

**Systematic, Pervasive and Widespread Violations of the Rights of Indigenous Peoples in the  
Democratic Republic of Congo**

**AN NGO REPORT  
SUBMITTED TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS  
WORKING GROUP ON INDIGENOUS POPULATIONS/COMMUNITIES**

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**Submitted by:**

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1 For example: Mulvagh, L and Nelson, J, *Central Africa: Great Lakes region and Cameroon*, for The Indigenous World 2005, IWGIA; FPP and CED, *Protecting and encouraging traditional sustainable use in Cameroon: Customary use of biological resources by local and indigenous peoples in Western Dja Reserve, Cameroon*, Moreton-in-Marsh, August 2005; Caruso, E, *The Global Environment Facility in Central Africa: A desk-based review of the treatment of indigenous peoples' and social issues in a sample of 14 biodiversity projects*, Moreton-in-Marsh, March 2005; Jackson, D, *Implementation of International Commitments on Traditional Forest-Related knowledge: Indigenous Peoples' experiences in Central Africa*, Moreton-in-Marsh, December 2004; Nelson, J and Hossack, L (Editors), *Indigenous Peoples and Protected Areas in Africa – From principles to practice*, Moreton-in-Marsh, 2003.

## I. Introduction

1. The Democratic Republic of Congo ('DRC') ratified the African Charter on Human and Peoples' Rights ('the Charter') on 20 July 1987. It is therefore bound to respect and guarantee the rights set forth in this treaty without delay, however it has failed to do so with regard to indigenous Twa peoples, who suffer pervasive, massive and institutionalized racial discrimination on a daily basis, in violation of their rights under Articles 2 and 3 of the Charter.
2. In violation of indigenous peoples' rights under Charter Articles 14, 20, 21, 22 and 24, discrimination against indigenous peoples in DRC is particularly marked concerning their land and resource rights. These and other rights are neither enumerated nor guaranteed in domestic law, domestic remedies are unavailable in the case of violations, and generally applicable legal guarantees do not provide adequate and effective protection for indigenous peoples.<sup>2</sup> This disregard for indigenous peoples' rights is typified in the recently operationalized 2002 Forest Code, its implementing laws and the large number of forestry concessions that have been issued pursuant thereto, many of which are causing or threaten to cause irreparable harm to indigenous peoples.
3. As detailed in this report, the situation in DRC has deteriorated to the point that the physical and cultural integrity and survival of indigenous peoples is threatened. This is confirmed by independent experts and expert bodies, including the African Commission on Human and Peoples' Rights (hereinafter 'the Commission') and the UN Special Rapporteur on the situation of human rights in DRC (see Section III and Annex 1, *infra*). For example, the Commission has noted that "[i]ndigenous peoples suffer from particular human rights violations – to the extent that some groups are on the verge of extinction."<sup>3</sup>
4. Additionally, the United Nations Committee on the Elimination of Racial Discrimination (hereinafter 'CERD') has noted its concern about racial discrimination against indigenous peoples in DRC. For instance, in its 1996 Concluding Observations, CERD expressed its grave concern about, among others, "...allegations of large-scale discrimination against the Pygmies (Batwa) ...."<sup>4</sup> These experts have confirmed that international oversight and intervention are urgently required to avoid further irreparable harm to indigenous peoples' rights, dignity and integrity. In brief, the situation has become desperate.
5. In 2002, DRC promulgated a new Forest Code and has subsequently begun adopting a series of implementation laws. Furthermore, 103 forestry "concessions" (equivalent to 147,426 km<sup>2</sup> of forest, or an area the size of England and Wales) have been granted,

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<sup>2</sup> African Commission on Human and Peoples' Rights (ACHPR) and International Work Group for Indigenous Affairs (IWGIA) (2005), *Report of the African Commission's Working Group of Experts on Indigenous Peoples/Communities, Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa", Adopted by The African Commission on Human and Peoples' Rights at its 28<sup>th</sup> ordinary session, (Gambia, Denmark)* (hereinafter "ACHPR Working Group on Indigenous Populations/Communities (2005)" ), page 25.

<sup>3</sup> Ibid, page 5.

<sup>4</sup> *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Democratic Republic of Congo 27/09/96*. CERD/C/304/Add.18. (Concluding Observations/Comments).

despite a moratorium on forestry adopted in May 2002<sup>5</sup>. The 2002 Forest Code and the forestry concessions have been brought into effect without the participation of the affected indigenous communities (see Section IV *infra*). Additional implementation decrees continue to be adopted without the participation of indigenous peoples (see Section IV *infra*). The 2002 Forest Code and implementing laws violate the rights of indigenous peoples to their lands, territories and resources, and are discriminatory as, *inter alia*, and in violation of their rights under Article 3, they fail to protect indigenous peoples' rights to equality before the law and equal protection of the law and criminalize indigenous peoples' subsistence rights and right to dispose of their natural wealth (see Section IV *infra*).

6. The State has been unresponsive to the efforts made by indigenous peoples to resolve questions surrounding their land, resource and other rights. These efforts have included: submitting a series of complaints to the DRC authorities and the World Bank, the latter of which is providing assistance to the State with regard to natural resources management issues including forestry (see Section III and Annex 7 *infra*); submission of a formal request for an investigation by the World Bank's Inspection Panel, which has since recognised the need for a thorough enquiry (see Annex 8 *infra*); informing and sensitizing indigenous communities about the Forest Code (in the absence of any similar activity by the authorities); and forming a coalition with several indigenous and international environmental and human rights organisations. As noted above, adequate and effective domestic remedies capable of addressing and resolving violations of indigenous peoples' rights are unavailable as a matter of fact and law (see Section IV *infra*).
7. Despite these complaints and other advocacy work, the State has not sought to meet with indigenous peoples' representatives nor has it taken any action to address their concerns in relation to the impact of the 2002 Forest Code and forestry concessions on their rights. Indigenous peoples in DRC are therefore rendered defenceless and are left with no alternative but to seek international oversight and assistance. There is an urgent and compelling need for such assistance as they face daily and severe harm to their livelihoods and cultural integrity and their ability to exercise and enjoy their rights. As the Commission has noted, the very survival of indigenous peoples in DRC is threatened (see Section III *infra*). This NGO report supports a communication requesting such assistance from the African Commission's Working Group of Experts on Indigenous Peoples/Communities.

## II. Indigenous Peoples in DRC

8. Indigenous peoples in Central Africa were originally hunter-gatherers in the high altitude forests of the Great Lakes region. It is largely accepted that the hunter-gatherers living in the forest were the first inhabitants of DRC, who were later joined by migrating farmers

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<sup>5</sup> Ministère de l'Environnement et Ministère de Finances de la République démocratique du Congo, *Communiqué de Presse*, No. 3519, 1/11/2005. This Press Release by the DRC Ministries of the Environment and of Finance lists 141 existing forestry concessions as at 29 October 2005, of which at least 103 were granted since the May 2004 moratorium. See Annex 5.

and animal-herders. There are four main groups of indigenous, so-called “Pygmy”, peoples in the vast territory of DRC: the *Bambuti*, *Bacwa*, *Western Batwa*, and *Eastern Batwa*. As there has never been a national demographic census, their total number is unknown; however, estimates of the indigenous population range from 270,000 to four million, which is approximately 0.4%-7% of the total population.<sup>6</sup>

9. As the forests of Central Africa were cut down over the years by farmers and animal-herders, many indigenous peoples were forced to abandon their traditional way of life based on hunting and gathering. Some of them developed new livelihoods as potters, dancers and entertainers. Others became dependant on occasional work, or resorted to begging in order to survive. As indigenous peoples lost their forest refuge, they started to experience increasing prejudice and discrimination from the dominant culture, which despises them for their “Pygmy” origins. For example, the Special Rapporteur on the situation of human rights in DRC has noted that indigenous peoples in DRC are “[o]ften viewed as an animal sub-species” and are “[h]ated and excluded by most of the Congolese population”.<sup>7</sup>
10. The forest plays an essential part in ensuring the physical, cultural and spiritual well-being of indigenous peoples, who suffer extreme levels of poverty and ill-health without it. As the Commission notes:

*The situation of the Batwa in the DRC is similar to that of the Batwa in Rwanda, Burundi and Uganda - they live in extreme poverty...The Batwa believe that if they still lived in their forests, their lives would be better because they would be able to collect medicinal plants and practise their customs.*<sup>8</sup>

11. The physical, cultural, spiritual and economic security of indigenous peoples still living in the forests of DRC are under immediate threat from the dual pressures of conflict and forest zoning to greatly increase conservation and forest exploitation areas. According to a 2004 NGO report:

*The pressures on Pygmy peoples' lands, resources and societies will continue to increase. Civil conflict and population pressure in eastern DRC is causing large-scale population migrations into the Ituri forest in the north-east, and an influx of farmers, cash-crop plantations, miners and large-scale bush meat traders, posing major threats to forest biodiversity and local peoples' livelihoods. Destruction of forest resources, especially foods of high symbolic value such as honey and game, affects Pygmy peoples' bargaining powers and*

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6 The estimate of 270,000 is found in African Commission on Human and Peoples’ Rights, *Report of the African Commission’s Working Group on Indigenous Peoples/Communities*, op. cit, page 6; while the estimate of 4,000,000 is found in ARD, Inc. *Conflict Timber: Dimensions of the Problem in Asia and Africa, Volume III: African Cases – Final Report Submitted to the United States Agency for International Development*, Vermont, USA, page 17.

7 *Interim report of the Special Rapporteur on the situation of human rights in the Democratic Republic of Congo*, 26 September 2002, A/57/437, paragraph 66.

8 African Commission on Human and Peoples’ Rights, *Report of the African Commission’s Working Group on Indigenous Peoples/Communities*, op. cit, page 37.

*leverage in traditional exchange systems, further unbalancing social relations with villagers.<sup>9</sup>*

### **III. The Human Rights Situation of Indigenous Peoples in DRC**

#### **1. Articles 2 and 3 – Racial Discrimination against Indigenous Peoples in DRC**

12. Article 2 of the Charter prohibits discrimination, on any ground including race and ethnic group. Article 3 guarantees to all persons to equality before the law and equal protection of the law
13. The human rights situation of indigenous peoples in Central Africa has reached the stage that their physical and cultural survival is severely threatened. The DRC is no different. The Commission has recognised the pernicious effects racial discrimination and human rights violations have had on indigenous peoples:

*Terms such as "underdeveloped", "backward", "primitive", and worse are regularly applied to some people and not others in different countries. Along with the negative stereotyping and discrimination comes dispossession of these peoples' land and natural resources, which leads to impoverishment and threatens their cultures and survival as peoples. Lack of infrastructure, poor access to health services and appropriate education systems, exclusion from true participation in their own development and denial of their cultural and language rights further adds to their marginalisation and impoverishment.*

*Indigenous peoples suffer from particular human rights violations – to the extent that some groups are on the verge of extinction. While the degree of experience may differ from country to country, the situation is a cause for serious concern and it calls for intervention.<sup>10</sup>*

14. The Commission also notes the multiple categories and perpetrators of human rights violations of indigenous peoples in DRC and the harmful effects of conflict on them: "In the DRC the Batwa are frequently subject to arbitrary arrests, physical attacks against their houses and property, beatings from forest wardens, the payment of heavy taxes and expropriation of their land. Many have been killed or tortured by armed groups in the conflict in the DRC."<sup>11</sup>
15. The United Nations Human Rights Committee has also observed that indigenous peoples in DRC are subject to racial discrimination, which transcends discrimination experienced by other groups, stating that it is "concerned about the marginalisation, discrimination and

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<sup>9</sup> Jackson, D, *Implementation of international commitments on traditional forest-related knowledge: Indigenous peoples' experiences in Central Africa*, op. cit, page 19.

<sup>10</sup> African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group on Indigenous Peoples/Communities*, op. cit, page 5.

<sup>11</sup> Ibid, page 26.

occasional persecution suffered by the countries' numerous minorities, particularly the pygmies (article 27 of the Covenant)."<sup>12</sup>

16. Indigenous peoples in DRC have been disproportionately affected by the decades of armed conflict and civil war. The different warring factions have committed numerous gross violations of the human rights of indigenous peoples, including murder, summary execution, abduction, sexual violence, pillaging and cannibalism.<sup>13</sup> In 2003, the UN Special Rapporteur on the situation of human rights in DRC issued a joint communication with the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples to the Movement for the Liberation of the Congo concerning allegations of rape and cannibalism against the indigenous Pygmy peoples of Ituri province, highlighting their concern over the "situation of the Pygmies in [DRC] and in particular about the cruelty of the human rights violations reported."<sup>14</sup> The disproportionate treatment and targeting of indigenous peoples is directly related to entrenched and pervasive racial discrimination. Violence, for instance, is often tied to a belief on the part of the perpetrators that indigenous peoples, as inhabitants of the forest, have some sort of special powers. Rapists often justify rape with the claim that sexual relations with a "Pygmy" woman can cure back-ache.<sup>15</sup>

## **2. Articles 14, 20, 21, 22 and 24 – Violations of the Land, Territory and Resource Rights of Indigenous Peoples in DRC**

17. Article 14 of the Charter provides that the right to property shall be guaranteed. Article 17(2) of the Charter guarantees that every individual may freely take part in the cultural life of his or her community. Article 20 guarantees the right of peoples to self-determination, while Article 21 ensures to peoples the right to freely dispose of their natural wealth and to lawful recovery of property and adequate compensation in the event of spoliation. Article 22 guarantees the right of peoples to economic, social and cultural development. Finally, Article 24 provides that all peoples shall have the right to a general satisfactory environment favourable to their development.

18. Disregarding its regional and international human rights obligations, DRC does not recognise or protect the rights of indigenous peoples to own, enjoy, control or use their communal lands, territories and resources; has not delimited or demarcated these lands and territories nor has it taken any other effective measure to guarantee and secure their

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12 Unofficial translation of *Observations finales du Comité des droits de l'homme République Démocratique du Congo (version non éditée)*, CCPR/C/COD/CO/3, 27 mars 2006.

13 Jackson, D, *Twa women, Twa rights, in the Great Lakes region of Africa*, MRG, London, 2003; Lattimer, M, 'Erasing the Board': Report of the International research mission into crimes under international law committed against the Bambuti Pygmies in the eastern Democratic Republic of Congo, MRG, London, 2004.

14 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum: Analysis of country situations and other activities of the Special Rapporteur, UN Doc. E/CN.4/2004/80/Add.1, 6 February 2004, para. 34, p. 9.

15 Jackson, D, *Twa women, Twa rights*, ibid, page 13.

rights to lands, territories and resources.<sup>16</sup> According to the Constitution all land belongs to the State, and the State acts on this basis to the detriment of indigenous peoples.<sup>17</sup>

19. The customary law of the dominant Bantu society in DRC, which does not recognise indigenous rights to lands, territories and resources, governs lands that have not already been divided into individual plots by the land registration service and those found within non-urban areas. Under Bantu customary law, tracts of land with fixed boundaries can belong to a chief or tribal lineage, and rights to these lands are cognizable before courts and tribunals. However, indigenous peoples, whose customary rights are not cognizable, can be dispossessed of their land without recourse. The methodology used to decide if land is occupied or unoccupied (thus, State property) – a process known as ‘*enquête de vacance*’ – does not recognise the traditional tenure systems of indigenous peoples. Thus indigenous peoples’ lands and territories are legally classified as unoccupied and can be allocated to others at will.<sup>18</sup>
20. Indigenous customary land tenure systems in DRC do not recognise individual ownership of land, which is instead considered to be collectively owned. However, Congolese law does not recognise or respect the right of collective ownership of land. Furthermore, the process to obtain individual legal title to land is virtually inaccessible to indigenous peoples. Only a written demand can be made to the land distribution agencies in urban centres; the process can take as long as ten months and costs approximately US\$400. This discriminates against the vast majority of indigenous peoples who are illiterate, live far from urban centres and live in abject poverty.
21. The failure to recognize and respect collective indigenous ownership of lands, territories and resources, based on traditional occupation and use and indigenous customary law, is discriminatory and violates the right to equality before the law.

#### **(a) Commercial Resource Exploitation and Forest Zoning**

22. Increased forestry exploitation by logging concessionaires is substantially exacerbating and intensifying the threat to indigenous peoples’ physical, cultural, spiritual and economic security, and has already resulted in further dispossession and irreparable harm to indigenous peoples. Despite a forestry moratorium put in place in May 2002 and extended by a Presidential Decree of November 2005, the State has admitted that logging has continued with at least 103 concessions having been issued, most of which are currently being exploited.<sup>19</sup> Congolese law makes no provisions for nor recognizes the right of indigenous peoples to be consulted about and participate in decisions that affect

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16 See US State Department, *Congo, Democratic Republic of: Country Reports on Human Rights Practices*, Released by the Bureau of Democracy, Human Rights, and Labor, 8 March 2006, available at : <http://www.state.gov/g/drl/rls/hrpt/2005/61563.htm>; Centre d’Accompagnement des Autochtones Pygmées et Minoritaires Vulnérables, *Echos des Pygmées*, No.17, jan-mars 2005.

17 *Constitution de la République démocratique du Congo*, 18 February 2006, article 9.

18 Barume A K, *Heading Towards Extinction? Indigenous rights in Africa: the case of the Twa of the Kahuzi-Biega National Park, Democratic Republic of Congo*, IWGIA and Forest Peoples Programme, 2003.

19 Ministère de l’Environnement et Ministère de Finances de la République démocratique du Congo, *Communiqué de Presse*, No. 3519, 1/11/2005, op. cit.

them. Forestry concessions are regularly granted without even informing communities, even if they live within the concession zone.<sup>20</sup> For example, the indigenous communities in areas such as Yeimbo and Banga in the eastern province of Equator were not informed prior to forestry concession operations that were implemented on their lands post-moratorium by SIFORCO (Société Industrielle et Forestière du Congo) or SEDAF (Société d'exploitation-développement agricole et forestier).<sup>21</sup>

23. Moreover, the World Bank predicts a potential increase of 60% to 100% in logging in DRC.<sup>22</sup> World Bank documents refer to the “creation of a favourable climate for industrial logging”,<sup>23</sup> and that a region equivalent to 60 million hectares (i.e. an area bigger than France) is to be considered as “production forests”.<sup>24</sup> While the World Bank has agreed to fund reforms in the forestry and mining sectors,<sup>25</sup> indigenous peoples’ rights are not addressed in relation to those reforms and DRC presently has no effective legislative framework to regulate or control the environmental impact of forestry exploitation. Indigenous peoples’ organizations have filed a formal complaint seeking an investigation of the Government and World Bank’s activities with the World Bank’s Inspection Panel. Among others, this complaint alleges serious violations of World Bank safeguard policies relating to indigenous peoples and environmental impact assessment.
24. The Inspection Panel’s preliminary report notes that the World Bank has recognised that it may have acted too quickly in its support on forestry sector reforms,<sup>26</sup> The Inspection Panel also observed that the World Bank was not in full compliance with Operational Directive 4.20, its safeguard policy on indigenous peoples.<sup>27</sup> The World Bank recognised the importance of “reaching out” to indigenous communities, but claims it did not do so because the “forest areas were still inaccessible”.<sup>28</sup> The Panel notes that the Bank

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20 The map in Annex 4 indicates the location of existing logging concessions and protected areas in DRC, and where they overlap with indigenous communities.

21 Réseau des Associations Autochtones Pygmées (RAPY), en association avec MRG, *Les Peuples Autochtones et l'exploitation forestière: Mission d'investigation sur l'impact de l'exploitation forestière sur les communautés autochtones et locales des provinces Orientale et de l'Équateur, République Démocratique du Congo : Témoignages recueillis auprès des communautés autochtones Pygmées et autres communautés locales pour transmettre au Panel d'inspection de la Banque mondiale*, June 2006.

22 Rainforest Foundation UK, *Briefing Paper: New threats to the forests and forest peoples of the Democratic Republic of Congo*, February 2004 citing the following reports: *World Bank, Democratic Republic of Congo, Mission de Suivi Sectoriel, 17-27 April 2002; World Bank, Democratic Republic of Congo Mission de Suivi Sectoriel, 1-12 July, 2003; World Bank, Democratic Republic of Congo, Mission de Suivi Sectoriel, 17-27 April 2002*. Available at: <http://www.rainforestfoundationuk.org>.

23 Ibid, citing *World Bank, Democratic Republic of Congo, Mission de Suivi Sectoriel, 1-12 July, 2003*.

24 Ibid.

25 World Bank, *Democratic Republic of Congo: World Bank Approves US\$90 million Budget Support Operation, Press Release No. 2006/296/AFR*, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/CONGODEMOCRATICEXTN/0,,co ntentMDK:20750090~menuPK:349472~pagePK:141137~piPK:141127~theSitePK:349466,00.html>.

26 The Inspection Panel, *Report and Recommendation on Request for Inspection, Democratic Republic of Congo: Transitional Support for Economic Recovery Credit Operation (TSERO) (IDA Grant No. H192-DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (IDA Credit No. 3824-DRC and IDA Grant No. H064-DRC)*, undated, (hereinafter ‘Inspection Panel report’), paragraph 47. See Annex 8.

27 Ibid, paragraphs 25 and 41.

28 Ibid, paragraph 48.

recognises its failure to adequately consult with indigenous communities and that it needs to “establish more direct lines of communication with Pygmy leaders and communities.”<sup>29</sup> In response, the World Bank has committed to preparing an Indigenous Peoples Plan,<sup>30</sup> and confirmed that “consultation with local populations, especially indigenous peoples, must follow the principle of free, prior and informed consent.”<sup>31</sup>

25. Following a visit to DRC in January 2006 to consider the eligibility of indigenous peoples’ formal complaint, the Inspection Panel announced that it will carry out a full investigation.<sup>32</sup> Unfortunately a further Panel visit scheduled for May 2006 was postponed, due to reported insecurity in the run-up to national elections, and a rescheduled visit in October 2006 may also not go ahead as it too coincides with elections. The Panel cannot publish its investigation report until after this country visit. At time of writing this article, there is no indication of what findings the Panel may publish, and what decisions the World Bank Board of Directors will take in light of the report, however, as its jurisdiction only extends to the World Bank, action is still required to address the State’s acts and omissions that have resulted in the threat of immediate and irreparable harm to indigenous peoples in DRC.
26. Without regard for indigenous peoples’ rights, including to prior consultation and consent, the 2002 Forest Code determines how the forests of DRC will be zoned.<sup>33</sup> At least 40% of the forest will be allocated to commercial exploitation (known as “permanent production” forests) and 15% to conservation (known as “classified” forests). Although referred to as “protected” forests in the 2002 Forest Code, the remaining forest will also be subject to concessions; however the percentage of Congolese forest, if any, that will be regularised as indigenous-owned remains unknown and is not presently being considered.<sup>34</sup> The State retains ownership of all forestry land, with limited resource ownership rights allocated to concessionaires, and there are little or no use rights recognized for indigenous peoples in all zones (see Section III and Section IV *infra*).
27. The State’s bias in favour of commercial forestry exploitation takes no account of customary indigenous property and use rights, and there was no consultation with or participation by indigenous peoples in pilot zoning projects carried out with the assistance of the World Bank and the UN’s Food and Agriculture Organisation (FAO). This was confirmed in the Inspection Panel preliminary report, which notes that “OD 4.20 should have been triggered during project preparation”, yet was not addressed even though the

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29 Ibid.

30 Ibid, paragraph 41.

31 Letter from Mr. John McIntire, Sector Director, Rural, Environmental and Social Development, African Region, World Bank on “*World Bank involvement in the forest sector of the Democratic Republic of Congo*” to Mr. John Buckrell, Global Witness, 4 April 2006, see Annex 7.

32 *Inspection Panel report*, op. cit, paragraph 66.

33 *Loi 011/2002 du 29 Août 2002 Portant Code Forestier* (Law 011/2002 of 29 August 2002, Forest Code). All translations of the 2002 Forestry Code and implementation regulations are unofficial translations by the authors. Excerpts from the relevant provisions in the original French can be found in Annex 2.

34 Forest Peoples Programme et Reseau des Associations Autochtones Pygmée, *Guide pour la comprehension du Code forestier à l’usage des populations locales et du peuple autochtone ‘Pygmee’*, juin 2004, page 10.

World Bank has conceded that indigenous communities live in areas affected by their activities.<sup>35</sup>

28. According to the World Bank, the DRC zoning plans could affect at least 300,000 indigenous people and 35 million people in total who live in the forest or rely on them for their survival.<sup>36</sup> Indigenous peoples have been ignored to date and their rights have been disregarded. For those few indigenous peoples that have not yet been forcibly displaced the implementation of the new system of forestry concessions for commercial purposes will result in irreversible damage to the forests on which they depend for their physical, cultural and spiritual sustenance and survival as distinct peoples.<sup>37</sup> For those already displaced, further destruction of the forest will cause irreparable harm to their right to seek restitution of their lands and undoubtedly cause them additional material and immaterial harm.

#### **(b) Indigenous Peoples have become ‘conservation refugees’ in DRC**

29. The term ‘conservation refugees’ was developed to describe the massive and debilitating impact of conservation activities on indigenous peoples in Central Africa, such as the establishment of national parks, which “puts the rights of nature before the rights of people”<sup>38</sup> and which has resulted in the forcible dispossession and displacement of indigenous peoples. In DRC, as elsewhere in the region, following massive expropriations of traditional indigenous lands and forests and their expulsion from these areas by the State for agro-industry and for conservation purposes many indigenous peoples became landless squatters living on the edge of society. In order to survive, many have been forced to take up farming the lands of others pursuant to sharecropping arrangements that are functionally equivalent to bonded labour. Despite losing their traditional lands and resources, indigenous peoples have not received any compensation or other reparation for their losses and the vast majority today are denied any access to their traditional lands that have been incorporated into national parks.<sup>39</sup> Indeed, it is not uncommon for indigenous people to report that they have been shot at or branded ‘poachers’ and harassed or worse should they try to access their traditional forest lands.

30. For example, during the 1960s and 1970s, without prior consultation with or the consent of indigenous peoples, hundreds of indigenous families were expelled from the Kahuzi-Biega forest in eastern DRC to make way for a nature conservation area for lowland

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35 *Inspection Panel Report*, op. cit, paragraph 41.

36 Jackson, D, *Implementation of international commitments on traditional forest-related knowledge: Indigenous peoples’ experiences in Central Africa*, op. cit. page 44.

37 *Inspection Panel report*, op. cit, paragraph 12.

38 Dowie, M, *Conservation Refugees: When protecting nature means kicking people out* in *Orion Magazine*, Nov/Dec 2005, available online at: <http://www.oriononline.org/pages/om/05-6om/Dowie.html>.

39 See Lewis, J, *The Batwa Pygmies of the Great Lakes Region*, MRG, London, 2000; Lewis, J. and Knight, J., *The Batwa of Rwanda: Assessment of the Situation of the Batwa and Promotion of Batwa Rights in Post-War Rwanda*, WRM and IWGIA, Copenhagen, 1995; Woodburn, J, *Indigenous discrimination: the ideological basis for local discrimination against hunter-gatherer minorities in sub-Saharan Africa*, in *Ethnic and Racial Studies*, Vol.20, No.2, 1997, pp.345-361; Jackson, D, *Twa women, Twa rights*, op. cit; Nelson, J. and Hossack, L. (Eds), *Indigenous peoples and protected areas in Africa: From principles to practice*, op. cit; African Commission on Human and Peoples’ Rights, *Report of the African Commission’s Working Group on indigenous peoples/communities*, op. cit.

gorillas. To this day, they have been denied access to the area, have not been involved in park management, and have been denied any share of benefits. Furthermore, they have not been recompensed for the loss of their traditional lands and resources or restrictions on access to the park, and their cultural integrity and well-being has been substantially harmed.<sup>40</sup>

31. The effects and consequences of their forced expulsion from Kahuzi-Biega are ongoing and continuous for indigenous peoples in DRC. Furthermore, they continue to receive no benefits from the national park. Some Batwa are employed as trackers, and others are temporarily employed for work such as road-building, yet there is no comprehensive plan to address the issue of indigenous peoples' rights.<sup>41</sup> Indigenous territories expropriated to create the Kahuzi-Biega National Park became State land that cannot be used for private use, denying indigenous peoples their right to practise their traditional way of life and culture and unilaterally extinguishing their property rights. The indigenous peoples expelled from the Park consider it to be their territory since time immemorial. They maintain strong psychological, spiritual and cultural links with the forest, dispute the expropriation of their lands to create protected areas and forest concessions, and lament their loss even today. Nevertheless, the Park authorities refuse to let them enter.<sup>42</sup>
32. The Commission has noted the relationship between discrimination against indigenous peoples in DRC, expropriations of their land, and resulting poverty and marginalisation: "The Batwa who have been driven out of their forests have become the poorest of the poor, marginalized from society and suffering the same discrimination as the Batwa in Rwanda and Burundi. They are considered immoral, dirty, deceitful and uncivilised and Batwa children are considered to be good for nothing."<sup>43</sup>
33. The Commission also observes that expropriation of indigenous lands and territories still continues today as a result of racial discrimination in DRC, and that indigenous peoples are denied equal protection of the law to redress these wrongs:

*The Batwa who were driven out of the Kahuzi-Biega forests are now extremely poor, even destitute. Most have no property, and it is very difficult for them to obtain their basic needs. To survive, some have learned from other non-Batwa how to make charcoal from wood to sell and this gives them around \$10 every fortnight. Others who have plots of land try to cultivate them as best they can with potato and vegetables but, given that they are not used to farming, and that the rains have been extremely irregular in recent times, their situation remains one of extreme poverty. The Batwa in the North of the Kahuzi-Biega Park have settled on plots of land but these land (sic), officially unoccupied, may be allocated to someone else by the local authorities. The Batwa have no*

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40 Barume A K, *Heading Towards Extinction? Indigenous rights in Africa: the case of the Twa of the Kahuzi-Biega National Park*, Democratic Republic of Congo, op. cit; Nelson, J. and Hossack, L. (Editors), *Indigenous Peoples and Protected Areas in Africa: From Principles to Practice*, op. cit.

41 Ibid.

42 Ibid.

43 African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group on indigenous peoples/communities*, op. cit, page 23.

*legal protection once neighbours from other ethnic groups decide to take their land or drive them out of their villages.<sup>44</sup>*

34. Despite continual conflict, land expropriation and resource exploitation that surrounds them, several indigenous communities in DRC have managed to retain their hunter-gatherer forest-based economy and culture with varying degrees of success. In North Kivu and the Ituri regions there are still traditional exchange relationships between forest-based indigenous peoples and the neighbouring agriculturalist Bantu communities. These indigenous people can find work with the farmers, but they retain a degree of independence and can return to the forest. The indigenous peoples who have managed to maintain their traditional forest-based way of life have avoided the same level of racial discrimination and deprivation that afflicts those who have been forced out of the forest. They are nevertheless facing the same fate in light of forest zoning plans that, without any regard for their rights, will substantially increase protected areas and commercial forest exploitation pursuant to the 2002 Forest Code.

#### **IV. The 2002 Forest Code and Implementation Regulations**

35. The 2002 Forest Code, its implementing regulations and pursuant forest zoning and commercial exploitation violate indigenous peoples' rights to equality and non-discrimination and present an immediate threat to their lives and livelihoods in DRC. Further, the forestry legislation criminalizes indigenous peoples' rights and violates their right to equality before the law and equal protection of the law. Additionally, the rights of indigenous peoples to prior and meaningful consultation about, participation in and informed consent to activities on their lands and their rights to own and enjoy their lands, territories and resources are routinely violated in law and in fact. These rights are fundamental to the physical and cultural survival of indigenous people, whose existence is under immediate threat from the forestry-related legislation discussed herein.

##### **1. Articles 2 and 3 – The Forestry Legislation Discriminates against Indigenous Peoples in DRC, Violates their Rights to Equal Protection of the Law and Criminalizes their Land and Resource Rights.**

36. Article 2 of the Charter prohibits discrimination, on any ground including race and ethnic group. Article 3 guarantees to all persons to equality before the law and equal protection of the law.
37. The 2002 Forest Code is discriminatory on its face as it fails to recognise and protect the rights of indigenous peoples . There is no specific reference anywhere in the Forest Code to indigenous peoples, and the failure by the State to specifically recognise indigenous peoples, their land and property rights, their traditional land tenure systems and traditional lifestyles present an immediate threat that the State will continue to repeat and intensify the pattern of exclusion that previously resulted in the unilateral and uncompensated

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44 Ibid, pages 12-13.

expropriation of indigenous peoples' traditional lands for conservation and forestry exploitation, as discussed in Section III *ante*.

38. The forestry legislation fails to recognise and respect indigenous peoples' distinct forms of socio-cultural and political organization and forces them to adopt alien organizational structures in order to obtain title to their lands. For example, the community forest decree requires that “[e]very community wishing to manage a community forest will hold a consultation meeting bringing together all the members of the community concerned, under the authority of the invested chief, in order to designate who is responsible for management and to define the objectives and limits of said forest.”<sup>45</sup> Additionally, the community forest information sheet insinuates that title will be vested in either the “chief” (Article 1) or the person “responsible for management” (Article 2), or both.<sup>46</sup>
39. These regulations fail to recognise that indigenous peoples in DRC do not traditionally organize socially or politically in the same manner as dominant Bantu society, and do not have a designated ‘chief’ chosen from amongst their community who is regarded as the actual and/or totemic head of the clan or community. Instead, indigenous peoples organise collectively and adopt decisions pertaining to their traditional lands, territories and resources communally. The obligation of the forestry legislation to organise under the authority of a designated chief and invest title in that person discriminates against indigenous peoples' traditional forms of organisation. In practice, indigenous communities are often deemed to ‘belong’ to a neighbouring Bantu who designates himself – and becomes known as – their ‘chief’. Therefore the forestry legislation also exposes indigenous peoples to the threat of continuing the pattern of domination and coercion by neighbouring Bantu who falsely claim to represent indigenous peoples and their interests.
40. The community forests decree further discriminates against indigenous peoples, for whom the obligatory registration requirements are unattainable due to their extreme poverty and marginalisation. For example, prior to obtaining title to their forest, indigenous peoples must organise and hold a meeting comprising all the members of the community concerned.<sup>47</sup> However, with no provision in the law for the State to provide indigenous peoples with financial or other assistance to organise this meeting, the process is inaccessible given their wide dispersal and their lack of resources to access transportation and communication. No other provision is made in the forestry legislation to accommodate indigenous peoples' specific needs in relation to registration of property rights.

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<sup>45</sup> Décret No.../...Du...Fixant Modalités d'Attribution des Forêts aux Communautés Locales, undated, distributed by email faonpp@micronet.cd to civil society focal points on 10/2/2006 for comment by 21/2/200. Current status unknown, article 4. All translations of the 2002 Forestry Code and implementation regulations are unofficial translations by the authors. Excerpts from the relevant provisions in the original French can be found in Annex 2.

<sup>46</sup> Fiche de Renseignements Pour l'Octroi d'un Permis d'Attribution à Titre Gracieux d'une Concession Forestière à la Communauté Locale, undated, distributed by email faonpp@micronet.cd to civil society focal points on 10/2/2006 for comment by 21/2/200. Current status unknown.

<sup>47</sup> Décret No.../...Du...Fixant Modalités d'Attribution des Forêts aux Communautés Locales, op cit, articles 3 and 4.

41. The provisions governing use rights in the forestry legislation discriminate against indigenous peoples and violate indigenous peoples' rights to a secure means of subsistence and to freely dispose of their natural wealth. For example, while the Forest Code states that local communities "living in or beside a concession" have use rights for "domestic" purposes only (even if it is their own concession), it permits agriculture to be practiced in the same area.<sup>48</sup> With no specification to the contrary, the implication is that commercial agriculture can be practised in these forests, while commercial use of forest resources is prohibited. Banning indigenous peoples from exercising their right to sell their forest resources (for example, to supplement household incomes or provide funding for healthcare) constitutes a direct threat to their physical and socioeconomic well-being.
42. There are several instances where the forestry legislation violates indigenous peoples' rights to judicial remedies and protection and to due process of the law. For example, there is no judicial procedure for appeal or recourse against the Environment Minister's decision to adopt a gazetting plan or grant a forestry concession on indigenous peoples' traditional lands and territories.<sup>49</sup> The situation is even graver in light of the fact that the Environment Minister can disregard the findings of public consultations during his deliberations on gazetting plans,<sup>50</sup> or grant concessions by circumventing the normal consultation procedures.<sup>51</sup> There is similarly no appeal procedure for indigenous peoples against forestry concession management plans which may violate their rights, and the forestry legislation fails to provide indigenous peoples with any judicial recourse against concessionaires who breach the terms of their management plans. Therefore, even where in law and in fact indigenous peoples are able to participate in public consultations, and make their concerns or opposition known, their input can be completely ignored by the State, and they are without any recourse or access to effective judicial or administrative remedies. The failure by the State to ensure equality before the law and equal protection of the law for indigenous peoples presents an immediate risk of further alienation of indigenous peoples' lands and prevents indigenous peoples from mitigating the immediate and irreparable harm caused by expropriations of their traditional lands, territories and resources.
43. The forestry legislation further discriminates against indigenous peoples by criminalizing their subsistence rights and rights to freely dispose of their natural wealth. For example, the penalty for exercising use rights in a gazetted forest in breach of forestry legislation is imprisonment for a period of two months to one year and/or a 10,000 to 50,000 Franc fine (US\$23-115).<sup>52</sup> Additionally, the penalty for exercising use rights in a "protected" forest

48 *Loi 011/2002 Portant Code Forestier*, op. cit, article 42.

49 *Décret No... du... Fixant La Procédure De Classement et de Déclassement des Forêts*, undated, circulated to DRC NGO Focal Points by Geert Diemer, Consultant Politique et Institutionel, on behalf of the FNPP team, 18/11/2005 for comment by 29/11/2005. Present status of decree unknown.

50 Ibid, article 14. The Minister is merely asked to explain his decision if he makes one contrary to the consultation transcript.

51 *Décret fixant la procédure d'attribution des concessions forestières*, article 36 which states that the Environment Minister can "exceptionally grant a forest concession by mutual agreement [with a concessionnaire]: (1) when the forestry exploitation or wood conversion industry project uses an ultra-modern exploitation material or technology with little impact on the environment; (2) for the purposes of forestry research or bioprospection."

52 *Loi 01/22 Portant Code Forestier*, op. cit, article 150.

in breach of the Code is imprisonment for a period of one month to one year and/or a 5,000 to 25,000 Franc fine (US\$11.5-57.5).<sup>53</sup> As indicated in Section IV.3 *infra*, use rights in gazetted and “protected” forests are extremely limited and fail to recognise or respect indigenous peoples’ rights: they do not recognise hunting as a legitimate activity; and prohibit any use other than for domestic purposes only. A prohibition on indigenous peoples exercising their subsistence rights and freely disposing of their natural wealth poses a grave threat to their cultural and physical survival.

## **2. Articles 13 and 20 – The Forestry Legislation Violates the Right to Free, Prior and Informed Consent of Indigenous Peoples in DRC, and Violates their Rights to Political Participation and Development**

44. Article 13 of the Charter guarantees to every individual the right to participate freely in the government of his or her country. Article 22 guarantees the right of peoples to development. Despite one provision to individual rights and the other to collective rights, in the context of indigenous peoples these two provisions can be seen as inter-related, since indigenous peoples are often denied a voice, either individually or as a collective, in political and developmental decisions which affect them.
45. International law recognizes the right of indigenous peoples to participate meaningfully in, and give their free, prior and informed consent to, decisions which may affect them. For instance, ILO Convention No. 169 provides that indigenous peoples have “the right to decide their own priorities for the process of development … and they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”<sup>54</sup> Similarly, the UN Declaration on the Right to Development notes that “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.”<sup>55</sup> Further, Article 19 of the UN Declaration on the Rights of Indigenous Peoples, approved by the Human Rights Council in June 2006, states that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights”<sup>56</sup>
46. Indigenous peoples’ right to give or withhold their free, prior and informed consent to activities that may affect their rights is also recognised in the International Covenant on the Elimination of Racial Discrimination (‘the Convention’). For example, CERD has noted that states are required to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.”<sup>57</sup> CERD has also recognised indigenous peoples’ rights to “effective participation…in decisions

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53 Ibid, article 151.

54 Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 27/6/89, Art.7.1.

55 UN Declaration on the Right to Development, Art. 2(3)

56 United Nations Declaration on the Rights of Indigenous Peoples, approved by the Human Rights Council. UN Doc. A/HRC/1/L.3, 23 June 2006.

57 General Recommendation XXIII on Indigenous Peoples (1997), op. cit, para. 4(d).

affecting their land rights, as required under article 5(c) of the Convention and CERD's General Recommendation XXIII, which stresses the importance of ensuring the 'informed consent' of indigenous peoples."<sup>58</sup>

47. In violation of indigenous peoples' rights, the 2002 Forest Code contains no requirements that indigenous peoples be meaningfully consulted about or participate in decision making or give their free, prior and informed consent to activities on their traditionally owned lands and territories, particularly with regard to forest zoning and management plans, gazetting and commercial forestry concessions. In fact, there is no such requirement in any other law in force in DRC. The Code's implementing regulations also contain multiple examples of the State's failure to respect indigenous peoples' rights to participate in decision-making and to give their free, prior and informed consent to activities on their traditional lands and territories. These failures give rise to the immediate and urgent risk of further alienation of indigenous lands and substantially prejudice the possibility of recovery of lands previously alienated.

48. These specific failures include, but are not limited, to:

- **Failure to consult with and ensure the participation of indigenous peoples in the elaboration of the forestry legislation and subsequent implementation.**

Despite assurances by the State that there would be active participation by local communities and NGOs in forestry sector reforms,<sup>59</sup> to date there has been virtually no public consultation and public knowledge about the Forest Code and its implementation laws is severely limited.<sup>60</sup> In fact, there is no provision anywhere in the forestry legislation for indigenous representation on any of the committees at the provincial or national level that will approve and oversee activities relating to forestry gazetting, concession title conversion or granting of new forestry concessions, and concession management plans; no obligation that these committees directly consult with affected indigenous communities in a timely and appropriate manner; and no assistance to enable indigenous communities to independently contact these bodies.<sup>61</sup> Congolese civil society

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58 *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia* 24/03/2000, para 9.

59 See, for example, République démocratique du Congo, Ministère de l'Environnement, Conservation de la Nature, Eaux et Forêts, *Forum des Nations Unies sur les Forêts, Rapport National 2004*, 13 janvier 2004, Point A.2 (page 9), Point A.3 (page 11).

60 See Annex 3 for a copy of a letter from Congolese civil society and indigenous organisations to the Congolese Minister for the Environment, Water and Forests, the Representative of the World Bank and the Representative of the FAO, on *The Future of the Forests in the Democratic Republic of Congo and the people living within these forests*, Kinshasa, 12/02/2004, available at: <http://www.rainforestuk.org>.

61 See, for example, *Arrête Ministeriel No...du...Portant Composition, Organisation et Fonctionnement des Conseils Consultatifs Provinciaux des Forêts*, undated, distributed by email address faonpp@micronet.cd to civil society focal points on 18/11/2005 for comment by 29/11/2005, current status unknown; *Arrête Ministeriel No...du...Portant Composition, Organisation et Fonctionnement du Conseil Consultatif Nationale des Forêts*, undated, distributed by email address faonpp@micronet.cd to civil society focal points on 18/11/2005 for comment by 29/11/2005, current status unknown; *Arrête Ministeriel No...Du...Fixant la Procédure d'Elaboration, d'Approbation et de Contrôle de la Mise en Œuvre des Plans d'Aménagement Forestier*, undated, copy seen by civil

and indigenous organisations have expressed their deep concern at their exclusion from the decree elaboration process on several occasions.<sup>62</sup> The World Bank has also said it is “concerned with the Government’s capacity to develop and enforce the implementing regulations and states that many of these regulations are still lacking.”<sup>63</sup>

- **Failure to ensure indigenous peoples participate in the procedure to convert forestry titles into new concessions, post the 2002 Forest Code.**

The recently operationalized Presidential decree on converting forestry concessions states that titles granted prior to the adoption of the 2002 Forest Code must be “converted” into new titles otherwise the forest will revert back to State ownership.<sup>64</sup> This legislation constitutes an urgent and immediate threat to indigenous peoples’ rights. There is insufficient obligation in the law on the State to carry out full and thorough consultations with indigenous peoples to ensure their informed participation and to establish their customary property and use rights and delimit and demarcate their lands and territories, and there has been no known consultation with and participation by indigenous communities prior to the list of conversion requests being published by the State,<sup>65</sup> despite assurances by the World Bank that consultations with indigenous peoples should follow the principles of free, prior and informed consent.<sup>66</sup> The failure by the State to ensure a transparent, participatory decision-making process involving indigenous peoples means that forestry concessions will continue to be granted on indigenous lands and territories, thus perpetuating the systematic and pervasive eradication of indigenous peoples’ rights, livelihoods and existence.

- **Failure to ensure sufficient participation by indigenous peoples prior to gazetting forests.**

The forest gazetting decree contains no obligation on the State to ensure that appropriate methodology and techniques will be used to enable indigenous peoples’ full and effective

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society in August 2005, current status unknown, draft elaborated by technical committee led by WWF, see *Liste Harmonisée des Textes d’Application de la Loi Forestière* (Référence document: FNPP/DRC – Doc002/2005). Any provisions in the forestry legislation that foresee representation by a member of the “local community” in such committees fail to recognise that without specific provisions for indigenous representation it is highly unlikely that indigenous people will be represented by other community representatives due to discrimination and their extreme social exclusion and marginalisation.

62 See Annex 3 for the letter from Congolese civil society and indigenous organisations to the Congolese Minister for the Environment, Water and Forests, the Representative of the World Bank and the Representative of the FAO, on *The Future of the Forests in the Democratic Republic of Congo and the people living within these forests*.

63 *Inspection Panel report*, op. cit, paragraph 43.

64 Décret No. 05/116 du 24 Octobre 2005 Fixant les Modalités de Conversion de Concession Forestière et Portant Extension du Moratoire en Matière d’Octroi des Titres d’Exploitation Forestière.

65 By February 2006, 73 title-holders requesting 235 concession conversions had been registered. See République démocratique du Congo, Ministere de l’Environnement, Conservation de la Nature, Eaux et Forets, *Communiqué Officiel No. 001/CAB/MIN/ECN-EF/2006, 02/02/2006*, and see Annex 6 for the list of requests.

66 Letter from Mr. John McIntire, Sector Director, Rural, Environmental and Social Development, African Region, World Bank on “*World Bank involvement in the forest sector of the Democratic Republic of Congo*” to Mr. John Buckrell, Global Witness, 4 April 2006, op. cit. The World Bank is supporting the DRC in the forestry concession title conversion project, as evidenced by the attached Terms of Reference to Mr. McIntire’s letter (Annex 7).

participation in public consultation meetings, including financial assistance to travel to meeting locations, which are all to be held in administrative centres.<sup>67</sup> Furthermore, there is no obligation for prior participation by indigenous peoples in the elaboration of the report around which public consultations are based, instead they are asked to comment *post hoc* on plans that already include delimitations of the area to be gazetted and land use proposals.<sup>68</sup> The public consultation period only lasts between two to six months, which is completely insufficient to guarantee proper consultation with and participation by affected indigenous peoples. There is no guarantee giving indigenous peoples access or consent to the gazette plan or consultation report *post* consultation to verify its authenticity (including whether their inputs have been incorporated).<sup>69</sup> The failure by the State to ensure a transparent, participatory process for indigenous peoples during the gazetting procedure, or requiring the consent of indigenous peoples to activities on their traditional lands and territories, risks further repetition of the forcible dispossession and displacement of indigenous peoples following expropriations of their lands (as described in Section III *ante*), and presents an immediate and urgent threat to their physical, cultural, spiritual and economic wellbeing.

- **Failure to ensure sufficient participation by indigenous peoples prior to granting new forestry concessions.**

The methodology, procedure and techniques proposed for the public enquiry preceding new concession granting all fail to acknowledge the complexity and technical nature of the questions on which indigenous communities will be asked to give their opinions, and make no provision for specific assistance to support the meaningful participation of indigenous peoples.<sup>70</sup> There is no obligation that indigenous peoples' consent will be sought sufficiently in advance of any final authorisation of the concession, nor that indigenous peoples will be given sufficient time to fully understand the information received, request clarification if necessary, seek advice and determine or negotiate conditions in a fair and transparent manner. The failure by the State to ensure adequate consultation with and consent of indigenous peoples prior to granting new forestry concessions gives rise to the immediate and urgent risk of further alienation of indigenous peoples' lands and territories for commercial exploitation purposes.

- **Failure to ensure sufficient participation by indigenous peoples when elaborating, implementing, monitoring and evaluating forestry concession management plans.**

There is no requirement in the management plan decree for indigenous participation or consultation at any stage of the elaboration, adoption, monitoring or evaluation of a forestry concession management plan, or in the elaboration of documentation upon which the plan is based, including the forest inventory, mapping, socio-economic data and

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67 Décret N... du... Fixant La Procédure De Classement et de Déclassement des Forêts, op cit, article 6.

68 Ibid, article 3.

69 Ibid, articles 6 and 10.

70 Arrêté Ministériel No...Du...Fixant la Procédure d'Enquête Publique et de Consultation Préalable a l'Octroi des Concessions Forestières, op cit.

survey of main human activities in the area concerned.<sup>71</sup> Furthermore, there is no appropriate procedure outlined in the decree to ensure that indigenous peoples whose traditional lands, territories and resources have become subject to a management plan are informed about the decision.

### **3. Articles 14, 20, 21, 22, and 24 – The Forestry Legislation Violates the Rights of Indigenous Peoples to their Lands, Territories and Resources.**

49. Article 14 of the Charter provides that the right to property shall be guaranteed. Article 17(2) of the Charter guarantees that every individual may freely take part in the cultural life of his or her community. Article 20 guarantees the right of peoples to self-determination, while Article 21 ensures to peoples the right to freely dispose of their natural wealth and to lawful recovery of property and adequate compensation in the event of spoliation. Article 22 guarantees the right of peoples to economic, social and cultural development. Finally, Article 24 provides that all peoples shall have the right to a general satisfactory environment favourable to their development.
50. The Commission has noted that “the protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates both to Articles 20, 21, 22 and 24 of the African Charter.”<sup>72</sup>
51. Article 33 of the Forest Code clearly indicates the State’s desire to prioritise commercial and conservation use of the Congolese forest over community forests when it states that “in order to promote the rational and sustainable use of forests, the minister ...will take the necessary measures to implement programmes that favour the development of forestry research.” Article 34 goes on to define forestry research as including “management, conservation, exploitation...forestry, and the commercialisation of forestry products.” The definition makes no reference to community forests and indigenous peoples’ rights and interests.
52. The forestry legislation contains numerous examples of the States failure to respect and protect indigenous peoples’ right to own, occupy, use and enjoy their traditional lands, territories and resources. These failures give rise to the immediate and urgent risk of further alienation of indigenous lands and substantially prejudice the possibility of recovery of lands previously alienated. They include, but are not limited, to:
  - **Failure to recognise indigenous ownership of their lands, territories and resources, rights to collective title and traditional land tenure systems.**

Coupled with substantial and highly prejudicial resource exploitation operations, the failure to recognize and guarantee indigenous peoples’ rights has lead to gross violations of indigenous peoples’ human rights, undermining their means of subsistence and severely compromising their physical, cultural and economic integrity (see Section III

<sup>71</sup> Arrête Ministériel No...Du...Fixant la Procédure d’Elaboration, d’Approbation et de Contrôle de la Mise en Œuvre des Plans d’Aménagement Forestier, op cit, articles 8 and 21.

<sup>72</sup> ACHPR Working Group on Indigenous Populations/Communities (2005), above note 2, at p. 21

*ante*). The Forest Code perpetuates this failure by reiterating the States' exclusive ownership of the forest domain, stating that the "forests constitute the property of the State"<sup>73</sup>, that "classified forests form part of the public State domain",<sup>74</sup> and that "[p]rotected forests form part of the private domain of the State."<sup>75</sup> Forestry concessions only grant rights over forestry products "to the exclusion of any right whatsoever on the land",<sup>76</sup> while the community forests decree states that "[t]he forester will conduct himself in the forest concession attributed to him as a forester and not as the owner."<sup>77</sup> Without adequate recognition in law of indigenous peoples' rights to their traditional lands, resources and territories and measures designed to regularise and secure these rights in fact, there is an urgent risk of immediate and irreparable harm to indigenous peoples.

The forestry legislation denies indigenous peoples and their communities legal personality by requiring that community forest title will be vested in only one person (see paragraphs 36-37 *ante*). Additionally, the forestry gazetting decree states that public consultations will be based on a report containing "the most recent map of scale 1/200,000 showing the precise limits of the proposed gazetted area and the perimeters of titles included in these limits."<sup>78</sup> This provision fails to recognise that indigenous peoples hold collective customary title rather than registered title to their lands and territories, and that Bantu customary law does not recognise indigenous rights to lands (see Section III *ante*). This denial of legal personality and failure to sufficiently identify and delimit indigenous lands in the forestry concession procedures poses an immediate threat of further alienation of indigenous lands and territories.

There is no provision anywhere in the forestry legislation to ensure that detailed research is carried out on existing land ownership, occupation and use prior to forest zoning, gazetting, and granting concessions.<sup>79</sup> The methodology of '*enquête de vacance*' used to decide if land is occupied or unoccupied (thus, State property) does not recognise the traditional tenure systems of indigenous peoples. Indigenous peoples' lands and territories are therefore legally classified as unoccupied and can be allocated to others at will. This failure has led in the past to State expropriation of indigenous lands and territories (see Section III *ante*). The failure by the current forestry legislation to sufficiently identify existing land use and rights presents an immediate threat of further alienation of indigenous peoples' lands and substantially prejudices the possibility of recovery of lands previously alienated.

- **Failure to delimit, demarcate and title indigenous peoples' lands and territories.**

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<sup>73</sup> Loi 011/2002 Portant Code Forestier, op. cit, article 7.

<sup>74</sup> Ibid, article 12.

<sup>75</sup> Ibid, article 20.

<sup>76</sup> Ibid, article 21.

<sup>77</sup> Décret No.../...Du...Fixant Modalités d'Attribution des Forêts aux Communautés Locales, op. cit, article 3.

<sup>78</sup> Ibid.

<sup>79</sup> See, for example, Décret No... du... Fixant La Procédure De Classement et de Déclassement des Forêts, op cit, article 3.

The State has to date failed to delimit, demarcate and title indigenous peoples' lands and territories in order to provide certainty and clarity about the extent and boundaries of those lands and territories and has therefore failed to guarantee security of tenure to indigenous peoples. Addressing these issues is also not contemplated in the forestry legislation or any other law. Explanatory materials supplementing the legislation also provide that community forests cannot exceed an area of 5,000 hectares.<sup>80</sup> Imposing this limitation prior to the identification of indigenous lands presents a certain threat of reducing indigenous peoples' land base and severely curtailing their traditional lifestyle and cultural survival.

- **Failure to respect and protect indigenous peoples' use rights, cultural rights and rights to their resources.**

Use and access rights to a forest once it has been gazetted are severely limited by the forestry legislation. In violation of indigenous peoples' land and subsistence rights, and rights to freely dispose of their natural wealth, the Forest Code prohibits the creation of any community forests in gazetted forests, and prohibits all use rights in national parks, nature reserves and botanic gardens. The legislation also criminalizes any commercial exploitation of "classified" forests. This failure by the State to recognise and respect indigenous peoples' customary rights in protected areas presents the same risks of persistent gross violations of rights as seen in the expropriation of their lands to create conservation zones such as the Kahuzi-Biega National Park (see Section III *ante*).

Article 39 of the Forest Code declares that use rights in classified forests are limited to "gathering dead wood and straw...gathering fruits and plants for food or medicinal purposes...gathering gum, resin or honey...gathering caterpillars, snails or frogs...taking wood for housing and for artisanal use."<sup>81</sup> This very specific list fails to permit gathering of many other forest products and resources on which indigenous peoples rely for their subsistence, fails to recognise the traditional indigenous practise of hunting, and fails to recognise other traditional and customary uses by indigenous peoples of their lands, including sacred sites and burial grounds.

Indigenous peoples' rights to their resources are additionally violated by further provisions in the Forest Code on use rights in forestry concessions. Article 44 states that "[r]esident populations in a forestry concession may continue to exercise their traditional use rights in the concession **as long as this is compatible with forestry exploitation**" (author highlight).<sup>82</sup> As highlighted in paragraph 45 *ante*, the State has already expressed its preference for commercial logging and conservation forestry, rather than community use. In the absence of an express provision to ensure protection of indigenous peoples' livelihoods and resource rights, and based on past experience, it is highly certain that priority will be given to forestry exploitation over traditional use rights if a conflict arises between the two.

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80 *Fiche de Renseignements Pour l'Octroi d'un Permis d'Attribution a Titre Gracieux d'une Concession Forestière a la Communauté Locale*, op. cit.

81 *Loi 011/2002 Portant Code Forestier*, op. cit, article 39.

82 Ibid, article 44.

## **V. Conclusion**

53. The rights of indigenous peoples in DRC to practice, enjoy and maintain their culture, to be secure in their means of subsistence, to freely dispose of their natural wealth, to property and to participate in and consent to decisions and activities affecting them are neither recognized nor respected at present. This is especially the case for rights to lands, territories and resources. Indigenous culture and identity are fundamentally tied to their relationship with their ancestral lands, territories and resources. Without strong, effective and enforceable rights to these lands, territories and resources, their cultural integrity is seriously undermined and threatened.
54. International standards state that indigenous peoples have the collective right to own, use and peacefully enjoy their traditional lands, territories and resources, to freely dispose of their natural resources and to be secure in their means of subsistence. States have a corresponding duty to recognize these rights by, among others, titling, demarcating and ensuring the integrity of these lands and territories. In DRC, this has not been done and these rights are routinely violated both by act and omission. In the case of the former, by promulgating the 2002 Forest Code and implementation regulations, and issuing concessions to logging companies who operate on indigenous lands with impunity and destroy vital subsistence resources; by converting indigenous lands into protected areas without their consent, and; by granting indigenous lands to others. In the latter, by failing to title, demarcate and guarantee indigenous land rights. The 2006 Constitution and 2002 Forest Code explicitly states that all resources belong to the State, which has the inalienable right to exploit those resources without also providing concomitant guarantees protecting indigenous peoples rights.
55. Subsistence and other use rights (hunting, gathering, cultural practices) are particularly vulnerable in gazetted forests and forestry concessions. Subsistence and use rights are further diminished by the forestry legislation, and the ongoing denial of access to protected areas that were created on expropriated indigenous lands and territories.
56. Neither the 2002 Forest Code nor its implementing decrees, nor existing zoning plans for forests in DRC take into account indigenous governmental institutions and legal systems, nor is either of these otherwise formally recognized in Congolese law. These institutions also have no formal say over or input in deciding the nature and extent of development activities in their territories and activities classified as development frequently have detrimental effects.
57. There is no mechanism in Congolese law to provide for the informed participation and consent of indigenous peoples in decisions that affect them. This is especially the case concerning decisions about their lands and resources and whether conservation areas and concessions are issued thereon or nearby. So far, the State has made no attempt to consult with indigenous peoples, communities and organisations on the forestry legislation provisions that will affect them. Instead, the State unilaterally decides if decrees will be circulated to state-selected civil society organisations (“focal points”) for comment post-elaboration. None of the focal points are indigenous organisations or organisations

representing indigenous peoples and no State assistance is provided to enable wider distribution of the decrees to indigenous peoples or to facilitate participation by indigenous peoples in the process.

58. The situation has become desperate as additional implementation regulations continue to be elaborated and adopted without the meaningful prior consultation and participation by indigenous peoples and in violation of their rights. Apart from three decrees that have been published in official journals, the status of all other elaborated decrees is currently unknown. Of an estimated fifty decrees to be elaborated, only 16 have to date been released by the State into the public domain. There is the urgent risk that these regulations will pass into legislation and, when operationalized, the immediate threat that the State will continue to repeat and intensify the pattern of exclusion that previously resulted in the unilateral and uncompensated expropriation of indigenous peoples' traditional lands for conservation and forestry exploitation.