



December 2022

Examining support for the rights of Indigenous Peoples and local communities in the context of REDD+ in the Democratic Republic of Congo

Marie-Bernard Dhedya Lonu¹, Juan Pablo Sarmiento Barletti² and Anne M. Larson²

Summary

- Safeguards interpretation processes depend on country-specific understandings and implementation of relevant laws and recognized rights, including adherence to international agreements on the rights of Indigenous Peoples and local communities (IPs and LCs) and different political and economic priorities.
- This flyer presents the results of a review of legal documents and interviews with specialists in the Democratic Republic of Congo to understand the level of support for the rights of IPs and LCs in law and policy in the context of REDD+.
- Government and international actors see more inclusive participation in the REDD+ process as a key achievement, yet Indigenous and civil society actors remain skeptical about inclusion in decision making; legislative efforts should strengthen the inclusion of all stakeholders.
- Significant progress on land rights is expected with the recent adoption of the law on the Promotion and Protection of the Rights of the Indigenous Pygmy Peoples and the ongoing land reform process.
- The implementation and monitoring of safeguards for REDD+ and other forest-based initiatives must involve IPs and LCs, respecting their rights, knowledge and participation, as outlined in the DRC's Nationally Determined Contribution.

1 UNIKIS-LSDD

2 CIFOR-ICRAF

This flyer is part of a series on REDD+ safeguards, focusing on the rights and social inclusion concerns of the women and men of the Indigenous Peoples and local communities (IPs and LCs) that steward the forests where climate solutions are implemented. Flyers provide lessons for application in different national contexts, present evidence for decision makers and practitioners to consider the implications and benefits of supporting the rights of IPs and LCs, and contribute to the participation of IP and LC representatives in discussions on and monitoring of safeguards.

Introduction

As the framework for reducing emissions from deforestation and forest degradation and enhancing forest carbon stocks (REDD+) moves to results-based payments, there is a need to re-examine safeguards. At the 2010 Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in Cancun, seven safeguard principles for the implementation of REDD+ were adopted, including two that address Indigenous Peoples and local communities (IPs and LCs). The Cancun safeguards mandate that countries interpret these principles, deferring to national law in deciding what counts as 'respect' or 'participation' for IPs and LCs.

Scholars and practitioners have been concerned about REDD+'s potential impact on the rights of IPs and LCs from early on (Sarmiento Barletti and Larson 2017). Without proper guidelines, the application and operationalization of REDD+ safeguards varies between countries, with different impacts on IP and LC rights (Jodoïn 2017). Indeed, the national interpretation and rollout of safeguards is framed by country-specific legal interpretations of relevant rights, adherence to international agreements on the rights of IPs and LCs, different political and economic priorities, and actor-specific interests. Concerns over safeguards focus on the need to expand rights recognition and to bridge gaps in access to recognized rights, including land tenure, resources and participation (Savaresi 2013; Wallbott 2014).

The introduction of voluntary standards provided an opportunity for guidelines that are more supportive of IP and LC rights than national interpretations of the Cancun principles. This transition is important in countries where IPs and LCs experience discrimination. However, there is considerable variation in standards (Sarmiento Barletti et al. 2021). While some standards motivate countries to increase their support for the rights of IPs and LCs by tying result-based payments to evidence of 'doing good' or, in few cases, of 'doing better', others set lower bars of 'doing no harm' (Lofts et al. 2021).

Given the specificity of national safeguards interpretation processes, this flyer presents the results of a review of legal documents and interviews with legal specialists in the Democratic Republic of Congo (DRC) to understand the level of support for IP and LC rights in law and policy in the context of REDD+ (Table 1). Further analysis will set out the voluntary standards that the DRC's legal system already abides by, as well as the reforms that would be needed to

comply with more stringent options. We aim to clarify the interplay between different standards that may not align yet are deployed for the same activities within the same countries. Outputs will support REDD+ actors in navigating the range of criteria, indicators and rules, and integrating them into their national implementation frameworks and reporting processes for a coherent operationalization of safeguards.

The state of support for IP and LC rights in the context of REDD+

Although the DRC is signatory to international agreements that uphold the rights of IPs and LCs, such rights are just beginning to be addressed in national legal instruments. Indeed, the country has ratified several international agreements that enshrine the right to self-determination and the promotion and protection of minorities including IPs and LCs.

Nevertheless, some laws only refer to IPs and LCs in a superficial manner, failing to guarantee that their recognized rights are respected. For example, collective ownership of land acquired in accordance with law or custom is guaranteed by the provisions of Article 34 of the Constitution. But land ownership in the DRC is exclusively vested in the state and, in practice, communities and individuals can only hold rights of enjoyment, use, usufruct, passage and concessions on state land. Respect for the constitutionally-recognized collective ownership rights poses serious problems in practice because, in accordance with articles 387, 388 and 389 of the Land Law, they must be detailed by a presidential ordinance, which has not been issued to date.

Currently, however, the DRC is revising its Land Law. This brings hope regarding the consideration of the rights of IPs and LCs and the securing of these rights through the establishment of customary land registries and other mechanisms. In addition, the Law on the Promotion and Protection of the Rights of the Indigenous Pygmy Peoples passed the Senate in June 2022 and was signed by President Tshisekedi in November. Although various conflicts over customary land and its uses remain, they may diminish as new laws begin to be implemented.

Regarding resource rights, progress in granting community rights has been made since the 2002 Forestry Code,

including Decree No. 14/018 (August 2, 2014) allowing local communities to obtain forest concessions (*Concessions forestières des communautés locales*, CFCL) with perpetual and imprescriptible titles. Local communities can also obtain conservation concessions whereby the government entrusts them (totally or partially) with the use and management of forest and wildlife resources for the conservation of biological diversity. However, implementing community forestry and biodiversity conservation concessions is challenging due to the procedural costs involved and the technical skills required. Finally, a 2018 Ministerial Order on REDD+ affirms that forest carbon stocks are the property of the state but recognizes that units of emissions reduction are owned by those who invest in REDD+, including local communities who invest in this sector. These rights can be interpreted in the context of texts such as the Forestry Code, the Land Law and many others.

Box.1 What is in the table?

The table lists ten criteria regarding the DRC's legal support for the rights of IPs and LCs. The criteria are: (1) recognizes historically under-represented groups; (2) aligns with the Cancun safeguards; (3) recognizes gender inequalities and/or women's exclusion; (4) recognizes the rights of IPs and LCs under international law; (5) recognizes land and resource rights for IPs and LCs; (6) recognizes community carbon rights; (7) recognizes the right of IPs and LCs to free, prior and informed consent (FPIC); (8) requires formal benefit sharing mechanisms; (9) requires formal grievance mechanisms; and (10) includes provisions for monitoring, reporting and verification (MRV) for rights and social inclusion concerns. We rated each criterion based on whether it aligned with the DRC's laws fully (yes), partially (partial – for those that only met some aspects of the criterion), or not at all (no).

Table 1. The DRC's support for IP and LC rights in the context of REDD+ (at a glance)

	Rating	Detail	Reference/Source
(1) Groups recognized by law	Partial (Indigenous Peoples and local communities)	No law formally enshrines the notion of 'Indigenous Peoples'. The rights of Indigenous Peoples are covered by the provisions of the Constitution of 2006, amended in 2011, which did not specifically recognize Indigenous Peoples but did recognize collective property acquired in accordance with the law or customary law (art. 34). The Constitution also gives the State the duty to ensure and promote the peaceful and harmonious coexistence of all ethnic groups in the country and to ensure the protection and promotion of vulnerable groups and all minorities (art. 51 and 123 point 6). Currently, Indigenous Peoples are generally dealt with by other categories, in particular as local communities, to which they are often assimilated. However, other official government texts (reports, strategic plans, application measures for the forestry code and other laws, action plans, etc.) do enshrine the notion of Indigenous Peoples. Progress is expected with the recent Law on the Protection and Promotion of the Rights of Indigenous Pygmy Peoples.	Congo (Democratic Republic of the)'s Constitution of 2006 with Amendments through 2011. Available at https://www.leganet.cd . Sixth Report of the Democratic Republic of Congo to the Conference on Biological Diversity. Available at https://cd.chm-cbd.net . Indigenous Pygmy Peoples in the DRC: the status of their rights and the situation in Tanganyika Province, Alternative report to the periodic report of the Democratic Republic of Congo to the Human Rights Committee, DGPA, 2017.
(2) Cancun safeguards/SIS	Partial (SIS validated)	The DRC validated its safeguards information system in April 2022 to strengthen its eligibility for results-based payments. It still needs to be disseminated to stakeholders at the national level and then submitted to the UNFCCC.	Democratic Republic of Congo, 2018. Arrêté Ministériel n°047/CAB/MIN/EDD/ANN/MML/05/2018 fixant la procédure d'homologation des investissements REDD+. Available at https://www.droitcongolais.info/files/960.05.18-Arrete-du-9-mai-2018_homologation-de-investigation.pdf .
(3) Gender inequalities/women's exclusion	Partial	Inspired by the conventions and treaties it has ratified at the international level (Convention on the Elimination of All Forms of Discrimination against Women, etc.), the DRC has adopted general standards for the promotion and protection of women's rights. The Constitution of 2006, amended in 2011, establishes the principle of equality between men and women and condemns discrimination against women in the civil, political, economic, social and cultural fields. This principle is crystallized in the 2015 Law on Parity and the Family Code. Although laws relevant to natural resources do not clearly or specifically enshrine women's rights, the National REDD+ Framework Strategy imposes the integration of a gender dimension in all policies, planning and implementation of REDD+ projects.	Law No. 15/013 of 1 August 2015 on the modalities of application of women's rights and parity, available at http://leganet.cd . National REDD+ Framework Strategy of the Democratic Republic of Congo, available at https://www.regjeringen.no/globalassets/departementene/kld/kos/drc/national-redd-framework-strategy_drc_summary-for-decision-makers_2012 .
(4) IP and LC rights under international law	Yes	The DRC has been a signatory and ratified, the International Covenant on Civil and Political Rights, the United Nations Declaration on the Rights of Indigenous Peoples, the International Covenant on Economic, Social and Cultural Rights, the Convention on Biological Diversity, and the Nagoya Protocol, all of which enshrine the right to self-determination and the promotion and protection of minorities, including Indigenous Peoples and local communities.	SYMOCEL, Electoral Processes in the DRC: Inclusion of Minorities and Indigenous Pygmies, 2016.

	Rating	Detail	Reference/Source
(5) Land & resource rights	Partial	The Constitution of 2006, amended in 2011, recognizes collective ownership of land acquired in accordance with the law or custom (art. 34). However, as land ownership is exclusively vested in the State, the only rights over land recognized to individuals and communities are rights of enjoyment, use, usufruct, passage, as well as concessions, etc. Although the 1973 Land Law does not have a presidential ordinance to specify and allow for the full application of community land rights acquired in accordance with custom (art. 387, 388 and 389), progress has been made as several laws recognize the rights of local communities over resources. The 2002 Forestry Code and the decrees related to community forestry allow local communities to obtain local community forest concessions (<i>Concessions forestières des communautés locales</i>) with imprescriptible titles in perpetuity. Local communities can also obtain conservation concessions through which the government entrusts (totally or partially) the exploitation and management of forest and wildlife resources with a view to the conservation of biological diversity. However, community forestry and conservation concessions are not easily implemented by local communities given the costs, procedures and skills required for their implementation and management.	Dhedya Lonu, M-B., Le développement des communautés riveraines face au pluralisme juridique et à la politique de sécurisation foncière en RDC (Cas de la concession forestière n°033/05 de la Compagnie de Transport de l'Exploitation Forestière 'COTYREFOR' d'Alibuku en Province de la Tshopo), PhD Thesis, University of Kisangani, 2018. (Unpublished). RRI, 2021. Status of Legal Recognition of Indigenous Peoples' Local Communities' and Afro-descendant Peoples' Rights to Carbon Stored in Tropical Lands and Forests. Technical Report. FAO, Report on integrating biodiversity into forest management. Case study of the DRC. FAO, Mainstreaming biodiversity in forest management, in finalization.
(6) Community carbon rights	Partial	Although community carbon rights are not legally enshrined, it could be interpreted from different norms that holders of land rights may (at least partially) also hold carbon rights. These norms include the Forestry Code, the Land Law, the Nature Conservation Law, as well as their implementation texts such as Ministerial Order n°047/CAB/MIN/EDD/AAN/MML/05/2018 setting the procedure for the approval of REDD+ investments in the DRC, and the adoption of Law n°17/009 of 2017 authorizing the ratification of the Paris Agreement under the UNFCCC.	Rainforest Foundation UK, REDD et les droits communautaires en RDC : l'Usage des cartes participatives pour informer le programme intégré REDD du MAI-NDOMBE, 2018 (Mapping for Rights). Available at https://www.mappingforrights.org/wp-content/uploads/2020/05/REDD-et-droits-communautaires-en-RDC-2018.pdf .
(7) Free, prior and informed consent	Partial	There are a few references to FPIC in the Ministerial Order of 2018 on the homologation of REDD+ investment project and in the law on the protection and promotion of the rights of Indigenous Pygmy Peoples.	Democratic Republic of Congo, 2018. Arrêté Ministériel n°047/CAB/MIN/EDD/ANN/MML/05/2018 fixant la procédure d'homologation des investissements REDD+. Available at https://www.droitcongolais.info/files/960.05.18-Arrete-du-9-mai-2018_homologation-de-investigation.pdf . National REDD+ Framework Strategy of the Democratic Republic of Congo, available at https://www.regjeringen.no/globalassets/departementene/kld/kos/drc/national-redd-framework-strategy_drc_summary-for-decision-makers_2012.pdf .
(8) Formal benefit-sharing mechanism	Partial (reforms underway)	Benefit sharing is organized by Ministerial Order n°047/CAB/MIN/EDD/ANN/MML/05/2018 which sets up a mechanism defining the distribution of the DRC state's share of REDD+ products, and by requiring REDD+ investment holders to negotiate an agreement with stakeholders to develop a benefit sharing plan. However, to date, the DRC's Official Gazette has not published Annex 1 of the decree. Furthermore, environmental legislation and related legislation (e.g., land tenure, land use planning, agriculture, energy, taxation, etc.) have been undergoing reform for several years and will allow for the proper consideration of benefit sharing. [e.g., the Land Law with the land policy should specify the rights of local communities to rural land and describe the benefit-sharing mechanisms related to their use and exploitation of the resources on it].	National REDD+ Framework Strategy of the Democratic Republic of Congo, available at https://www.regjeringen.no/globalassets/departementene/kld/kos/drc/national-redd-framework-strategy_drc_summary-for-decision-makers_2012.pdf . RRI, 2021. Status of Legal Recognition of Indigenous Peoples' Local Communities' and Afro-descendant Peoples' Rights to Carbon Stored in Tropical Lands and Forests. Technical Report. Arrêté 026/CAB/MIN/EDD/AAN/KTT/04/2017 DU 08 NOV 2017 fixant le cadre de directives nationales sur le CLIP dans le cadre de la REDD en RDC.
(9) Formal grievance mechanisms	Partial	There are conflict and dispute resolution mechanisms in the DRC's National REDD+ Framework Strategy, but no law formally enshrines them in the REDD+ Framework. Only Ministerial Order n°047/CAB/MIN/EDD/AAN/MML/05/2018 of 2018, which sets the approval procedure for REDD+ investments in the DRC, specifies a feedback and appeal mechanism, with definitions in the manual annexed to the order. However, the Official Gazette of the Democratic Republic of Congo has yet to publish Annex I with the decree. Notably, some initiatives to resolve disputes can be observed in some early REDD+ initiatives.	National REDD+ Framework Strategy of the Democratic Republic of Congo, available at http://www.forestcarbonpartnership.org .
(10) MRV of social/rights concerns	Partial	The DRC finalized its SIS on 5 April 2022 but it remains untested, which does not allow an assessment to be made at this stage.	

Regarding gender equality and women's rights, the DRC has ratified relevant treaties and conventions, leading to the adoption of general standards for the promotion and protection of women's rights. Additionally, the Constitution establishes the principle of equality between men and women and condemns all forms of discrimination against women in various spheres. In the context of natural resources however, to date, only the national REDD+ framework strategy requires the cross-cutting integration of gender concerns in the policies, planning and implementation of REDD+ projects in the DRC.

The DRC validated its new safeguards information system in April 2022 to fulfill requirements for results-based payments. This system still needs to be disseminated among stakeholders at all levels before it is submitted to the UNFCCC. Conflict and dispute resolution mechanisms are currently included in the national REDD+ framework strategy, as well as in the Ministerial Order of 2018 on the homologation of REDD+ investment projects but cannot yet be easily assessed as they are not enshrined in laws that would formally include them in REDD+. The recent Law on the Protection and Promotion of the Rights of Indigenous Pygmy Peoples reinforces the reference to the right to free, prior and informed consent.

Progress is expected regarding the existing REDD+ benefit-sharing plans, as these will need to be standardized. These are currently established by a ministerial decree that is not in effect, because the Annex specifying the benefit-sharing mechanism was not published in the official gazette. The regulatory framework should include some of the 10 measures approved by the Ministerial Council to strengthen the forest sector in the DRC. Sectoral reforms in the areas of land tenure, land use planning, among other areas, will provide clarification regarding benefit-sharing arrangements.

Although the DRC's legal framework on climate change (including REDD+) is among the most advanced in Africa, there is more work to be done. Several reforms need to be undertaken for alignment with international REDD+ principles. Ongoing reforms also need to be completed and the gains made need to be crystallized in laws rather than being left as regulations that can be vulnerable to different interests and policy shifts. There is an opportunity to support these processes in the second letter of intent signed between the DRC and the Central African Forest Initiative (CAFI) which supports political engagements, including several reforms. It is important to remember that the law is only one factor: other contextual challenges (socioeconomic, cultural, political) also need to be addressed.

Box.2 On the Law on the Promotion and Protection of the Rights of Indigenous Pygmy Peoples

The legal recognition and protection of IPs requires an adequate and effective normative framework. Despite progress in the DRC since 2002, certain vulnerable peoples – such as the Indigenous Pygmy Peoples - have not been sufficiently protected by laws for nature conservation and the environment, including the Forestry Code.

Although the DRC is a signatory to international conventions recognizing Indigenous Peoples, there was previously no national law providing the relevant legal content and protection mechanisms. Indigenous Peoples have been equated with local communities, defined as "a population traditionally organized on the basis of custom and united by the bonds of clan or parental solidarity that underpin its internal cohesion. It is also characterized by its attachment to a territory". This definition does not allow for proper recognition of Indigenous Peoples, who are also marginalized by certain neighbouring peoples, exacerbating their already vulnerable state and experiences of extreme poverty.

The Law on the Promotion and Protection of the Rights of Indigenous Pygmy Peoples in the DRC intends to address this. In addition to providing a definition of Indigenous Peoples ("Hunter-gatherer peoples generally living in the forest," distinguished "by their cultural identify, their way of life, their attachment and closeness to nature and their endogenous knowledge"), it proposes a normative framework for the protection of Indigenous Peoples in the DRC.

This law is in line with the implementation of international commitments made by the DRC in various treaties and agreements (e.g., UNDRIP). Although general in nature, the law guarantees certain rights of Indigenous Peoples in the context of REDD+. Indeed, rights to land and resources are guaranteed in Chapter VI, in its articles 46 to 51 on property, which guarantee IP's collective and individual ownership of the land they occupy and other resources. The rights to benefits resulting from the use and commercial exploitation of lands and resources are also guaranteed by this law in Article 5, as well as access to information in the chapter on the right to education and health.

Despite the merits of this law, it still has some shortcomings. This is the case for the issue of women's rights, which is only mentioned in a general way in the area of combating sexual violence and in procedures for consultations, failing to recognize that women are often marginalized with regard to land and resource access; and for the issue of FPIC, as it only requires the prior consent of IPs in the case of the creation of protected areas on their land whenever this may directly or indirectly affect their way of life; it does not apply to other areas.

Acknowledgements

This research is part of CIFOR's Global Comparative Study on REDD+ (www.cifor-icraf.org/gcs). The funding partners that have supported this research include the Norwegian Agency for Development Cooperation, the International Climate Initiative (IKI) of the German Federal Ministry for the Environment, Nature Conservation, and Nuclear Safety, and the CGIAR Research Program on Forests, Trees and Agroforestry (CRP-FTA) with financial support from the CGIAR Fund Donors. We also want to thank the people interviewed for this research: Assani Ongala Hassan (Coordonnateur National REDD+/MEDD-RDC), Ursil Lelo Di Makugu (UNIKIS), Erick Kassongo (CODED), Gérard Imani Mugisho (UOB), Joseph Itongwa (Coordonnateur sous régional REPALEAC et Directeur Exécutif National ANAPAC-RDC), Daniel Mukubi Kikuni, MSc. (Expert au Ministère de l'Environnement et Développement Durable, Direction du Développement Durable ((DDD)), Division Biodiversité) and Alain Parfait N. Ngulungu (Point Focal -Tenure Facility/RDC). We also thank Pham Thu Thuy and Blaise-Pascal Ntirumenyerwa Mihigo for their reviews and comments.

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