contributions from international groups. These openings are laudable and must be encouraged to come to consensual products.

The role of the state as the primary locus of decision-making that is so common in older legislation seems to continue as a common thread in most of the reform processes. On the other hand, the new legislation and proposals from the central government have resulted in a proliferation of local and decentralized institutions, several of which are based in civil society. This ‘top-down’ devolution of control is taking
place simultaneously with a much broader process of political decentralisation. While this process may appear promising on paper, there remain significant obstacles for its effective implementation. All of these trends seem to be contradictory and further examination will be required to fully trace their logic and impact. One thing on which there is little doubt is that local institutional reform is strong on paper, but still weak in the field. A major task ahead remains the need to invest heavily in building the capacity of local institutions so that they can take advantage of these new operational spaces. The government should be cautious about excessively regularizing local institutions through legislation as less-flexible institutions will be difficult to apply to local settings or be matched with any institutional development and capacity building efforts from the state and other actors.

The process of legal reform has paid little attention to the realities of implementing certain processes and procedures in a country as vast, with difficult access and poor communication as the DRC. More innovation and efforts will be required to come to more cost-effective and rational procedures that can be implemented at a large scale.

There is little doubt that conflicts and inconsistencies exist between different laws and regulations, requiring efforts of harmonization. Some laws such as the Code Foncier are outdated and have even become unconstitutional due to subsequent reforms, yet are still used to regulate land. These legal ambiguities create opportunities for abuse by those who are more intimately familiar with the convoluted system.

The rights of communities, customary land/forest owners and customary natural resource management institutions remain an issue of primary concern. The concept of Local Community Forest Concession responds to a certain extent to the need to formalize the legitimate rights of rural dwellers over natural resources, but so far, it is the only tool available to formalize customary rights. Similar initiatives for formalizing customary rights over land, as an example, do not yet exist, nor are these being discussed as part of the ongoing reform process of the Code Agricole. The recognition and especially the formalization of community rights over land and natural resources continue to be considered as some sort of “favor” that the state gives to its rural citizens. Both rights and benefits that communities may derive from their management of the natural resources base need to be negotiated with the state and/or other rights holders, rather than being considered as acquired values.

Other challenges that remain open for debate include (i) the definition of the local community, both in statutory legal terms and in the customary traditional reality, and (ii) the role that traditional chiefs could/should play in community based land and natural resources management. It must be clarified whether a local community acquires a public or private legal personality, as this has major implications for institutional relations with the state.

The Code Forestier clearly defines a local community as a social group that is organized on the basis of a clan or similar family ties. Other references to the possible concept of a local community leave no doubt: “the local community is a clan; all members have common ancestors; they speak the same language; people who do not respond to these criteria are considered as strangers” (RRN Magazine Vol. 5, 2009). This view maintains that a local community is defined in correspondence with an ethnic identity that excludes others from participating in the local management and even the use of certain resources. Experiences in other countries leave no doubt that this is not the way forward for more democratic, accountable and inclusive forms of natural resources management. It is also a recipe for corruption, exclusion, mismanagement, conflict and social instability. It does not take into account the dynamics of the rural world, mobility of communities, marriage and immigration patterns, the fluidity of social identities, resettlement issues, especially in post conflict situation. Recognising customary rights is not a simple ratification of current systems, which often privilege traditional and non-traditional big men (and men in general), but vesting rights in individuals who share rights with others within a variety of nested social units (Cousins, 2007). This requires that decisions on resources management are subject to

democratic principles of downward accountability to a majority of rights-holders. Other approaches for recognizing community structures need to be examined, with several valuable models available in the regions (Mozambique, South Africa, Tanzania and Namibia).

The discussion on the nature of community tenure rights has direct implications on the future role of the traditional chief. The draft Arrêté on the management of LCFC is very clear on this matter and aims at reducing the role of the chief by turning decision making processes more democratic. However, there remain different views on this position and further debate will be required.

3. Processes and programmes with opportunities to advance community tenure rights

This section gives a brief overview of ongoing processes and programmes that affect the rights of communities over land and natural resources. These initiatives focus mainly on the forest sector and use the existing legislation described above to achieve this. The following were identified to be most relevant to this study:

- Community forestry
- REDD
- Land use planning: meso zoning, macro zoning and micro zoning;
- Handling post conflict land tenure issues;
- Others.

3.1 Community Forestry

Community forestry is part of a wider government programme in the Programme National des Forêts et Conservation de la Nature (PNFoCo – The National Programme for Forests and Nature Conservation), which is a far-reaching forest sector programme of the MECNT. The PNFoCo constitutes in itself a strategic framework between the activities and projects planned and in progress in the forestry sector. Its aim is essentially to implement the Code Forestier, to promote environmental services and to improve the environmental and social management of the forest sector. The PNFoCo is partially financed by the World Bank (approx. US$70 million) and a Multi-Donor Trust Fund managed under the UN system.

This operational programme deals with natural resources management overall, including nature preservation, and is based on six intervention components: (1) institutional capacity building, (2) transversal support: participative zoning, support for the Code Forestier’s application and outreach, completion of the old forest title deed reconversions, (3) nature conservation, (4) control and development of production forests, (5) rural and community forestry and (6) environmental protection.

With regard to experimentation programmes, $7.8 million USD are being devoted to supporting local community forest initiatives, including the promotion of alternatives to deforestation in four “landscapes” (Lac Tumba, Maringa-Lopori, Wanga, Salonga and Ituri). The geographically integrated pilot projects are relying on these initiatives in the cases of Maringa-Lopori, Wanga and Ituri. These landscapes are defined under the CARPE programme (see below).

The first activities on LCFC started with the FAO project Projet de développement et de la mise en œuvre de la Forésterie Communautaire en République Démocratique du Congo FAO-GCP/DRC/033/BEL – (FORCOM), which were initiated in 2007 and is scheduled to continue into 2012. This project was instrumental in preparing the first drafts of the LCFC regulatory framework.
In 2009, Forest Monitor started another community forestry project, *Mode de Gestion des Forêts des Communautés Locales (FORCOL)*, which is due to be completed by the end of 2010 and run in parallel with FORCOM. Reviews of the projects have been mixed. While the independent Mid-Term Review of the FORCOM project was rather positive in its assessment, the MECNT views the FAO’s engagement in the forest sector as being unsatisfactory.

On a more hopeful note, a new project initiative launched under the auspices of Forest Monitor, the *Project de mise en œuvre des forêts des communautés locales et autochtones en DRC*, is particularly important for the future of community forestry and especially for the implementation of the LCFC concept in DRC. This project, for which some €7 million have been requested from the Congo Basin Forest Fund to the African Development Bank, is a follow up to the FORCOM project. It is structured around four components:

- Field work in 4 provinces of Orientale, Equateur, Bandundu and Bas-Congo to create 60 LCFCs;
- Developing Congolese expertise in community forestry, through building the capacity of civil society groups, and supporting local community forest management groups, NGOs as service providers, and local forest administrations;
- Harmonizing approaches within the MECNT to respond to forest policy implementation, especially community forest management;
- Supporting the central and decentralized forest administration in the *Direction Générale des Forêts* (DGF – the Forest Management Department in the MECNT) and the provinces. In principle, this support should also focus on the strengthening of the newly established Directorate of Community Forest.

In particular, the effort to create 60 LCFCs and the capacity-building efforts to achieve this goal are the most important points of progress for the promotion of a community rights based approach for forest management. The implementation of these activities will mainly be subcontracted to NGOs that will receive training. Altogether, 9 NGOs have been assigned with the responsibility to cover projects in the four provinces: COCOLPE, OCEAN ADIKIS (Bandundu province); FESERI, CEDEN CDRN (Equateur); CEDEN (Bandundu); AMAR, CEPECO (Bas-Congo).

The creation of 60 LCFC offers an excellent opportunity to test and validate the methodologies that are proposed under the draft *Décret* and *Arrêté* on LCFC. However, there are concerns that the aims of the project will be threatened by its potentially overly-ambitious scale. There is a risk that should this initiative fail, it may be used by opponents of community forestry as evidence for their causes. This may therefore have an opposite effect to the desired outcome by helping opponents of community forestry to promote other forms of resource management that may not be nearly as attentive to community interests.

### 3.2 REDD initiative

With more than 1.45 million km² of wooded area, including some 1 million km² of forest cover of which more than half is tropical forest, DRC has one of the most coveted resources for donors, the UN, conservationists groups and others who aim to steer a major future REDD programme. It was identified by the UN-REDD programme as one of the first three African countries to implement Phase 1 of the REDD programme.

Deforestation rates are low (0.25%) in comparison with other countries that are often used as a reference for DRC, such as Brazil and Indonesia. Large parts of the country remain highly inaccessible (little remains from the 100,000 km road network from the early 1960s) and as long as this continues, it may be a major blessing for any future REDD programme; infrastructural decay tends to be good for conservation since operating costs become too high for large-scale timber extraction. However, there are
signs that maintaining the present low deforestation rates will be difficult. Seven years after the signing of the peace agreement, rural areas are increasingly coming under pressure to open up for natural resources exploitation and for conversion into agriculture (for instance oil palm plantations); major road works are currently in progress (Kisangani – Uganda; Kinshasa-Lubumbashi) or are being planned.

Activities relating to REDD process in DRC only began recently. In 2009, a first UN-REDD Programme allocation of $1.9 million USD, and a grant of $200,000 USD from the Forest Carbon Partnership Facility (FCPF) helped launch and structure DRC’s national REDD+ process. The core objectives of this process are: (i) to prepare a Readiness Preparation Plan through a participatory and multi-stakeholder approach; (ii) to inform and train stakeholders in order for them to actively participate in the REDD+ process; (iii) and to lay the technical foundations for REDD+. At the end of 2009, the government passed Decree 09/41 “Providing for the creation, compositions and organization of the implementation structure of the process of reducing emissions from deforestation and forest degradation – REDD”. The institutional structure presented in the decree is the product of a participative exercise conducted by all stakeholders during the UN-REDD/FCPF joint mission in January 2009.

The major result of the work on REDD so far has been the drafting of a Readiness Preparation Plan for REDD (R-PP) which was completed by June 2010 (copy available). This plan proposes a preparatory programme covering 2010-2012 that will result in a consensual strategy, to be made operational through action plans, following several studies, monitoring and a series of experimental activities. The REDD activities so far have been linked to different programmes such as the PNFoCo. Apart from funds mobilised by the UN-REDD programme, activities can be funded through the UN-Multi Donor Trust Fund and the World Bank (under the Forest Carbon Partnership Facility). The REDD National Coordination works together with FCPF in order to integrate REDD-related subjects to this effort. Several forest sector programmes are complementary and feed into the REDD programme. These synergies will better enable a real implementation of the Code Forestier and thus help to advance the achievement of common objectives.

The R-PP notes that little effort has been made to clarify the legal framework and procedures for land tenure - currently four different entities are able to issue property titles for land or for natural resources use (MdA, MECNT, MoM and ICCN), and there is no process for coordination. Cadastres, when they actually exist, are operated in an isolated fashion. As a result, overlapping concessions (e.g. for forestry and mining) are common, and there does not appear to be an existing mechanism for resolving conflicts over tenure rights, even though the R-PP does acknowledge that conflicting claims to land for farming, timber concessions and mining do exist. The R-PP acknowledges that these issues must be resolved to allow for the implementation of REDD.

The DRC R-PP for REDD also does not really focus on the role that communities will play in a future REDD strategy. The link between communities’ secure access to land and and increased levels of local accountability to better conserve the natural resources base is largely absent. There is also little detail on the benefits that communities can derive from a REDD programme, and how these benefits can encourage these same communities to be real partners in REDD. There are some references to this issue in the R-PP in Annex 2c "REDD implementation framework”. The Annex mentions the need for a study on transversal legal reform to support the implementation of REDD. Numerous areas in which the legislative and institutional framework is currently inadequate are identified , including: absence of most of the necessary implementation decrees for the Forest Code referring to the draft Décret and Arrêté; absence of coherent national and local zoning plans which would give geo-spatial meaning to the Forest Code and the associated implementation decrees; overlapping forest, mining, agro-industry (plantations) and community tenure claims; incompleteness of existing policy and legal reform processes, such as the 'legality review’ of logging titles (leading to uncertainty about the legal status of some operations); lack of recognition and security of land tenure for local communities and indigenous peoples; and the challenge of decentralisation. Moreover, there is incoherence between laws; between laws and the 2006 Constitution; and between written/statutory law (droit écrit) and customary law (droit coutumier).
The R-PP suggests that a study needs to be programmed to clarify these issues so that the GoC can take the necessary steps to address these before the end of 2012. This study would then create an action plan to support the necessary legal reforms, and prioritise these in terms of necessity and feasibility. This includes the identification of reforms that are essential for the implementation of a REDD strategy, and which would be beneficial but not a prerequisite. Based on this priority list, an action plan could be created as to how the national REDD process could support or initiate necessary legal reforms, and in what context (i.e. following or leading processes, pilot projects etc.) The following questions need to be answered:

- What can be done by the MECNT? (Community Forestry)
- What needs to be done at another level (MAF, community land rights)? And who should do this? (Inter-Ministerial Committee of REDD, level of Prime Minister or President?)
- Would it be possible to recognise these rights within pilot project site(s) via an Arrêté?
- What are the advantages and disadvantages of this approach?

Discussions with a number of stakeholders have identified that (i) the recognition and formalization of community rights over land and forests, and (ii) developing a national zoning or land use plan, need to be considered as a prerequisite for having a solid REDD strategy in place before the end of 2012. The UN-REDD team could likely put some pressure on the GoC to achieve this. A written commitment from the GoC (a joint statement of the MAF and the MECNT) to revise the Code Foncier in the near future would be considered as a strong signal.

The preparation of the draft guiding paper by a UNDP consultant, Programme anticipé REDD+: Modernisation et sécurisation foncière,19 (November 2010) is another sign that actors are acknowledging the need for having a solid land policy and land tenure reform process in place that supports the rights of communities over land and forests as part of the preparation of a robust REDD strategy. The document proposes that the GoC should have identified and agreed upon a framework for a land tenure reform process before the end of 2012, and schedules some 5 years for the reform process itself.

3.3 Zoning and land use planning

The use of zoning and state-level land use planning in DRC finds its origin in the forestry sector. Zoning is considered as a tool to implement the Code Forestier, more specifically (i) to identify forest lands that can be allocated by the state as concessions, and (ii) to facilitate achieving the threshold of the 15% area cover under classified forests, and (iii) to allocate forested lands to other uses and to regulate these uses. Three zoning approaches are being used at different scales, each with their specific objectives and methods.

3.3.1 Meso-zoning - Landscape zoning

Meso zoning was introduced under the Central African Regional Program for Environment (CARPE), supported by USAID and implemented through in a partnership with several international NGOs in DRC; including the African Wildlife Foundation (AWF), the Wildlife Conservation Society (WCS) and the World Wildlife Fund (WWF). Twelve landscapes were identified across the Congo Basin, with four falling integrally (Maringa-Lopori-Wanga; MaikoTayna Kahuzi - Biega; Ituri-Epulu-Aru; Salonga-Lukenie-Sankuru) or partially (Lac Tele-Lac Tumba) on the DRC territory. These landscapes were recognized as priority areas for conservation based on their relative taxonomic importance, their overall integrity, and the resilience of ecological processes represented.

The Meso zoning divides each landscape into different management zones, including: (i) protected zones, (ii) community-based natural resource management zones, and (iii) extractive zones. Within these zones,
CARPE and its partners are working to implement sustainable natural resource management practices at the local scale. The approach was inspired by the US Forest Service Guide to Integrated Landscape Land Use Planning. Landscape planning differs from macro-zoning planning in that it plans at a larger spatial scale and can assess broader, wide-ranging trends, influences and impacts which are deemed to be required for the ecological sustainability of conservation areas. The zoning focuses strongly on conservation of forest and biodiversity. This overall methodology is complemented in some landscapes by other but similar approaches, such as the Heartland Conservation process (HCP), used by AWF in the in the Maringa-Lopori-Wanga landscape.

Extracts from a publication on the “Lessons learned from the Maringa-Lopori-Wanga landscape” (IUCN, 2010)\(^\text{20}\) provides some insight in the Meso zoning approach:

- Livelihood activities of local people including subsistence agriculture, bush-meat hunting, commercial hunting, traditional and industrial logging were perceived as threats to conservation.

- Data collection was focused on (i) biological surveys, in line with the conservation objective of the planning, and (ii) socio-economic surveys along some major road axes. Approximately 250 agricultural fields were geo-referenced. There was no indication that information was collected on tenure rights over land and forestry resources, customary land and natural resources management institutions, or local land management practices;

- CBNRM were zoned on the basis of existing agricultural activities. The CBNRM area was subdivided into (i) permanent Forest CBNRM, and (ii) non-permanent forest CBMRM. The use of the latter is determined as “allowing some habitat destruction for agricultural activities”. It is assumed that on the former no such agricultural activities are permitted.

- Satellite imagery and spatial modelling (Marxan, a conservation planning software) were used to identify areas most suitable for future human expansion, taking into account current needs for agriculture and livelihood activities. Simultaneously, a habitat suitability analysis for biodiversity conservation was carried out. Matching the two outcomes identified possible areas of conflict. Proposed protected areas were either justified or identified as better suited for conversion to agricultural land, based on model data and assumptions.

- The zoning aimed for ‘real ownership of the project’ by local communities. It was later revealed that local communities are not consulted in a way that allowed them to influence general and specific methodologies during the conception of the multi-year programme.

Thus far, landscape zoning has been strongly technology-driven, with local populations generally being considered as a threat rather than as a potential asset for achieving good conservation practices. The presence and conservation value of natural resources has been the centrepiece of the planning process, rather than the people who have been using these resources since time immemorial. The planning has not taken into account the rights that local populations have established over the land and natural resources. The zoning of land has been implemented on the basis of very visible and arbitrary land use patterns (such as the presence of agricultural fields). Areas and locations for future human activity have also been calculated on the basis of mathematical models based on assumptions of land use rather than based on consultation and an understanding of local-land use patterns.

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3.3.2 Macro-Zoning - Forest Zoning

Macro zoning or forest zoning is a tool used by the GoC to make decisions on future land use focusing on the forest sector. As with Meso zoning, Macro zoning also finds its origin in the Code Forestier and has been institutionally driven by the MECNT. Arrêté 017/09 institutionalises a Comité National de Pilotage to steer the zoning process in the country for seven years to come. The committee membership is inclusive, with representation from several ministries, civil society, and the private and INGO sectors. The committee is presided by the MECNT, with the Direction d’Aménagement et d’Inventaires Forestiers (DIAF – The Forest Inventory and Planning Division) operating as the technical secretariat.

Pilot activities for Macro zoning were initiated as early as 2003 with the FAO, and were followed by other efforts from different INGO (WWF, AWF, WCS) under the CARPE programme. A major programme milestone was the adoption in May 2010 of an Operational Guide which is a normative document for forest zoning. It is the result of a 3-year process that was supported by all stakeholders including civil society. The existence of national forest zoning is considered by some insiders to the process as a prerequisite for a future REDD programme. There are indications that the development of a National Land Use Plan (or Macro zoning) will be required by 2015 with a preliminary vision established by the end of 2012. The zoning will be executed by an external service provider (a consultant); a budget of US$2.6million is being made available to MECNT (by the World Bank).

The Operational Guide proposes the following areas to be zoned at a scale of 1/200,000:

- Extension or creation of new classified forests to achieve a national coverage of 15%;
- Protected forests;
- Permanent production forests;
- Local community forests and indigenous people lands;
- Areas for oil exploitation and mining;
- Areas for new major socio-economic infrastructure;
- Areas to be affected for alternative forest use;
- Rural development areas;

The guide gives further detail on the different steps of the exercise, including the pre-requisites for planning, the institutional set up for the implementation, procedures for data analysis, mechanisms for participation and consultation with stakeholders, responsibilities for decision making and plan approval. It is not the aim here to analyse the proposed methodology, but just to highlight a number of issues that may be relevant for having a general understanding on how this zoning may impact community rights.

A pre-requisite for earmarking and allocating land to one of the zoning classes is “legal information on land and customary rights”. This stipulation clearly refers to the need for having detailed information (i) on all existing concessions of different nature (land, forest, mining) and (ii) on existing customary rights. Compiling information on concessions is in itself a daunting task; data are spread over different cadastres, all supported to exist in a parallel way by law (Code Forestier, Code Minier, and the draft Code Agricole). At this point, there is no legal or operational guidance for bringing these resources together into a single unified multi-purpose cadastre. The required information on customary land rights is not only more complicated to obtain, but also more problematic to deal with. In fact customary rights have not been legally registered so there is virtually no textual or spatial information available. In the case that the GoC wants to uphold unregistered customary rights, which it must do according to law (customary rights are being recognised both under the Code Foncier and Code Agricole), these rights need to be made visible.

This may lead to a situation where Macro zoning needs to be preceded by the identification of all existing customary rights over land and forest. The failure to do so would effectively deprive communities and customary rights holders of any protection since these communities and their activities would not be
represented in these spatial representations. As such zoning could then be used to take away the rights of a majority of rural communities through allocation of the land to other actors/uses. The aforementioned Operational Guide highlights this very risk, myopically stating: “in most cases detailed information will not be available. This is a universal observation irrespective of the financial and human resources that can be made available during the process. One must remember however that any plan can be revised in the light of progress made on new data collection. It is hence important not to delay the zoning just because there is a lack of information now”. The approach articulated in the Operational Guide clearly opens the way for zoning to happen on a ‘virgin rights basis’. Parts of civil society, headed by RRN, are insisting that Macro zoning be preceded by the identification of existing customary and community rights.

The Operational Guide also highlights that the final zoning plan would be of an indicative character only; in that the results would not be legally binding. Within this ideal, boundaries proposed during the process could be drawn the moment new information became available. However, the final zoning plan would be published through a Decree by the Prime Minister which brings into question the ideal expressed in the Operational Guide, i.e. the plan would not have any legal stature. Areas that have been zoned in the plan as classified forests, community forests, forest concessions would, in theory, all be enacted under existing subject law.

These ambiguously defined procedures leave significant room for interpretation. There is no clear guidance on how eventual changes could be made to the plan once it is enacted. Would these changes require a new decree, for instance? May it be the case that once zoning decisions are made and approved, probably in the absence of the pre-requisite on customary rights over land and natural resources, immediate action will be taken to legalise the status of land according to the outcomes of the plan? All of this ambiguity leaves questions and indeed may result in communities losing their rights.

The identification of some zoning classes requires further clarification. The Operational Guide proposes specific zones for (i) local community forests, (ii) indigenous people lands and (iii) areas for rural development. These zones are subcategories of the mapping unit “protected forests” under the Code Forestier. The definition of subclasses is not clear and seems to mix land use criteria with land rights. The classification suggests that rights of communities and their economic activities may only be recognised in these “reserved” areas. This approach supports a parallel development model with indigenous people and communities confined to specific areas, and commercial activities to others. Does it also imply that the rights communities may have established over other areas are not recognised? Does this framework create reserves for indigenous people? Can rural development then be confined to specific isolated areas?

The consultation process with rural populations in the planning exercise also merits attention. The zoning proposals prepared by the planning consultant are to be shared and explained to local populations through the institutional mechanism of a Comité Local de Pilotage which operates at the territoire level (the nation counts 145 territoires). It is also suggested that village-level meetings can be organized to share the zoning results directly with the populations and their representatives. These rounds of consultation are ideally used to draw out communities’ opinions which would eventually provide suggestions for a revised version. Community representatives would then participate in the Local Committee meetings where decisions are made on a consensual basis. These are consequently validated by DEP and DIAF (technically), the Comite National de Pilotage (contents and proposals), and finally approved by the Minister MECNT.

While the intent for involvement of rural populations is laudable and in line with international norms and standards, it remains a question how this might be achieved in practice in such a vast country as the DRC which is plagued with major accessibility problems. The distance between the village or the territoire and a Kinshasa-based consultant seems so big that this intent may turn out to be unrealistic, or result in major costs and time.
Conclusions on Macro-zoning

Macro-zoning or land use planning at a scale of 1/200,000 or smaller is used as a strategic tool by an increasing number of African governments to come to some sort of future vision on land use, which may eventually result in a national land use policy. The land use plan or zoning is then considered as the spatial expression of this policy. It is in this context that macro zoning should be considered in DRC: a strategic tool that is indicative for future land use and management, and which can be used in a strategic way to orient major land uses. The ‘indicative’ rather than legally-binding nature of Macro-zoning is well highlighted in the Operational Guide, but there remain doubts whether it will be able to retain this character.

There are indications that the GoC will go further and transfer Macro-zoning into an executive tool that prescribes future land use. In the absence of solid information on existing customary land rights, or other rights, this would be a mistake. Responsible decisions on future land use can only be taken on the basis of an understanding of existing land rights and land use systems. In the DRC, there is no information on the majority of these rights, i.e. customary rights. Customary rights are recognised to some extent in law, but have, for the most part, never been made visible, documented or registered. These existing rights cannot be identified at the working scale of a Macro-zoning exercise, and will require other efforts at a larger scale.

Due to the vast expanse of the country and difficulties of accessing the interior, it is not possible to first identify all rights that are established over land and natural resources, and only in a second phase proceed with macro-planning. However, this sequential approach has been proposed by some NGOs, including RRN. This divergence in approach has resulted in a stalemate between the GoC and civil society on how to proceed with zoning. This difference between the parties needs to be discussed and resolved, along the lines discussed below in section 3.3.3.

Macro-zoning is mainly driven by biodiversity conservation and forest logging agendas. If Macro-zoning could be taken out of its industrial forestry and conservation straightjacket, focusing more on individuals and communities and on rural development, it could become a strong tool for a more holistic development strategy and a basis for inclusive national territorial planning. Through this alternative approach, the polygons and land use boundaries demarcating (mainly restrictive) land uses would not be considered as an objective per se. Instead, the process of zoning and planning would be seen as a tool for capacity building, bringing different sectors and actors together and creating platforms for negotiation and dialogue between these actors and sectors.

The Macro-zoning at the national level is an excellent opportunity to bring together information contained in different cadastres. This in itself would be a major achievement worth pursuing. However, in the absence of data-exchange protocols, this harmonization may not be easy task. There is also a legal vacuum as no law proposes the establishment of a single and unique cadastre; each sector maintains its own database and appears to be reluctant to share their information.

Macro-zoning can have a major impact to implement a common vision on future land use, but, to be used responsibly as a tool for development rather than dispossession, it will need to be used in combination with other implementing tools to achieve its goal, including the mapping of existing land rights and Micro-zoning.

3.3.3 Micro-zoning - local participatory land use planning and mapping

Micro-zoning corresponds with land use planning at a larger scale (1/50,000 or similar) and is more action-oriented than Macro-zoning. Micro-zoning is mainly being used in DRC for two different purposes: (i) addressing human settlement and economic activities in classified (protected) areas, and (ii) addressing the occupation of forest concessions by local communities.
Micro-zoning in classified areas

A good example of how Micro-zoning is being used in the DRC is the land use planning project that is being implemented to support the management of the Okapi Faunal Reserve (OFR) in the protected area in the Ituri-Epulu-Aru area in eastern Congo (this case study is part of the CARPE project and is illustrated in IUCN, 2010). The OFR is situated on a settlement frontier with a high population density (100 persons/km²) which is increasing in part due to immigration from the conflict-torn Kivu regions. The region has seen a significant influx of immigrants who come in search of arable land and economic opportunities. The OFR was created in 1992, before the enactment of the Code Forestier and was likely established in the absence of serious attempts for public consultation, with the conservation of biodiversity as the sole objective. Participatory land use planning is now being used to strike a balance between conservation interests and the economic activities of the local populations settled in the area.

The OFR is zoned in areas for hunting, agricultural activities, settlement and conservation. The identification of agricultural areas was the result of a consultative process with customary landowners. The classification of areas used a system based on estimated land clearing rates, fallow calculations, average field sizes, number of households and population growth rates as a basis to calculate the size of the designated agricultural areas. The areas identified for this particular category were then negotiated with elders and village representatives. Upon agreement, the areas were physically demarcated with boundary markers and signposts. Once the land use plan is ultimately completed and all the identified Micro-zones have been created, it will be officially considered as part of the OFR management plan. The agricultural zones will be targeted by agronomists to increase crop productivity using less land area and to limit forest clearing for agriculture.

These initiatives merit credit as they try to find immediate solutions to threats for conservation areas through consultation with local people rather than through their draconian exclusion. However, the underlying principles of the overall Micro-zoning approach are not in line with a rights-based approach where local community rights are recognised as a starting point, and these communities are considered as real partners in the conservation and development of the area, yielding in direct benefits from this local management. Communities are now pushed, albeit with their agreement, into some sort of local Bantustan, where isolated development of the agricultural sector must support their livelihoods.

The existing scenario in the OFR can be described as follows:

- In 1992, the GoC decided in 1992 to create a biodiversity reserve, ignoring the existing rights of the local populations over land, forests and wildlife resources;
- When conflict arose between conservation interests and local populations, a land use plan was negotiated, which resulted in ceding some rights and land back to communities- though on a conditional basis and under severe restrictions;
- The future livelihoods of local populations will depend very much on state interventions for intensifying agriculture in demarcated area, which may be unlikely to take place;

An alternative, rights based, scenario would have read as follows:

- The GoC and the local populations negotiated a local land use plan and came to a consensual agreement to establish a biodiversity conservation area;
- The rights of local communities were then formalized over the entire area; the state and other stakeholders negotiated access to land (and thus rights) with the communities; the biodiversity area was legally created according to existing law but with recognition of community rights over this area; rights over agricultural and hunting areas were registered in the name of communities;
- Local communities derived direct benefits from all land uses in the area including cash benefits from the management of the reserve.
The case study from the IUCN report noted that “signing land use agreements with local populations is not a way of signing away the communities’ land to the OFR. Customary rights over the area remain, but it is recognition of the fact that they live in a protected area which needs to be planned and monitored”.

The study also underlined that “the reserve is not ceding land back to the community as the zones remain under the mandate of ICCN and they are subject to the regulations of a protected area”. It seems that there is some acknowledgment that communities have established rights over the area but that they are not allowed to exercise these rights. On the contrary, the state appears to regulate the use of these rights to meet its own interests. This notion reinforces the basic principle that the recognition of customary rights only is not enough for supporting communities. Rights holders also need to be in a position to exercise these rights.

In agreement with the CARPE team conclusions, the Micro-zoning planning tool is in many ways experimental and subsequent monitoring of results and adaptive management are key. It is promising in that, as a tool, it responds to the basic agreed concepts of participatory land use planning (the ICARRD, 2006 principles for instance). However, as it is, it still falls short of fully supporting a rights based approach to conservation and development in DRC. At present, it is used as a remedial tool to mitigate conflict, but not yet as part of the establishment procedures for Classified Areas (designated for community use and management), which should be its future. To some extent, its possible future use is illustrated by the way the Tayna community-managed reserve in eastern DRC was created, although this needs further analysis.

**Micro-zoning in forest concessions**

Civil society groups such as RRN advocate strongly for Micro-zoning being an integral part of the conversion procedures of forest titles into forest concessions, as well as for the creation of new forest concessions beyond the expiry date of the moratorium. The underlying principle remains that local populations over whose land these titles were issued without their knowledge and involvement should be considered as genuine stakeholders for decision making over these lands.

The Micro-zoning of forest concessions maps generally the following areas: (i) conservation, (ii) protection, (iii) production, and (iv) community activities. Concessions-holders pay taxes only over the production part of the concession. Such a land use planning exercise can result in the re-dimensioning of forest concessions, adjusting boundaries in function of present land occupation and land use by communities. Zoning is again used a tool to mitigate conflicts that exist in concessions, not to prevent conflicts that the creation of a concession may entail. There is a common understanding however that if Micro-zoning could be made compulsory and considered as an integral part of the concession’s management plan, it may be the only tool to defend to some extent community rights that were annihilated when the concession was established.

Compulsory Micro-zoning in support of community rights could be more effective if it would happen in an earlier stage, i.e. as part of the request for conversion and not as part of the management plan when the conversion is already agreed. The RRN is presently conducting such a planning exercise, including the mapping of local community rights, on a Sodefor concession in Oshwe. It immediately appears that concession holders oppose the use of this tool, especially when the zoning is implemented by NGOs.

Micro-zoning as a land use planning tool can offer promising results under specific conditions, particularly when it is timely and well applied. One could also imagine that it could be used for establishing LCFCs within existing industrial concessions as an outcome of the planning process. This process could eventually allow local communities taking advantage of the infrastructure, technology transfers and logistical supports that the concession-holder is putting into place.
Participatory mapping

Participatory mapping is an important tool used for Micro-zoning. Zoning or land use planning are often confused as participatory mapping in DRC, although participatory land use planning entails much more than mapping. Participatory land use planning uses other techniques such as participatory rural appraisals, information-matching tools, the development of local negotiation platforms and alternative dispute resolution techniques to come to a consensual land use plan. Participatory maps are used as a tool to enable these processes, rather than having the map as the end objective.

Forest Monitor and RRN have produced a first draft guideline for participatory mapping, which will be used as a tool to create LCFCs. While it is a good start, this guideline still needs further thinking and development. For instance, it would be good to develop it further into a guideline for local land use planning rather than to limit its use to mapping LCFCs. The guide could go beyond the identification of local rights over land and natural resources only, and be more practical and orienting in providing a tool to communities for facilitating the management of their territory. Such a land use plan would then become a strong management and advocacy tool for communities to negotiate with others on land and natural resources use. Recent work by the World Bank in Mozambique identifies a more organic way of linking community land rights, Micro-zoning and participatory land use planning with local development. To date, RRN in the DRC tends to consider participatory mapping primarily as an advocacy tool for the organization itself to illustrate that the puzzle of overlapping rights at the local level.

Conclusions on Micro-zoning

Local participatory land use planning or Micro zoning activities are a potentially strong empowerment tool for local communities to play a more active role in land and natural resources management. It has the potential to enable communities to develop a concrete vision on future land use, to reconfirm their established rights of land and natural resources, and to engage in negotiations with other stakeholders like the government (such as ICCN, MECNT) and investors (present and future forest concessions holders). At this moment, Micro zoning is used as a reactive remedial tool to mitigate existing conflicts and differences of interest (with a focus on the interest of the state), not as a pro-active tool to promote its own development vision.

Local land use planning is also an excellent tool to identify and make decisions on local land rights. One of the outcomes of local land use planning is an agreement on existing community and customary land rights. In the FAO’s terminology this agreement is sometimes called the “territorial pact”. Such a ‘territorial pact’ then becomes the basis for the regularization and registration of these rights.

As such, the use of both Macro and Micro-zoning in a manner that is strategic and harmonizes GoC and civil society land and natural resources management objectives is a big opportunity for the DRC. A major objective of Macro-zoning is the identification of specific areas that are to be prioritized for an intervention at the local level. These include areas where major land use conflicts occur, areas that are characterized as valuable for conservation, or the implementation of conservation programme such as REDD. These priority areas are then targeted for Micro-zoning which would ideally address issues that cannot be dealt with at the macro level. These issues include the identification of local rights over land and natural resources, local visions on future land use and management, local institutions that may play a role in resources management, and local decision making bodies that must be consulted. This alternative, hybrid, strategy meets the needs of both (i) the GoC which needs to produce nationwide management plans to respond to challenges such as REDD, and (ii) the needs expressed by civil society to have the agreement of local populations before decisions on land allocation are taken. This approach responds constructively to a possible planning stalemate where civil society asks for having all existing customary land rights delimited before embarking on a Macro-zoning process. It embraces the principle to go ahead with the implementation of various zoning initiatives in specific areas on the basis of pilot projects.
Working in target areas that are identified as a result of Macro zoning is a strategic option that may considerably reduce costs associated with the registration of community (such as LCFCs). This approach enables a cluster approach, with clusters identified as a result of land use planning.

### 3.4 Handling post-conflict land issues

The handling of post-conflict land issues is a regional concern, particularly when it comes to the eastern DRC where the environment has been volatile since 1994 with different waves of violent conflict and the population movements that result from the social disruption. Population pressures have also increased on good agricultural soils, while there has also been a high interest for the conservation of biodiversity along the borders with the Uganda and Rwanda. Local conflicts between pastoral and sedentary agricultural groups, together with the predatory exploitation of several highly-valued minerals under the protection of local militias add to the environment of instability.

UN-Habitat has been working together with the GoC and the North Kivu Provincial Government on a programme that was initiated in 2009 and which focuses on 3 major pillars:

- **Conflict mediation:** The establishment of mediation centres to address and resolve land conflicts, which, thus far, seems to be successful. The project focuses on mediation at the village level and the training of mediators. This component is financed by UNHCR and the UN peacekeeping mission in DRC – MONUC. Part of this programme is the mapping of informal land occupations. When disputes are resolved, the rights holders are issued some sort of land certificate that supports the outcome of the mediation. However, these documents are not yet recognized as legally representative of a set of rights under existing legislation.

- **Support to the reconstruction of a land administration system:** This task has not yet been initiated, but the main idea is to sensitize the GoC through the Ministère des Affaires Foncières (MAF) to adopt the Social Tenure Domain Model as an alternative to a standard cadastre. Under this model, informal occupations are mapped with the use of orthophotos (aerial photographs corrected so that scale is uniform) or other high resolution imagery. It is a system to record and document rights including overlaps, but it does not adjudicate these.

- **Support to land policy and law development:** The UN-Habitat is strongly lobbying the MAF to initiate the revision of the 1973 Code Foncier. It emphasizes the need for coordination between different ministries (MAF, Agriculture, and Decentralisation) and promotes the idea of an Inter-Ministerial Coordination Group headed by the MAF. It has further suggested the creation of a steering committee with participation of civil society organizations as a platform for consultation. One of the first concrete outputs would be a “Lettre de politique foncière” (see Madagascar) which can than guide the drafting of a new land code or the revision of the previous one. Themes that can be addressed in such a land policy statement include the recognition, formalization and regularization of customary land rights and local land management institutions, the future role of traditional authorities in land administration and management, the rights of women to land, among others.

Another initiative is to implement a 2009 Memorandum of Understanding with the International Conference on the Great lakes Region (ICGLR). The MOU outlines a vision to better protect land and property rights for displaced people through the Pinheiro Principles. Activities have yet to be initiated in DRC.

USAID recently committed new funds to UN-Habitat; US$4.7 million for a period of 2 years. These funds will be used to extend Habitat’s activities in eastern Congo (South Kivu and Orientale-Ituri) and to initiate
activities in Kinshasa on land policy and law reform, including the recruitment of an international land policy advisor.

The MAF, UN-Habitat’s main partner in Kinshasa, is aware that the 1973 Code Foncier needs to be revised as it is, in its present form, technically unconstitutional. The adopted approach is very legalistic, with a team of lawyers being commissioned without involvement of other public (provincial governments and administrations are beyond doubt well informed on necessary changes) and civil society actors. One of the priorities for revision seems to be to cut into traditional authorities’ powers. The Minister wants to have some results before next year’s elections. UN-Habitat seems to acknowledge that coordination with the MdA and other ministries (decentralisation and territorial management; MECNT, Justice) is required to open up the debate and revision. The Ministry of Justice, for instance, is also proposing reform, and considers some “Tribunaux de paix” for handling land disputes. It remains also to be seen how the GoC will deal with the land tenure-related sections that are included in the new Code Agricole. The appointment of a Special Presidential Advisor on Land and the Environment (Marie France Mubenga) seems to underline the importance of the land sector for policy actors.

UN-Habitat has also established a partnership with WWF for some tenure research inside the Virunga Park. The present approach of conservation organizations toward human occupation in that area seems to correspond more with expulsion than with finding viable solutions for accommodating land occupants and recognizing their rights. UN-Habitat wants to document occupational rights inside the park in a similar way as they have already done in the neighbouring lands (using the Social Tenure Domain Model - STDM).

3.5 Other processes

There are a number of other on-going processes affecting community rights which were not assessed during this overview as they were beyond the immediate objectives of this work. However, their examination should feature in future analyses. Large-scale land acquisitions in the agricultural sector, driven mainly but not only by oil palm plantations are one such issue. The DRC was one of the case studies in the World Bank’s Land Acquisition study, but report was not available at the time of this paper’s drafting. The mining sector should also be examined, especially following the 2002 Mining Law through which mining concessions have been allocated. Recent major road construction projects will also have major implications of the rights of local communities. Other initiatives of interest include the development of a Rural Development Policy, a Poverty Alleviation Strategy, and the implementation of the Decentralisation Policy.