



# **AFRICAN LAW STUDY LIBRARY WITH SPECIFIC EMPHASIS ON DEMOCRATIC REPUBLIC OF CONGO**

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# THE RULE OF LAW IN THE DEMOCRATIC REPUBLIC OF CONGO

## Preface

The rule of law is set out right from the preamble of the Constitution of the Democratic Republic of Congo<sup>1</sup> in the following manner:

“Led by our common desire to build in the heart of Africa, the rule of law and a powerful and prosperous nation based on a genuine political, economic, social and cultural democracy”

Article 1 of the Constitution, in its first paragraph confirms once again the importance that the Constitution grants the principle of the rule of law:

“The Democratic Republic of Congo is in its borders, as at 30 June 1960, a country governed by the rule of law, independent, sovereign, united and indivisible, social, democratic and secular.”

Given the importance of the courts under the rule of law, the Congolese Constitution specifically states in its Article 149 the basis of the latter in an independent judiciary:

“The Judiciary is independent of the Legislature and the Executive.”

What does this mean and what are the expectations linked to it? Again the Constitution expresses in clear terms. It is about justice and therefore also about the fight against injustice. Justice specifically consists of the fight against impunity, a thought similarly formulated in the preamble.

“Considering that injustice with its corollaries, impunity, nepotism, regionalism, tribalism, clanism and clientelism, by their many vicissitudes, have led to the reversal of general values and ruin the country;”

It is in this context that the new Constitution is established, which provides for not only democratic elections but promotes the rule of law.

Thus, hopes that are linked to the establishment of the rule of law are also expressed.

It is under these circumstances that we organized a seminar on the rule of law at the University of Lubumbashi. The rule of law affects all areas of law. It is for this reason that we selected a wide range of topics which were divided into three groups.

## 1. Structure, organization and functioning of the courts in Katanga Province

How are courts organized in Katanga?

How is the independence of judges guaranteed?

What is the role of customary law?

What is the role of traditional forms of conflict resolution?

<sup>1</sup> Constitution of the DRC, official gazette of the Democratic republic of Congo, 47<sup>th</sup> year, special edition, Kinshasa 2006





## 2. Themes relating to criminal law. What are the objectives of criminal proceedings?

How do we deal with injustice? What role does the question of the guilt of an individual play? How is it about the restoration of equality in the society, social compensation?

Finally the issue of the mission of the International Criminal Court was also a subject of the group discussions.

## 3. The rule of law also means legal security for citizens and businesses. That is why the third part of our seminar focused on issues of the foundations of the rule of law in terms of opportunities for economic development.

The better the economic rights are protected, for both nationals and foreigners, and the more it is done outside the border, the easier it will be to establish international trade relations. The protection afforded by the rule of law therefore promotes economic development.

Thirty doctoral students at the University of Lubumbashi have developed work on one of these themes. We chose the best works among them which were then published in this book. These works deal with issues which are closely related to African history and culture such as:

- Treatment of the guilty by customary law
- Conflicts of succession before a customary court and respect for the rights of women and child rights;
- Approach of the courts towards witchcraft.

Other topics discussed were those related to the effects of globalization on exports from the DRC to the European Union and imports from the European Union into the DRC, i.e. the importance of the law to successful economic development. The role of the International Criminal Court also combines an international approach with regional problems.

Any community or any state is based on principles and assumptions. The rule of law can only develop when the conditions under which it can flourish are clarified. Ernst-Wolfgang Böckenförde, expert on modern German public law and a long time judge at the Federal Constitution Court lists the following conditions for a democratic order and the rule of law:

“The existence of the state as a political power, its final decision on the legality and democratic order guaranteed within the state created as a result<sup>2</sup>.”

The rule of law thus presupposes a peaceful order guaranteed by the state. This causality is also reflected in the constitution of the DRC. Article 1 states: The motto of the Democratic Republic of Congo is “Justice-Peace-Work”. Peace and justice are essential elements of the rule of law. The DRC is integrated into the community of African states, it is a member of the organization of African Unity and endorsed and signed the African Charter of Human Rights. The Charter shows that human rights can

2 Ernst -Wolfgang Bockenford, Entstehung und Wandel des Rechtsstaatsbegriffs dans Recht, Staat, Freiheit [2006], p.168





and must be adapted to the African context. It does not just focus on the individual but also on the membership of everyone to the community, first to the family, then to the people, Art. 18, 19, 22.<sup>24</sup> Article 29 clarifies that the individual is part of a community and therefore has a duty to serve his national community, preserve and strengthen social and national solidarity. Perhaps this community aspect of the African Charter of Human Rights expresses one of the elements that distinguish the development of African Law compared with that of European law. It is perhaps no coincidence that several participants chose topics related to customary law, not to look into the past, but as a basis for development that is both realistic and modern.

Among our goals, was mainly a desire to guide young researchers on the legal reality and the possibilities to influence this reality. The themes of the published works illustrate that the rule of law is not just an abstract idea, but a guiding principle that can be molded and shaped in regional contexts and that may be developed with different facets and different details.

This publication intends to contribute to the strengthening of law which is coherent to social reality and to allow through critical analysis, the reconciliation of this law with international instruments.

We thank the University of Lubumbashi, the Rector Chabu Mumba, the Dean of the Faculty of Law Adnan Haddad, the leader of the UNESCO Chair, all the lecturers who participated, notably Professor Sango MUKALAY Adalbert and Professor Judge Mongo who facilitated the realization of this seminar. We also thank the Konrad Adenaur Stiftung, which supports this project and makes the publication of the works we have chosen possible. We hope that this will open and intensify the debate. Finally, we thank the participants for their efforts and achievements. As usual, the views expressed in the published works are those of the authors, not necessarily ours or those of the foundation.

**Hartmut Hamann**

**Kalala Illunga Matthiesen**

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<sup>3</sup> Alain Supion, *Homo juridicus, Essais sur la fonction anthropologique do Droit* [2005], p. 304 f. (Essays on the anthropological function of Law [2005] p. 304 f)







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# International and Constitutional Law Issues in Africa

Marc Michael Schultz

## A. Introduction

In many African states the making of political decisions is still influenced by personal interests and without respect for the principle of separation of powers.<sup>1</sup> It will take a long time yet before democratic processes can be sustained.<sup>2</sup> With thirteen civil wars, twelve armed conflicts and millions of refugees, Africa is the continent most affected by violence<sup>3</sup> and therefore a constant problem as far as international relations are concerned. The question of the independence of the judiciary is ever present during the democratization process.<sup>4</sup> The process begins with an agreement on a constitutional dispensation and the implementation of political and freedom-related rights.<sup>5</sup> The process of democratization includes promotion of the rule of law.<sup>6</sup> A constitutional state has a clear hierarchy of norms with the constitution at the top, to which all laws, policies of government and other agencies and judicial rulings are bound.<sup>7</sup> Other “non-negotiable” principles of the rule of law are separation of powers, placing public authority under the principle of legality, the principle of equality of all people before the law, constitutional courts, a sufficient number of independent judges and an independent judiciary.

The existence of contradictory legal traditions can lead to complications when implementing principles of the rule of law<sup>8</sup>, e.g. in non-secular states, where Sharia law is above the constitution. According to *Tetzlaff and Jakobeit* there were eight different forms of governance in Africa by 2005 differentiated by the level of the rule of law: democracies, which Kenya is part of since 2002, countries currently undergoing the process of democratization, such as Tanzania, façade-democracies, hereditary monarchies, military regimes, such as Uganda and Rwanda, failed states and unstable territories with no state monopoly of governance, e.g. Northern Uganda.<sup>9</sup>

## B. Guaranteeing the independence of the Judiciary

An independent judiciary is a human right. Article 10 of Resolution 217 A (III) of the United Nations which was passed on 10.12.1948 (Universal Declaration of Human Rights) reads:

*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

Therefore the issue of judicial independence is also a matter of safeguarding and respecting human rights.

<sup>1</sup> Tetzlaff/Jakobeit, p. 117

<sup>2</sup> Golaszinski, p. 2

<sup>3</sup> Tetzlaff APuz 2002, p. 3

<sup>4</sup> Abraham in: Russel/O'Brien, p. 25

<sup>5</sup> Woyke/Knelangen, p. 52; Merkel; Experts Conference, p. 2

<sup>6</sup> Howard in: Russel/O'Brien, p. 89

<sup>7</sup> See Russel in: Russel/O'Brien, p. 22: There are examples that function without being bound to a constitution, e.g. Great Britain, Sweden, New Zealand, Israel.

<sup>8</sup> Kurtenbach, p. 149

<sup>9</sup> Tetzlaff/Jakobeit, p. 121 ff

## I. Normative Foundations

The principles of judicial independence are clearly articulated in numerous declarations.<sup>10</sup> The foundation is formed by *Resolutions 40/32 and 40/146* which were passed by the General Assembly of the United Nations in 1985 and which comprise six categories<sup>11</sup>:

### Independence of the judiciary

1. *The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*
2. *The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*
3. *The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*
4. *There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*
5. *Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.*
6. *The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.*
7. *It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.*

### Freedom of expression and association

8. *In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.*
9. *Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.*

### Qualifications, selection and training

10. *Persons selected for judicial office shall be individuals of integrity and ability with*

<sup>10</sup> See detailed summary: International Commission of Jurists 2004

<sup>11</sup> GA 1985 Res 40/32 and 40/146

appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

### Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration. Professional secrecy and immunity
15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

### Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

These principles were refined by an international expert-group of chief justices and passed in 2002 as the **Bangalore Principles of Judicial Conduct**. It is a code of honour for judges and contains the following categories, each of which are explained in detail:<sup>12</sup>

<sup>12</sup> Bangalore Principles; in Europe the standards are not viewed uncritically, where as they are seen, for example, in some African countries as models.

- independence
- impartiality
- integrity
- propriety
- competence
- diligence

By 1999 a committee of international judges had already come up with a similar document known as the *Universal Charter of the Judge*.<sup>13</sup> Subsequently, the United Nations, in reference to the Resolutions 40/32 and 40/146, has severally called for the adoption of strengthening of the principles articulated there.<sup>14</sup> Individual groups of states and some individual states have adopted the Charter and now apply the standards. For African countries, the *African Commission on Human and Peoples' Rights* has developed principles and guidelines known as *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* and called on African states to adopt and implement them. In line with the basic principles of the UN, the document covers, among other things, the foundations for fair trial, the terms of service for the judiciary and guidelines for the appointment and dismissal of judges. It emphasizes the freedom of expression, freedom of association for the judges and calls upon states to provide sufficient resources and finances for the courts.<sup>15</sup> For African Commonwealth states, the *Latimer House Guidelines for the Commonwealth*<sup>16</sup> of 1998, which has since been modified to give the respect for human more prominence, plays a very important role by providing basic guidelines for national standards. This is in line with the UN Resolutions 40/32 and 40/146 as well as the Bangalore Principles the respect for human rights, which call for separation of powers, the right to a legal judge, sufficient financing and provision of resources for the judiciary and state guarantee of judicial independence through the establishment of a *Judicial Service Commission* responsible for the welfare of the judiciary.

Countries from the Asia-Pacific region have a similar document in the form of the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*<sup>17</sup> which contains 10 main categories and 44 subcategories of norms which take into account the uniqueness of specific countries, especially with regard to the appointment of judges. Subsequent to that the Australian Bar Association developed its own *Charter*.<sup>18</sup> For legal practitioners, the International Commission of Jurists has put together an 83-page compendium containing the basic guidelines for an independent judiciary as well as examples of administration of justice by international courts according to international standards.<sup>19</sup> The *Freedom House*<sup>20</sup>, the *Mo Ibrahim Foundation*<sup>21</sup>, the *Carl-Bertelsmann Foundation* and the *American Bar Association* have developed an index for assessing the rule of law and the independence of the judiciary.<sup>22</sup> In the subcategory "Independence of the Judiciary", the Mo Ibrahim Foundation assesses the situation on a scale of 1-100 (best) points<sup>23</sup> on the basis of the following issues and questions:

<sup>13</sup> Adopted by the Central Council of the International Association of Judges on 17<sup>th</sup> November 1999

<sup>14</sup> ECOSOC Resolution 2006/33

<sup>15</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

<sup>16</sup> Latimer House Guidelines for the Commonwealth

<sup>17</sup> Beijing Statement of Principles

<sup>18</sup> Charter of Judicial Independence, Australian Bar Association

<sup>19</sup> International Commission of Jurists, 2004

<sup>20</sup> SSC (Sub-Core Civil Liberties) Index

<sup>21</sup> Foundation of "Ibrahim Index of African Governance"

<sup>22</sup> Currently being reviewed.

<sup>23</sup> Data for 2008 was based on an assessment by the Freedom House SSC 2006 and 2007

- Is there interference with the judiciary by the executive or other political, economic or religious institutions?
- Are judges appointed and dismissed in a fair and transparent manner?
- Do judges make fair and independent judgments or do they make rulings in favour of the government or individual interests because of bribery?
- Do the executive, the legislature and other arms of government respect the administration of justice and is this implemented effectively?
- Do the large private companies respect the administration of justice and are rulings that go against the interests of the elite implemented?<sup>24</sup>

This project paper makes complementary reference to a scientific-theoretical aspect in its thematic relationship. *Russell* calls for a Theory of Independence of the Judiciary, which considers a political-scientific view<sup>25</sup> in order to properly depict the relationships between the judiciary and the political system.<sup>26</sup> It is evident that there is no closed theory in this regard.

## II. The Structure of the Judiciary in Rwanda, Tanzania, Kenya and Uganda

Based on what has been mentioned previously, an attempt will now be made to analyze the extent to which the basic principles of an independent judicial system are guaranteed and implemented in specific countries. The basic principles of an independent judiciary can be depicted schematically as follows:

Basic Prerequisites for an Independent Judiciary				
Basic Conditions	Prerequisites for The office	Terms of Service	Personal Rights	Political Conditions
Precedence of Statutes corruption	Transparent elections	Security of tenure Adequate pay and Pension	freedom of Expression religious freedom	No tolerance for No interference from executive
Administration of justice/ Hierarchy of norms	No discrimination Professional training	Transparent promotion and terms of service	Freedom of association	Respect for court rulings
Responsibility for own Judicial affairs		Right to official secrecy		No interference by ruling elite
Financial Independence		Immunity Fair disciplinary code		
Guarantee of Independence				

### 1. Summary: Political Situation

First of all the political science aspect must be taken into account by considering basic background information on the political situation in the respective countries or the political framework in which the judiciary is embedded.

<sup>24</sup> Methodology, Freedom House, p. 10

<sup>25</sup> Compare Russell in: Russel/O'Brien, p.2

<sup>26</sup> Ibid. and p. 11





## a) Rwanda

Rwanda attained independence from Belgium in 1962. In “the fastest genocide of modern times”, using simple weapons, machetes, spears and clubs, 800,000 people were murdered in just 100 days, translating to five murders per minute - not even the murder machinery of the Nazis was that fast.<sup>27</sup> These words can be used to describe the political and social background situation in Rwanda in 1994. There was no separation of powers; hardly any trained judges and all judicial structures were destroyed.<sup>28</sup> In spite of these circumstances Rwanda decided, as opposed to South Africa, to adopt a legal process of coming to terms with the genocide. Today Rwanda is one of the poorest countries in the world.<sup>29</sup> Despite being an autocratic state, Rwanda receives development aid from donors like never before.<sup>30</sup> The democratization process began after the genocide and the victory of the *Rwandan Patriotic Front* (RPF) and the subsequent ascent to power by the current president *Kagame*.

A new constitution, which does not conform to international democratic standards, was introduced in 2003.<sup>31</sup> Since then the RPF rules in an authoritarian manner and controls the whole territory.<sup>32</sup> The president of the country is elected directly. He appoints the prime minister. There is a two-chamber system comprising the Senate and the House of Representatives. The senators make decisions on laws and other constitutional matters, laws governing defence and security matters as well as criminal and electoral law.<sup>33</sup> The freedom of assembly, which is guaranteed in the constitution, is however restricted in reality.<sup>34</sup> Press freedom is subject to legal restrictions, but religious freedom is generally respected.<sup>35</sup> According to the ranking by Freedom House, Rwanda received a grade of 6 for political rights and 5 for civic rights. Rwanda is therefore classified as not free.<sup>36</sup>

## b) Tanzania

After German and British colonial rule, the then Tanganyika received its independence in 1961. The Republic of Tanganyika and the Republic of Zanzibar were united to form the United Republic of Tanzania and Zanzibar in 1964. The state also belongs to the poorest countries in the world, though economic development is visible.<sup>37</sup> The country had a social one-party system until 1992. Today it is a central presidential republic. Zanzibar is largely autonomous and has its own government and its own jurisdiction. The parliament consists of representatives elected by the people, representatives of Zanzibar, members nominated by the president, a fixed number of women (quota) and the *Attorney General*<sup>38</sup>. There is separation of powers. *Freedom House* awards 4 points for political rights, 3 for civic rights and classifies the country as “partially free”. An anti-corruption law which was passed in 2007 is intended to tackle the widespread corruption, a fact which *Freedom House* particularly emphasizes.

<sup>27</sup> Bitala in: SZ of 23.03.2004

<sup>28</sup> Governance World Watch; Wenke, p. 26 ff.

<sup>29</sup> Kerler/Roggenkamp

<sup>30</sup> See: Stroh GIGA Focus 11/2007

<sup>31</sup> Ibid.

<sup>32</sup> Kerler/Roggenkamp

<sup>33</sup> Stroh GIGA WP 43/2007

<sup>34</sup> Ibid

<sup>35</sup> Rwanda 2008, Freedom House

<sup>36</sup> Ibid; 1 = best grade, 7 = worst grade, Methodology, Freedom House

<sup>37</sup> Tanzania (2008), Freedom House

<sup>38</sup> Chief government legal advisor



## c) Kenya

British colonial rule in Kenya officially came to an end in 1963. *The Kenya African National Union (KANU)*, which was formed in 1960, governed the country until 2002. The president of the country has far-reaching powers to the extent that for a long time political parties and parliament only played a subordinate role in a state with a presidential system of governance.<sup>39</sup> According to the report from *Human Rights Watch*<sup>40</sup>, the multiparty system has developed further since the defeat of president Moi in 2002. Today Kenya has one of the most independent parliaments in Africa. Despite initiatives by the current government of *Kibaki*, there is still widespread corruption and patronage in official circles. Development aid accounts for only 7% of Kenya's budget, such that the influence from donor-countries is relatively minimal. *Freedom House* awards 4 points for political rights and 3 for civic rights. Generally Kenya is classified as "partially free".<sup>41</sup>

## d) Uganda

Uganda attained its independence in 1962 after British colonial rule. After a coup in 1971, General Idi Amin took over power and pursued and murdered hundreds of thousands of his political opponents. His successor, Obote, continued with the rule of terror after winning elections in 1980 and killed more than one million people. Uganda is associated with human trafficking and child-soldiers. Today Uganda is a presidential republic with a multi-party political system. The last elections, which saw president Museveni elected for the third time, took place in 2006. His political party, the *National Resistance Movement (NRM)*, enjoys a two-thirds majority in parliament. The parliament has a fixed representation quota for women, disabled people, youth and soldiers. The death penalty, which is still in place, is no longer applied for civilians. Due to the violent activities of the *Lord's Resistance Army* in Northern Uganda, the area is still politically unstable.<sup>42</sup> *Freedom House* awards 5 points for political rights and 4 for civic rights and generally classifies Uganda as "partially free"

## 2. The Structure of the Judiciary

Except for Rwanda, the countries covered in this study have similar legal traditions. Before independence in Rwanda, written *civil law* was applied for whites and customary law for the indigenous population. The current legal system is based on written law and customary law but also contains aspects of Anglo-Saxon *common law*. The legal systems of Tanzania, Kenya and Uganda are based on the Anglo-Saxon *common law* and customary law. Today they also contain elements of *civil law* and Islamic law (Sharia, applicable only in family disputes for Muslims). With this background the aforementioned four countries gave themselves constitutions at independence, which have since been altered severally through amendments, expungement, or complete reviews. The current constitution applicable in Rwanda came into force on 4<sup>th</sup> June 2003 and was last amended on 13<sup>th</sup> August 2008.<sup>43</sup> The revised constitution of Tanzania dates back to 1977.<sup>44</sup> The current constitution applicable in Kenya came into force in 1994; an amended version was rejected through a referendum in 2005. Uganda gave itself the third constitution in 1995.<sup>45</sup>

<sup>39</sup> Ahner-Tönnis

<sup>40</sup> Kenya Events of 2007, Human Rights Watch

<sup>41</sup> Kenya (2008), Freedom House

<sup>42</sup> Inwent, Uganda and Uganda (2008), Freedom House

<sup>43</sup> Constitution of the Republic of Rwanda, Ministry of Justice, Codes and Laws of Rwanda

<sup>44</sup> Nyanduga/Manning

<sup>45</sup> Mahoro



## a) Establishment of Separation of Powers in the Constitution

According to international norms, the state must guarantee separation of powers and independence of the judiciary and these principles must be anchored in the constitution because of their importance.

**Rwanda** standardizes the affairs of the judiciary in Section IV, Capital 5 of *The Judiciary* and guarantees its independence from the legislature and the executive under Paragraph 1 in Art. 140.<sup>46</sup>

**Tanzania**, by a 13<sup>th</sup> amendment to the constitution through Article 107 B, apart from confirming the separation of powers in Article 4, has generally made it clear only the judiciary is entitled to the administration of justice and operates independently in this regard.<sup>47</sup>

**Uganda's** constitution contains a similar provision in Article 128 which guarantees the courts independence and freedom from manipulation by persons or government agencies.<sup>48</sup>

**Kenya** is the only one that has not clearly declared separation of powers or independence of the judiciary. In 1967 the parliament passed a bill (*Judicature Act*<sup>49</sup>) which binds the judiciary to the constitution, the laws of the *Commonwealth* and non-repugnant customary law. The draft constitution rejected through a referendum (2004) however contained a clear statement on separation of powers and independence of the judiciary in Capital 13 (Art. 185).<sup>50</sup>

According to international standards, the judiciary must also be financially independent from the executive. **Rwanda** guarantees the judiciary financial and administrative autonomy in Article 140 of its constitution. In **Tanzania**, the expenditure of the judiciary is financed by national budget and is not dependent on the annual budgetary debates of parliament.<sup>51</sup> In **Kenya** there is no fiscal independence of the judiciary since, according to Art. 104 of the constitution, the judiciary budget is determined by parliament.<sup>52</sup> In comparison with that, Art. 128 (5) of the constitution of Uganda stipulates that all administrative costs of the judiciary, all salaries, pensions and other expenses are financed from the national budget. To this extent, the judiciary is granted budgetary autonomy.<sup>53</sup>

## b) Structure of the Administration of Justice

International standards stipulate that the administration of justice should only be carried out by law courts according to the laws of a country. In a constitutional state there is hierarchy of norms and administration of justice, defined competencies for the administration of justice and rules that ensure fair trial. With international assistance in most cases, these countries have implemented reforms, some of which are still ongoing, and now formally conform to these requirements.

<sup>46</sup> Constitution, Codes and Laws of Rwanda

<sup>47</sup> Reference in Munuo 2006, S. 5 and Keregero; the amendments have been published only in Kiswahili

<sup>48</sup> Constitution, Laws of Uganda

<sup>49</sup> Chapter 8, Kenya Law Reports

<sup>50</sup> International Commission of Jurists, 2005, p. 14

<sup>51</sup> Keregero

<sup>52</sup> Wahiu, p. 12

<sup>53</sup> Constitution, Laws of Uganda





## aa) Rwanda

There are three constituent pillars for Rwanda's judiciary today: The International Court of Justice in Arusha, Tanzania, which should remain out of focus in this context, regular and special courts (Art. 143 of the constitution<sup>54</sup>). The *Gacaca-Courts*, established to deal with genocide-related cases, belong to the last group. New courts have been established, trial procedures and judicial structures have been put in place and professional and administrative standards have been set.<sup>55</sup> The *Supreme Court* is at the top of the system of regular courts, followed by the *High Court* with comprehensive jurisdiction. Below it are middle-level and lower courts of law. The *Gacaca* and military courts belong to special courts. Apart from these, there are other special courts (such as commercial courts) and others that may be established by the law as the need arises. The decisions of the *Supreme Court* cannot be contested and are binding for all courts, except through an act of clemency (Art. 144). The *Supreme Court* and the *High Court* each have a president and a vice-president (Art. 146, 149) and other professional judges. Middle-level and lower courts were established through the addition of Articles 150 and 151. Chapter V, Paragraph 2, Subsection 2 deals with special courts - *Gacaca* Courts - which only exist in Rwanda. The jurisdiction of the *Gacaca* Courts covers only cases of genocides and crimes against humanity. The *Gacaca* courts are hierarchically structured and divided according to the 1<sup>st</sup> up to 4<sup>th</sup> categories of crime. The most serious crimes of the 1<sup>st</sup> category are handled by the state courts.<sup>56</sup>

The Structure of the Administration of Justice in Rwanda		
Supreme Court		
Regular Courts	Special Courts	
High Court		Military High Court
Provincial Courts out of the City of Kigali	Gacaca Provincial	Military Court Court
District Courts	Gacaca District Court, Category 2 crimes	
Municipality/Town Courts	Gacaca Sector, Category 3 crimes	
	Gacaca Cell, Category 4 crimes	

## bb) Tanzania

In accordance with Sec. 4, Chapter 5 of the constitution, the highest organ of the judiciary is the High Court (Art. 108)<sup>57</sup>, which is made up of the *Principal Judge* and at least 15 other judges, who are suggested by the *Judicial Service Commission* and appointed by the president of the republic (Art. 109). The *Principal Judge* assists the *Chief Justice*. Section III of the constitution allows for the establishment a judiciary for Zanzibar with its own *High Court*. The *High Courts* have unlimited jurisdiction and are also responsible for legal matters of admiralty (merchant navy). They are appellate courts of the lower courts. The

<sup>54</sup> Constitution of the Republic of Rwanda, Codes and Laws of Rwanda

<sup>55</sup> Governance World Watch

<sup>56</sup> See in detail: Wenke

<sup>57</sup> Excerpt from the Constitution from: The World Law Guide

appellate court of the *High Court* and other lower courts with wider jurisdiction<sup>58</sup> is the *Court of Appeal* (Art. 117), headed by the *Chief Justice* who is appointed by the president and also heads the whole judiciary. Section VI is deals with the establishment of a special court (*Special Constitutional Court of the United Republic*, Art. 125) which does not interfere with the jurisdiction of the other courts but deals with constitutional matters (Art. 126). It consists of former judges of the highest courts (Art. 127). The jurisdictional hierarchy continues with the *Magistrates Courts*, established in accordance with the *Magistrates' Courts Act of 1994*. They include the *Resident Courts* in larger cities and the *District Courts*, of which several can be found in one District. On the lower end are the *Primary Courts* with jurisdiction over civil and criminal cases. Tribunals are a special component of the judiciary. A further component was established through a special law no. 102/2002 to deal with land disputes (*Land Disputes Settlements*).<sup>59</sup> Due to the Islamic majority of Zanzibar there are *Kadhi's Courts* and *Kadhi's Appeal Courts* in the territory.

Structure of the Judiciary in Tanzania		
Court of Appeal		Special Constitutional Court of the United Republic
Regular Jurisdiction		Special Courts
High Court Mainland	High Court Zanzibar	Tribunals with High Court Status
Constitutional matters, election disputes Merchant navy		Industrial Court of Tanzania, Tax Revenue Appeal Court Loans and Advances Realization Trust Tribunal <sup>60</sup>
Magistrate Courts	Special Courts	Kadhi's Appeal Court Court Martial
Primary Courts	Special Courts	Kadhi's Court Military

### cc) Kenya

The Judiciary is mentioned in Chapter IV of the constitution in three paragraphs.<sup>61</sup> Part 1 covers the hierarchy of the courts at the top of which is the *Court of Appeal* (Sec. 64), followed by the *High Court* (Sec. 60) and spells out the composition of these courts. The *Court of Appeal* deals with legal disputes arising from the High Court. The Court of Appeal has extensive jurisdiction in all areas of civil and criminal law, deals with constitutional matters and is also the appeals court for the lower courts. The parliament may establish further courts (Sec. 65). Section 66 establishes Kadhi's Courts for Muslims with jurisdiction over personal affairs, marriage, divorce and inheritance. Apart from these, there are the lower courts (*Chief Magistrate's Court*, *Senior Principal Magistrate's Court*, *Principal Magistrate's Court*, *Senior Resident Magistrate's Court*, *Resident Magistrate's Court* and *District Magistrate's Court*) as well as other special courts e.g. Industrial Court and Children's Court (est. 2002).

<sup>58</sup> See Act no. 17 of 19.11.1993, The World Law Guide

<sup>59</sup> World Law Guide

<sup>60</sup> nola

<sup>61</sup> Constitution of Kenya: See also summary in: International Commission of Jurists 2005, p. 8 f.

There is no constitutional court; however there is a relevant department in the High Court. Quasi-courts such as the *Industrial Court* and the *Rent Tribunal* (for rent disputes) were also created.<sup>62</sup> Recently, anti-corruption courts have also been created.<sup>63</sup> The *Magistrate's Courts Act* spells out the jurisdiction of the lower courts and the Code of Civil and Criminal Procedure.<sup>64</sup>

Structure of the Judiciary in Kenya			
Court of Appeal			
Regular Jurisdiction	Special Courts		
High Court			
Senior Principal Magistrate's Court	Special Courts & Tribunals	Kadhi's Courts	Military Courts
Principal Magistrate's Court	Children's, Industrial Court		
Senior Resident Magistrate's Court			
Resident Magistrate's Court			
District Magistrate's Court			

#### dd) Uganda

The structure of the judiciary is spelt out in Chapter 8 of the Constitution in Article 129. At the top of the judiciary pyramid is the *Supreme Court of Uganda*, followed by the *Court of Appeal of Uganda*, the *High Court of Uganda* and the lower courts. The *Supreme Court* comprises the *Chief Justice* and other judges whose number is determined by parliament (Art. 130). It is the highest court of the land and may deviate from previous rulings and pronounce a new one as binding. The *Chief Justice* is the most senior judge and is responsible for the administration of all courts in Uganda (Art. 133). The *Court of Appeal* is constituted comparatively. It is headed by the *Deputy Chief Justice* (Art. 134). In accordance with Art. 137, the *Court of Appeal* has the special function of a *Constitutional Court*. The *Principal Judge* is the head of the High Court (Art. 138). Made up of 5 departments, it is the appellate court of the lower courts. There are also three levels of Magistrate's Courts. Uganda is currently subdivided into 26 *Chief Magistrates-Districts*.<sup>65</sup> The *Judicature Act* (Chapter 13)<sup>66</sup> spells out the structure of the judiciary in more detail. There are also special courts and tribunals such as those for tax matters, family cases, land ownership as well as court martials and *Kadhi's Courts*.<sup>67</sup>

<sup>62</sup> Ojienda/Aloo

<sup>63</sup> Thitu, p. 23

<sup>64</sup> Chapter 10, Kenya Law Reports

<sup>65</sup> Gloppen/Kibandama/Kazimbazi

<sup>66</sup> Judicature Act, Laws of Uganda

<sup>67</sup> Mahoro, JSIU



Structure of the Judiciary in Uganda			
Supreme Court			
Regular Jurisdiction		Special Courts	
Court of Appeal/Constitutional Court		Court Martial Appeal Court	
High Court		Military Courts	
Chief Magistrate's	Special Courts	Kadhi's Court	Military Court
	Industrial, Labour, Family		
Magistrate's I			
Magistrate's II			

### C) Administration of Justice

One of the basic elements of an independent judiciary according to international standards is a clearly defined judicial authority that does not rest with the executive. Independent judicial organs have been established in all the four countries in question.

#### aa) Rwanda

The constitution of Rwanda stipulates that the Judiciary is subject to the High Council of the Judiciary (Art. 157). It is responsible for supervising and advising the executive in all judicial matters, decisions regarding the appointment and dismissal of judges, general administrative matters of the judiciary, disciplinary matters of regular jurisdiction (exception: President and Vice-President of the Supreme Court) and establishment of new courts or new laws affecting the administration of justice. Article 158 deals with its composition, which shows that actually there is closeness to the executive since a majority of the members of council are appointed by the president. The Council consists of:

- President of the Supreme Court
- Vice-President of the Supreme Court
- 1 judge of the Supreme Court, elected by his peers
- Presidents of the High Court and the Commercial High Court
- 1 judge of the High Court, 1 judge of the Commercial Court, elected by peers
- 1 judge of the Commercial Court as a representative of the staff
- Judges of the Intermediate Courts as representatives of the staff
- Judges of the Primary Courts as representatives of the staff
- 2 deans of the law faculties of recognized universities, elected by their colleagues
- 1 representative of the Law Society, elected by his colleagues
- 1 representative of the Ministry of Justice, appointed by the minister
- President of the National Human Rights Commission
- The Ombudsman
- Other officials, whose number is determined by the law





According to statutory provisions, the constitutional law (*organic law*) no. 2 *Determining the Organization, Powers and Functioning of the Superior Council of the Judiciary* of 20.3.2004 spells out the individual organs, scope of authority and functions as well as details of disciplinary code for the highest judicial authority.<sup>68</sup>

## **bb) Tanzania**

In Tanzania the same duties are carried out, in accordance with Section II Art. 112 by the Judicial Service Commission chaired by the Chief Justice. Similarly, the closeness to the executive is a matter of concern due to the members appointed by the president:

- Chief Justice
- Attorney-General<sup>69</sup>
- 1 judge of the Court of Appeal, appointed by the president in consultation with the Chief Justice
- Principal Judge of the High Court
- 2 members appointed by the president

Members of parliament cannot be members of the commission. Further details are spelt out through Legal Gazette no. 2/05 (*Judicial Service Act*).<sup>70</sup> The *Judicial Service Commission* therefore oversees the general administration of justice, the professional affairs of judges and judicial officers of the lower courts, implementation of service and disciplinary guidelines, etc. The commission is responsible for hiring of judges of the lower courts and is empowered to set up an ethics committee to deal with disciplinary matters and terms of service for judicial officers. A similar arrangement exists in Zanzibar through the Zanzibar Judicial Service Commission Act, 2003 (Act No. 13).<sup>71</sup>

## **cc) Kenya**

A similar arrangement for Kenya can be found in Paragraph 3, Art. 68 of the constitution. The Judicial Service Commission comprises the following members:

- The Chief Justice
- The Attorney General<sup>72</sup>
- 2 members appointed by the president from among the judges of the High Court and the Court of Appeal
- The Chairman of the Public Service Commission

The closeness to the executive is also evident here. The Judicial Service Commission is not subject to the control of any other authority, but requires the approval of the president to issue directives affecting other persons or offices in the public service (68, 3). In accordance with Art. 69, the Commission is responsible for the functional and disciplinary supervision of the judges of the lower courts (applies also to the Kadhi's Court) and other judicial officers. It is responsible for the appointment and dismissal of judges of the lower courts.

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<sup>68</sup> Ibid.

<sup>69</sup> Top government legal advisor

<sup>70</sup> Ibid

<sup>71</sup> The Zanzibar Judicial Service

<sup>72</sup> As chief government legal advisor Commission



## dd) Uganda

The establishment of a *Judicial Service Commission* is stipulated in Art. 146 of the constitution. It comprises members appointed by the president after the approval of parliament. The members are:

- The Chairman
- A representative who qualifies to hold the office of a judge of the Supreme Court
- A member appointed by the Public Service Commission
- 2 advocates with not less than 15 years professional experience, nominated by the Uganda Law Society
- 1 judge of the Supreme Court, appointed by the president after consultation with judges of the Supreme Court, the Court of Appeal and the High Court
- 2 members appointed by the president, who are not lawyers
- The Attorney General as an ex-officio member.

The Chief Justice, his representative and the Principal Judge cannot be members of the commission. According to Art. 147, the commission has the following functions: Advise the president on the appointment and dismissal of judges, establish and maintain an independent and efficient machinery for administering justice for all in Uganda through recruiting, training, motivating and disciplining judicial officers, and promotion of public awareness and access to justice.

The commission also advises the government on how to improve the judiciary. According to Art. 148 it is also responsible for deployment of judges (with the exception of the most senior judges) and other judicial officers. Details about the commission and its functions are spelt out in the *Judicial Service Act (Chapter 14)*.<sup>73</sup>

## d) The Judiciary

The possibility of exerting influence on the judiciary is most evident when it comes to the appointment and dismissal of judges. Objective guidelines could at least promote transparency of the process. In all the four countries the judges of the highest courts are appointed by the respective presidents.

### aa) Appointment and Dismissal of Judges

In **Rwanda**, the procedure for the appointment and dismissal of judges of the *Supreme Court* is stipulated in Art. 147 which was introduced into the constitution in 2008. The President and the Vice-President of the Supreme Court are appointed by the President of the republic in consultation with the cabinet and the High Council of the Judiciary. They must be lawyers with at least eight years of professional experience (five years for doctoral graduates) and possess demonstrated administrative qualities. They may only be dismissed from their positions on grounds of improper conduct, incompetence or serious professional indiscipline if this is demanded by at least 3/5 of the members of parliament and senators and when 2/3 of the elected members of parliament and senators approve.

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<sup>73</sup> Judicial Service Act, Laws of Uganda





This guideline applies for all judges of the *Supreme Court*, in accordance with Art. 148. The names of at least 2 judges must be suggested for each position. They must be elected by an absolute majority of the Senate. A similar clause applies for the *High Court* in Art. 149. Article 12<sup>74</sup> of the Law No. 6 BIS/2004 on the *Statutes for Judges and other Judicial Personnel* of 14.4.2004 which stipulates that the *Superior Council of the Judiciary* is responsible for the appointment, promotion, transfers and dismissal of judges (except for military courts).

**Tanzania's** constitutional gives the president of the republic immense powers with regard to the appointment of judges. Apart from the *Chief Justice*, all the judges of the highest courts in Tanzania are appointed by the president, after their names have been suggested by the *Chief Justice* (118). They must not be members of other courts (119). The Judges of the High Court must be experienced lawyers. However, according to 109 (8) of the constitution, the president of the republic may, in exceptional cases, deviate from this regulation. The president is also responsible for the appointment of judges of the Resident Magistrate's Court. He has however delegated this authority to the Judicial Service Commission.<sup>75</sup> According to Art. 113 (1) a, the president has the right to deploy judges of the Magistrate's Courts, but in b, it is the responsibility of the Judicial Service Commission to dismiss these judges. The judges of the highest courts cannot be dismissed during their tenure of office, except in the event that they become incapacitated or bankrupt. Their dismissal must be carried out in a special procedure through a commission (Art. 110 and 120). A similar procedure applies for the judges of the District and Resident Magistrate's Courts. The dismissal of judges of the lower courts is the responsibility of a Special Commission of the Judiciary.<sup>76</sup>

In **Kenya** Sec. 61 of the constitution empowers the president to appoint the judges of the *High Court* and, in accordance with Sec. 62, other judges after recommendation by the *Judicial Service Commission*. According to Sec. 64, this also applies to the judges of the *Court of Appeal*. The professional qualifications mandatory for the office of a judge of the *High Court* are spelt out in Sec. 61 and apply to the judges of the *Court of Appeal* as well. They must be qualified lawyers with at least seven years of professional experience as a judge or lawyer in the Commonwealth. The constitution also spells out the exceptional cases in which a judge may be dismissed and the procedure thereof (Sec. 62). According to the constitution, the judges of the two highest courts may only be dismissed by the president on medical grounds or other reasons which make it impossible for them to continue to carry out their duties on the recommendation of a tribunal set up by the president. Otherwise the *Judicial Service Commission* is, in accordance with Sec. 69, responsible for the appointment, dismissal and enforcing discipline among judges. Since the members of the commission are appointed by the president, there is always a risk of interference and influence by the executive on the judiciary at all levels.<sup>77</sup>

Art. 142 of the constitution of **Uganda** gives the president of the republic powers to appoint all judges of the highest courts in consultation with the *Judicial Service Commission* and after the approval of parliament. If the position of a judge of the highest court falls vacant, the president may, after consulting with the *Judicial Service Commission*, fill this position even with someone who has attained retirement age. The requirements for the

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<sup>74</sup> 14/4/2004-Law No. 6 BIS/2004 on the Statutes for Judges and Other Judicial Personnel, Codes and Laws of Uganda

<sup>75</sup> Keregero

<sup>76</sup> Ibid

<sup>77</sup> Radical Surgery in Kenya's Judiciary, Global Corruption Report, p. 222





office of a judge are described in detail in Art. 143. To qualify for the office of the *Chief Justice*, one must have served as a judge of the Supreme Court of a court of comparable jurisdiction or an advocate for at least 20 years. For the other higher courts, the same rules apply with a reduction of the years of experience to fifteen or ten years. As in the other three countries, judges in Uganda may only be dismissed under very exceptional circumstances, e.g. due to incapacity for office or professional misconduct (Art. 144 2). Under these circumstances, the president may only dismiss the judge after an investigating tribunal recommends the dismissal. The *Judicial Service Commission* is responsible for the appointment of all other judges of the lower courts (except military courts) according to Art. 148 of the constitution.

### **bb) Terms of Service**

According to international norms the state has a responsibility to create decent working conditions for its judiciary. Among other things, this includes the guarantee of a long working relationship, guidelines on safeguarding salaries and pensions as well as immunity and the obligation to maintain secrecy. In this way the risk of external influence through bribery or being pressurized by influential persons can be countered, thereby guaranteeing judges security as they administer justice independently.

Favouritism or nepotism in the office can be eliminated by putting in place clear guidelines for promotion on one hand and implementing a strict disciplinary code. Confidence in the judiciary can be instilled if there is a code of ethics for the judiciary which meets international standards. This will lead to fair administration of justice.

Comments can be made about some of the areas mentioned here. In all the countries mentioned, the guidelines for judicial office have only been formulated in the constitution for judges of the highest courts. In this regard there is guarantee of security of tenure until retirement at a specific age in the constitutions of Rwanda (Art. 142), Tanzania (Art. 110, 120), Kenya (Art. 62,64) and Uganda (Art. 144).

Rwanda put in place a policy<sup>78</sup> through Law No. 6 BIS/2004 on the *Statutes for Judges and other Judicial Personnel* of 14.4.2004<sup>79</sup> which clearly spells out the details of the terms of service for judges and other judicial officers. The policy covers all aspects of judicial office, from the oath of office to dress code, code of discipline, working hours, remuneration, retirement, etc. In Art. 142 of its constitution, Tanzania guarantees the security of judicial remunerations and has since put in place guidelines for retirement for judges of the highest courts through Law No. 16/07 (The Judges Remuneration and Terminal Benefits).<sup>80</sup> The salaries of judges are determined by the president and paid from the state coffers (Section II 4). There are also further guidelines on pension and other benefits. During the tenure of a judge, the terms may not be changed to the disadvantage of the office-holder. This however does not apply for magistrates. Magistrates in Kenya and Uganda do not have this security of tenure as well.

Uganda's constitution guarantees in Art. 128 that no changes can be made to the disadvantage of serving judges of the highest courts. According to Art. 147, the Judicial

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<sup>78</sup> Ibid

<sup>79</sup> International Commission of Jurists, 2005, p. 20

<sup>80</sup> World Law Guide







Service Commission is responsible for all matters affecting the terms of service of judicial officers. There are still deficits in the current legal guidelines. There is, for example, no guideline on pension and other benefits (accommodation, transport). The Judicial Service Commission is currently working on an appropriate policy for judges at all levels.<sup>81</sup>

The process of judicial reforms in Kenya is not yet complete. A 183-page report of the Subcommittee for *Ethics and Governance of the Judiciary* recommends in several places the establishment of a policy to streamline remuneration and other structural aspects of the judiciary.<sup>82</sup> By 2004 the Chief Justice had announced the passing of a law with relevant content on hiring, promotion and professional practice for judicial officers.<sup>83</sup>

The constitutions of Rwanda and Tanzania do not contain guidelines on the provision of judicial immunity. Kenya provides immunity for judges in the Judicature Act,<sup>84</sup> and Uganda through Art. 128 of its constitution.

Formally, all four countries have laid down the guidelines for disciplinary procedures. For the judges of the highest courts appointed by the president, the respective justice commissions form a special investigating tribunal which forwards its recommendations for the dismissal of a judge to the president who can then dismiss the judge. The judicial service commissions of all the countries are responsible for drafting codes of discipline and ensuring their implementation.

All the four countries have put in place a code of ethics in accordance with the *Bangalore Principles*. In Rwanda the Law No. 0/2004 of 29.05.2004 *Relating to the Code of Ethics for the Judiciary*<sup>85</sup> is applicable. Five articles in Chapter 3 deal with the incompatibilities of judicial office. Accordingly, a judge is not allowed to take up any additional employment, political duties or be a member of a political party; he cannot be a director of a company and a member of his family cannot work in the same court. Chapter 4 deals with the sanctions. In Tanzania, Art. 134 A prohibits a judge from belonging to a political party. In line with the Bangalore Principles, a code of conduct covering four areas was adopted at the Conference of Judges and Magistrates in March 1984 (*Code of Conduct for Judicial Officers of Tanzania*). The code expects judges, among other things, to recognize the dignity of their office and that they cannot take advantage of it or accord themselves privileges. Judges must observe the laws, must not be biased, must carry out their duties with thoroughness and avoid nepotism and favoritism. Their financial affair must be straightforward. They may engage in additional work to a limited extent, but not as legal advisors. Kenya (*Judicial Service Code of Conduct and Ethics*)<sup>86</sup> and Uganda<sup>87</sup> (since 2003) also have similar laws. Fair and constitutional trials must be guaranteed in all the four states.

### 3. Application of the Law

Apart from having it entrenched in the constitution, the independence of the judiciary in a given country is best determined by how it is upheld in practice. Formally all the four countries meet the standards of an independent judiciary. The reality when it comes to application is, however, not always in harmony with those standards.

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<sup>81</sup> Kasule

<sup>82</sup> Otieno

<sup>83</sup> Judicial Service Bill, International Commission of Jurists, 2005, p. 29

<sup>84</sup> The penal immunity of judges is in the Penal Code, Cap 1 (15)

<sup>85</sup> Codes and Laws of Rwanda

<sup>87</sup> Code of Judicial Conduct



## a) Rwanda

According to the assessment and ranking by the *Mo Ibrahim Foundation*, Rwanda is awarded 42.9 points in the category of “Independence of the Judiciary” and therefore placed at position 26 out of 48 African states.<sup>88</sup> In its report for 2008, *Freedom House* refers to the progress of reforms due to the establishment of new courts and employment of properly trained judicial officers, but also points out that the judiciary is still preoccupied with defending its independence from the executive.<sup>89</sup> This corresponds to the observations made by *Human Rights Watch*. In its latest 103-page report on judicial reforms in Rwanda, the organization comes to a similar conclusion. The judiciary is largely submissive<sup>90</sup> to the executive and private economic and ruling elite since the majority of the judicial officers are members of the ruling RPF.<sup>91</sup> The judiciary is still subjected to political pressure.<sup>92</sup> In many cases there has been no guarantee of fair trial and the *habeas corpus* process is sometimes not followed, especially in cases involving members of the opposition party MDR. Members of the MDR were convicted on the basis of a law that was not applicable at the time they were charged.<sup>93</sup> The executive did not always respect court rulings, e.g. when orders were given for prisoners to be released. Judges are appointed for politically motivated reasons, whereby ethnicity and closeness to the ruling RPF are crucial.

Despite the existence of laws that stipulate the contrary, many of the judges are party members, especially of the ruling RPF.<sup>94</sup> Human Rights Watch observed many cases where the law was breached with regard to the administration of justice. Judges were transferred to the newly created positions of state counsels on the orders of the cabinet without approval of the *Council of the Judiciary*. Rwandan lawyers<sup>95</sup> are subjected to pressure by the political and ruling elite. The same applies to other judicial officers who then act in contravention of constitutional regulations or allow evidence to disappear. The most prominent case of external pressure on the judiciary involved the former president Pasteur Bizimungu, in which the judge admitted irregularities in the case after he fled from Rwanda. The explosive genocide-related trials are particularly subjected to a lot of influence. *Human Rights Watch* reports of influence from the Catholic Church. Sometimes the pressure is exerted by subtle means; sometimes public pressure is exerted by political figures. The closeness to the government mostly determines whether charges are dropped or not. Judges and state counsels who try to resist the external pressure are often dismissed and have to flee the country. The traditional *Gacaca Courts* do not conform to international standards. The judges of the *Gacaca Courts* were given a six-week “crash course” in judicial training. They are prosecutors and trial judges<sup>96</sup> at the same time and are also overwhelmed by the numerous cases they have to handle.

## b) Tanzania

Tanzania, with 71.4 points, is the best ranked country placed at no. 10 according to the *Mo Ibrahim Index*. After many years of single-party rule by the CCM, *Freedom House* has observed the first signs of an independent judiciary, which is however still subjected to

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<sup>88</sup> Judicial Independence, Mo Ibrahim Foundation

<sup>89</sup> Rwanda (2008), Freedom House

<sup>90</sup> Law and Reality, Progress in Judicial Reform in Rwanda, Human Rights Watch

<sup>91</sup> Kerler/Roggenkamp

<sup>92</sup> Independence of the Judiciary, Law and Reality, Human Rights Watch

<sup>93</sup> Ibid

<sup>94</sup> Ibid

<sup>95</sup> Former Justice Minister, sitting and former judges, former state counsels and lawyers, ibid.

<sup>96</sup> In detail: Wenke; Ullman/Donat; Governance World Watch

political influence. The rights of prisoners are not respected. The conditions of detention are catastrophic and there is widespread abuse of office by the police.<sup>97</sup> In 2007 13 judges of the *Primary Courts* and a judge of the *Resident Court* were dismissed due to corruption-related cases.<sup>98</sup> The Chief Justice has now established a supervisory council for the Magistrate Courts as a way of tackling corruption. One of the key activities involves the organizing of training programmes for Magistrates.<sup>99</sup>

### c) Kenya

The Ibrahim Index places Kenya at no. 17 with 57.1 points among the African states in the area of “Independence of the Judiciary”.<sup>100</sup> Like many other public departments, the Kenyan judiciary is still affected by corruption despite the government’s efforts to curb the menace.<sup>101</sup> A major project dubbed “radical surgery”, under which a large number of judges of the higher courts were dismissed and replaced by new ones, was intended to declare a fight against corruption. Nevertheless, according to a report of the *International Commission of Jurists* in 2004<sup>102</sup>, procedures were followed that were inconsistent with international standards. For example, the names of the accused judges were published and they were put under pressure to either resign or be dismissed. Some of the cases are currently being reviewed in court. The appointment of the new judges was a great violation of the international principle of guaranteeing judges security of tenure. They were just employed temporarily on contract and some were not even qualified to hold senior judicial positions. The Commission found indicators of political patronage and the use of ethnic criteria in the appointment of judges. There are also concerns about the closeness of the *Judicial Service Commission* to the executive.<sup>103</sup>

Despite the existence of formal constitutional guidelines, senior judicial appointments are still made by the president based on opportunistic motives.<sup>104</sup> The appointment of judges does not conform to international standards; there is lack of transparency in promotion and a code of discipline. *Freedom House* is concerned that the judiciary is still understaffed and underfinanced, and cases take too long to be concluded.<sup>105</sup> The criticism is also directed at the fact that the allocation of finances to the judiciary is determined by parliament and not the judiciary itself.<sup>106</sup> Recently there was a conflict of opinions between the Prime Minister Odinga and Justice Minister Karua on one side and the Chief Justice on the other side regarding the introduction of performance-contracts for judges as a means of tackling the slow handling of cases. The former insisted on proof of performance while the latter saw this as an attempt to interfere with the independence of the judiciary.<sup>107</sup>

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<sup>97</sup> Tanzania (2008), Freedom House

<sup>98</sup> Munuo

<sup>99</sup> Machira, *The Citizen* of 11th August 2008

<sup>100</sup> Information for 2008 based on estimates from the Freedom House SSC Of 2006 and 2007. For more details see Ibrahim Index of African Governance, Judicial Independence, Mo Ibrahim Foundation

<sup>101</sup> Kenya (2008) Freedom House; Thitu, p. 34

<sup>102</sup> International Commission of Jurists, 2005

<sup>103</sup> See also: Wahiu, p. 11

<sup>104</sup> Wahiu, p. 10

<sup>105</sup> Kenya (2008), Freedom House

<sup>106</sup> Akiwumi

<sup>107</sup> Wanderi

<sup>108</sup> Judicial Independence, Mo Ibrahim Foundation

## d) Uganda

The Mo Ibrahim Foundation places Uganda at position 22 with 50 points in the area of “Independence of the Judiciary” among the African States.<sup>108</sup> In an assessment carried out in 2008, Freedom House criticizes a series of judicial deficits. It was found out, for example, that the police does not respect the judiciary and interferes with court cases. The *East African Court of Justice* found Uganda guilty of ignoring judicial principles and abusing civic rights by repeatedly allowing the military to interfere with court cases.<sup>109</sup> *Human Rights Watch* also makes reference to the interference. The military gained access to the court-room to stop the release on bond of people accused of supporting the Ugandan rebel organization People’s Redemption Army. After lengthy negotiations the accused were released, only to be rearrested and detained for murder. The Ugandan judiciary went on strike for a week because of this interference and was confronted on the streets by a massive police force. It was the second time in recent past that state security forces had interfered with a court case.<sup>110</sup> Criticism from within comes from the Chief Justice of the Supreme Court. He complains that the judiciary is not allocated sufficient resources.<sup>111</sup> In a 48-page report on the state of the judiciary in Uganda the *International Bar Association* made the following observations: The Ugandan government has interfered with court cases and exerted pressure on judges thereby creating an atmosphere of fear within the judiciary. The judiciary is not funded according to its requirements and appointment of judges is based on political interests of the ruling party. There is also criticism of the fact that civilians have been tried in military courts.<sup>112</sup>

## C. Conclusion

During a conference organized by the Konrad Adenauer Foundation on the State of the Judiciary in African Countries importance observations were made.<sup>113</sup> Due to the practice in the countries mentioned here whereby judges are appointed by the head of state, there is a risk of having appointments not based on professional qualifications but on political interests. A different setup of the judicial authorities (Judicial Service Commission), less authority for the Chief Justice and - due to the confidence of the public in the judiciary - a compulsion to public exposure of economic conditions of judges would be beneficial to an independent judiciary. The international community needs states with an effective, transparent and independent judiciary.<sup>114</sup> Without this it is not possible to protect individuals, even from infringement by the state on their rights.<sup>115</sup> The entrenchment of the independence of the judiciary would be a farce if in reality there is external political and indirect interference by the executive, contravention of the laws through corruption and failure to punish violations.

A judiciary whose independence only exists in theory but cannot be enforced is ineffective as an element of the rule of law in solving conflicts and punishing impunity in the process of democratization and ensuring that peace prevails.<sup>116</sup> When the state and its citizens

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<sup>109</sup> Uganda (2008), Freedom House

<sup>110</sup> Uganda, Events of 2007, Human Rights Watch

<sup>111</sup> Uganda (2008) Freedom House

<sup>112</sup> International Bar Association, p. 39 ff.

<sup>113</sup> Conference on the Independence of the Judiciary in Sub-Saharan Africa

<sup>114</sup> See Woischnik E+Z 2005

<sup>115</sup> Schlepp, Mehr Demokratie (More Democracy) No. 77 1/08

<sup>116</sup> Compare Kurtenbach, p. 149; Experts Conf



are equally committed to upholding the rule of law and this is guaranteed through an independent judiciary, then an important foundation is laid for building peace-promoting structures at national and international level. Every step in this direction deserves further support by the international community. Non governmental organizations are still very important as neutral observers of the process in monitoring initiatives and efforts to promote peace.





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# Legal Foundations and Stage of Development of the African Court of Human Rights

Nikolaj Jeremias Straube

## A Introduction

The African Court of Human Rights, which was ratified by 15 member-states on 25.01.2004<sup>1</sup>, stands on the touchstone of legal history. Is it a breakthrough for the protection of human rights in Africa or is it an ineffective costly institution?

African states did not lack some formal mechanisms for protection of human rights after independence from their colonial masters. Most of them formally adopted the human rights protection laws introduced by the colonial powers and integrated them into their constitutions.<sup>2</sup> The occupiers withheld the privileges of real protection of human rights from the African population, but this did not affect anything as far as the formal standardization of human rights issues in the states that had been colonized. However even the newly independent states did not put much emphasis on the respect for human rights and the wellbeing of the people. In several cases the universality of human rights from specific African cultural points of view was even questioned.<sup>3</sup>

In most African countries the guarantee of human rights suffered a setback under single-party rule, dictatorships and military regimes. Despots such as Jean-Bedel Bokassa (President and Emperor from 1966 to 1979 in Central Africa)<sup>4</sup>, Idi Amin (Dictator from 1971 to 1979 in Uganda)<sup>5</sup>, Francisco Macias Nguema (President in Equatorial Guinea from 1968 to 1979)<sup>6</sup>, Mobutu Sese Seko (President of Zaire from 1965 to 1977)<sup>7</sup> or Mengistu (Ethiopian head of state from 1977 to 1991)<sup>8</sup> were able to establish their power in their respective African countries. They are examples of brutality within a state and the abuse of human rights by a country.

While the respect for human rights was not given priority, there were civil wars being fought which had catastrophic consequences. The rulers rejected supervision by the international community of states by making reference to the sovereignty and the fact that the problems were internal.

It is for this reason that it can be said that the African path to “Culture and Human Rights” and the rule of law was cumbersome not only from a legal point of view but also from a historical one. However, even as early as the early 1960s there were efforts in the newly independent states to improve the condition of human rights. In 1963, in the midst of the decolonization process, the Organization of African Union was formed. Its Charta recognizes the respect for human rights in its preamble.<sup>9</sup> This recognition of human rights, which

1 [www.asil.org/insights/2006/09/insights060919.html](http://www.asil.org/insights/2006/09/insights060919.html)

2 Examples are the constitutions of Guinea (1958), Kenya (1963) or Nigeria (1963)

3 L. Kühnhardt in “Die Universalität der Menschenrechte” (The Universality of Human Rights), Munich, 1987 p. 281 ff.

4 [http://lexikon.gulli.com/Jean-B%C3%A9del\\_Bokassa](http://lexikon.gulli.com/Jean-B%C3%A9del_Bokassa)

5 [http://africanhistory.about.com/od/biography/a/bio\\_amin.html](http://africanhistory.about.com/od/biography/a/bio_amin.html)

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9 [http://de.wikipedia.org/wiki/Geschichte\\_der\\_Menschenrechte\\_in\\_Afrika](http://de.wikipedia.org/wiki/Geschichte_der_Menschenrechte_in_Afrika)





had little legal enforceability, was ratified and legally strengthened by all African states in June 1981 through the African Charter of Human and Peoples' Rights ("Banjul-Charter") which came into force in October 1986.<sup>10</sup> At the same time the Commission on Human and Peoples' Rights was established. Finally in order to ensure the Charter was respected by all signatories, the African Court of Human Rights was established on 25.01.2004. Its effectiveness will contribute enormously to the condition of human rights in Africa.

## **B Legal Foundations of the Protection of Human Rights in Africa**

### **I. Respect for Human Rights in General**

The first real agreement on the protection of human rights was signed as early as 1948 by the then independent states through the General Declaration of Human Rights - a resolution of the United Nations.<sup>11</sup> This Agreement is however not binding for the individual states due to the lack of an international agreement character. The ratification of international pacts on political and peoples' rights and on economic, social and cultural rights by some African states<sup>12</sup> in 1966 saw the official signing of a binding treaty, but the principles were not observed and human rights did not receive any protection worth mentioning.

In a Resolution passed in Lagos in 1961 ("Law of Lagos"), African lawyers from all countries resolved to give more weight to the respect for human rights and affirmed their desire to respect the Declaration on the Protection of Human Rights of 1948 and to push for the establishment of an African Court of Human Rights. This Resolution alone did not have any legal impact, but it represented an important step towards the respect for the rule of law and human rights in the African political climate.

The Organization of African Unity (OAU) was formed in 1963 in Addis Ababa, Ethiopia. This was the first pan-African organization, bringing together 30 nations as founders. The primary goals of the OAU were to achieve political and economic unity of Africa on the global community as well as the sovereignty, territorial integrity and independence of African states. The Union was supposed to strengthen Africa outwards, especially in view of the past colonial history, and protect it from destructive external influences. The strengthening of the protection of human rights was not planned initially.<sup>13</sup> This was left to the individual countries to implement in line with the principle of non-interference in the affairs of other countries.<sup>14</sup> The founding Charter simply contained a preamble of general recognition of human rights.<sup>15</sup> Through the transformation of the OAU into the African Union (AU) in 2001, human rights should be promoted and protected in accordance with Article 3h of the Charter. However the main objective of the formation of the AU remains the economic and political strengthening of Africa by implementing the principles laid down upon the establishment of the OAU. The AU should promote the effectiveness of the cooperation without having to put the protection of human rights at the forefront.<sup>16</sup>

The African Charter on Human and Peoples' Rights was finally signed at the 18<sup>th</sup> Conference of the Heads of State and Government of the OAU in June 1981 in Banjul, Gambia.<sup>17</sup> It

<sup>10</sup> [http://assets.cambridge.org/97805218/83993/excerpt/9780521883993\\_excerpt.pdf](http://assets.cambridge.org/97805218/83993/excerpt/9780521883993_excerpt.pdf)

<sup>11</sup> M. Worku, p. 36

<sup>12</sup> Kenya, Madagascar, Mali, Rwanda, Senegal, Tanzania, Zaire

<sup>13</sup> Steiner/Alston, p. 921

<sup>14</sup> M. Worku, p. 45

<sup>15</sup> M. Worku, p. 38

<sup>16</sup> Nowak, S. p. 223 f

<sup>17</sup> J. Rehman, p. 237





came into force in October 1986 upon ratification by all OAU member-states. The Charta comprises 68 Articles and is a binding document for all member-states. It contains not only political, social, economic as well as individual rights but also - and this is in contrast to the other regional human rights conventions in Europe and America - collective right of peoples' to equality, self-determination, development and peace. The Charta further contains the obligations of the individual with regard to the society.<sup>18</sup>

The central organ of the African human rights Charta is the African Commission for Human and Peoples' Rights. It was established in 1987 on the basis of Art. 30 of the ACHPR. It consists of 11 independent members appointed by the heads of state to serve for a period of six years.<sup>19</sup>

## **II. The Establishment of an African Court of Human Rights**

The establishment of an African Court of Human Rights was not an objective in the original form of the 68 Articles of the ACHPR. The additional protocol on the establishment of a human rights court which was passed in 1998 provided the legal foundation for the formation of a supranational human rights court. The actual establishment of the Court did not take place until 2004 upon the ratification by the fifteenth state in accordance with Art. 34 Paragraph 3 of the additional protocol.<sup>20</sup>

### **C Analysis of the Legal Foundations**

#### **I. The Banjul-Charta**

In order to establish the role of the African Court of Human Rights within the context of the protection of human rights across Africa the African Charta on Human and Peoples' Rights as a source of law and the Commission for Human and Peoples' Rights must be analyzed. Their legal structure and manner of operation are closely linked with the establishment of the African Court of Human Rights. Consequently the legal structure of the Banjul-Charta and the Human Rights Commission of the OAU (AU), particularly with reference to the Human Rights Court will be analyzed below.

##### **1) The Legal Structure of the Banjul-Charta**

The African Human Rights Charta is divided into a preamble and three parts. The first part consisting of Articles 1 to 29 deals with material rights and obligations. The second part, Articles 30 to 63, stipulates the guidelines for the establishment of the African Commission for Human and Peoples' Rights. The third part consisting of Articles 64 to 88 contains guidelines on the enforcement of the Charta, its ratification, requirements and amendments.

###### **a) Preamble**

The preamble contains a general acknowledgement of ideals; it reflects the character of the Charta in light of which the entrenched legal norms should be interpreted. The Charta is, for example, still characterized by the thoughts of fighting and preventing colonialism as well as securing the integrity of African states and peoples. The Charta also acknowledges the need to protect the rights of the individual and to establish organs t o

<sup>18</sup> M. Nowak, p. 225

<sup>19</sup> Smith, p. 129

<sup>20</sup> Smith, p. 130







implement this protection. It also explains how to bring the Charta into harmony with the general human rights regulations of the United Nations. The preamble also points to the interpretation of the Charta from an African cultural perspective. Generally what stands out is the fact that the preamble emphasizes the protection of collective rights. It is however not obvious that this collective protection of rights overrides the protection of individual rights.<sup>21</sup>

## **b) Material Rights and Obligations**

The African Human Rights Convention (AHRC) contains individual rights in Articles 2 to 18, collective rights in Articles 19 to 24 and obligations in Articles 27 to 29.

### **aa) Individual Rights**

Articles 2 and 3 of the Charta deal with equality rights. Article 2 of the AHRC) mentions the prohibition of discriminatory practices on the basis of distinguishing characteristics. The absence of an explicit prohibition of discrimination of minorities may be a surprise in view of the heterogeneity of many African states. However, the formulation using the phrase “such as” implies that the list of characteristics is not complete.<sup>22</sup> This gives the African Court of Human Rights more room for interpretation. Article 3 of the AHRC further contains the principle of equality before the law and the right to the same protection through the law. “The law” can be interpreted in different ways under the Banjul-Charta. Article 3 Paragraph 2 of the ACHR gives the citizen a subjective right to equitable treatment, which can also be verified by the African Court of Human Rights.<sup>23</sup>

Article 4 of the AHRC protects physical integrity of the individual. The limitation of the protection in Sentence 2 to “arbitrary” attacks is a result of the minimal consensus among the member-states due to the fact that in many African states the death penalty is still in force.

Article 5 guarantees the protection of human dignity and prohibits torture as well as inhuman or degrading punishment or treatment.

Article 6 guarantees the freedom of the individual and prohibits arbitrary arrest. As opposed to the two other regional human rights conventions, there is no explicit protection of arrested persons.<sup>24</sup> This reflects a weakness in the protection of human rights in the Banjul-Charta. The laws of procedure and the right to fair trial in Article 7 do not sufficiently compensate for the weakness of the protection of human rights.

Article 8 of the AHRC guarantees the freedom of conscience, occupation and religion. This right can only be interfered with if there is a danger to public order and security.

Article 9 contains the right to information and freedom of expression, but a simple reservation of statutory powers is laid down for freedom of expression in Article 9 Paragraph 2.

Article 10 protects the freedom of association. But even the freedom of association is subject to a small reservation of statutory powers and is therefore weaker as compared to

<sup>21</sup> Keba Mbaye, p. 175, Bortfeld, p. 38

<sup>22</sup> Bortfeld, p. 41

<sup>23</sup> Bortfeld, p. 41

<sup>24</sup> See Article 5 of the European Human Rights Convention, Article 7 IV - VII of the American Human Rights Convention





that in the two other human rights conventions.<sup>25</sup>

Article 11 guarantees freedom of assembly. There is also a reservation of statutory powers here because a restriction on the basis of laws to protect one of the listed legally protected interests can occur. The list of legally protected interests is not conclusive, leaving plenty of room for restrictions on the freedom of assembly.

Article 12 guarantees several modalities of freedom. Paragraph 1 explains the right to move freely in a country and to choose where to reside. This right is also subject to reservation of statutory powers. Paragraph 2 deals with the right to leave one's country and return. Paragraph 3 guarantees everyone the right to asylum under national and international laws.

According to Article 13, every individual has a right to lead public affairs and to access public office, use public facilities and enjoy public services.

Article 14 guarantees the right to own property. The state can only interfere with this right, if it has to act in public interest or common good.

Article 15 deals with the right of an individual to work under fair and acceptable conditions as well as equal pay for equal work.

Article 16 guarantees the right to physical and psychological health.

Article 17 gives the individual the right to education and cultural life. It is notable that in comparison to the previous three rights, this right is given a higher protection.

## **bb) Collective Rights**

One peculiarity of the Banjul-Charta in comparison to other international treaties are the rights of the peoples (Collective Rights), also known as "Rights of the Third Generation" or "Solidarity Rights".<sup>26</sup> The African Charta of Human and Peoples' Rights contains a series of collective rights in Articles 19 to 24 of the AHRC.

Article 19 guarantees the equality of the peoples.

Article 20 guarantees existence and the right of self determination.

Paragraph 1 of Article 21 guarantees the right to access resources, Paragraph 2 the right to regain ownership of resources and the right to adequate compensation. The right of the peoples to development and equal access to common heritage of humanity is contained in Article 22.

Article 23 guarantees the people the right to freedom and security and Article 24 the right to satisfactory environment.

The problem that arises with the collective rights in Articles 19 to 24 of the AHRC is the content of those "guaranteed" rights. They are all very vaguely formulated and leave plenty of room for a variety of interpretations.<sup>27</sup> This fact is also a result of the minimum

<sup>25</sup> See Art 11 of EHRC and Art 16 of AHRC

<sup>26</sup> Riedel, p. 9-21

<sup>27</sup> Bernhardt - Tomuschat, p. 463







consensus among the signatories. Another problem relating to the Third Generation Rights has to do with whom they refer to. This is because the Banjul-Charta does not give a definition of the word “peoples”.<sup>28</sup> It must first be established that within the context of the Treaty the word “peoples” is used as a contrast to the “individual”. It is however unclear which of the two groups are favoured more by the Charta.

There have been calls for a more specific definition of “people”. The proponents of this would like “people” to refer to the citizens of a state. Another middle approach attempts to define the word “peoples” more accurately. According to their definition, a people must

- have a common history
- be ethnically interrelated
- show cultural and linguistic similarities
- show religious and ideological similarities
- geographically tangible
- related in economic aspects
- consist of a minimum number of human beings

A look at the collective rights in the Banjul-Charta shows that they are restricted due to their fragmented nature and the minimal political consensus among the signatories as far as the verification of the rights by the African Court of Human and Peoples’ rights is concerned. There is no provision for legal enforceability of the collective rights in their current form in the AHRC.

### **cc) Obligations**

The Banjul-Charta gives the individual certain obligations. The obligations towards the family, state and international community are stipulated in Article 27 of the AHRC. Article 28 puts the individual under obligation to respect his fellow human beings. These obligations are more clearly described in a catalogue of obligations in Article 29. These obligations hardly have any relevance for the African Court of Human Rights because they are under the control of national courts.

## **2) The Commission for Human and Peoples’ Rights**

This Commission is the only control-organ originally established in the Banjul-Charta to ensure that the peoples’ human rights are upheld, respected and promoted.<sup>29</sup> Its duties and effectiveness are essential for the operations of the Human Rights Court. It is entrenched in the second part of the Charta (Art. 30 to 63 of AHRC) which is further subdivided into 3 chapters.

### **a) Organization**

The first chapter of the second part of the AHRC manifests the organization of the commission in Articles 30 to 44.

In accordance with Art 30 of the AHRC, the Commission is an establishment of the OAU or AU. Its legal foundations are contained in its Rules of Procedure. Article 31 of the AHRC stipulates the composition of the membership of the Commission. The Article stipulates

<sup>28</sup> Rehman, p. 250

<sup>29</sup> Art. 30, AHRC





that the Commission must consist of 11 members of good moral integrity without mentioning any geographical or gender-specific quotas. The Banjul-Charta does not however have any guideline that would ensure the independence of the members. This has sometimes led to a situation where holders of political office are members of the Commission at the same time.<sup>30</sup> It can however be argued that the commissioners are appointed to serve as individuals (Art 31 Para 2 of AHRC) and are expected to act independently in discharging their duties (Art 38). Article 109 of the Rules of Procedure of the Commission contains a guideline on the independence of its members.<sup>31</sup>

The members of the Commission are elected by the heads of state in accordance with Art 33 of the AHRC through secret ballot and each member-state may suggest up to 2 members, one of which must not be from the same country that has suggested their name. The commissioners serve for a term of 6 years; during the first election four members were elected for only two years, another three members for four years. The term of office for a member of the Commission is decided by drawing lots, in accordance with Art 37 of the AHRC.

### **b) Duties of the Commission**

The duties of the Commission are stipulated in Art 45 of the AHRC. The Commission has a supportive function (Art 45 No. 1), a protective function (No. 2), interpretation function (No. 3) and an obligation to carry out any duties that may be assigned to it by the heads of state.

The supportive function is specified in Art 45 No. 1 a, b. It includes in a) duties of research, publications, public relations as well as commenting and giving recommendations. In b) the Commission is given the mandate to “draw up and interpret principles and rules in the area of human and peoples’ rights as well as the basic freedoms which African governments can use when drafting their laws”. Finally the commission is mandated in c) to work together with other international human rights institutions.

The content of the supportive functions in Art 45 No. 1 a) and c) show how weak the competencies of the Commission in this area are. Simply commenting and giving explanations (No. 1 a) and the cooperation with other institutions (No. 1 c) by their own nature do not have any legally binding character.

The quality of the protective function (Art 45 No.2) is guaranteed mainly through the granting of prosecuting competencies of the commission.<sup>32</sup> This gives the Commission an adjudicative function.

The interpretive role of the Commission (Art 45 No. 3) is also a classical judicial role and one that promises much in its conception. However in reality it has been established the Commission only occasionally carries out this role due to being overworked and lack of time for adequate preparation.<sup>33</sup>

<sup>30</sup> Bortfeld, p. 58

<sup>31</sup> Bortfeld, p. 58

<sup>32</sup> Bortfeld, p. 75

<sup>33</sup> Bortfeld, p. 86





## **c) Proceedings Before the Commission**

### **aa) State Communication**

The process of state communication is divided into two application modalities in accordance with Art 47 to 54 of the AHRC. According to Art 47, 48 of the AHRC, a country can call the commission to play a mediating role if there is a dispute with another country and no amicable solution can be reached. This procedure manifests the African principle of preference for peaceful resolution of conflicts.<sup>34</sup> According to *Benedek*<sup>35</sup>, the Commission can also be called upon by one country to intervene if the country feels that another country has acted in contravention of the Banjul-Charta.

### **bb) Other Communication**

These fall under several judicial requirements stipulated in the Banjul-Charta. The Treaty is however very vague on the admissibility of the communication. The starting point is Art 58 Para 1 of the AHRC which considers the application founded if the communication points to “massive abuse of human and peoples’ rights”. The communication may also come from an individual.<sup>36</sup> But even here the weaknesses of mechanisms to protect human rights in Africa are noticeable. When the commission receives official communication it simply records it and brings it to the attention of the conference of the heads of state.

### **cc) State Reports**

Article 62 of the AHRC requires every member state to give a report every two years highlighting the measures it has taken towards implementing and upholding the rights and objectives of the Banjul-Charta.

### **d) Interim Results**

The establishment of a controlling organ to promote, verify and protect the protection of human and peoples’ rights in Africa is legally historic and ethnically a great and good step. However, due to the many weaknesses in organization, powers given and legal obligation of regulations coupled with the lack of financial resources and willingness on the part of member-states to cooperate, the actual effectiveness of the African Commission on the Protection of Human and Peoples’ Rights is limited. In view of this the Protocol on the establishment of an African Court on Human and Peoples’ Rights will be analyzed below

## **II. Protocol to the Banjul-Charta on the Establishment of and African Court of Human and Peoples’ Rights**

The establishment of an African Court of Human Rights through the Supplementary Protocol to the Banjul-Charta, which was ratified in 1998, seems to have brought the whole system of protection of human and peoples’ rights in Africa under new focus. Whether or not the Court can overcome the challenges mentioned above will be analyzed below.

<sup>34</sup> Mbaye, p. 164

<sup>35</sup> Benedek, p. 158

<sup>36</sup> Umozurike, p. 642, Mbaye, p. 248 f.





## **1) History of the Origin and Historical-Political Background of the Protocol**

At the beginning of the 1990 there were increasingly loud calls for the improvement of the protection of human rights in Africa. These calls came from all groups across the socio-political spectrum: lawyers, economists, opposition politicians and governments. The first draft was ratified<sup>37</sup> in September 1995 at a conference of experts organized by the OAU. The second (April 1997) and the third (December 1997) conferences of experts amended the text again, until the final version of the Supplementary Protocol was signed by the heads of state and government in Ouagadougou, Burkina Faso in June 1998.

Two factors are significant for the change in the development of the state of human rights in Africa. On one hand the onset of the process of democratization in the former east block countries had a kind of political “domino-effect” on the African states.<sup>38</sup> The subsequent wave of democratization resulted in many African heads of state and government - and these are the ones that make all important decisions in the OAU - followed suit and pushed forward with efforts to improve the protection of human rights and the establishment of an African Court of Human Rights.<sup>39</sup>

On the other hand the abolishment of the worldwide block-system meant that the African states which were formally aligned to the east block lost their economic assistance and grants from other socialist-oriented states. The former western donor countries also lost their strategic interest in Africa because the fight for supremacy was over. This led to economic losses in those countries as well. The will to embrace pan-African solidarity was strengthened by the general worsening of the economic situation in African states and the recognition that aid from outside Africa was on the decline. This led to the establishment of African institutions such as the African Court for Human and Peoples’ Rights. More importantly, the improvement of the state of human rights was forced because all development aid from donors was tied to the fulfillment of principles of the rule of law.<sup>40</sup>

## **2) Content of the Protocol**

The Protocol forms the legal foundation for the establishment, organization, procedures and competencies of the African Court for Human and Peoples’ Rights.

### **a) Overview/Preamble**

#### **The Protocol consists of 35 Articles.**

It is introduced by a preamble which recognizes freedom, equality, justice, peace and dignity as the main aspirations of the African Peoples. The preamble declares all declarations and conventions passed by the OAU as legal foundations for the promotion and securing of human rights. Finally the preamble declares that the attainment of the objectives of the African Charta on Human and Peoples’ Rights requires the establishment of an African Court on Human and Peoples’ Rights to complement and reinforce the functions of the African Commission on Human and Peoples’ Rights.

<sup>37</sup> Mubiala, p. 84

<sup>38</sup> Betz/Matthies, p. 39

<sup>39</sup> Tetzlaff, p. 11

<sup>40</sup> Nuscheler, p. 24





## **b) The Organization of the Court**

Article 1 declares generally that there shall be established within the OAU an African Court of Human and Peoples' Rights, the organization, jurisdiction and functioning of which shall be governed by the present Protocol. Article 2 describes the abstract general relationship between the Court and the Commission to complement its objectives.

### **aa) Composition**

According to Article 11 the Court shall consist of eleven judges, nationals of Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights. A novelty is noted in the African human rights system in Articles 12 Para 2, 14 Para 3: In the election of Judges, the Assembly shall ensure that there is adequate gender representation. This regulation is not found in any other regional human rights system and is therefore a positive product of the improving process of human rights protection in Africa.<sup>41</sup>

### **bb) Election of Judges**

Regulations on the election of judges are contained in Articles 12 to 14. States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be nationals of that State. Due consideration shall be given to adequate gender representation in nomination process. An equitable representation of all the regions must also be observed (Article 14 Para 3).

### **cc) Term of Office**

The judges of the Court shall be elected for a period of six years and may be re-elected only once. The terms of four judges elected at the first election shall expire at the end of two years, and the terms of four more judges shall expire at the end of four years.

The judges whose terms are to expire at the end of the initial periods of two and four years shall be chosen by lot to be drawn by the Secretary-General of the OAU immediately after the first election has been completed.

A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of the predecessor's term.

All judges except the President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it deems appropriate. The effect of this is that, due to understaffing, cases take very long to conclude, which hampers the efforts to protect human rights.<sup>42</sup> On the other hand, working on part-time basis poses the risk of conflict of interests arising from other duties of the judges.

### **dd) Independence and Incompatibility**

The independence of the judges is stipulated in Article 17. The independence of the judges shall be fully ensured in accordance with international law. No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate

<sup>41</sup> Bortfeld, p. 99

<sup>42</sup> Bortfeld, p. 103





for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court. The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law. At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.

Article 18 declares that the position of judge of the court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office as determined in the Rules of Procedure of the Court.

### **ee) Cessation of Office**

According to Article 19 Paragraph 1, a judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court. Such a decision of the Court shall become final unless it is set aside by the Assembly at its next session.

In case of death or resignation of a judge of the Court, the President of the Court shall immediately inform the Secretary General of the Organization of African Unity, who shall declare the seat vacant from the date of death or from the date on which the resignation takes effect.

The Assembly shall replace the judge whose office became vacant unless the remaining period of the term is less than one hundred and eighty (180) days.

The same procedure and considerations as set out in Articles 12, 13 and 14 shall be followed for the filling of vacancies.

### **ff) Presidency of the Court**

According to Article 21, the Court shall elect its President and one Vice-President for a period of two years. They may be re-elected only once. The President shall perform judicial functions on a full-time basis and shall reside at the seat of the Court. The functions of the President and the Vice-President shall be set out in the Rules of Procedure of the Court

### **gg) Quorum**

According to Article 23, the Court shall examine cases brought before it, if it has a quorum of at least seven judges. Due to the fact that there are 11 judges and a minimum of seven is required, the court can only have one chamber. The African Court of Human Rights will therefore not be an appellate court, a contrast from the European Court of Human Rights.<sup>43</sup>

### **hh) Seat of the Court**

The Seat of the Court is not explicitly mentioned in the Protocol. Article 25 simply states that the Court shall have its seat at the place determined by the Assembly from among States parties to this Protocol. However, it may convene in the territory of any Member State of the OAU when the majority of the Court considers it desirable, and with the prior consent of the State concerned. The seat of the Court may be changed by the Assembly after due consultation with the Court.

<sup>43</sup> Schlette, p. 950 ff.







The African Court of Human Rights has been in Arusha, Tanzania since August 2007. The problem with this arrangement in view of the aim of ensuring cooperation between the Court and the Commission as stated in the Protocol, the two institutions of the AU are geographically very far apart: the Court is in East Africa; the Commission's Headquarters are in Banjul, Gambia in West Africa.

## **ii) Budget**

According to Article 32, the expenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court. The budget is not determined by the member-states.<sup>44</sup>

## **c) Jurisdiction of the Court**

### **aa) Scope**

According to Articles 3 and 4, the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

### **bb) Advisory Opinions**

At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate of dissenting decision.

## **d) Proceedings before the Court**

The following chapters will delve into the options, strengths and weaknesses of the system of proceedings established by the African Court of Human Rights.

### **aa) Right to Lodge a Complaint**

The question on who has the right to lodge a complaint at the African Court of Human Rights is of fundamental importance with regard to ensuring effective protection of human rights. The access to the court is stipulated in Article 5.

According to Article 5, the following are entitled to submit cases to the Court:

#### **aaa) The Commission**

According to Article 5 Paragraph 1, the commission first of all is entitled to submit cases to the Court.

#### **bbb) Member-States**

Article 5 Paragraph 1 contains three guidelines on how member-states can submit cases to the Court. In the first instance this is possible, if the state has already submitted a case to the Commission<sup>45</sup>, secondly if the state was an appellant in a case before the Commission and thirdly if a citizen of the respective country is a victim of human rights violation.

<sup>44</sup> Bortfeld, p. 117

<sup>45</sup> Communication from States according to Art. 47 of the AHRC







### **ccc) Individuals and NGOs**

The right of individuals and NGOs to lodge cases before the African Court of Human Rights is contained in Article 3 Paragraph 3. This right is however restricted by the subjugation clause of Article 34 Paragraph 6: the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration. Until now, only Burkina Faso and Mali have signed such a clause<sup>46</sup>

- which reflects a lot of weakness for the Protocol.

### **ccc) African Intergovernmental Organizations**

This is a unique provision in international comparison. According to this provision, African intergovernmental organizations also have the right to lodge cases. They are neither signatories of the Banjul-Charter or any other important treaties and therefore do not have any obligations, only rights.

### **bb) Types of Cases**

The Protocol permits individuals to lodge cases, allows communication to be received from states, accepts submissions from the Commission and complaints from intergovernmental organizations.

#### **aaa) Individual Cases**

There is a special meaning added to cases lodged by individuals in the African system. A guideline on the prerequisites for their acceptance is found in Article 6 Paragraph 1 and states that the Court, when deciding on the admissibility of a case instituted under article 5 (3) of this Protocol, may request the opinion of the Commission which shall give it as soon as possible.

Article 6 Paragraph 2 specifies the conditions under which cases may be permitted before the Commission in the context of Article 56 of the AHRC. As opposed to the Commission, which must observe the prerequisites mentioned there, the Court has room for dynamic interpretation<sup>47</sup> as stated in Article 6 Paragraph 2 - that the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter. That means that the Court can ignore one of the prerequisites listed and accept a case to be lodged.

Communications relating to human and peoples' rights received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and

<sup>46</sup> The Danish Institute of Human Rights - Analysis, p. 11

<sup>47</sup> Bortfeld, p. 154



7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

#### **bbb) Cases Lodged by States**

The lodging of cases by member-states before the Court of Human Rights is mentioned in Article 5 Paragraph 1 b - d. There are no prerequisites for access to the court by states. This is a peculiarity compared not only with other regional human rights protection courts<sup>48</sup>, but also compared with communication from states to the Commission. The stipulation of criteria for acceptance is left entirely to the Court. The problem arises in this regard with the relationship between the Commission and the Court, which places them at the same level in Articles 2 and 8.

#### **ccc) Cases Submitted by the Commission**

The possibility of the Commission lodging cases to the Court is contained in Article 5 Paragraph 1 No. 1a. The legal foundation for this is found in Paragraph 7 and Article 2 of the Preamble - the so-called complementary role of the Court. On the other hand precise distinctions must be made when asking questions as to whether the Commission can independently bring a case to the Court.

#### **ddd) Cases Submitted by Intergovernmental Organizations**

The access to the Court by intergovernmental organizations is permitted under Article 5 Paragraph 1 No. 1e. This is a peculiarity in international human rights practice. There are also no regulations on the specific requirements for access.

#### **cc) Guidelines for Proceedings**

The guidelines on hearings and representation before the African Court of Human Rights are contained in Article 10 of the Protocol. Paragraph 1 states that the Court shall conduct its proceedings in public. The Court may, however, conduct proceedings in camera as may be provided for in the Rules of Procedure. Article 10 Paragraph 2 stipulates that any party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may also be provided where the interests of justice so require. Paragraph 3 states that any person, witness or representative of the parties, who appears before the court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.

#### **dd) Interim Orders**

The African Human Rights Court is also mandated to issue interim orders in accordance with Article 27 Paragraph 2. The decision to issue such orders rests with the Court and is not subject to an application by an involved party. Of course the Court can also grant such a right in the Rules of Procedure. It is disputable whether interim orders have any mandatory legal effect on the addressee. Regionally, this is dealt with differently. Interim orders are not binding before the European Court of Human Rights<sup>49</sup>, whereas their binding nature before the Inter-American Court of Human Rights is not in doubt.<sup>50</sup>

<sup>48</sup> Article 35 I of EHRC, Article 46 of AHRC

<sup>49</sup> Oellers-Frahm, p. 198 f.

<sup>50</sup> Pasqualucci, p. 847



## **ee) Termination of Proceedings**

An international case can be terminated in many ways. Several internationally known modalities for terminating are discussed below.

### **aaa) Amicable Settlement**

The Court should first work on the modalities for amicable resolution of disputes - Art. 9.

### **bbb) Unilateral Termination of Proceedings**

Granted, there is no regulation on unilateral termination of proceedings. However, considering that it is clearly regulated and practiced in the European and inter-American system<sup>51</sup>, it would be wise for the African Court of Human Rights to come up with a similar regulation and adopt it.

### **ccc) Judgment**

The modalities of passing judgment are contained in Articles 27 to 31.

#### **1) Verdict**

The guidelines are contained in Article 27 Paragraph 1. If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the repayment of fair compensation or reparation.

#### **2) Reaching a Verdict**

The guidelines for rendering judgment are found in Article 28.

Paragraph 1: The Court shall render its judgment within ninety (90) days of having completed its deliberations.

Paragraph 2: The judgment of the Court decided by majority shall be final and not subject to appeal.

Paragraph 3: Without prejudice to sub-article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.

Paragraph 4: The Court may interpret its own decision.

Paragraph 5: The judgment of the Court shall be read in open court, due notice having been given to the parties.

Paragraph 6: Reasons shall be given for the judgment of the Court.

Paragraph 7: If the judgment of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion. This point underscores the independence of the judges and ensures higher transparency in content and consultations.

#### **3) Effect**

A court's power of judgment depends on the legal consequences arising from those judgments on one hand. On the other hand, especially for international courts, the factual consequences also play a big role.

<sup>51</sup> Art. 37 ECHR, Art. 52 IACHR





The legal consequence of a judgment can further be divided into formal and material legal validity.<sup>52</sup> The formal legal validity, the finality of the judgment is contained in Article 28 Paragraph 2. A review of this judgment is possible in accordance with Article 28 Paragraph 3. The material legal validity, which is only binding to the parties of the case<sup>53</sup>, is contained in Article 30. However, due to the limited ability of international courts to enforce the judgments, the factual consequence is not insignificant. Factual are those consequences which cause the parties involved to act at real and political level due to the image and authority of the Court.<sup>54</sup> The authority and image of the Court also depend largely on the extent to which it is known and the public opinion towards it. In this regard the public nature of its proceedings and judgments as indicated in Article 10 Paragraph 1 and Article 28 Paragraph 5 contribute towards bettering its image compared to that of the Commission.

#### **4) Enforcing the Verdicts**

To ensure the effectiveness of a judgment, Article 29 Paragraph 1 stipulates that the parties to the case, the AU member-states and the Commission shall be notified immediately the judgment is passed. According to Article 29 Paragraph 2, the Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly. It still remains to be seen whether all these requirements lead to the desired goal. A third control mechanism is the submission of an annual report to the General Assembly and the report should specify, in particular, the cases in which a state has not complied with the Court's judgment.

#### **5) Other Regulations**

The guidelines on ratification and amendments are contained in Article 34 and 35 of the Protocol. According to Article 34 Paragraph 1, the Protocol is open for signature and ratification or accession by all state parties of the Banjul-Charta. The minimum number of ratifications is 15, according to Article 34 Paragraph 3. It was not until January 2004 that the fifteenth state ratified the Protocol.

According to Article 35 Paragraph 1, the Protocol may be amended if a state party to the Protocol makes a written request to that effect to the Commission.<sup>55</sup> If amendments are made, the amendments shall only come to force for those state parties which have accepted them, according to Article 35 Paragraph 3.

#### **D. Actions of the African Court of Human Rights so Far**

The first 11 judges of the African Court of Human and Peoples' Rights were elected on 22<sup>nd</sup> January 2006 and sworn in on 2<sup>nd</sup> June 2006.<sup>56</sup> By the 2<sup>nd</sup> June 2008 the term of office for two judges had already expired without a single case ever being brought before the Court.<sup>57</sup>

<sup>52</sup> Miehsler, p. 44 ff

<sup>53</sup> Mosler, p. 1032

<sup>54</sup> Schreuer, p. 695

<sup>55</sup> Following the transformation of the OAU into AU the Commission takes over the duties of the Secretary-General of the OAU

<sup>56</sup> Wachira, p. 3

<sup>57</sup> The Danish Institute of Human Rights, p. 11





## E. Conclusion

The establishment of an African Court of Human and Peoples' Rights was occasioned by the poor state of affairs in comparison with other regional human rights systems. This state of affairs needed to be changed. Today the African Instrument for protection of human rights can be compared in many aspects with the European and the Inter-American ones. Due to the legal capacity of the parties involved, the protection of human rights before the African Court of Human Rights goes further than in other systems, because a case can be filed by an individual either directly to the Court or through the Commission. There is also no need of prior involvement of the Commission as far as cases before the Court are concerned. Even for individuals presenting cases there is no requirement to first contact the Commission. This direct access to the Court puts it in better light compared to its regional counterparts. A further positive aspect of the African Court of Human and People's Rights is the fact that where cases of abuse of human rights are established, the compensations are even higher than those provided in the European and Inter-American systems. The European Court of Human Rights can only order compensation if the internal regulations in a country are not sufficient.

Furthermore the African Court of Human and Peoples' Rights has powers to issue orders that prohibit infringement of the law; through its judgments it can direct the way issues are handled within a country. It still remains to be seen whether these directives are effective or not.

Following the decision by the African Court for Human and Peoples' Rights to increase the number of judges from 11 to 16 in April 2008<sup>58</sup>, it now lies in the middle between the two other regional Courts. Whereas the European and the Inter-American models have the advantage of simplicity and clarity, the African System fares better in the independence of the organs. The consequence of this is that the African Commission on Human and Peoples' Rights is not reduced to an ordinary court. The prosecutors do not have to wait for the conclusion of the Commission's proceedings, thereby saving on time and costs. On the other hand the equality of the organs means they can countercheck each other and this makes the process of reaching a verdict more differentiated.

In conclusion it can be said that the establishment of the African Court of Human and Peoples' Rights is a giant milestone in the process of improving human rights in Africa. The contractual concepts are in many aspects even more developed than those of the other two regional human rights systems. It is however not clear whether this will translate into real justice for the individuals due to the enormous deficits in mentality towards human rights on the continent, low economic power and political instability. Nevertheless the African Court of Human and Peoples Rights can, due to its image, make a contribution by creating more awareness about human rights and by upholding the standards of human rights through its administration of justice.

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<sup>58</sup> Wachira, p. 14





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# Exports from the DR Congo into the EU

Milan Gohlke

## Part A: Compliance with Legal Guidelines

### I. Application of International Law

International Law is the law applicable to all members of the international community. The DR Congo and the EU must first of all be subject to international law before they can apply it.

#### 1. Subjectivity to International Law by the DR Congo

In general terms a subject to international law refers to an upholder of international laws and obligations in which case, as the ICJ clearly points out in its report “Reparations for Injuria”<sup>1</sup>, the level of being subjected to this law may vary.<sup>2</sup> Through this statement the ICJ has paved the way for some form of categorization of the subjects to international law. Consequently only states may have unlimited subjectivity to international law because they are the only upholders of all rights and obligations. They are therefore referred to as the “original” or “natural” subjects to international law.

As a sovereign state the DR Congo is consequently an original subject to international law in the sense of the Three-Elements-Theory of Jellinek. Not even the current armed conflict or the weakened government can alter this subjectivity.<sup>3</sup> This is because the recognition of states is different from the recognition of governments. The recognition of a government means the affirmation that a particular regime has the legal authority to govern in a state. Since the recognition of a government presupposes the recognition of the respective state, the recognition of a state may only acquire a separate meaning if there is no recognition of a government.

#### 2. Subjectivity to International Law by the EC – not (yet) the EU

The European Union, which has a supranational character, has a special status within the international law.<sup>4</sup> There is no doubt that today it is an important player in international relations. With regard to subjectivity to international law, however, there is an overwhelming support for the view that only the EC and the EAES have their own legal personality.<sup>5</sup> The proponents of this view support their argument with the fact that the subjectivity to international law is not clearly laid down in the EU Treaty,<sup>6</sup> whereas the EC-Treaty has contains such a guideline in Art. 281 of the ECT and therefore the EC is subject to international law<sup>7</sup> in the context of derived subjectivity acquired from its member-states in a limited form.<sup>8</sup>

<sup>1</sup> ICJ-Rep. 1949, 173

<sup>2</sup> Hobe, AVR 37 p. 156

<sup>3</sup> Hailbronner Rn 85; in Vitzthum (Ed.)

<sup>4</sup> Calliess, Art. 1 EUV, Rn 22

<sup>5</sup> Schwarze, Art. 1 EU Treaty Rn 9

<sup>6</sup> Streinz, Rn. 680

<sup>7</sup> Klein Rn 249; in Vitzthum (Ed.)

<sup>8</sup> By 1964 the European Court of Justice had recognized the status of the EC in international law and talks of “international legal capacity”. See ECG, 15.7.1964, Rs. 6/64, Costa/ENEL, Collection 1964, 1269





Therefore the wording of Article 49 of the ECT (“Member of the Union”) and 18 of the ECT (“The Presidency represents the Union”) can only be understood to mean that the EU is granted legal status. Finally, Article 37 Paragraph 1 of the EUT clearly says that the member-states, and not the Union, hold common views on international matters. But otherwise the guidelines of the EUT do not have any competencies that only a subject of international law would be entitled to. A legal status granted to the EU would however give it the advantage of being able to sign treaties and appear before a court of law as well as being able to become a member of international organizations. In recent times the EU - following the Treaty of Nice - has already signed over 60 treaties with third parties on the basis of Article 24 and Article 38 of the EUT<sup>9</sup>. This indicates the increasing need for its own international legal capacity. The efforts to have the EU acquire an independent legal capacity therefore seem to be an objective worth pursuing. This would lead to more clarity in political relationships and would lead to more efficiency and legal security. According to Article 47 of the EUT the “Union” has a legal personality. But this is just the result of the change from the EC into its successor, the “Union”, envisioned by Treaty of Lisbon (Art. 1 Paragraph 3 Page 3 of the EUT). Up to that point the EU remains - in accordance with the ruling of the German Federal Constitutional Court<sup>10</sup> - an international organization *sui generis* without subjectivity to international law.

*The term EU (and not EC) is however still used partially below. This does not however indicate subjectivity to international law.*

## **II. Application of the WTO-Law**

### **1. Application of the WTO-Law as Law of Contract**

International law is applicable with regard to the export of goods from the DR Congo into member-states of the European Community. Since this involves trade relations between two subjects of international law the Law of the WTO is applicable. The controversy surrounding the international legal status<sup>11</sup> of the European Union does not arise here, since the EC (and not the EU - in default of the competency<sup>12</sup> granted to it in 1995) is a member of the WTO. Furthermore, every member-state of the EC also a full member of the World Trade Organization.

### **2. Application of the GATT in Particular**

The WTO was formed in 1995 upon the signing of the Marrakesh Treaty after the successful completion of the Uruguay-Round. The Marrakesh Agreement establishing the World Trade Organization” consists of only 16 articles but contains several other agreements and specifications which can be found in the annexures of Marrakesh Agreement. For example, Annex 1A contains the Multilateral Agreement on Trade in Goods, to which the General Agreement on Tariffs and Trade of 1994 also belongs. The GATT 1994 contains fundamental legal guidelines for international trade in goods. Rather unusually structured, it points at the beginning to the fact that the GATT 47 which was in existence long before the establishment of the WTO is also part of the new GATT 94.

<sup>9</sup> Thym, 2006, p. 875

<sup>10</sup> Federal Constitutional Court 89, 155, 195

<sup>11</sup> Oppermann Rn 639

<sup>12</sup> Van den Bossche p. 106





### III. The Most Favoured Nation Clause and National Treatment

#### 1. General Content and Implication of the Most Favoured Nation Clause

Most favoured nation clauses are found in bilateral and multilateral international treaties as a commitment to automatically accord the signatories preferential treatment; that means the obligated partner must treat all other partners in such a way that reflects preferential treatment.<sup>13</sup> In this way the following objectives are pursued:

- Enabling free trade because protectionist measures against individual countries become outlawed.
- Stabilization of world trade due to increased transparency in trade policies and the outlawing of special preferences between states.
- Guaranteeing access to the world market for newcomers and less powerful countries, because preferential treatment becomes generalized.
- Simplifying of customs regulations in the absence of guidelines of origin.<sup>14</sup>

In this way the rights granted through the most favoured nation clause are either of a similar nature or belong to the same category as those granted to other states. The advantages resulting from these rights can be varied. In some treaties they affect the subjects and citizens, in other treaties products and in others they affect states.

Today the most favoured nation status is seen as the most important principle within the framework of international trade. It is said that it resulted to a considerable extent in the surprising expansion of world trade after the Second World War. In particular the unconditional form of granting the most favoured nation status is seen as a suitable and successful means of attaining equal treatment between states.<sup>15</sup>

#### 2. The Most Favoured Nation Clause in the GATT 1947 Treaty

The most favoured nation clause is contained in Articles I and II of the first part of the GATT 47. Here the unconditional granting of the most favoured nation status of Article I can be seen as a cornerstone of the GATT.<sup>16</sup> In accordance with this Article all signatories commit themselves to accord every WTO member-state equal treatment when levying import and export duty on goods and when implementing administrative guidelines for the same. This Article guarantees all member-states that all fiscal and non-fiscal advantages, exemptions, favours and benefits granted by one country to another for a product originating from or destined for that must be extended to every other GATT-member. This makes equal treatment immediate and unconditional, i.e. there is no need for such negotiations in favour of other GATT-partners.<sup>17</sup>

Apart from the burdens caused by duty and other taxes, the principle of granting the most favoured status also refers to, as shown by the reference in Art. I GATT 47, the influencing of importation and exportation of goods through laws, administrative directives and other regulations.<sup>18</sup> On the basis of the most favoured nation clause it is possible for the WTO member-states to adjust to the individual prices and duties of other states.

<sup>13</sup> Verdross/Simma, p. 485

<sup>14</sup> Klodt, in: Robinson/Sauvant/Gavitrikar, p. 184

<sup>15</sup> Ünsal, p. 45

<sup>16</sup> Siebold p. 85; in Schachtschneider (Ed.)

<sup>17</sup> Ott, p. 87

<sup>18</sup> Ott, p. 87





If these principles were followed, one would only need to check in the customs system **Harmonised Commodity Description and Coding System (HS) of Tariffs** of the EC to find out which requirements are imposed on specific products imported into the EC. There are, however, exceptions to the guidelines on granting the most favoured nation status with regard to developing countries.

### **3. Principle of National Treatment**

Whereas in the principle of granting the most favoured nation status the discrimination of one state *between* different partners should be avoided, in the principle of national treatment the aim is to avoid discrimination of one state *against* other WTO member-states<sup>19</sup> by, say, putting foreign products at a disadvantage compared to local products. This principle is embodied in Article III of the GATT 47.

## **IV. Exceptions to the Most Favoured Status in Favour of Developing Countries in the WTO-System**

### **1. Status of the DR Congo**

#### **a) DR Congo as a Developing Country**

In order for the DR Congo to enjoy the special rights extended to the developing countries by the WTO, the DR Congo would have to be classified as a developing country. The WTO does not, however, have an official definition of what a developing country is. There is, therefore, the possibility of a developing country declaring itself as such.<sup>20</sup> The WTO member-states therefore announce themselves whether they are industrialized nations or developing countries. However, the automatic benefiting from privileges only occurs when the developed countries do not object to the declaration.<sup>21</sup>

In the case of DR Congo, this not in dispute since its status as a developing country is recognized worldwide. However there are also classifications within the group of developing countries. There are the Newly Industrialized Countries (developing countries on the way to becoming industrialized nations), Least Developed Countries (the poorest developing countries) and other developing countries. Even here there are no clear guidelines to determine if a country has moved from the level of Developing Country to a Newly Industrialized Country or not. As a result individual countries can also declare their own status here.<sup>22</sup>

#### **b) DR Congo as a Least Developed Country**

The LDC is a category artificially created by the United Nations. Currently 50 countries, in which 10.5% of the world population lives, fall in this category<sup>23</sup>. The current UN-criteria for LDCs (The Criteria for Identification of LDCs) are based on the Gross National Product, the Economic Vulnerability Index, the Human Assets Index as well as the limitation of the population to a maximum of 75 million inhabitants.<sup>24</sup> The Gross Domestic Product

<sup>19</sup> Van den Bossche, p. 370

<sup>20</sup> Van den Bossche, p. 107

<sup>21</sup> Vedder, in: Institut für Völkerrecht, p.171

<sup>22</sup> Ünsal, p. 124

<sup>23</sup> UN Office of High Representative for the LDCs, List of LDCs, dated 29.11.2008, compare <http://www.un.org/special-rep/ohrls/ldc/list.htm>

<sup>24</sup> UN Office of High Representative for the LDCs, Criteria of LDCs, dated 29.11.2008, compare <http://>



must be less than 750 US\$, the Human Asset Index (gives details of the calorie-intake per person as a % of the minimum requirement, child mortality rate, adult-literacy levels and the levels of admission in secondary schools) must be below 59 and the Economic Vulnerability Index (based on exports, Instability of export proceeds, agricultural production and the contribution of manufacturing industries and services to the GDP) below 36. This differentiation is meaningful to the extent that more developed countries have more obligations and less special rights. There is no shortage of conflict-potential within this principle of classification.

In the case of DR Congo the decision is potentially controversial - since the DR Congo meets all the LDC-criteria as set by the UN and belongs to the LDCs. In the general balance of trade in 2007 the DR Congo occupied position 178 among all countries in comparison.<sup>25</sup> Due to widespread corruption, inadequate transport infrastructure, telecommunications and information technology, not to mention the presence of armed conflicts and wars on Congolese soil (due to the direct involvement of neighbouring states such as Rwanda, Uganda, Burundi, Angola, Zimbabwe and Namibia now also referred to as the "African World War"), the country lies even much lower than other equally underdeveloped states of Sub-Saharan Africa.<sup>26</sup>

International trade on the Western half of the country is extremely limited due to the non-functional port in Matadi and the difficult navigation of the Congo River. The lack of electricity and the underdeveloped financial sector scare away private investors. Rival militia groups are embroiled in bloody wars to control the mineral-rich Eastern and Southern parts of the country. Even the UN-Troop MONUC which has been stationed there since 2000 can only provide peace to a limited extent as shown by the current turn of events. The classification of DR Congo as an LDC is therefore absolutely justified.

## **2. Special Guidelines for Developing Countries Within the WTO**

Since this project exclusively deals with the export of commodities (and therefore excludes the service sector, intellectual property rights and measures to promote investment), there are special guidelines in the GATT from which the DR Congo could benefit when exporting goods to the EU.

### **a) Article XVIII of GATT 47**

The Article XVIII, originally being the only development-related guideline of the GATT, permits the alteration and withdrawal of customs concessions under certain conditions so as to establish a branch of industry (Section A), exempt a country from quota-restrictions, protect balance of payments (Section B) as well as - complementarily - to establish an economic sector (Section C). This Article however only has relevance with regard to imports into developing countries, not their exports.

### **b) Part IV of GATT 47**

Part IV of the GATT was added in 1965 under the title "Trade and Development" with the aim of promoting trade for countries that are developing.<sup>27</sup>

[www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm](http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm)

<sup>25</sup> World Bank, Trade Brief of DR Congo 2008, p.1 compare <http://info.worldbank.org/etools/wti2008/docs/brief44.pdf>

<sup>26</sup> World Bank, Trade Brief of DR Congo 2008, p.2 compare <http://info.worldbank.org/etools/wti2008/docs/brief44.pdf>

<sup>27</sup> Pellens, p. 209



aa) Article XXXVI Paragraph 1a) of GATT 47 repeats that one of the main objectives of the WTO is to improve the standard of living and to promote further development of all member-states. Paragraph 3 further underscores the necessity of taking progressive dynamic measures to enable developing countries to have fuller participation in international trade.

bb) However, the only concrete regulation in Part IV is Article XXXVI Paragraph 8 of GATT 47, which exempts the developing countries from the fundamental reciprocity-obligation of the GATT. According to this article the industrialize nations should not expect any contributions which are incompatible with their individual needs in the area of development, finance and trade. In this way the DR Congo is excluded from the linear rule of negotiations, she can only commit herself to the EU on concessions she has clearly identified and accepted. Therefore, if the EU gives preferential treatment to export from the DR Congo, the DR Congo does not have to automatically extend this to the EC-countries. The regulation however leaves open the option for the industrialized nations to demand any favour in return or not.

The practical implication of Article XXXVI Paragraph 8 of GATT 47 is rather minimal because according to this regulation the developing countries are only entitled to benefits if the industrialized countries demand an equal contribution.<sup>28</sup> Furthermore, developing countries cannot demand any concrete favourable conditions.

cc) Article XXXVII of GATT 47 calls upon industrialized nations to take measures that favour developing countries. In particular some products from developing countries and which are of great economic importance should be accorded preference. But even this Article is not obligatory. In most cases developed nations only apply it when there are no practical or legal hurdles involved.<sup>29</sup>

Because of this legal technicality associated with principles and objectives, less so for rights and obligations, Article IV is clearly different from the remaining regulations of the Treaty.<sup>30</sup>

### 3. Enabling Clause

#### a) Background

Due to an inadequate legal foundation for a comprehensive preferential trade treaty between the industrialized nations and the developing countries (it was only possible in special circumstances for a “waiver” to be granted in the context of Article XXV Paragraph 5 of GATT 47 in isolated cases), the Enabling Clause<sup>31</sup> was introduced in favour of the developing countries within the framework of the Tokyo Round of Negotiations between the GATT-signatories in 1979. It consists of 9 Articles and forms the most important exception to the principle of the most favoured nation status from Article I of GATT 47.

<sup>28</sup> Ünsal, p. 81

<sup>29</sup> Ünsal, p. 82

<sup>30</sup> Herrmann/WeiBOhler, Rn 993

<sup>31</sup> Actually: “Differential and more favourable Treatment Reciprocity and fuller Participation of developing Countries”





## **b) Scope of Application**

It must first of all be clear that the Enabling Clause only applies to trade in commodities - it cannot be extended to other sectors such as service-provision, protection of intellectual property and investment.<sup>32</sup>

- 1) Paragraph 1 of the Enabling Clause states clearly that signatories can grant developing countries “differentiated and favourable treatment without extending these favours to other signatories.” The EU is therefore allowed to give preferential treatment in matters of trade to the DR Congo regardless of the principle of the most favoured nation status. The successive paragraphs of the Enabling Clause list the areas in which special and differentiated treatment is permitted and the specific cases in which this may happen.
- 2) The best known area of application in accordance with Paragraph 2 a) of the Enabling Clause is the Generalized System of Preferences (GSP). It is the central development political instrument which, in the case of the EU, envisions further customs-exemption on imports from the affected countries.<sup>33</sup> It operates with a complex and highly differentiated incentive-system in order to guide the developing countries towards implementing desired political or economic policies.
- 3) Paragraph 2b) of the Enabling Clause permits differentiated and favourable treatment of developing countries with regard to non tariff-related measures which are regulated through multilateral treaties in the context of GATT 47. This area of application, however, has very little meaning in concrete terms.
- 4) Paragraph 2 d) of the Enabling Clause extends the area of application to include special treatment of LDCs. It permits “special treatment in favour of least developed countries among the developing countries within the framework of general or specific measures in favour of developing countries.

This allows the EU to have a further differentiation within the group of developing countries. In concrete terms, the GSP of the EU envisions a complete abolition of tariffs on exports from the DR Congo and 49 other LDCs worldwide, with the exception of arms (see EBA). The special meaning of this advantage lies in the fact that “according to Paragraph 2 d) the countries granting preferential treatment do not have to provide evidence that the differentiation between developing countries and least developed countries is not discriminatory.<sup>34</sup> Paragraph 2b) therefore makes it easy for developed countries to make certain concessions to LDCs since they do not have to first provide evidence to justify the differentiation. In the end both the industrialized countries and the LDCs benefit.

## **c) Obligation to Notify**

According to Article 4 of the Enabling Clause, every signatory that takes precautionary measures in order to introduce an agreement in the context of Paragraph 2 d) of the Enabling Clause must first notify the WTO-signatories and inform them of all the aspects

<sup>32</sup> Compare Art I b) GATT 94: all the decisions of the signatories of GATT 47 are part of GATT 94, i.e. they are still valid in GATT but are not transferable to GATS or TRIPS.

<sup>33</sup> Pellens, p. 214

<sup>34</sup> EC-Conditions for Granting Tariff Preferences to Developing Countries, 7th April 2004, WT/DS246/AB/R, Paragraph 172





of the precautionary measures taken and give them an opportunity to consult within the shortest time possible. The EC has fulfilled this requirement by making the Generalized System of Preferences the subject of the meeting of the Committee for Trade and Development which succeeded the notification.<sup>35</sup>

#### **d) Legal Nature**

The Enabling Clause is not a temporary “waiver” in the context of Article XXV Paragraph 5 of GATT 47, but, in accordance with Art. 1 b) of GATT 94, it is part of GATT 94, which includes decisions of signatories within the framework of GATT 47.<sup>36</sup>

### **V. Concrete Implications for Trade Between DR Congo and the EU**

#### **1. The Generalized System of Preferences of the EC**

The “Generalized System of Preferences” (GSP) of the EC, which was introduced for the first time in 1971, contains the unilateral granting of preferential treatment with regard to tariffs to all developing countries for both manufactured and agricultural products. This meant the GSP violated the principle of reciprocity as well as the principle of the most favoured nation status in accordance with Art. 1 of GATT 47. However, since the GSP is applicable to all developing countries there are no more legal challenges since the introduction of the Enabling Clause in 1979. In any case the GSP has permanently been endorsed by the legal foundation of the Enabling Clause since 1979.<sup>37</sup> Even the DR Congo, together with the former European colonies and overseas territories of the 77 African, Caribbean and Pacific States are principally covered by the GSP. There are, however, special relationships arising from the Treaties of Lomé and Cotonou which go beyond the scope of the GSP. The objective of the GSP is to combine trade and development policies in order to reduce the levels of poverty in developing countries and to integrate these countries into the system of international trade.<sup>38</sup> For this purpose the effects of preferential treatment on the EC-states are reviewed annually and adjustment made where necessary. Using a development index the per capita income and the volume of exports of each favoured developing country are measured and compared with the EU. With the specialization index it is possible to determine the volume of exports into the EU by a specific developing country in a particular sector. If the share for a country in a given sector lies above a certain percentage (between 15-20%) of the total imports of the EU from the favoured countries, the preferential treatment for that country is abolished. As previously mentioned, the DR Congo is covered by the current GSP.<sup>39</sup> In this way the country also benefits from the specially favoured EBA-Initiative within the GSP.

#### **2. The Rules of Origin of the GSP**

Before the DR Congo and other developing countries can benefit from the GSP they must comply with the European Union’s Rules of Origin of the GSP.<sup>40</sup> The Rules of Origin, contained in Art. 66 - 97, are intended to ensure that only those products from developing countries which were either wholly or to a sufficiently large extent ((Art 67 Paragraph 1a

<sup>35</sup> Pellens, p. 227

<sup>36</sup> According to WTO-Secretariat, Legal Note on Regional Trade Arrangements und the enabling clause, 13th May 2003, WT/COMTD/W/114, p. 3

<sup>37</sup> Ünsal, p. 96

<sup>38</sup> Hemke, in: Menschenrechtsmagazin (Human Rights Magazine), p. 282

<sup>39</sup> EC Council Regulation 980/2005 (valid for the years 2006-2008)

<sup>40</sup> Art 66-97 of Regulation No. 2454/93





of the GSP) produced in those countries can benefit from the preferential treatment. This regulation ensures that countries not covered by the GSP do not export their products into the EU through the favoured countries.<sup>41</sup> Products with a different HS-Code from those originating from non-favoured states fulfil the criterion that they were, to a sufficiently large extent, produced in a country favoured by the GSP and may therefore benefit from the preferential treatment for entry into the EU. This rule is however still to be complemented by a “Single List” which contains different criteria for a variety of products which must be met by the developing countries. The regulations will not only specify the materials used in manufacturing the products which must originate from the favoured countries, but also materials not originating from the favoured country but whose use is allowed under the Rules of Origin (Art 69 of the Rules of Origin).

Furthermore Annex 15<sup>42</sup> of the RO contains the maximum percentage of raw materials from non-favoured countries that such products are permitted to have. The maximum percentage allowed lies between 40% - 50%.<sup>43</sup>

Also, according to the Tolerance Rule (Art 71 RO), the value of materials from non-favoured countries may not exceed 10% of the value of the finished product.

### **3. The EC-ACP Preference Treaty of Yaoundé and Lomé and their Legal Problems in the WTO**

The main targets of the development policies of the EU since 1964 are the so-called ACP-States. A large proportion of these are former colonies. It began with the Treaty of Yaoundé. Both Treaties of Yaoundé in 1964 and 1971 led to the establishment of one-sided free trade zones in the context of Art. XXIV GATT 47 between the EC and 18 African states.<sup>44</sup> The free trade zones were one-sided because only the developing countries involved had the privilege to continue tariffs and establish new ones. Further concessions were granted to the ACP-states, among them Zaire (today known as DR Congo), in the four Lomé-Treaties between 1975 and 2000. In this way the EU avoided imposing restrictions on imports from the ACP-states while these states were only subject to the most favoured nation status among the EC member-states. The ACP-states were granted free access for 99% of all products.<sup>45</sup> The only exception in the Lomé-Treaty was the duty-free importation of sugar, bananas and rice.<sup>46</sup> Fluctuations in profits made by developing countries were compensated by price guarantees through funds from the EU. Through this arrangement the ACP-states were assured of minimum prices for specific products which were an incentive to concentrate on the production of these goods. The DR Congo benefited from both treaties.

The legal hurdle with regard to this one-sided preferential treaty arose from the fact that selective preferential treatment in trade was incompatible with the principle of the most favoured nation as stipulated in Article 1 GATT 47. In the event that mutual preferences had been granted, a legally consistent application of the regulation on free trade zones in accordance with Art XXIV Paragraph 5b GATT 47 would have occurred. On the contrary, the preference system of the Lomé-Treaty was excluded from the requirements of GATT

<sup>41</sup> Berisha, p. 23

<sup>42</sup> List of working of processing required to be carried out on non-originating materials in order that the product manufactured can obtain originating status, dated 29.5.2003

<sup>43</sup> Annex 15 Rules of Origin

<sup>44</sup> Ünsal, p. 102

<sup>45</sup> Ünsal, 103

<sup>46</sup> Hemke, in: Menschenrechtsmagazin (Human Rights Magazine), p. 284



47 or the current World Trade Organization in accordance with Art. 9 Paragraph 3 of the Marrakesh Treaty.<sup>47</sup>

#### **4. The Treaty of Cotonou and EPA (Economic Partnership Agreements)**

The signing of the Treaty of Cotonou in June 2000 saw the renewal of trade relations between the EU and the ACP-states. The Treaty is valid for 20 years. In that treaty the EU and the ACP-states agreed on new WTO-compatible trade regulations. It mainly deals with existing additional favours in the form of duty-free access to the market for sugar, meat and bananas and, more importantly, the guarantee of EU-level prices. Whereas the ACP-states were still regarded as one homogenous area in the Lomé-Treaty, WTO-compatible free trade zones between the EU and the ACP-states should be created in the context of Art. XXIV Paragraph 5b of GATT 47, which should come into force as from 2008. It is important to note that in the special case of the DR Congo the EU allowed all the 77 ACP-states an accumulation with regard to the Rules of Origin until 2007 under the Treaty of Cotonou, deviating from the strict GSP Rules of Origin. This accumulation made it possible for goods from all ACP-states to be treated as though they originated from one of the favoured ACP-states.

The new Economic Partnership Agreements (EPAs) were originally not meant to be made on a bilateral level between the EU and the individual ACP-states but between the EU and the regional economic blocs of the ACP-states. Although the negotiations about the EPAs began as far back as 2002, it has still not been possible to sign any agreement with most of the LDCs, among them the DR Congo.<sup>48</sup> This can be traced back to a large extent to the EBA-Initiative of the EC.

#### **5. EBA for DR Congo as an LDC (EC-Guideline 416/200149)**

The “Everything-But-Arms”-Initiative of the EC, through which the GSP for the LDCs was modified, came into force as early as 2001. EBA is a special preference system for LDCs within the GSP. Through the EBA-preferences several products which are subject to duty under the GSP (meat, fruits, processed sugar, grain and cocoa products)<sup>50</sup> from the DR Congo and all other LDC can be exported to the EU duty-free and without any quota-restrictions. At the moment 50 states are classified by the United Nations as LDCs, 35 of which are ACP-states.<sup>51</sup> Within the framework of EBA, this group of countries is granted duty-free trade with the EU for all products except arms and ammunition. This security related exclusion of arms is however clearly granted to the EU through Art XXI b) ii GATT 47. Currently, in addition to this rule, the trade in sugar and rice is still excluded.<sup>52</sup> The following rules apply for these agricultural products:

1. Between 1<sup>st</sup> September 2006 and 1<sup>st</sup> September 2009, the duty rate for rice should be gradually reduced to zero. There will be an import quota in place by that time, which will amount to the maximum volume of rice imports into the EU from LDCs in the recent past plus an additional 15%. This quota will be increased annually by a further 15% until a maximum limit of about 6700 tonnes is attained in 2008-2009.

<sup>47</sup> Van den Bossche, p. 116


<sup>48</sup> As of 29.11.2008

<sup>49</sup> EC Rule No. 416/2001 of the Council of 28<sup>th</sup> February 2001; Official Gazette of the EC L 60/43

<sup>50</sup> Classification according to the HS System

<sup>51</sup> LDC List of the United Nations as of 29.11.2008, <http://www.un.org/special-rep/ohrls/ldc/list.htm>

<sup>52</sup> EC-Rule No. 416/2001

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2. The customs tariff on sugar should be reduced to zero in the period between 1<sup>st</sup> July 2006 and 1<sup>st</sup> July 2009. An import quota will be in place here as well, with a maximum limit of almost 200,000 tonnes in 2008-2009. Sugar imports which fall under the Cotonou-Treaty are exempted from this regulation, i.e. sugar import from the ACP countries can be permitted in addition to the 200,000 tonnes.

The EU monitors the origin of the imported products since only those goods produced in the LDCs are promoted. The EU also reserves the right to increase the duty tariffs if the imports harm the European producers or the European market. Apart from that, the EU may impose restrictions on exports from all countries at any time in accordance with Article XX a GATT 47 if there is a threat to public morals (Art XX GATT 47), public health or the environment (Art XX b GATT 47), cultural goods of national importance (Art XX f GATT 47) or any other goods mentioned there.

Due to this overwhelming preference for all LDCs within the frame work of EBA it can be understood why the incentive to be part of a relatively unfavourable EPA is rather low. It can also be confirmed that by treating all LDCs equally within the context of Art. 2 of the Enabling Clause the EU has complied with WTO-guidelines.

## **6. Arms-Embargo against Congo-Rebels**

In response to the EBA-Initiative of the EU the UN Security Council, through Resolution S/RES/1807 of March 2008, extended its arms embargo against the rebels in the DR Congo, which had been in force since 2005. The committee was unanimous in its decision to extend the sanctions until the end of 2008. At the same time the Council lifted the ban on the importation of arms for the government in Kinshasa.<sup>53</sup> The resolution states that the prerequisite for legal supplies is prior consultation with the group of experts appointed by the United Nations.<sup>54</sup> On its part, the EU enforced this embargo through its Resolution 1377/2007.

Since the scope of this project is limited to the exports of DR Congo, any potential supplies of arms by EC states to the DR Congo will not be discussed here.

## **7. Sensitive Products of the EC in the Agricultural Sector**

### **a) General Treatment of Developing Countries**

In order to compensate for economic disadvantages the EU accords developing countries certain trade favours in the form of low import duty. This reduction of import duty has a minimal effect to some extent since the EU reserves the right to classify important agricultural products as sensitive. Neither do the markets have to be completely opened nor duty tariffs lowered or abolished for these products. The EU has so far used three categories for duty reductions (20%, 36%, 100%) whereby 20% reduction applies to “sensitive products” such as sugar, powdered milk, olive oil, wine, a variety of fruits and vegetables and products of the first level of further processing.

<sup>53</sup> S/RES/1596 (2005)

<sup>54</sup> S/RES/1807 (2008)





## **b) Special Treatment of the DR Congo an LDC**

Initially all industrialized countries, including EC member-states, were (“shall”) to grant the LDCs duty-free and unlimited access to their markets until the end of 2008. Those industrialized countries that are unable to implement this were supposed to abolish duty for 97% of the products from LDCs and gradually increase this to 100% of the products.<sup>55</sup>

Nevertheless, the new concept presented by the G7<sup>56</sup> at this year’s Mini-Conference of Ministers in Geneva envisions a “4+2%-Model, i.e. a restriction of the products classified as sensitive to 4% of the tariff lines, with an additional exception of 2% for countries with exceptionally high duty-tariffs. This would seriously hamper the objective of substantial liberalization in the agricultural sector. There is a positive compromise-suggestion of the EC. It sees true compensation as a direct relationship between products classified as sensitive and an expansion of duty quotas. Accordingly, such industrialized countries which classify 4% of their tariff lines as sensitive should, as importers of agricultural products, grant the LDCs an expansion of duty quotas to 4% of local consumption.

Due to the failure of this year’s conference in Geneva and the subsequent delays in the Doha-Negotiations, it remains unclear when the LDCs will obtain free access to the market of industrialized countries. The only positive fact is that the EC through its EBA-Initiative has considerably opened its markets to the DR Congo and all other LDCs and will completely do so by September 2009.

## **8. Trade Statistics and Implications**

### **a) Agricultural Products**

With an export share of over 70%, these are goods worth about 26 million US Dollars; the DR Congo exports most of its agricultural products to the EU. The products most commonly exported are tobacco, coffee, maize, sugar cane, cocoa, nuts and palm oil.<sup>57</sup> Although 99.7% of all EU-tariff lines officially grant LDCs duty-free access to European markets in accordance with HS, the actual value of DR Congo’s exports stands at just 87%<sup>58</sup> due to the aforementioned exceptions in the form of sensitive products (specifically rice and sugar).

### **b) Non-Agricultural Products**

The EU is also by far the most important trade partner when it comes to non-agricultural products. Goods worth 755 million US Dollars were exported into the EC. The main goods here were cobalt, copper, diamonds and tin. Since there is no exemption from non-payment of duty on all non-agricultural goods from LDCs, except in the EBA-Initiative of the EU, 100% of all these exports are exempted from duty and quotas.

### **c) Products in General**

The most important trade partner of the DR Congo is the EC (47.5% of all goods are exported to Belgium<sup>59</sup> alone). In 2007 goods worth 781 million US Dollars were exported

<sup>55</sup> During the WTO Conference of Ministers in 2005, the industrialized countries were granted a concession of 3% with regard to free market access and abolition of duty tariffs.

<sup>56</sup> Germany, France, Great Britain, Italy, Japan, Canada, USA

<sup>57</sup> F AO Statistical Year Book of DR Congo, 2005

<sup>58</sup> Democratic Republic of Congo, WTO- World Tariff Profiles 2008

<sup>59</sup> World Bank, November 2008





into the EU. Due to the predominantly large proportion of non-agricultural products, 99% off all Congolese goods exported into the EU are exempted from duty.

## **VI. Development as a Legal Principle of the WTO**

It is a debatable point whether the DR Congo can claim to have a right to development with regards to exports into the EU.

### **1. Deriving a General Internal WTO Principle of Development**

In the WTO the principle of development has been developed further into a general principle. On the one hand specific reference is made to the objective of economic development in many instances.<sup>60</sup> However, in addition to that, the objectives of development and the improvement of living standards are formulated.<sup>61</sup> These formulations bear witness to a comprehensive concept of development that is not limited to economic aspects alone.

### **2. International Development Principles as External Principles**

It is true that the WTO-system cannot be understood in “clinical isolation” from the rest of the international law.<sup>62</sup> General principles of international law are part of the international law to be considered in the WTO-law.

#### **a) The Right to Development in the DR Congo**

The most controversial question in international development law is that of the scope and content of a possible right to development. There is no general consensus at state level that would lead to concrete specific claims or responsibilities with regard to development in international trade.<sup>63</sup> The right to development is therefore restricted to the right to development of other countries that are subject to international law.

#### **b) Material Equality of States**

The equality of states is one of the basic principles of international law, which has received approval in accordance with the principle of sovereign equality of Article 2 no. 1 of the UN-Charter. The legal obligation of industrialized countries to a global redistribution should arise from the principle of compensational imbalance. At least a partial recognition of this necessity can be seen in the preferential treatment granted to developing countries through specific guidelines already mentioned. However there is still no general principle accepted beyond this.<sup>64</sup>

#### **c) Principle of Solidarity**

The principle of solidarity according to international law can be derived from Art 55 f and from the general nature of the UN-Charter which takes a binding international social principle as a basis. Nevertheless, no positive obligation to perform can be derived from it apart from isolated development-specific restraints in behaviour and forbearance.<sup>65</sup>

<sup>60</sup> According to item 1 of the preamble of Art XVIII GATT 47 and in paragraph 2 of the preamble of Marrakesh Agreement establishing the WTO

<sup>61</sup> Paragraph 1 of the preamble of the Marrakesh Agreement

<sup>62</sup> Appellate Body Report “United States - Gasoline”, 29<sup>th</sup> April 1996

<sup>63</sup> Odendahl, *Das Recht auf Entwicklung (The Right to Development)*, p. 277 ff

<sup>64</sup> Pellens, p. 240

<sup>65</sup> Pellens, p. 241







## **Part B: Possible Legal Measures to Ease Export of Commodities**

The various tariff regulations of the EU that currently restrict exports will no longer play any role from September 2009 (with the introduction of full liberalization of the market for rice and sugar). For the DR Congo, the main challenge to accessing the EU-market will then be technical trade barriers. These “Technical Barriers to Trade” must therefore be fought using the law.

### **I. Improved System of Establishing Rules of Origin**

The complex and strict rules of origin previously mentioned limit trade preferences and, consequently, their benefits for the DR Congo. This is clearly reflected in the trade statistics which show a decline in the volumes of exports from the DR Congo and other LDCs into the EU.<sup>66</sup> There are however two approaches to the matter that would make it possible for the DR Congo to increase its exports into the EU.

#### **a) Integration into the System of Regional Accumulation**

Under the provisions of Art 67 Paragraphs 2 - 4 of the Rules of Origin, the EU allows a bilateral accumulation or, under Art 72, 72a, 72b, a regional accumulation of the rules of origin which, similar to the Cotonou Treaty, make it possible for commodities from particular countries to be treated as though they originated from one of the favoured developing countries. According to regional accumulation under Article 72 Paragraph 1 of the Rules of Origin, products from the favoured countries which comply with the Rules of Origin may be processed in other countries from particular regional zones and yet still be treated as if they were produced in a favoured country.

In this regard Art 72a Paragraph 1a of the Rules of Origin stipulates that the increase in value of the product must be higher in the favoured country as the value of the raw products from the non-favoured countries. Compliance with these regulations allows the importation of these products into the EU by observing the rules of origin and by taking advantage of the preferential treatment.<sup>67</sup> Currently, under Art. 72 Paragraph 3 of the RO, there are 3 regional zones which fall under these regulations. None of these zones are in Africa (because of the Economic Partnership Agreements - EPAs), which means that not even the DR Congo can benefit from them. An integration of African customs unions such as CEMAC<sup>68</sup> or ECCAS<sup>69</sup> (both of which the DR Congo is a member of) into this system of regional zones in the context of Art. 72 Paragraph 3 of the RO would lead to economic integration within Africa and eventually to an increase in exports into the EU which permits accumulation. The admission of the DR Congo into one of such regional African groups not covered by EPAs could therefore immensely ease exportation.

#### **b) Simplifying the Rules of Origin**

Article 71 of the Rules of Origin, which demands a “high domestic value”, also does not appear appropriate. According to this Tolerance Rule, the value of raw materials from non-favoured countries should not be more than 10% of the end-product to be exported. This rule almost exclusively benefits only the newly industrialized countries and not the

<sup>66</sup> European Commission - External Trade, Evolution of the LDCs Trade Balance with the EU

<sup>67</sup> Brenton, p. 13

<sup>68</sup> Communauté Economique et Monétaire de l' Afrique Centrale

<sup>69</sup> Economic Community of Central African States





LDCs. This meant that until the end of 2007 some LDCs such as the DR Congo were still exporting under the less stringent rules of origin of the Cotonou Treaty.

The threshold of the substantial “value added” in a favoured country should therefore be considerably reduced, meaning Article 71 should be changed. The African Growth and Opportunity Act (AGOA) of the USA, which has now been extended to 2012, can serve as a perfect example. According to this Act, contrary to the current GSP Rules of Origin of the EU, African countries can also use manufacturing factories from third countries. This led to an increase of 144% in exports between 2000 and 2007.<sup>70</sup> The EU would therefore be well advised to minimize the element of value-addition. The Report of the Blair Africa Commission had already suggested a simple 10% value-addition criterion for each favoured country.<sup>71</sup> This would have the advantage that the dependence on specific raw materials and unprocessed products would reduce and there would be an incentive to build more processing industries such as textile industries. This would lead to a **diversification of the export structure** in the DR Congo. A reduction in the demand for value-addition would eventually promote trade with third countries and subsequently ease exportation into the EU.

In this regard it is important to note that a new official proposal of the EU-Commission of November 2008 envisions, in accordance with Art. 3.6 Appendix 13a (referring to Art 76 RO), a reduction of the threshold of “high domestic value” to 30%.<sup>72</sup>

## II. Legal Foundation for a Quicker Abolition of Agricultural Subsidies

Article 6 of the WTO Agreement on Agriculture permits the EU to financially subsidize their domestic agricultural products. These agricultural subsidies of the EU amount to about 45 billion Euros annually, which surpasses the gross national product of all the LDCs together, currently fall under the “Amber Box” (trade-distorting subsidies) of the WTO. Whereas there is a call in Article 6 Paragraph 1 AG for the reduction and eventual abolition of these subsidies, there is still no time-plan for its implementation. It would therefore make sense to amend the Amber-Box Regulation of Art 6 accordingly.

A faster reduction of subsidies in agriculture in the EU would still ease the exportation of agricultural products from the DR Congo into the EU. On the other hand, a reduction of European agricultural subsidies would lead to an increase in prices since the supply of agricultural products on the world market would reduce, leading to higher prices. However, the DR Congo imports more agricultural products than those it exports,<sup>73</sup> such that a reduction of agricultural subsidies would only benefit consumers in the EU. Due to the ambivalent effects that a complete abolition of agricultural subsidies in the EU would have, this aspect is difficult to assess.

If the assumption is made, however, that in the middle term the competitive producers would counterbalance the production deficit of the EU, then the world prices should also fall. These would at least remove the trade distortions and products from both the DR Congo and the EU would benefit. The money made available through the abolition of minimum prices could be used by the DR Congo and other LDCs to improve efficiency in production and industrialization within the framework of **Aid for Trade (AfT)**. The transport and communication networks, which currently lead to increased transaction

<sup>70</sup> US-African Trade Profile 2008

<sup>71</sup> Blair Commission Report, p. 41

<sup>72</sup> Art. 3.6 of Appendix 13a, referring to Art. 76 RO, Draft EU-Regulation TAXUD/2046/2007-1

<sup>73</sup> FAO Statistical Yearbook of DR Congo, 2005



costs and thereby hamper trade, can be expanded. The improvement of competitiveness is more crucial. To achieve this, legal and economic steps must work in tandem.

What must be appreciated is not only the unanimous decision of the EU agricultural ministers in November 2008 to further reduce the large agricultural subsidies but also the increase of trade-related EU-cooperation assistance to 2 billion Euros annually within the framework of the Aid for Trade strategy.

### **III. No EPA-Compulsion for the DR Congo**

Due to the fact that EPA-negotiations with the DR Congo have so far failed, it is important to ask how the EU on its part will deal with the matter. Contrary to what is the case for all other ACP-countries, failure to sign an EPA automatically leads to the implementation of EBA. The failure to sign an EPA would therefore be less problematic for the DR Congo than for developing countries that are not classified as LDCs. Non-LDCs automatically fall back into the less favourable General System of Preferences (GSP).

It is true that the emergence of free trade zones within Africa would promote regional integration. One must also not forget that there are already very many economic partnership agreements in Africa (ECOWAS in West Africa, CEMAC and ECCAS in Central Africa, SADC in Southern Africa and COMESA in East and Southern Africa). Although the DR Congo is a member of ECCAS, so far only the West African members of ECOWAS can count any tangible benefits.<sup>74</sup> This is also due to the fact that economic EPA-benefits, such as strengthening of the export industry, are rather long-term. It would be more useful to first concentrate on the short-term tangible objectives such as simplifying the Rules of Origin or the abolition of agricultural subsidies and increasing the AfT-budget.

### **IV. Entitlement to EU Economic Aid on the Basis of Accountability of States**

The right of the DR Congo to additional export assistance by the EU could arise from the accountability of states. The accountability of states for abuses of international law attributed to them is a basic principle of a functioning international law that nations subscribe to. An important consequence of this is the right of the aggrieved country to compensation. The right of developing countries to reparation for the sufferings caused by colonial exploitation has often been discussed between countries and in many writings.<sup>75</sup> In this case, a claim for reparation would be made against the former colonial power Belgium, an EU-member. This would be more so the case due to the lack of determinability of what should be compensated, who should compensate and who is entitled to lodge a claim for compensation.<sup>76</sup>

<sup>74</sup> Tupy, page 9

<sup>75</sup> Pellens

<sup>76</sup> Odendahl, Das Recht auf Entwicklung (The Right to Development), p. 170



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## Abbreviations

### Abkürzungsverzeichnis

<b>Af1P</b>	Aid for Trade
<b>AG</b>	Agreement on Agriculture
<b>AGOA</b>	African Growth and Opportunity Act
<b>AKP</b>	Gruppe der afrikanischen, karibischen and pazifischen Staaten
<b>CEMAC</b>	Communaute Economique et Monetaire de 1' Afrique Centrale
<b>COMESA</b>	Market for Eastern and Southern Africa
<b>DR Kongo</b>	Demokratische Republik Kongo
<b>EBA</b>	Everything But Arms
<b>ECCAS</b>	Economic Community of Central African States
<b>ECOWAS</b>	Economic Community Of West African States
<b>EG</b>	Europäische Gemeinschaft
<b>EGV</b>	Vertrag zur Gründung der Europäischen Gemeinschaft
<b>EL</b>	Entwicklungsländer
<b>EU</b>	Europäische Union
<b>EUV</b>	Vertrag ber die Europäische Union
<b>G-7</b>	Gruppe der 7 Industrienationen
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GSP</b>	Generalized System of Preferences
<b>HS</b>	Harmonised Commodity Description and Coding System of Tariffs der World Trade Organization
<b>IGH</b>	Internationaler Gerichtshof
<b>IL</b>	Industrieländer
<b>LDC</b>	Least Developed Countries
<b>MFN</b>	Most Favored Nation
<b>RO</b>	Rules of Origin
<b>SADC</b>	Southern African Development Community
<b>UN</b>	United Nations
<b>UNCTAD</b>	United Nations Conference on Trade and Development
<b>WTO</b>	World Trade Organization



# The Role of the EU in the DR Congo

Patrick Kirchner

## A Introduction

“Paix, Justice, Travail” is the motto of the Democratic Republic of Congo, the third largest country in Africa. The same motto can be found on the country’s coat of arms. Just the fact that one can write a project paper on “The Role of the EU in the DR Congo” already shows that this motto is more of a wish than a reality because there would otherwise be no “role of the EU” to be explored and which is already a subject of numerous law as well as political science studies.

This project paper attempts to gradually take a closer look at the role of the EU in the DR Congo. A brief outline of the most important stages in Congolese history (B) should lead to a better understanding. The legal basis of the activities (C) of the EU will be studied by first looking at the aspects of international law, then the European Constitutional Law with the structural distinctiveness of EU foreign relations. After that the current objectives and activities of the EU in the DR Congo will be described (D) and analyzed; and it is important to differentiate between political and economic activities. Finally the prospects of other objectives (E) should be considered, in view of the recent difficult developments in the East Congo region and background as well as possible solutions to the challenges in the area.

Two questions need to be answered: On one hand the role of the EU will be analyzed and assessed from two points of view: first the meaning for the EU and then for the DR Congo; because the two sides must not complement each other and, as will be evident, the EU benefits more than the DR Congo. Secondly the relationship between the first and the second pillar of the EU will be analyzed as well as the possibility and the modality of causing a change in this relationship and how to show this using the DR Congo as an example.

## B Historical Outline

The Democratic Republic of Congo lies in Central Africa on the Equator. The country has a turbulent history and has always had a special role. After its “discovery” by the Portuguese, Belgium was the main European power occupying the DR Congo. The Belgian King Leopold II did not want to miss the opportunity to have a colonial territory for Belgium. However, since the Belgian population was generally against colonialism, King Leopold acquired Congo in 1885 as a “private property”<sup>1</sup> and created a status beyond all forms of international law which would remain unique in the whole history of colonialism. The tragic consequence was that all the inhabitants of the country were also seen as stateless private property and became victims of the excessive exploitation of the time, which led to international condemnation of the “Atrocities in Congo” and subsequently Leopold was forced to convert Congo to a “normal” colony in 1908.<sup>2</sup> In the years that followed, the country was exploited by Belgium; there were unrests at first and later independence movements emerged. At the start of 1959 Belgium gave in to the increasing public pressure and hastily retreated from the DR Congo.<sup>3</sup> They left behind chaos that is still responsible for the countries woes to date.

<sup>1</sup> Hamann, ZaöRV 65 (2005), p. 467, 468

<sup>2</sup> Wikipedia: Democratic Republic of Congo

<sup>3</sup> Nitsche, Aktueller Begriff No. 19/2006, p.1





Patrice Lumumba became the president of the young state; but after only 18 months his former colleague Joseph-Désiré Mobutu led a revolt against him with support from the West, renamed himself Mobutu Sese Seko and established one of the longest and most terrible dictatorships in Africa.<sup>4</sup>

In 1971 the name of the country was changed to Zaire. Transition did not come until 1997. A rebel movement under the leadership of Laurent-Désiré Kabila was formed on the border with Rwanda and overthrew the dictator<sup>5</sup>. But even the subsequent period did not bring peace to the country; the period after 1996 was recorded in history as the Congo War;<sup>6</sup> the then US-Secretary of State Albright spoke of the “first African World War”<sup>7</sup>. After the assassination of Kabila in 2001 his son “inherited” the presidency of the country.<sup>8</sup> For the first time there were efforts to bring peace and stability to the country; this was however very difficult due to the destroyed infrastructure, administration and economy. In particular, the Eastern provinces cannot be controlled by the central government; the minerals in the area being plundered by the neighbouring countries. In 2002 the international community raised hopes of the resolution of the conflict: the Pretoria-Agreement saw the signing of a peace treaty with Rwanda.<sup>9</sup> A transition-government was formed together with the rebels in 2003, which paved the way for elections in 2006.<sup>10</sup>

## C Legal Foundations

### I. Foundations of International Law

This paper examines the role of the European Union in the DR Congo. First of all the foundations of international law with regard to the EU’s activities should be analyzed. The reason for this approach is as follows: One of the key aspects of the role of the EU in Congo is the involvement of the Artemis and EUFOR RD Congo Missions. Both missions are mandated by resolutions of the UN Security Council and therefore international law is applicable. Apart from this formal argument, the material background must also be considered. The question that must be asked is: to what extent is the EU subject to international law with regard to its involvement in the DR Congo?

#### 1. Legal Entity of the EU?

This question leads to the long-debated issue of the legal entity of the EU; because the question arises as to who is entitled to the rights and duties - the EU or the member-states? The starting point of this discussion is the fact that the EU-Treaty, as opposed to the explicit guideline in Art. 281 of the EC, does not have a clear guideline on the legal entity of the Union.<sup>11</sup> This shows that the signatories of the EU-Treaty did not want to grant legal personality; otherwise the adoption of a norm similar to Art. 281 would have been feasible. However this cannot be the only determining criterion. The ICJ expressed its opinion regarding the United Nations as far back as 1949 on the subject of *Reparation for Certain Injuries*<sup>12</sup>. The ICC confirms here that subjectivity of an international organization

<sup>4</sup> Indonga-Imbanda, p. 10

<sup>5</sup> Indonga-Imbanda, p. 17

<sup>6</sup> Indonga-Imbanda, p. 18

<sup>7</sup> Reiter, Erich: Der Kongoeinsatz der EU (EU’s Congo Mission), Vienna 2003, p. 6

<sup>8</sup> Hamann, ZaöRV 65 (2005), p. 467, 470

<sup>9</sup> Nitsche, Aktueller Begriff No. 19/2006, p. 2

<sup>10</sup> Gegout, EFARev. 10 (2005), p. 427, 430

<sup>11</sup> Thym, ZaöRV 66 (2006), p. 863, 865

<sup>12</sup> ICJ Reports 1949, p. 11, 174 ff. - „Reparation for Certain Injuries”





to international law is based on its duties and mandate which were given to it upon its inception and can be modified based on the duties and mandates acquired later to enable it carry out its original mandate (so-called *implied powers*).<sup>13</sup> Generally the EU is viewed more as an umbrella-organization which on its own cannot be subjected to international laws and obligations.<sup>14</sup> The member-states would have to be the ones to be considered as far as rights and duties are concerned.

Today many developments speak in favour of giving the EU its own legal identity. Article 24 in particular gives the EU its own competence to conclude contracts. According to Article 24, treaties signed in this manner are binding for the “Organs of the Union” and not only for the member-states. The European Council (Art. 4 EU) is an organ of the EU and not of the EC.<sup>15</sup> The increasing tendency today is to have treaties signed on behalf of the EU and not the member-states<sup>16</sup>; this must be seen as *subsequent practice* (Art. 31 No. 3). Furthermore it is not proper to hold all the member-states accountable, even in cases where they were not part of a given deal.<sup>17</sup> This dilemma is eliminated when all the responsibility rests with the EU. Another problem arises with the granting of legal entity status to the EU: If the EU has rights and obligations within the framework of GASP, then we must ask which legal propositions are binding for the EU regarding its activities in the DR Congo. This is because, as opposed to the member-states, the EU not a signatory of the United Nations.

## 2. Foreign-Policy-Related Legal Obligations of the EU: “Rule of Law”

The problem is partially normalized for the EC in Art. 307 EC: The UN-Charter is an old treaty of the member-states which continues to derive its validity from the principle of “pacta sunt servanda” (Latin for “agreements must be kept”). The formation of the EC is a “res inter alios acta” (Latin for “a thing done between others”) for the UN and therefore has no consequence on the rights and obligations of the signatories of the UN-Charter. This is clearly spelt out through Art 307 of the EC.<sup>18</sup> This however still does not say anything about the validity for the EC. According to the EUCJ, the so-called Haegeman doctrine<sup>19</sup> is not only applicable to the Community<sup>20</sup> but also to the EU and that the agreements form an ‘integral part of the Union’s legal order. This is consequently the framework for the supranatural activity of the EC which will be discussed in this project paper.

## 3. Basic Principles of the United Nations

Since its formation, the UN sees itself committed to two main objectives: Securing world peace and the respect for human rights and basic freedoms (compare Art. 1 No. 1 and No. 3 of the UN-Charter). There is a tendency to deal more intensively with acts that violate peace and pose a threat to international security. On one hand this leads to a conflict between Chapter VII of the UN-Charter which allows for sanctions and the order to respect the sovereignty of nations in Art. 2 (7) of the UN-Charter<sup>21</sup>; but on the other hand one can see that the normative and material intervention options and the practical will to

<sup>13</sup> Hobe/Müller-Sartori, JuS 2002, p. 8, 9

<sup>14</sup> Klein, Eckart, in: Vitzthum, p. 381

<sup>15</sup> Klein, Eckart, in: Vitzthum, p. 381

<sup>16</sup> Thym, ZaöRV 66 (2006), p. 863, 874 f.

<sup>17</sup> Tomuschat, Christian, in: Von der Groeben/Schwarze, Art. 281

<sup>18</sup> Oppermann, § 7

<sup>19</sup> Vedder, EUC 2007

<sup>20</sup> EUCJ 1974, 449

<sup>21</sup> Weber, EUC 2006, p. 879, 882



intervene in the international community of nations have broadened.<sup>22</sup> These principles of the UN form the basis for the engagement in Congo.

#### 4. Resolutions of the Security Council on the Situation in Congo

The foundations of international law with regard to the role of the EU in the DR Congo will be studied in detail. The first European military operation in Congo was the Operation Artemis in 2003. As far as international law is concerned the EU based its decisions on Resolution 1484 of the UN Security Council of 30<sup>th</sup> May 2003.<sup>23</sup> By making reference to Chapter VII of the UN-Charter, the EU-troops obtained a mandate which also legitimized the use of military force.<sup>24</sup> The same applies for the EUFOR RD Congo-Mission which was formed through the UN Security Council Resolution 1671 of 25<sup>th</sup> April 2006.<sup>25</sup>

##### a) Posing a Threat to Peace (Art. 39 of the UN-Charter)?

Regarding the legality of these resolutions, the question arises as to how the Security Council arrived at the conclusion that there was “a threat to peace” (Art. 39 of the UN-Charter) in the DR Congo. It must also be remembered that the Security Council has plenty of room to manoeuvre when making assessments (*margin of appreciation*).<sup>26</sup> Because a first look at the situation shows that the events are internal. The International Law on Interventions from Art. 2 No. 7 prohibits the United Nations from interfering with the internal affairs of a state (so-called *domaine reserve*). That is why for a long time it was assumed that in principle that Art. 39 of the UN-Charter was not applicable for military intervention inside a state and these cannot pose a threat to peace. A pure civil war therefore does not pose a threat to peace. A civil war can however pose a threat to peace in accordance with Art. 39 of the UN-Charter if it leads to large numbers of refugees fleeing into other countries and thereby threatening the stability of the region.<sup>27</sup> This is the justification that was used by the Security Council in 1991 to stem the systematic persecution of the Kurds by Iraq and in 1997 to counter the Apartheid-regime in South Africa.<sup>28</sup> The tendency within the Security Council, however, is to conclude that there is a threat to peace as long as there are systematic abuses of human rights. This was first applicable in the case of Rhodesia where the regime was involved in abuses of human rights as well as apartheid-like activities; nevertheless this was a unique scenario, since Rhodesia was not yet accepted as an independent state and Great Britain was in agreement with the steps taken. The decisive turning point was however the Resolution 794 of the Security Council on the Somalia-Conflict.<sup>29</sup> In this case it was agreed that there was a threat to peace simply because of the internal situation in Somalia which involved massive abuses of human rights and the existence of a humanitarian crisis without the Resolution mentioning anything about the floods of refugees, even though the General Secretary had written to the Security Council drawing attention to the existing refugee crisis.<sup>30</sup> This point of view is supported by the fact that according to the “Barcelona Traction” human rights abuses are interpreted as such by all states.<sup>31</sup> Accordingly, all states have a responsibility to uphold

<sup>22</sup> Erhart, Sicherheit und Frieden (Security and Peace) 3/2007, p. 105, 106

<sup>23</sup> Security Council S/RES/1484 (2003) of 30th May 2003

<sup>24</sup> Tanner, ASMZ No. 2/2004, p. 1

<sup>25</sup> Security Council S/RES/1671 (2003) of 25th April 2006

<sup>26</sup> Herdegen, Völkerrecht (International Law), § 41

<sup>27</sup> Döehring, Völkerrecht, Rn. 456

<sup>28</sup> Herdegen, Völkerrecht, § 4, Rn. 16

<sup>29</sup> Security Council S/RES/794 of 3<sup>rd</sup> December 1992

<sup>30</sup> Stein/von Buttlar, Rn. 859 f.; Herdegen, Völkerrecht, § 41, Rn. 13

<sup>31</sup> ICJ Reports 1970, p. 3, p. 32 - “Barcelona Traction”



human rights. Any country that does not respect human rights acts against the rest of the community of nations and must therefore be prepared for international consequences.

In view of all these reasons, it can therefore be assumed that there was a threat to peace in the DR Congo. As proof that the threat of having large numbers of refugees was not unfounded, the massive human rights abuses in Rwanda in 1994 led to many refugees flocking into neighbouring countries and the countries were unable to cope with them, leading to instability which has persisted in the whole region until today.

### **b) Between Peace-Keeping and Peace-Enforcement**

This confirmation according to Art. 39 of the UN-Charta paves the way for all manner of measures as spelt out in Chapter VII of the UN-Charta. Despite the fact that the Security Council lays down the procedure the legal justification of the steps taken still remains unclear. This is because one hand military interventions are permitted as stipulated in Art. 42 of the UN-Charta. What is characteristic of the steps taken in accordance with Art. 42 of the UN-Charter is that they are taken against the will of the country involved (so-called *peace enforcement*). However, since the DR Congo declared its acceptance of the involvement of troops<sup>32</sup>, this cannot be qualified as a forced intervention, which then renders Art. 42 of the UN-Charta questionable as a legal basis.

It is for this reason that the troops are commonly referred to in public as blue-helmet deployments. This institution can be traced back to the former UN Secretary General Dag Hammarskjöld and has been in use since the early years of the UN. It was born out of the Suez-Crisis of 1956 between Israel and Egypt when, upon a request by Hammarskjöld, a *United Nations Emergency Force* (UNEF) was installed as a buffer between both parties.<sup>33</sup> The deployment of blue-helmets is however not clearly explained in the constitution of the United Nations. What is significant is that their deployment can only take place at with the approval of both parties. Chapter VI and Article 40 of the UN-Charter are often used partially as reference.<sup>34</sup>

In view of this the deployment in the DR Congo cannot be seen as a classic blue-helmet deployment and this description is misleading. In the terminology of Agenda for Peace, it is not a peace-keeping but a peace-enforcement troop because it is based on a Chapter VII-Resolution with the option for military intervention to which the country involved has agreed.<sup>35</sup> This authorization according to Chapter VII of the UN-Charta has clear advantages: the deployment has a safe legal foundation and does not have to be justified as a highly controversial humanitarian intervention.<sup>36</sup> On the other hand an intervention by invitation<sup>37</sup> would also have been feasible - nevertheless with the risk that it would have been possible to withdraw the approval.

This strange position between the deployments lead to the conclusion that the DR Congo - at least in some parts of the country - is considered as a "failing state" without an effective state authority but rather a country caught up in a civil war between two rival groups.

<sup>32</sup> Erhart, Security and Peace 3/2007, p. 105, 111

<sup>33</sup> Stein/Von Buttlar, Rn. 865

<sup>34</sup> Wolfrum, p. 185

<sup>35</sup> Herdegen, Voelkerrecht, § 41 Rn. 30

<sup>36</sup> Stein/Von Buttlar, Rn. 812 ff.

<sup>37</sup> Stein/Von Buttlar, Rn. 654





## 5. The EU as a Regional Organization According to Chapter VIII of the UN-Charter

Within the framework of the United Nations there is great peace-political potential for the role of the EU because it can be classified as a regional organization in accordance with

Chapter VIII of the UN-Charter. What is characteristic for such a consideration is an internal conflict resolution mechanism and the objective stated in the formation-treaty as that of promoting peace.<sup>38</sup> In the case of the EU this can be derived from Art. 11, 5 and Art. 17 II of the EU. But these objectives are geared more towards internal relations within the EU; the African continent is considered less as an area of operations for the EU.<sup>39</sup> Therefore any intervention by the EU will always remain an isolate decision of its member-states.

### II. Legal Foundations from a European Perspective: Supranational and Inter-governmental Foreign Relations of the EU

Since its formation the European Union has increasingly been taking up the role of the single most important actor on international affairs.<sup>40</sup> As a “Union of Nations” the EU is more than just an international organization in the context of international law; it is a special intensive integration community that is very close to being a state.<sup>41</sup>

The classical foreign affairs policies with the aspect of security and defence still form part of the key aspects of national sovereignty.<sup>42</sup> So long as the EU/EC does not take steps towards a “United States of Europe”<sup>43</sup> - something that now looks more and more unlikely for more member-countries, then the important foreign affairs activities will be handled by the member-states themselves.<sup>44</sup> Nevertheless the economic integration calls for the transfer of external competencies to the EC in certain areas. This arrangement portrays a mixed picture of the EU-Foreign Relations: they are partially integrated within the framework of the EC-Treaty in areas such as trade and development policies. At the same time the Maastricht EU-Treaty of 1992 underscores the inter-governmental form of the common general foreign affairs and security policies (GASP) (Art. 11-28 EU)<sup>45</sup>

This dichotomy of the EU-foreign relations forms the framework for its foreign activities and therefore the basis for its involvement in the DR Congo. Because even the European involvement in the DR Congo is taking place concurrently in two areas: economic cooperation - especially under the Yaoundé/Lomé/Cotonou Agreement - is of a supranational nature. The various activities of the ESVP (as part of GASP) are, on the other hand, more intergovernmental.

This project paper will attempt to look at the EU involvement in the DR Congo from these two perspectives.

<sup>38</sup> Weber, EUC 2006, p. 879, 887 f.

<sup>39</sup> Weber, EUC 2006, p. 879, 888

<sup>40</sup> Brok, IP 7/2003, p. 56

<sup>41</sup> Oppermann, § 30, Rn. 1

<sup>42</sup> Weber, EUC 2006, p. 879, 883

<sup>43</sup> Winston Churchill, The Tragedy of Europe, 19<sup>th</sup> Sept. 1946

<sup>44</sup> Oppermann, § 30, Rn. 2.

<sup>45</sup> Oppermann, § 30 Rn.3





## The Partnership Treaty of Yaoundé/Lomé/Cotonou

Its origin can be traced back to 1958 when the EC adopted the association approach towards overseas countries and territories in accordance with Art. 131 ff. In particular, France put a precondition to its former colonies on the formation of the Union.<sup>46</sup> At the same time the process of decolonization began and this led to the dwindling importance of these norms. Today they only apply to a few overseas territorial possessions of some member-countries under the special regime of Art. 182-188. With the independence of Belgium, the relationship between the EU and Congo can no longer be based on the constitutional association according to Art. 182 of the EC.<sup>47</sup>

As far as development cooperation of the Union with developing countries is concerned, reference would first have to be made to the foundations of Art. 308 EC.<sup>48</sup> It was the Maastricht-Treaty that created its own title with special EC-responsibilities (Art. 177 ff. EC)<sup>49</sup> From 1964 several development-partnerships were formed between the EC and the newly independent countries, the so-called ACP-states in Africa, the Caribbean and Pacific, based on Art. 310 of the EC. The guidelines were laid down for specific periods, first through the Treaty of Yaoundé (Cameroon) and later through the four Lomé-Agreements (Togo) of 1975, 1979, 1984 and 1989. In 2000 the Treaty of Cotonou<sup>50</sup> (Benin) was formed between the EU and 77 ACP countries to last for 20 years. The DR Congo was among the signatories. It creates a special regulation outside the general development cooperation. (Art. 179 III EC).<sup>51</sup>

### 1. CFSP and ESDP

The **Common Foreign and Security Policy (CFSP)** refers to the foreign policy of the European Union (EU) which deals mainly with security, defence, diplomacy and related fields. CFSP deals only with a specific part of the EU External Relations, which domains include mainly Trade and Commercial Policy and other areas as funding to third countries, etc. The CFSP operates as the second of the three pillars of the European Union as established by the Treaty of Maastricht in 1992. The precursor is the European Political Cooperation (EPC) which started informally in 1986 before being entrenched in the common European records.

The framework for the involvement of the EU in the DR Congo is determined by the European Security and Defence Policy (ESDP) which forms an integral part of CFSP. It forms the operative aspect of CFSP and equips the EU with the operative capacities for its own civil and military crisis management.<sup>52</sup> What is significant for the status of the ESDP is the fact that its speedy development did not have to involve constitutional amendments but its implementation was due to the general understanding of Art. 17 EU as driven by political initiatives between the lines of the Union-Treaty.<sup>53</sup>

#### a) Area of Expertise of the Defence Policy of the EU (Art. 17 I EU)

The legal basis for the engagement of the EU in the DR Congo is found in Art. 17 of the EU. The current version of Art. 17 of the EU was detached from the previous setup of the

<sup>46</sup> Hilpold, EFARev. 7 (2002) p. 53-54

<sup>47</sup> Oppermann, § 31, Rn. 14

<sup>48</sup> Bieber/Epiney/Haag, § 34

<sup>49</sup> Hilpold, EFA Rev. 7 (2002), p. 53

<sup>50</sup> ABL. 2000, L 317/3

<sup>51</sup> Oppermann, § 31, Rn. 22

<sup>52</sup> Dietrich, ZaöRV 66 (2006), p. 663, 664

<sup>53</sup> Kielmansegg, European Law 2006, p. 182, 184





EU and WEU, thereby freeing the ESDP to stand on its own.<sup>54</sup> The core of this provision is constitutionally outlined by the conceptuality of the principles of fallback and voluntarism. The fundamental law states that the EU does not have its own operative capacities but relies on the military capacities of its member-states (fallback principle)<sup>55</sup>. Even if the member-states vote for a military operation it does not translate into a constitutional compulsion to assemble troops. In accordance with the principle of voluntarism, the member-states are free to decide if they will be involved and the extent of their involvement.<sup>56</sup>

The role of the EU in the DR Congo involves military operations in the area of European Security and Defence Policy (ESDP). These are neither contrary to the fallback principle nor the principle of voluntarism. Whereas common actions are legally binding in accordance to Art. 14 III of the EU, this obligation can only be demanded within the context of areas of expertise available. Any powers of control by the EU over its member-states would be outside the scope of Art. 17 I UA 1 EU and therefore be ineffective as an ultra-vires act.<sup>57</sup>

### **b) The Petersberg Tasks (Art. 17 II of the EU)**

The EU follows similar principles as those of the UN: Art. 11 of the EU explicitly talks of preserving common values and interests in accordance with the policies of the UN-Charter: preserving peace and international security, promotion of international cooperation, developing and strengthening democracy and the rule of law as well as the respect for human rights and basic freedoms.

The “Petersberg tasks” are an integral part of the European security and defence policy (ESDP). They were explicitly included in the Treaty on European Union (Article 17) and cover:

- humanitarian and rescue tasks;
- peace-keeping tasks;
- tasks of combat forces in crisis management, including peacemaking.

The challenges in this case are not due to the fact that there is an immediate threat to peace in the EU from the DR Congo. It has more to do with the objective of securing peace in a country that has a significant role for the whole region. The case of a single nation on its own does not really pose a threat, but there is a risk of the whole region degenerating into anarchy and violence.<sup>58</sup> This is because the Congo-Basin is the hub between the North and the South, the West and the East of Africa. Conflicts in Congo spread over to the neighbouring regions (so-called *Spillover-Effects*<sup>59</sup>)

### **c) Instruments and Forms of Action of the Union Law**

Articles 17-27 of the EU state the particular instrument and the institutions of CFSP. It mainly has to do with cooperation between states, occasionally there are some integrative elements such that it can be said the CFSP is still characterized by intergovernmental initiatives. This is particularly evident in the position of the European Council as the central organ of the CFSP, which retains control of the foreign-policy-related actions at

<sup>54</sup> Kielmansegg, European Law 2006, p. 182, 183

<sup>55</sup> Cremer, Hans-Joachim, in: Calliess/Ruffert, Art. 17

<sup>56</sup> Cremer, Hans-Joachim, in: Calliess/Ruffert, Art. 17

<sup>57</sup> Kielmansegg, European Law 2006, p. 182

<sup>58</sup> Erhart, Security and Peace 3/2007, p. 105, 108

<sup>59</sup> Ottaway/Herbst/Mills, eAfrica, March 2004, p. 4





any given time (compare Art. 13-18 of the EU). The supranational organs of the EC are subordinate to it: The Commission neither has the initiative-monopoly nor the possibility to take a case to the European Court of Justice (Art. 18 IV, 22 I, 27 of the EU); even the political parliament is practically not involved. The Commission is also not in a position to determine its administrative substructure because the Council and the political and security committees go their separate ways in this area as well.<sup>60</sup> The activities in the DR Congo are based on common actions in accordance with Art. 13 III, 14, 23 of the EU. These form the main instrument of CFSP alongside the common points of view.

#### **d) The Relationship Between EU and NATO**

Upon the formation of the ESDP in 1999, the individual EU member-states began building their own military and civil capabilities, a development which by definition would lead to a state of competition between EU and NATO. Art. 17 I UA 2 of the EU lays down the respect for NATO-obligations by the European members of NATO when forming the CFSP and contains a proclamation of compatibility of NATO and CFSP-policies. It however does not provide details; the cooperation therefore developed in politically defined ways.<sup>61</sup> Procedures to be followed in crisis management should it be necessary to fall back on NATO-resources were spelt out in the so-called Berlin-Plus-Agreement of December 2002.<sup>62</sup> The problem was that several key issues, among them those to do with the division of duties and the *right of first refusal* were left out. NATO reserves for itself the right of first access in order to be able to intervene first. The EU could only intervene in the event of a refusal by NATO, meaning it was effectively degraded to a second-class player.<sup>63</sup>

This is particularly underscored by Great Britain, Turkey and the USA, which refer to the Helsinki Council-Resolution of December 1999.<sup>64</sup> However, some EU-states deny NATO this privilege. NATO Secretary General Jaap de Hoop Scheffer pleaded for a functional division of duties: NATO should take up operations of high intensity and the EU to take up those of a lesser magnitude. Apart from the problem of division of duties, the relationship between the two organizations is still not clarified conclusively. The uniqueness about the relationship between the relevant missions in the DR Congo lies in the fact that they were planned and implemented without considering NATO-structures. In particular, the military operations Artemis and EUFOR RD Congo were single-handedly led by the EU, whereby national operations headquarters in France and Germany were used.<sup>65</sup> In this way the strengthening of the EU and the emphasis of the independence from the NATO was excluded.<sup>66</sup>

## **2. Institutional Framework**

The **Common Foreign and Security Policy (CFSP)** draws its support from the institutions of the EU, for which Art. 28 I of the EU explains fundamental institutional policies of the EC-Treaty to be applicable. The EC-institutions make use of the written special legal instruments and are able to act intergovernmental in this manner.

<sup>60</sup> Thym, *Archive of International Law* 42 (2004), p. 44, 50 ff.

<sup>61</sup> Oppermann, § 33

<sup>62</sup> Hofmann/Reynolds, *SWP-Aktuell* 37 (2007), p. 1

<sup>63</sup> Wikipedia: Berlin Plus

<sup>64</sup> European Council (Helsinki) of 10/11 December 1999

<sup>65</sup> Hofmann/Reynolds, p. 3

<sup>66</sup> Tanner, *ASMZ* No. 2/2004





### **a) Flash Point Between the Commission and the Council**

Some of the deficits of the EU's intervention can be traced back to unanswered internal structural questions. When analyzing a crisis, the European Commission and Council of Ministers meet at different venues without considering the advantages of a possible structural separation of duties. The Commission makes reference to its old competencies, its proven experience and its financial possibilities. It is not very supportive of the new role of the Council of Ministers.

The competencies of the two organs are not clearly defined, which often leads to overlaps, competition and hindrances. Before the beginning of the ESDP, the Commission was already involved in conflict management using its own methods and resources. The council, however, obtained the mandate for civil-military handling of crises following the formation of the ESDP.<sup>67</sup> These pending structural issues affect the missions of the EU. In the background of all this is the question whether successful crisis management can be done using the current community system as opposed to the intergovernmental approach which is now recommended. The Commission proves that the Council is totally incapacitated without its assistance in financing and equipping of missions. Furthermore, most crises cannot be solved on a short-term; they require a long-term commitment, which at the moment can only be provided by the European Commission which has relatively enormous financial and human resources and is therefore able to hire experienced officers. It is upon this background that the Council is making an effort to strengthen itself in those areas of weakness by temporarily hiring national officials to join its bureaucracy and establishing its own sources of funding. In the case of military missions this has already been done through establishment by member-states of the backup-fund ATHENA<sup>68</sup> to which only the Council has access.

A similar instrument is being mooted for civil missions that would give the Council more financial flexibility when planning and carrying out ESDP missions.<sup>69</sup> Clarifications are still needed before the EU can exploit its full potential. An intertwining with policies of the Community (especially in the areas of Development, Human Rights Democracy, Regional Stability and Association Policy) could still lead to synergy-effects.<sup>70</sup>

### **b) Special Envoy of the EU**

Article 18 Paragraph 5 of the EU allows the Council to appoint a special envoy for specific political issues. This position is less clearly outlined as opposed to that of the High Commissioner (Art. 18, III, 26 EU). The naming of a special envoy has been a popular instrument for a long time for highlight the presence of the CFSP in crisis-areas. In 1996 the EU appointed Aldo Ajello as a Special Envoy of the EU for the Great Lakes region.<sup>71</sup> His successor since 2007 has been Roeland van de Geer.<sup>72</sup>

This is important to the extent that the EU is able to concretize and give a face to its policies towards the African Continent.<sup>73</sup>

<sup>67</sup> Rummel, SWP-Study 22 (2005), p. 20

<sup>68</sup> Council Decision 2004/197/CFSP of 23<sup>rd</sup> February 2004

<sup>69</sup> Rummel, SWP-Study 22 (2005), p. 20

<sup>70</sup> Thym, AVR 42 (2004), 44,46

<sup>71</sup> Gegout, EFARev. 10(2005), p. 427, 434

<sup>72</sup> Country Information of the Foreign-Office on the DR Congo, November 2007

<sup>73</sup> Erhart, Security and Peace 3/2007, p. 105, 107



### **c) The Political and Security Policy Committee (PSC)**

It is also important in this context to look at the Political and Security Policy Committee (PSC), established according to Art 25 of the EU. It consists of the permanent representatives (ambassadors) of the member-states in Brussels and the political directors of the foreign ministries. It has developed into a central governing committee of the CFSP in civil and military affairs.<sup>74</sup> The PSC receives advisory support from the EU Military Committee.<sup>75</sup> The PSC is in charge of the political control and strategic leadership of the CFSP Crisis-Operations. The CFSP and the PSC have found their main objective and permanent authority in Brussels.

### **D. Current Activities and Objectives**

After dealing with legal questions the different areas in which the EU is involved The DR Congo should be highlighted. Since its formation, the EU has been engaged in Africa. For a long time the economic aspect within the framework of the ACP-Partnership was at the forefront. Nevertheless a political dimension has also emerged gradually alongside the purely economic and development-political cooperation. This change is evident in the example of the DR Congo.<sup>76</sup>

### **I. Economic and Development Cooperation**

From the time the European integration process began with the Rome Treaties in 1957, the EC (or EEC) maintained economic and development cooperation with the ACP-states, among them the DR Congo. The treaties were association-treaties which granted the associated countries “special privileged conditions”<sup>77</sup>.

#### **1. ACP-Development Association**

##### **a) The Cotonou-Agreement of 2000: Redirection of the Development Strategy**

The Cotonou- Agreement of 2000 outlines the foundation for development cooperation between the EU and the 77 ACP-states. It came into force on 1.4.2003 and is valid until 2020.

The Agreement is named after the place where it was signed, in the capital city of Benin. Its implementation is a continuation of the previous treaties which were signed in the Togolese capital Lomé; however several areas were amended.<sup>78</sup>

At the core of the Lomé-Agreements were one-sided asymmetrical trade preferences, which did not attempt to change anything in the development-dependence of the ACP-states. That is why it was decided to have a future goal of gradually integrating the ACP side into the world economy. This change of attitude was influenced by exogenous factors, mainly the specifications of the WTO-law.<sup>79</sup> One of the core principles of the WTO-law is in the “Most Favourable” Principle (Art. I:1 GATT), which means that preferential treatment

<sup>74</sup> Council Resolution ABl. 2001, L 49/1; Dietrich, ZaöRV 66 (2006), p. 663, 684

<sup>75</sup> ABl. 2001, L 27/4

<sup>76</sup> Faria, ISS Occasional Papers no. 51 (2004) p. 5

<sup>77</sup> ECJ 1987

<sup>78</sup> Opper,amm. § 31

<sup>79</sup> Babarinde/Faber, EFARev. 9 (2004), p. 27, 28

in trade must be extended equally to all signatories; benefits accorded to one member must also be extended to the other members of GATT.<sup>80</sup> The effect of this would have been that the EC would be under obligation to extend the favours granted to the ACP-states to all other trade partners. The special waivers according to Art. XXV: 5 GATT<sup>81</sup> which existed previously in favour of developing countries have expired. However the GATT-regime already has an alternative, which sees the exclusion of customs unions and free trade zones from the “Most Favourable” Principle.<sup>82</sup> The latter is only limited to the abolition of customs duties and trade barriers between the partner-countries whereas customs unions imply an additional uniform foreign trade regime. That is why from 2008 trade rules that conform to the WTO are made whereby economic partnership agreements (EPAs) are intended to abolish free trade zones between the signatories.<sup>83</sup>

### **b) Institutions of the Partnership**

Article 14 CA establishes organs such as the ACP-Ministers’ Council, the Ambassadors’ Committee and the Parliament in which all are equally represented. The day-to-day operations are done by the Ambassadors’ Committee which consists of permanent representatives of the EU-states, representatives of the Commission and the ACP-Missions in Brussels.

To ease the decision-making process involving such a large number of partners, the work takes place in a quasi-bilateral manner in the form of the “EC-Group” and the “ACP-Group”; both sides consult and agree beforehand. The Consensus-Principle applies in the Council of Ministers.

The Parliament plays an advisory role, is equally made up of members of the European Parliament and parliaments of the ACP-states and meets in long intervals alternately in Europe and overseas.<sup>84</sup>

### **c) Political Objectives**

As an expression of modern development policies, the Cotonou-Agreement is no longer limited to economic issues only, but it also incorporates a political dimension (Art. 8 ff. CA).<sup>85</sup> In the background is the acknowledgement by the member-states of the importance of good governance in the context of democracy, rule of law and respect for human rights.<sup>86</sup> Directly related to that is the objective of sustainable development. Art. 97 CA spells out a mechanism for suspension in the event that a member-state does not observe this fundamental element of the Agreement. A comprehensive political dialog helps to achieve the political goals, where the EU takes “common measures to promote human rights and democratic principles”<sup>87</sup> The Agreement however points out clearly that this political dimension must be understood in the context of principles recognized worldwide and not as an attempt to export the European concept of democracy. It is more important that every country develops “its own democratic culture”.<sup>88</sup>

<sup>80</sup> Herdegen, International Economic Law, § 9, Rn. 34

<sup>81</sup> Herdegen, International Economic Law, § 9, Rn. 38

<sup>82</sup> Herdegen, International Economic Law, § 9, Rn. 35

<sup>83</sup> Babarinde/Faber, EFARev. 9 (2004), p. 27, 29

<sup>84</sup> Oppermann, § 31, Rn. 99

<sup>85</sup> Babarinde/Faber, EFARev. 9 (2004), p. 27, 37

<sup>86</sup> Faria, ISS Occasional Papers no. 51 (2004), p. 31

<sup>87</sup> EU-Regulations 975 and 976/1999, ABl. L 120/1, p. 8

<sup>88</sup> Oppermann, § 31. Rn. 100





#### **d) Funding**

In continuing with the principles of the Lomé Agreements the current Cotonou-Agreement envisages a comprehensive financial support of the ACP-states by the EU. Articles 55 ff. spells out the areas in question and possible ways of funding. The concrete financial support using resources from the European Investment Bank and the European Development Fund have first been outlined in the financial protocol of the Cotonou-Agreement (Annexure I) to cover the period from 2000 - 2005 and are usually extended periodically. The amount set aside for the first phase is 15.2 billion Euros, mainly intended to be used as contribution towards long-term development projects. This simplifies the many previous funding instruments in the Lomé-Agreements.<sup>89</sup>

This cooperation between the Democratic Republic of Congo and the EU dates back to January 1958 and to the first tranche from the EEC. The DR Congo's share of the first five tranches from the EEC added up to 420 million Euros. The sixth and seventh disbursements were largely suspended during the period from 1992 to 2002 because of deficits in democracy under the leadership of the then president Mobutu and due the Congo-wars from 1997 to 2002. The support was limited to a few decentralized programmes with partners from the NGO-sector.<sup>90</sup>

It was not until the beginning of the "intracongolese dialogue" and the Treaty of Sun City in 2002 that full cooperation could be resumed.

#### **e) Critical Evaluation**

The general verdict on the successes of the Lomé-Agreements from 1975 - 2000 is ambivalent and largely negative. Many ACP-states are still among the poorest countries in the world: 39 of the 77 countries belong to the group of least developed countries. All imports from the ACP-states into the EU in 2002 were equivalent to those from Norway, and one third of those were from South Africa, such that the share from the other countries was even much smaller. The proportion of exports from the ACP-countries into the European market is less than 5%, and most of these are from South Africa. The global liberalization within the framework of the WTO further lowers the impact and the usefulness of the ACP-preferences.<sup>91</sup> Furthermore, Africa, and especially the DR Congo has another problem: the political situation is so unstable - it is one of the few current examples of a "failed state" - such that here most of the ACP-regulations only exist on paper. With this background, the Cotonou approach with a sustainable integration into the world economy is an important and accurate signal. As mentioned before, without a durable stabilization of the political situation, even this option is not promising. There is a further risk that comes with the WTO-regulations: since in future only real free trade agreements will be accepted, developing countries are forced to open their markets to Europe and are therefore unable to protect themselves against cheaper imports from Europe.

## **2. The Humanitarian Assistance Programme ECHO**

Humanitarian aid is an important component of future development policy of the EU. Since Maastricht in 2002 humanitarian aid is generally covered under Art. 177 ff

<sup>89</sup> Oppermann, 31, Rn 102

<sup>90</sup> Country information on DR Congo provided by the Foreign Office on November 2007

<sup>91</sup> Oppermann, § 31, Rn. 104







of the EC. This leads to parallel responsibilities between the EC and the member-countries<sup>92</sup> and the subsidiarity principle is applied. The Union draws the base lines of its independent humanitarian assistance through decrees. On this basis, decisions are made in committees before being adopted by the Commission. This established the European Community Humanitarian Office (ECHO) in 1992 as a special department of the Commission.<sup>93</sup>

ECHO works in Congo together with local and international partners in order to provide humanitarian aid; mainly medical supplies, access to clean drinking water and sanitation, food security as well as psycho-social support. The fight against cholera and meningitis epidemics is carried out together with WHO and UNICEF.<sup>94</sup>

## II. Political Cooperation

Apart from the economic and development activities that have been carried out by the EU for a long time, a political dimension has emerged in recent years. This change from purely economic to an inclusion of full political cooperation will be discussed below.

The political engagement of the EU in the DR Congo occurs in several areas: an example is the military operation *Artemis* which began in 2003 with the aim of stabilizing the security situation and improving the condition of human rights in Ituri-Province. Three years later saw the emergence of another military operation in 2006 in the form of EUFOR RD to support the MONUC-Mission of the United Nations in securing and observing the elections in Congo.

Apart from that the EU is particularly active in the area of policing: From 2005 European police experts trained local police forces in the DR Congo within the framework of the Mission EUPOL Kinshasa. As the name already suggests, the scope of this mission was originally limited to the capital city Kinshasa; in July 2007 it was renamed EPOL RD and expanded to cover the rest of the country.

Since 2005 the Mission EUSEC RD Congo has been in place to support the authorities in the process of reforming the Congolese security sector.

### 1. The Operation “Artemis”

The Operation “Artemis” took place between 12<sup>th</sup> June to 1<sup>st</sup> September 2003. The declared objective was to stabilize the security situation and to improve the human rights conditions in Ituri-Province and its capital Bunia. In this region in the northern part of the country, warring militias carried out atrocities against the civilian population and a humanitarian catastrophe was looming. At this time the MONUC-Mission of the United Nation consisted of only a small contingent of soldiers from Uruguay that was forced to watch the situation helplessly. The process of increasing the troops would have taken longer and there were fears of the situation degenerating into genocide as witnessed in Rwanda in 1994. For this reason the Under-Secretary General of the United Nations Jean-Marie Guéhenno turned to his countryman Jacques Chirac to ask the EU for help through him. On the basis of Resolution 1484 of 30<sup>th</sup> May 2003<sup>95</sup> the UN Security Council decided to

<sup>92</sup> EUCJ 1993, I-3685 ff

<sup>93</sup> Oppermann, § 31, Margin No. 115

<sup>94</sup> Martinelli, EFARev. 11 (2006), p. 379, 386

<sup>95</sup> Security Council S/RES/1484 (2003) of 30th May 2003





convert the joint operation<sup>96</sup> to into Operation Artemis<sup>97</sup> on 5<sup>th</sup> July 2003. Within a record time of just 8 days there was a successful intervention in Congo. Some unique aspects of the Mission stand out: first it was the first mission that was carried out independently by the EU without using the structures and resources of NATO, for the first time the EU showed its capability for military intervention without NATO.<sup>98</sup> At the same time, Artemis stood under the banner of the EU, but was de facto still a French operation. France had the controlling position in this mission; its headquarters were established in Paris, the Commander in Chief and the Troops-Commandant were both French generals. However, the political control over the operation was left to the Political and Security Committee (PSC) of the EU.<sup>99</sup>

At first the operation had to deal with a lot of logistical problems because the airport in Bunia was not usable, such that a detour through a base in Entebbe (Uganda) had to be taken. Nevertheless an improvement of the situation in and around Bunia was attained. Troops-Commandant Thonier declared the City of Bunia a weapons-free zone under the motto "*Bunia, ville sans armes*" and gave the militias an ultimatum to surrender their weapons.<sup>100</sup>

## **2. The Presidential Elections in 2006.**

The transitional government made up of representatives of opposing parties that has been in power since 2003 had the duty to provide a new beginning in the DR Congo through fresh presidential and parliamentary elections.

### **a) Background**

For the first time after more than 40 years of dictatorship and war the DR Congo has the chance to hold general elections to directly elect a president. Most of the almost 26 million citizens eligible to vote had the first chance in their lives to participate in free elections. After many years of endless civil wars caused by ethnic strife, the struggle for the control of minerals and central power in Congo which destabilized the whole region, the elections provided a great chance for peace and stability in the region. But there were fears that those opposed to peace and losers in the elections would promote an escalation of the conflict; the dilemma was that on one hand the elections were an important step in consolidating peace, but on the other hand they posed a risk to the stability because the warring parties had not fought for six years only to lose their power through elections.<sup>101</sup> In order to ensure that the elections were conducted smoothly the United Nations requested the EU to support the UN Peacekeeping Mission (MONUC) stationed in Congo in 2005 with European military forces during the election period. The EU Council passed a resolution to establish the Operation EUFOR RD Congo.

### **b) Election Process**

The incumbent president Joseph Kabila managed to win the runoff election on 29.10.2006 by garnering a 58% majority. His challenger Jean-Pierre Bemba obtained about 42%.

<sup>96</sup> Council Joint Action 2003/423/CFSP of 5th June 2003

<sup>97</sup> Tanner, ASMZ No. 2/2004, p.1

<sup>98</sup> Gegout, EFARev. 10 (2005), p. 427, 442

<sup>99</sup> Tanner, loc. cit

<sup>100</sup> Tanner, loc. cit

<sup>101</sup> Tull, SWP-Aktuell 12 (2006), p. 1





President Kabila was sworn into office on 6.12.2006. The Supreme Court of the DR Congo had confirmed the election results on 27<sup>th</sup> November and rejected the appeal of candidate Bemba, who had claimed there were irregularities in the election. The runoff election had been necessitated by the fact that the first elections on 30.7.2007 did not give any of the candidates a clear majority.

### **c) The Role of the International Community and the EU: The Mission EUFOR RD Congo**

In order to pave the way for elections, the military operation EUFOR RD Congo took place from 30.7.2006 to 30.11.2006 with the aim of supporting the MONUC-Mission of the UN in ensuring the democratic elections were conducted smoothly and fairly. Upon the request of the UN the Council decided to beef up the whole Action<sup>102</sup> from 27.4.2006 by sending 1,700 soldiers to the Congo, among them 780 from Germany. Alongside 21 EU member-states, Turkish forces were also involved in the Operation. The EUFOR Mission in Congo was particularly outstanding and is therefore viewed as a “turning point in the EU’s global ambitions”.<sup>103</sup>

The Mission enjoyed international legitimacy in every aspect, including the express support of the Congolese transition government. Their deployment was however met with criticism in some quarters - not least in Germany. On one hand questions were raised about the involvement of Western forces in the DR Congo and what interests were linked to this. Two aspects were highlighted: the operation was first seen as an “important milestone towards the militarization of the EU”<sup>104</sup> ; it was simply meant to provide “practice-opportunity for the European forces in a challenging environment”.<sup>105</sup> Secondly the EU was accused of seeking control of the rich mineral resources in the country. The other side argued that the mandate given to the Mission was excessive and thus posed a danger to the success of the Mission.<sup>106</sup> The task of the EUFOR RD was to support MONUC in bringing stability, protect the civilian population from physical violence and to secure the airport in Kinshasa. They were also to assist in evacuating people caught in dangerous situations. The tasks were very specific and did not include the general democratization of the Congo. Furthermore the mandate was restricted to a specific period of four months after the first round of the presidential elections<sup>107</sup>

The first serious challenge for the Mission was to cope with the large numbers of dead and injured civilians after the results of the elections were announced. Of special significance was the attack made by the Presidential Guard of the Joseph Kabila on 21<sup>st</sup> August 2006 on the home of his opponent Jean-Pierre Bemba. Present at that place at the time were also 14 ambassadors and the representative of the UN Secretary-General, William Swing. The MONUC-Troops and the EUFOR forces intervened and escorted the diplomats to safety while a security ring was established around the home of Bemba. Additional support forces were flown in from Libreville (Gabon).<sup>108</sup>

This incident made many Congolese look at the EUFOR-Mission differently: Instead of being seen as an attempt by the West to support Kabila who was very unpopular in Kinshasa, the

<sup>102</sup> Council Joint Action 2006/319/CFSP, 27th April 2006

<sup>103</sup> Martin, IPG 1/2008, p. 89, 90

<sup>104</sup> Henken, Ausdruck (IMI-Magazin), August 2006, p. 3, 8

<sup>105</sup> Henken, Ausdruck (IMI-Magazin), August 2006, p. 3, 9

<sup>106</sup> Kinzel, SWP-Aktuell 52 (2006) p. 1

<sup>107</sup> Erhart, European Security Review 32 (March 2007), p. 105, 110

<sup>108</sup> Erhart, Sicherheit und Frieden (Security and Peace) 3/2007, p. 105, 109



European troops were seen as a neutral and genuine force. Their image also improved because of the way they appeared in public. Instead of patrolling in tanks like MONUC, the EUFOR-Soldiers were often seen in public walking on foot - and even spoke French!<sup>109</sup>

#### **d) The Reform of the Security Sector**

Apart from the establishment of a new, freely elected government and presidency with democratic legitimacy, the comprehensive reform of the security sector in Congo (Security Sector Reform, SSR) forms the second pillar of the involvement of the EU in Congo. Two approaches have been used to achieve this: on one hand a newly integrated army and police force should be created; on the other hand programmes should be implemented to disarm, demobilize and reintegrate the irregular fighters into the civilian population. This process is seen as the “key challenge towards ensuring lasting stability both in the country itself and in the Great Lakes Region”.<sup>110</sup>

#### **e) Analysis of the Problem**

In this regard, it is important to first get an overview of the current state of the security sector. It is a fact that there are still many obscure groups of former combatants which must be included in the process. Beginning with the former Congolese forces (FAC), i.e. the former government forces, to the Movement for the Liberation of Congo (MLC) led by Jean-Pierre Bemba, the Congolese Movement for Democratic Freedom (RCD-ML) led by Mbusa Nyamwisi, the Movement for National Democracy (RCD-N) based in North-Ituri and Mai Mai, which is made up of ethnic militias and militarily organized groups in North and South Kivu and in Katanga.<sup>111</sup> This overview shows the magnitude of the challenge posed to restructuring efforts. The matter is complicated even more by the fact that apart from the army and the police, the judiciary, customs department and particularly the penal system must also be included. The key element of the reform is to establish a new army by integrating all the different forces and political factions.<sup>112</sup> The selection of the target groups is very crucial here. The criteria should be Congolese nationality, voluntarism, physical and emotional aptitude, elementary education of at least 6 years and an age of between 18 and 40 or 45 years. The last point in particular rules out the recruitment of child-soldiers in the process of integration. But this is the area with most complications: many civilians, former rebels and militias often do not have official identification documents. This is because most state registration offices (except in larger towns) have ceased functioning due to many years of civil strife.

There is another complication in the same direction: there are no reliable details of the exact number of combatants involved. At the start of the transition period the number was estimated at around 340,000. However, a survey carried out by South African experts in six provinces in July 2005 proved that the statistics could not be relied upon; it was discovered that between 40 and 60% of the troops only existed on paper.<sup>113</sup> Apparently the military officials inflated the numbers in order to pocket the money allocated for paying the soldiers, whereas the troops in many regions hardly received their pay, leading to numerous cases of plundering, robberies and other abuses of human rights.

<sup>109</sup> Martin, IPG 1/2008. P. 89, 94

<sup>110</sup> Pauwels, European Security Review 25 (2005), p. 3

<sup>111</sup> Sebahara, FES-Hintergrundinformationen, p. 2

<sup>112</sup> Pauwels, European Security Review 25 (2005), p. 3,4

<sup>113</sup> Sebahara, FES-Hintergrundinformationen, p. 3



After the transition government verified the statistics in January 2006 the numbers were adjusted to only 120,000 troops; nevertheless the Presidential Guard and the combatants not registered by the governing partners are not included, such that there is still no accurate figure of the security forces. This makes the process of integration very difficult.<sup>114</sup>

After this overview, the activities of the EU in this sector will be analyzed, particularly the civilian missions in the framework of the European Security and Defence Policy (ESDP). These include the police department with the EUPOL Kinshasa Mission and EUPOL RD Congo, as well as the military with the Mission EUSEC RD Congo.

#### **f) The Missions EUPOL Kinshasa and EUPOL RD Congo**

The Mission EUPOL Kinshasa<sup>115</sup> lasted from 12.4.2005 to 30.6.2007. Through this Mission 30 European police experts trained the police forces of the DR Congo. The duties of the European police experts included mainly supporting the “Integrated Police Unit” (IPU) of the Congolese Police which was supposed to act as a neutral party in the process of providing security to institutions and politicians. EUPOL is the first civilian crisis mission of the EU in Africa in the context of the European Security and Defence Policy (ESDP).<sup>116</sup>

As from 1.7.2007 the activities of the Mission were not restricted to the capital Kinshasa, but covered the whole country as EUPOL RD Congo.<sup>117</sup> The task of the Mission is to provide expert advice to the Congolese government on the reform of the national police service and the improvement of the interaction between the police and the judiciary. EUPOL RD Congo as a successor to EUPOL Kinshasa is meant to work together with the Mission EUSEC RD Congo established in June 2005 in bringing stability to the security sector. For this purpose, the EU Sent 39 police and judiciary experts to support the Congolese inspectors and to share their expertise in planning and carrying out operations.

The declared objective is to provide solid training of the new police forces. It began with basic training in security measures for the territorial police, followed by training for 5,300 police officers in the large cities of the country on how to handle civil disturbances.

Similar to the military reforms, the fight against corruption is of paramount importance here. Corruption has escalated due to poor working conditions and low pay. Consequently plans are underway to quadruple the salaries of police officers. This will however not solve the problem of disappearing money. On the other hand, without such an increase the motivation and loyalty of the troops cannot be guaranteed.

#### **g) The Mission EUSEC RD Congo**

Since 8.6.2005 the Mission EUSEC RD Congo<sup>118</sup> has been providing expert advice and support to the Congolese authorities in the process of reforming the national military. It consists of 10 experts attached to different institutions of the Congolese security sector. At first sight this may appear to be a very small number, but these experts are in very senior key positions. They are stationed in the office of the Defence Minister, Chief of General Staff, Staff of the Army, Committee for Common Operations and in the National Commission for

<sup>114</sup> Sebahara, FES-Hintergrundinformationen, p. 3 f.

<sup>115</sup> Council Joint Action 2004/847/CFSP, 9<sup>th</sup> December 2004

<sup>116</sup> Pauwels, European Security Review 25 (2005), p. 3, 4

<sup>117</sup> Council Joint Action 2007/405/CFSP, 12<sup>th</sup> June 2007

<sup>118</sup> Council Joint Action 2005/355/CFSP, 2nd May 2005





Disarmament, Demobilization and Reintegration.<sup>119</sup>

The biggest problem for the military is also the irregular pay: there are plans to solve this problem by delinking the payment from the chain of command, such that payments are no longer made by the Army but by a separate department of the Defence Ministry.<sup>120</sup>

#### **h) Successes and Difficulties to Date**

The law on “Defence and Armed Forces” was passed on 12<sup>th</sup> November 2004. Today there is a uniform general staff for the defence forces in the DR Congo which caters for officers of all the different units. The chief commanders of the 10 military units of the country were appointed in accordance with the “Agreement on Power-Sharing” and given the mandate to oversee the integration in their areas of responsibility. Three of the chief commanders belong to the former Congolese forces (Ex-FAC), two to the former RCD, two to MLC, one to RCD-ML, one to RCD-N and one to the Mai-Mai<sup>121</sup>. This structure has contributed immensely to the stability.

International donors, led by Belgium, Angola, South Africa, the Netherlands and the EU, are financing the establishment and equipment of the integration centres as well as organizing training programmes.

But this also sees the onset of problems: the costs of providing equipment and transport are not covered; these must be met by the defence forces using their own resources or transport facilities of MONUC must be used. Transport is also very expensive due to the dilapidated infrastructure. The provision of funds from public coffers for this is very thorny because military reforms are not supported by conventional development aid programmes.<sup>122</sup>

Furthermore the protagonists were not ready to give up their troops to be integrated in the new structures before the elections. Generally the situation of the military paints an ambivalent picture: despite much progress, the armed forces and the police are to a large extent “still part of the problem rather than part of the solution”.<sup>123</sup> On this background the provision of new equipment and ammunition to the newly trained forces is viewed with scepticism, because providing weapons in a volatile region is a controversial issue. The current outbreak of conflict between government forces and rebels shows that the desired objective has not been attained. There are still major deficits as far as remuneration and training of the armed forces is concerned. These are often victims of the arbitrariness of their corrupt bosses.<sup>124</sup>

### **E. Possible Further Objectives**

#### **i) Background of the Current Crisis in East Congo and its Escalation**

The current escalation of conflict in the eastern part of Congo can be traced to the bloody war of the last two decades: on 6<sup>th</sup> April 1994 the aeroplane carrying the Rwandan President Juvénal Habyarimana was shot down in circumstances unexplained to this date.

<sup>119</sup> Erhart, Sicherheit und Frieden 3/2007, p. 105, 108

<sup>120</sup> Martinelli, EFARev. 11 (2006), p. 379, 393

<sup>121</sup> Sebahara, FES-Hintergrundinformationen, p. 4

<sup>122</sup> Sebahara, FES-Hintergrundinformationen, p. 6

<sup>123</sup> Erhart, European Security Review 32 (March 2007) p. 9, 11

<sup>124</sup> Böhm, DIE ZEIT, 31.10.2008



This act led to the beginning of the worst atrocities since the Second World War. Within just 100 days the Hutu-government and radical Hutu-militias murdered between 500,000 and 800,000 Tutsis and moderate Hutus. The rebels, led by their young leader and current president of Rwanda, Paul Kagame, began to defend themselves and defeated the Hutu-forces, the *genocidaires*. The murderers fled into neighbouring Congo - where they are still based today.<sup>125</sup>

Among the main players today is Laurent Nkunda. He was a general of the Congolese army but has been fighting the Congolese army for the last four years because he feels that his minority Tutsi community are not adequately represented in government. His claims are not entirely erroneous; the Tutsi and other Rwandese-born residents of Congo are often the subject of hate-speech in the Congolese media.<sup>126</sup>

The genocide of 1994 threatens to repeat itself in Congo with reversed roles. Since the return of bloody conflict at the end of August between the Congolese army and Tutsi rebels, the rebels led by Laurent Nkunda have been able to bring large parts of the East under their control. Since then, hundreds of thousands of civilians have been fleeing from the region. Mass-murders of civilians, rape, attacks and robbery are the order of the day in Congo. The conditions are appalling; there is insufficient food, drinking water and medical supplies. The persistent violent attacks make it impossible for aid agencies to reach the people.

The UN-envoy for the Congo, Alan Doss, spoke of “unacceptable war crimes”<sup>127</sup> But an end or a solution is not in sight. Even the UN Blue-Helmets-Mission with around 17,000 soldiers - the largest worldwide - has been stretched beyond its military limits. Mediation efforts and calls to stop the war have fallen on deaf ears.

## II. Approaches to Solving the Problem

### 1. Military Measures

In view of the dramatic situation described above, especially in the East of Congo questions must be asked about the appropriate reaction. There are plans to have an additional military mission and to send European soldiers into the crisis region. Klaus Köhler was among those who spoke in favour of this: “If we are serious about values that apply to all of us, then the Europeans must also provide soldiers in order to put a stop to the murders.”<sup>128</sup>

#### j) Duties and Objectives

The influence of Congo’s neighbouring countries, especially Rwanda, plays a big role in the rebellion in the eastern Congo. What must be relevant for the military deployment would therefore be to effectively patrol the eastern part of Congo, especially the whole of the 2,500 kilometre-long eastern border of the country in order to stem the movement of armed militias and foreign soldiers as well as the smuggling of minerals and weapons. For this to succeed, the presence of soldiers on the ground must be accompanied by patrols from the air and through satellite pictures. Relevant information would need to be provided by western states.<sup>129</sup>

<sup>125</sup> Richter, DIE ZEIT Online, 18.11.2008

<sup>126</sup> Richter, DIE ZEIT Online, 18.11.2008

<sup>127</sup> Quoted in: Kongo: Land Without Hope, Spiegel Online of 09.11.2008

<sup>128</sup> Quoted in: Congo-Crisis: Köhler calls for European Military Deployment, ZEIT Online, 18.11.2008

<sup>129</sup> Tull, SWP-Aktuell 39 (2004), p. 3







An appropriate long-term mandate must also be given. A short-stay and extreme inflexibility of time would only mean endangering the mission because a rushed withdrawal of troops would leave a power-vacuum in the country which would quickly be filled up by local militias. This would nullify all stabilization efforts.<sup>130</sup>

### **k) Scope of Possible Deployment: EU, NATO, UNO?**

The role of NATO must also be considered: As mentioned earlier, the EU has already underscored its independence through its engagement in the DR Congo and shown that it can act without turning back to NATO. This has led to a strengthening of the EU's position on the international stage. Doubts have however been cast as to whether this is the right approach for the DR Congo. This is because the current situation is obscure in many areas.

If the EU were to be drawn into a protracted and complicated conflict, it would not be able to turn to NATO but would have to rely on its own resources which are still limited in several aspects. Such a scenario would lead to an embarrassing withdrawal.<sup>131</sup> On this background, it must be the future objective of the EU to cut out the image of being loyal to a broad-based multilateralism and therefore work closely with the NATO-partners on the African continent and particularly in the DR Congo.

For the same reasons another alternative could be to avoid going it alone and instead contribute resources to strengthen the MONUC-Mission of the United Nations. Until now the European countries - lead by France and Germany - have strongly rejected requests by the UN Secretary-General to increase the UN troops such that the United Nations has largely relied on soldiers from developing countries.

### **l) Civilian Measures**

#### **m) The Future of the Reform of the Security Sector**

As has been mentioned before, the reform of the security sector is one of the most central duties for the international community. Despite a lot of progress having been made so far, there is still a lot of ground to be covered. Special emphasis must be made on the following aspects in future: on one hand the number of forces that need to be included in the reform process must be accurately established. All the main protagonists must make all their militias available; there should be no more private militias as was the case during the elections in 2006.<sup>132</sup> The members of the newly integrated army must be paid well so that there is no motivation to engage in acts of plunder and smuggling of drugs and weapons.

Until now the efforts of the EU were restricted to very short-term objectives: at the forefront were the demobilization and the collection of illegal weapons. Certainly this is necessary and correct. However, the social and economic reintegration of the combatants must also be given a lot of weight. They must be given alternative perspectives as civilians in order that the process may succeed in the middle and long term.<sup>133</sup>

<sup>130</sup> Tanner, ASMZ No. 2/2004, p. 1

<sup>131</sup> Tanner, ASMZ No. 2/2004, p.2

<sup>132</sup> Speiser, SWP-Aktuell 43 (2006), p. 4

<sup>133</sup> Tull, SWP-study 3 (2005), p. 27; Erhart, Security and Peace 3/2007, p. 105, 110





#### n) “We do not want any crack across our country”

As has been highlighted above, the factors contributing to the current crisis can be traced back to the tensions between the various ethnic groups. Since 1994 the conflicts between Tutsis and Hutus and the events in Rwanda have come to the limelight. And the current conflicts are a continuation of the wars that were witnessed at that time, only that the roles have been reversed. The rifts between the warring parties are deep; and, after the genocide in Rwanda, this can be understood. The magnitude of the atrocities was unsurpassed; thousands were murdered with machetes and clubs. The Hutus had accurately planned and prepared for the genocide, they had armed their militias and prepared their victims' lists. The media also played a fatal role. The radio station *Mille Collines* stirred up hatred and called for the murder of the Tutsis: “Death! Death! The graves are only filled halfway with the bodies of the Tutsis. Hurry up and fill them up.”<sup>134</sup>

The period that followed witnessed repeated conflicts as a result. Rwandan troops pursued the refugees and fought wars in the jungle between 1998 and 2003. The ethnic alignments first came up in the colonial era. The colonial masters and the Catholic missionaries from the Order of the White Fathers planned a fundamental reconstruction of the society; so they developed a history of the society based on racial differences, which had nothing to do with reality. According to that theory, the minority Tutsis became the elite of the country and were given preferential treatment. At the onset of the independence movements in the mid 1950s the church and the colonial masters did an about-turn and complained of exploitation by the ruling Tutsis whom they had supported for decades, and demanded the inclusion of the Hutus in power.<sup>135</sup> This proves one thing: the ethnic criteria used to divide the population were not deep-rooted structures among the people. The ideas were planted among them by outsiders.

Even if one can understand the cause of the bitterness and the mistrust, the problem cannot be solved permanently by hiding behind ethnicity. Who will benefit if the ethnic communities continue to rise up against each other? Accusations and prejudices cannot undo the suffering and the murders witnessed so far. As a matter of fact, this kind of racism must be overcome even in African states in the 21<sup>st</sup> century. The solution lies only in reconciliation between the protagonists.

*“We do not want any cracks across our country  
No virus nestled in the mind  
We do not want any We and any They”<sup>136</sup>*

These words from Grönemeyer apply for the vast majority of the people in the region. It is obvious that this is not an easy way, as long as the memories of the massacre are still fresh and the victims are preoccupied with the thoughts that the perpetrators could still be around. In order to achieve lasting peace, it is important for each side to jump over its own shadow and take a step to reach out to the other side. This is because weapons, hunger, diseases such as AIDS and cholera do not care about such characteristics. The parties involved must realize that their mistrust and their hatred do not help anybody. It is therefore important for the international community to help in building a functional state - where all the concerned parties are involved, so that they can all find their new home. One way would be, for example, to step up the mining of the rich mineral reserves

<sup>134</sup> Quote from: Beste/Puhl/Simons, *Der Spiegel* 47/2008, p. 136, 138

<sup>135</sup> Schürings, *Entwicklungspolitik* 7/2008, p. 1

<sup>136</sup> Grönemeyer, Herbert: *Flüsternde Zeit*, “12” - Audio-CD - EMI 2007





and use the proceeds to improve the lives of the population. Such actions would help the people to identify with the new political home and lead to a peaceful co-existence between all the peoples in the DR Congo.

In neighbouring Rwanda, the government has already declared reconciliation as the main objective and established a National Unity and Reconciliation Commission. What is important is that the victims on both sides understand the prerequisites for a functioning justice system. Stigmatizations must be eradicated: the Tutsis are the victims, the Hutus are the perpetrators. Such stereotypes will only worsen the situation. The atrocities committed by both sides must be acknowledged, the guilt must be dealt with. Otherwise the consequences of the atrocities will follow future generations: he who does not get justice will take revenge - even in the following generation.

It must however be understood that the process of forgiveness cannot be directed from outside: "reconciliation between people or communities cannot happen by decree but is a matter between neighbours and colleagues."<sup>137</sup> And one should not expect results immediately; the parties involved must understand that the events have left deep wounds which will take long to heal. But this is the only way to achieve long-lasting peace in the region. In any case one must also not forget that during the genocide in Rwanda in 1994 it was not only the Hutus who murdered the Tutsis; there were also militant Hutus who also killed moderate Hutus<sup>138</sup>, such that it can be concluded that the problem did not only have to do with ethnicity but also with political motives. This obviously does not change the atrocities, but gives hope in the fact that there is a chance for reconciliation, unity and a genuine search for compromise beyond ethnic borders. This is also the reason why the current conflict between the rebels and government in eastern Congo should not be seen as just a conflict between Tutsis and Hutus. The rebel movement (Congrès national pour la défense du peuple, CNDP) consists of members of other ethnic groups apart from Tutsi and Hutu, such as the Bashi. The demand for better treatment of the Tutsis is just one of the many issues, such that a political rather than an ethnic solution is more crucial. The outside world should not repeat the mistake of overemphasizing the ethnicity, a fact which led to even more problems!<sup>139</sup>

### **o) Decentralization**

Decentralization should be practiced on a political and administrative level so that the provincial administration is given concrete responsibilities. This is because it is much easier to protect minorities at the local level and involve them in political decisions than would be the case in a centralized system at the national level. It is easy to negotiate and make compromises with communities at the local level.

Until now, most of the development aid from the EU was given directly to the central government. It is only on very rare occasions that these resources came to the people on the ground; most of it remained with the president and the members of his government. This kind of kleptocracy could be avoided through closer cooperation with regional structures.<sup>140</sup>

Apart from the existence of corruption and misappropriation one must not forget that after many decades of anarchy and wars there is hardly any functioning infrastructure.

<sup>137</sup> Romkena, Life & Peace Institute 2001, p. 74

<sup>138</sup> Krause, EFARev. 8 (2003), p. 221, 228

<sup>139</sup> Dovenspeck: No War Between Hutu and Tutsi, taz, 24.11.2008, p. 12

<sup>140</sup> Schmidt, Frithjof: Theses on Criticism of the European Congo-Policy





After many years of terrible experiences the population views state structures with a lot of skepticism in many areas because to them they represent corruption and kleptocracy. These perceptions must be changed and the lost confidence must be restored or in some cases created for the first time. This can be achieved faster at the local level.<sup>141</sup> This also applies for the process of reconciliation already mentioned: this cannot be implemented from top to bottom; it must occur between individuals, neighbours and colleagues.<sup>142</sup>

## **F. Conclusion: Chances and Risks for Africa and the EU**

The results can be summarized as follows: The role of the EU in the DR Congo is already multifaceted and includes development assistance based on the Cotonou-Agreement, civilian expert missions as well as military deployment. Many of these forms of engagement are steps in the right direction. Nevertheless, the events of recent weeks point to the deficits of the efforts made so far. Possible solutions can be found, among other things, through improved multilateral cooperation (NATO, UNO); the key problem areas are the security sector, the process of decentralization and the reconciliation process in the DR Congo.

The EU has given itself a new face among the military and the civilian population through its involvement in the area of security and defence in the DR Congo. Following the collapse of the European Defence Community in 1954 due to the turmoil of the Fourth French Republic, defence-politics were a taboo-topic for European integration for almost forty years; the field was left to NATO and WEU. During this period the EU pursued the image of a “civilian power”<sup>143</sup> and was attractive as a sheep among wolves, enjoying a lot of trust in the international community.<sup>144</sup>

This is in line with the fact that even in the European Security Strategy<sup>145</sup> of 2003 the Union puts emphasis on preventive measures. Conflicts - even crises occurring in distant places - should not be solved primarily through military means; there are always economic and political instruments at hand.<sup>146</sup> However, these resources are mainly found at the supranational level and, in the case of the DR Congo, are being implemented through development cooperation in accordance with the Cotonou-Agreement.

On this background, the recent transformation of the EU from a pure civilian power to a defence and political player can be seen as “a momentous watershed”<sup>147</sup> The foreign policy of the EU has changed fundamentally, as can be seen in its role in the DR Congo. Apart from being involved in economic and development cooperation since 1957, particularly within the framework of ACP-Association, there is also an increasing political involvement in the form of crisis-prevention, diplomacy, military and humanitarian assistance. This is achieved on one hand through taking political dialog into the Cotonou Development Agreement (e.g. through human rights clauses); on the other hand the development of CFSP with the ESDP offers new instruments.

<sup>141</sup> Tull, SWP-Study 3 (2005), p. 26

<sup>142</sup> See above p. 41 ff.; also Tull, SWP-Aktuell 39 (2004), 4

<sup>143</sup> Erhart, Hans-Georg, ISS Chaillot Papers 55, Paris 2002, p. 10 f.

<sup>144</sup> Kielmansegg, European Law 2006, p. 182

<sup>145</sup> European Security Strategy of the European Council in Brussels, 12<sup>th</sup> December 2003

<sup>146</sup> Weber, European Law\* 2006, p. 879, 887

<sup>147</sup> Heisbourg, NATO Review 48 (2000), p. 8, talks of a change of Copernican proportions, but in reference to the sensational change of course by the United Kingdom, which enabled the establishment of ESDP; Kielmansegg, European Law 2006, p. 182 transfers the picture on to the role of the EU





The way for the future must nevertheless be that emphasis is laid on economic and development cooperation - even if that reduces the weight of the Council and the member-states in favour of the Commission. Sometimes military intervention may be the only option available, but this must remain *ultima ratio*. The most important thing is for the EU to rise up to the challenges decisively. The EU and its member-states must overcome their *sacro egoismo* and act not only in their own interest but also in the interest of the DR Congo and the rest of Africa. This calls for a strong coherence and coordination between the first and the second pillar of the EU so that it can act effectively.<sup>148</sup> The attainment of success will be an important contribution to the political and economic stability of Central, Eastern and Southern Africa.<sup>149</sup> Failure would turn back the whole continent and the DR Congo would be a symbol for Africa's failure and the failure of the EU in Africa.

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<sup>148</sup> Faria, ISS Occasional Papers no. 51 (2004), p. 33

<sup>149</sup> Papst, The Congo - A Conflict-Analysis, p. 11



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## List of Abbreviations

### Abkürzungsverzeichnis

<b>a.a.O.</b>	am angegebenen Ort
<b>ABl.</b>	Amtsblatt
<b>AETR</b>	Accord europeen relatif au travail des équipages des véhicules effectuant des transports internationaux par route
<b>AKP</b>	Afrika / Karibik / Pazifik
<b>Art.</b>	Artikel
<b>Aufl.</b>	Auflage
<b>ASMZ</b>	Allgemeine Schweizerische Militarzeitschrift
<b>AVR</b>	Archiv des Völkerrechts
<b>BVerfGE</b>	Entscheidungen des Bundesverfassungsgerichts
<b>CA</b>	Cotonou-Abkommen
<b>CFSP</b>	Common Foreign and Security Policy
<b>DR</b>	Demokratische Republik Democratic
<b>DRC</b>	Republic of Congo
<b>DRK`</b>	Demokratische Republik Kongo
<b>EC</b>	European Community
<b>ECHO</b>	European Community Humanitarian Office
<b>EEA</b>	Einheitliche Europäische Akte
<b>EEF</b>	Europäischer Entwicklungsfonds
<b>EFARev.</b>	European Foreign Affairs Review
<b>EG</b>	Europäische Gemeinschaft(en)
<b>EMRK</b>	Europäische Menschenrechtskonvention
<b>EPZ</b>	Europäische Politische Zusammenarbeit
<b>ESS</b>	Europäische Sicherheitsstrategie
<b>ESVP</b>	Europäische Sicherheits- und Verteidigungspolitik
<b>EU</b>	Europäische Union
<b>EUFOR</b>	European Union Force
<b>EuGH</b>	Europäischer Gerichtshof (= Gerichtshof der Europäischen Gemeinschaften)
<b>EUPOL</b>	European Union Police Mission
<b>EuR</b>	Europarecht
<b>EUSEC</b>	European Union Security Sector Reform Mission
<b>EWG</b>	Europäische Wirtschaftsgemeinschaft
<b>FES</b>	Friedrich-Ebert-Stiftung
<b>GASP</b>	Gemeinsame Außen- und Sicherheitspolitik
<b>Hrsg.</b>	Herausgeber
<b>ICJ</b>	International Court of Justice
<b>IGH</b>	Internationaler Gerichtshof
<b>ILM</b>	International legal materials
<b>IMI</b>	Informationsstelle Militarisierung e.V.
<b>IP</b>	Internationale Politik
<b>IPG</b>	Internationale Politik und Gesellschaft
<b>IPU</b>	Integrated Police Unit
<b>ISS</b>	Institute for Security Studies
<b>JnS</b>	Juristische Schulung



<b>MONUC</b>	Mission de ('Organisation des Nations Unies en République démocratique du Congo
<b>NATO</b>	North Atlantic Treaty Organization
<b>NGO</b>	Non-governmental organization
<b>ÖMZ</b>	Österreichische Militärische Zeitschrift
<b>PSK</b>	Politisches and Sicherheitspolitisches Komitee
<b>RDC</b>	République démocratique du Congo Resolution
<b>Rs.</b>	Rechtssache
<b>Rn.</b>	Randnummer
<b>Slg.</b>	Sammlung des Gerichtshofes der Europäischen Gemeinschaften
<b>SSR.</b>	Security sector reform
<b>SWP</b>	Stiftung Wissenschaft and Politik
<b>taz</b>	die tageszeitung
<b>UNEF</b>	United Nations Emergency Force
<b>UNICEF</b>	United Nations International Children's Emergency Fund
<b>UNO</b>	United Nations Organization
<b>Vgl.</b>	Vergleiche
<b>WHO</b>	World Health Organization
<b>WTO</b>	World Trade Organization
<b>WVRK</b>	Wiener Vertragsrechtskonvention
<b>ZaöRV</b>	Zeitschrift für ausländisches öffentliches Recht and Völkerrecht



# SUCCESSION CONFLICT BEFORE A CUSTOMARY COURT

by André Musenu Ngaza<sup>1\*</sup>

## Introduction and Subdivision of the analysis

### Introduction

The chapter is structure in such a way as to address in detail issues of “Conduct of proceedings and adherence to custom”, “Respecting women’s and children’s rights”, “Are there conflicts between traditional wisdom and human rights?”

Before focusing on the subject matter, it would be apropos to define the basic concepts of the theme. Actually, as we carry out this reflection we shall need to define certain concepts. The dictionary defines these concepts as follows:

a) **Conflict:** an opposition which arises between two courts either claiming jurisdiction (positive conflict) or lack of jurisdiction (negative conflict) with regard to the same case.

b) **Succession:** the legal transfer of assets and rights of a deceased person to a person who survives him/her. This can either be lineal or collateral succession.

c) **Court:** the place where justice is rendered, Law Courts; a jurisdiction of one or several magistrates who rule together.

d) **Custom:** the way of behaving, practice that is established through use and which is transmitted from generation to generation. It is essentially a set of ways of behaving and traditional beliefs.

With these definitions of key concepts that we shall focus on, there is need to analyse a case study of a succession dispute brought before a customary court. Some questions deserve to be raised in connection with the issue at hand, namely:

- How are proceedings conducted in cases of succession disputes before a customary court? Are customs upheld?
- What about women’s and children’s rights?
- Are there conflicts between traditional wisdom and human rights?

This chapter will attempt to respond to the above issues one at a time. Having raised these issues we shall subdivide our analysis into two parts.

### Subdivision of the analysis

Apart from the introduction and the conclusion, this analysis shall be subdivided into two parts as follows:

- The first part will deal with general considerations;
- The second part will focus on succession disputes before a customary court.

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## **General Considerations Successions**

When an individual dies, the estate of this person referred to as “the deceased” is opened at the place where the person, at the time of his/her death, resided or had as his/her principal residence.<sup>2</sup>

The rights and obligations of the deceased constituting inheritance are passed to his/her heirs and legatees in accordance with the provisions referred to in the inheritance, unless otherwise nullified by the demise of the deceased<sup>3</sup>. The estate of the deceased can be ab intestate or without a will in whole or in part.

### **a) General rules of ab intestate succession**

The deceased person’s children born in marriage and those born out of wedlock but affiliated during his lifetime as well as the children he adopted form the first category of heirs to the estate and receive three quarters of the inheritance<sup>4</sup>.

The surviving mate, the father and mother the whole-blood, consanguineous, or uterine brothers and sisters comprise the second category of heirs to the estate and make up three separate groups. They are entitled to the remaining inheritance if the heirs of the first category are present and the entire inheritance if otherwise.<sup>5</sup>

### **b) Rules regarding the Will’s format**

The will is a personal deed of the deceased by which he disposes, at the time he shall no longer be alive, of his property, distributes it, determines his heirs and establishes tutelary funeral arrangements or last wishes that the current law does not prohibit and to which effect is attached.<sup>6</sup>

The will may be in the authentic form (before a notary or registration officer at his area of residence), holographic (fully written, dated and signed by the testate) or oral (verbally stated by a person sensing his imminent death in the presence of at least two adult witnesses).

### **c) Rules related to the estate reserve**

The share to which the first category heirs are entitled shall not be affected by the testamentary provisions of the deceased that he made in favour of heirs in other categories or other universal or individual legatees.

The surviving marriage mate has right of usufruct of the house inhabited by the spouses and the household furniture. In addition, he is entitled to half of the usufruct of adjoining land that the occupant of the house personally developed for his own use as well as the business gain issuing from it, the other half would be for the heirs of the first category.

<sup>2</sup> Family Code

<sup>3</sup> Idem art.756

<sup>4</sup> Family code article 758 and 759

<sup>5</sup> Senior Lec. José YAV KATSHUNG: Right of succession of traditional heirs in the family code: solution or challenge?, 12/04/2001, Unilu

<sup>6</sup> Idem article 766



#### **d) Estate liquidation**

As long as the estate has not been liquidated, it constitutes a distinct estate. In the event of an intestate succession, the oldest of the heirs shall be responsible for the liquidation of the estate or in the event he opts out, it shall fall to the one appointed by the heirs.

If the liquidators were appointed through the will or if there was a universal legatee, the liquidation of the estate would be assigned to them<sup>7</sup>.

#### **e) Sharing the estate among heirs**

When the deceased estate is being distributed and taking into consideration the provisions in Article 786, it shall proceed as follows:

1. In the event of dispute among heirs the first category shall be the first to choose their share;
2. In the event of dispute among heirs of the second category, the surviving mate shall choose his/her share first followed by the fathers and mothers and finally the brothers and sisters.

After such a lengthy writing on the first part dealing with succession in general, we shall be compelled to analyse succession conflict before a customary court. This will lead us to the second part which shall now be our focus.

#### **Conduct of Proceedings and Adherence to Custom**

In this section, two important points will be analysed, namely: the conduct of proceedings in the event of succession conflict before a customary court as well as adherence to custom.

##### **a) The BAKUNDA Customary Judiciary Structure**

The study below involves the MUKELEKWA NTONDO chieftainship composed of the actual 1<sup>st</sup> NTONDO chieftainship the 2<sup>nd</sup> of the MUKEBO sub-chieftainship, the 3<sup>rd</sup> of the MWEMENA sub-chieftainship. (Sampwe Region - Upper Katanga District).

##### **“BAKUNDA” Dignity**

- **NFUMU MUKALAMBA MWENE WA KIALO:** Chieftainship chief, land owner;
- **INAMFUMU:** uterine sister to the chief who bore the successor to the chief in charge. Mother to KASUNGAMI. Stands next to the chief in public meetings;
- **LUMBWE or KIMENKINDA;** husband of the “Inamfumu” father of “Kasunganmi” brother-in-law to the chief (before the arrival of his son) is chosen by the Inamfumu, normally from among the slaves of his maternal uncle or of his brother. He is a high ranking dignitary and stands next to his spouse in meetings.
- **KANSUNGAMI:** may be the younger brother of the chief in charge, could also be the son of his uterine sister or even the son of his uterine niece. He is the possible successor of the ruling chief. He is often appointed as a judge in the customary court.
- **SWANA MULOPWE:** brother to the chief but from a different mother. Corresponds to “KAULU” of the BATABWA in the Moba region. He gets the chief’s belt at the death of the latter but never succeeds him at any time. The spirit of the deceased is believed to live in him. In conjunction with the “MWEPU”, he appoints the

<sup>7</sup> Family code Article 795







successor to the deceased chief, chosen from among the uterine younger brothers or uterine nephews after having discreetly inquired of the community's preferences. He serves as the examining magistrate and conducts the first examination of the attending parties.

- **MUMBA ILUNGA:** members of the chief's family who receives the deposit of arms of the chief whilst the succession rites are performed.
- **MUFUME:** Sub-chief
- **KITUMBAFUMU:** Village chief
- **WAKISAKA:** Chief's family members
- **TWITE:** is the representative of the first land owners before the advent of the BAKUNDA. He prepares the fawn coloured skin on which the chief sits during public meetings. He receives the tribute submits it to the chief after having deducted a part of it for himself. He holds the land "MIKISHI".
- **MWAPU:** is the elder brother or rather the representative of the older branch of the chiefs' family whose ancestor declined succession. He is the custodian of shades of ancestors and ancestral customs. He builds and maintains the chief's "MIKISHI" hut. He has the remedies which protect the chief and his family from evil spells. He is responsible for demarcating the compound (Lupangu) and the homestead of the chief and his headmen. He is consulted during important discussions on customs and acts attributed to ancestors. Whatever he says is accepted without any complaint.
- **SENGA:** is a dignitary who is no longer serving among the BAKUNDA region. He exists but his responsibilities have been forgotten.
- **MWADIAVITA:** war captain who takes part in operations when the "KALALA" forces enemies to unmask, he is supposed to create confusion among the enemies through sudden attack. He is an examining magistrate in the event that the SWANA MULOPWE is unavailable. He is a judge. He ensures public peace in the chieftainship.
- **KALALA:** takes the lead in the first skirmishes. Serves as judge. He is responsible for discreetly finding out the goings on in the chieftainship.
- **KILONGOSHI WA TANGILA or KANOMBWE:** Scouts and spies on the enemy and reports to the "KALALA". Flag bearer. Messenger.
- **MUTWALE:** distant relative of the chief guard of the village property and selects accommodation for visitors. Sometimes he serves as the chief's confidant and spy.
- **KASENDAMINA:** is one of the chief's favourites she is ever by her master's side to whom she serves as back rest. She never gets involved in discussions. She is simply the chief's seat in public hearings. The prefix "ka" "KANAKAZI" (female slave) seems to denote her as the harem guardian slave who would sleep in the chief's "LUPANGU" who was the guard of the chief's property. The selection is made from among the most gifted slaves.
- **KIAMATA:** is an orderly. He bears the chief's rifle and accompanies him wherever he goes. He prepares the chief's pipe.
- **NGOMBA:** "KUMVI" or "MONDO" beater (drums), and public crier/herald
- **MUSALE:** the chief's first wife
- **KATEKWE:** favourite wife.
- **WAMUMPOKO:** woman captured in war.
- **MULUNDA:** the chief's friends. He had the right to enter into the chief's homestead at any time. He was responsible for calming down the chief's anger. He could reprove the latter for his conduct with his wives. The latter could seek refuge in him.





## **b) Hereditary Titles and succession system**

The titles, chief, sub-chief, village chief, TWITE, MWEPU, SENG, MWADIAVITA, KALALA, KILONGOSHI, MUTWALE, NGOMBA, are hereditary. Succession is collateral: the youngest uterine brother, the uterine nephew, the son of the uterine niece uterine niece inherit by primogeniture order.

### **i) Procedure**

The initial institution, LUAMBO is secret. It is entrusted to SWANA MULOPWE or if unavailable, to the MWADIAVITA.

The complainant: MWINE WA MILANDU, appears before SWANA MULOPWE, as known as FIKILWA and places before him some iron spears, a hoe, two axes, three small pearl necklaces and one large pearl necklace without saying anything. Immediately the examining magistrate inquires what he expects to be done. The complainant lodges his case as the judge examines. After his deposition the latter bearing a gift, goes to the chief to whom he expresses his complaint. The chief decides whether there are grounds to prosecute. He goes an order to his subordinate, a dignitary to avail himself to Fikilwa.

The latter gives instructions with regard to the matter and initiates summons. Once the defendant and the witnesses arrive, the judge examines the defendant and the witnesses if he deems it to be necessary. Normally, the defendant would have, prior to this, also offered the same gift as the complainant.

The examining magistrate briefs the chief on what he would have learned. The latter summons the WA MILANDU or judges and the hearing becomes public and is referred to as KILIE. The chief does not participate in it. The judges stand in a squatting position on the Barza of the Chief's house. The complainant and the defendant stand before them. A little further off the witnesses also stand. The public stands about 20m away. The case is presented by the complainant who refers to witnesses who give their testimony. Each of the litigants can be assisted by someone who speaks well and who knows how to present facts. The judges ask any questions they feel are relevant.

Once the hearing is closed, the judges retire to the chief's house and the eldest: "MUKULU WA MILANDU" presents the facts to the chief as they were presented during the hearing. He would not restrain from asking his colleagues to confirm the accuracy of his statements. This consultation or secret report is known as Kalumbo (small secret investigation).

If the case is significant, the chief would have secretly obtained information from "Mwepu" with regard to the application of custom. He gives his opinion with regard to the sentence to prescribe and the judges ratify it. It may be that ideas on the application of customs diverge but this is exceptional and the chief always ends up getting his viewpoint accepted. The judges leave and publicly announce the accepted ruling.

The gifts submitted by the litigants are shared between the chief, the chiefs and the judges. These gifts correspond to the currently registration tax collected with this difference that the nonsuit alone currently pays.

Hearing the submission is called: KUITABILA MULANDU.

After the ruling, apart from the sentence, the losing party was required to pay the chief:



10 for an insignificant hearing; 2° small pearl necklaces; 3° for a more significant hearing; 5° small pearl necklaces; 3° for a significant: one or several rifles, one or several slaves. Paying the fine is called: KUFUTA MULANDU

## ii) Sentences formally applied

**Whip:** was applied using a “Mwenge” branch after having passed it through fire to soften it;

**Prison:** so as to prevent the prisoner from fleeing he used to have some kind of wooden fetters tied around the ankle

**Slave:** still determined through a ruling;

**Death sentence-**for treason, rebellion, sexual intercourse with the chief’s favourite

**Mutilation:** refusing to eat a slave’s portion, ablation of genital parts in the case of adultery committed between a slave and the wife of a free man.

Currently, the hearing takes place at the home of one of the judges who, after a brief examination informs the chief who in turn summons the defendant and witnesses. The witness does not attend the public hearing.

The judges, will however ask for opinion on the sentence to apply. The chief very rarely attends the session during which the sentence is prescribed.

The current judges are: the chief’s nephew (Kasungami), the son of the chief’s uterine niece, the Mwadiavita.

<i>In English</i>	<i>In Kikunda</i>	<i>In Kisanga</i>	<i>In Kiswahili</i>
1 <sup>st</sup> Secret examination	Luambo	Lubabo	
2 <sup>nd</sup> Secret examination	Kilie	Kilie	
3 <sup>rd</sup> Secret examination	Kaluambo	Kalubabo	
Court	Kilie	Ikilie	Hukumu
Dispute	Kitala	Lupata	Ubishi
Offence	Litompo	Litompo	Kosa
Offender	Kulufia	Kuwiiwa	Kupoteza
Judge	Wa Milandu	Wa Mianda	Muamuzi
Examining magistrate	Fikilwa		
Deliberation	Kikoome	Kakirie	Ufikiri
Presiding Judge	Mukulu wa milandu	Mukulu wa mianda	Muamuzi mk
Summon	Dimuluwe	Dimuluwe	Kiitikyo
Hearing	Mulandu	Mwandu	Shauri
Complainant	Mweine wa milandu	Mwine wa mambo	Mustaki
Defendant	Walitompo	Walitompo	Mustakiwa
Take depositions	Kuitabila mulandu	Kuitabila mianda	Kupokea sha

For the purpose of illustration, we can use this opportunity to give a example of a ruling in a customary court.

### iii) Ruling

#### Preamble

- Considering the request for reviewing Verdict N° 8 PVA Vol.100 RR.887 Vol.16 of 15<sup>th</sup> November 1957 of the Ngufu Sector Court submitted by MAYABU Emmanuel on the 5<sup>th</sup> of March 1958, ruling with the verdict reading as follows:
- “The court rules: that the land of Boko belongs to the Ntumba Mvemba clan. It states that the demarcations are the same as those determined by the regional court on 23 September 1931, by the administrative law judge Mr. MERCIER.
- The same demarcations from the L3oko that follow the tracks of the old railway line, on the left of which there is the “Nkamba” tree, from there right up to the palm tree until the old path drawn by Mr. CAMBRIER, leaving the path drawn by Mr. CAMBRIER to the left until the palm tree, until the “Ndimbu” tree until the palm tree, up to the “Kigeti” tree. The demarcation crosses the old railway line and continues straight ahead up to the two palm trees located along the banks of the Wungu Lake. Higher up from the lake, located alongside the road suitable for vehicles, the demarcation runs by the telephone line post up to the “Ndimbu” tree until the “Kigeti” tree; crosses the path up to the palm tree, then another; passes behind the house belonging to KIMBANGALA David until Boko road at the spot where a dry stick was placed. The area occupied by MPOSA Thomas and his other brothers belong to MPOLO. MPOSTA owns his house and the trees that he already planted; he cannot plant any more trees, he must work on the field that has just been allotted to him and cannot bury any other dead persons in this location. Fines NDOMBILI Louis eight hundred Francs damage costs to pay to MPOSA, within one to ten days of the CPC (45);

Charges NDOMBILLI Louis, MPOSA Thomas and KIMBANGALA David costs as follows: NDOMBILI Louis two thousand sixty-five Francs, within one or fifteen CPC days; MPOSA Thomas and KTM TALA David two thousand seven hundred and ten Francs within one or fifteen CPC days; MPOSA shall pay ten percent of the expenses out of eight hundred. Twenty Francs.

- Considering the remission of the case on 5<sup>th</sup> March 1958;
- Whereas the complainant MAYABU Emmanuel states that the sector court did not adequately examine and consequently did not rule on the issue of knowing whether MPOSA Thomas is or is not a member of the Ntumba\_Mvemba Boko clan; and that upon this issue the rest of the dispute hangs.
- Whereas the said MAYABU states that MPOSA Thomas is a foreigner; that he is disputing the existence, within the Ntumba-Mvemba clan of Mboko, the lineage known as “Nambu-Mpansu” whom Mposa is claiming to represent; that he denies on these grounds any rights of Mposa or this lineage on the land property of the Ntumba-Mvemba. (see also whereas clause n° ...)
- Whereas the court met in Boko for a fifteen day hearing (8-10 September, 5-10, 12-15 and 20 October), that the parties and all the relevant were heard, that the court, in the presence of these, proposed a detailed examination of the estate and drew a plan, consulted aerial photos, examined all the previous disputes, took into account the files of the former chieftainship and the former Boko sector, in summary, did not overlook any factor that could shade light on this muddled up issue.
- Whereas the clan dispute goes back to the period 1923-1925; that the land dispute was submitted to the courts for the first time in 1931 and that it led to the following rulings by the regional court-Verdict n° 122 of 23 September 1931 by Judges Mercier, Makako and Lenga, court clerk Dikambala François;



- a. Verdict n° 256 of 23<sup>rd</sup> April 1933 by Judges Lekeux, Lenga, Sita, Leba, Mawawa, Pembele, Kunsedi, with valuation by Chiefs Sitra and Kunsende;
  - b. Verdict n° 177 of 2<sup>nd</sup> October 1946 by Judges Maillet, Batu and Sita, with valuation by Judges Batu and Sita.
  - c. Whereas statements from chief Sita during the hearing, it emerges that there were still other detailed disputes with regard to the cultures in Boko, still between the Matula and Mposa families.
- Whereas, on the one hand, during successive hearings, the clan issue was never examined in full detail before; and that on the other hand, the land issue was resolved by decisions that mention “contentious land” and of “partial surrender” ,and “distribution to be done by judges”, but that these decisions neither specify what the demarcations of the contentious land were nor the material signs that would indicate the distribution of the contentious land.
  - Whereas in such conditions, the dispute could only develop further and that the concerned parties met again in 1957 before the Ngufu sector court.

#### **iv) Critical Analysis of the Judgement under Appeal**

##### **Presentation**

Whereas by its verdict n° 8 PVA Vol.100 of 15<sup>th</sup> November 1957, the Ngufu Sector court examined the dispute between: Mposa Thomas and NDOMBI Louis, but overall, the lineage referred to as “Nambu” against three lineages: ZINGA, Ntumba and Mpolo and this in regard to:

- The existence of a lineage referred to as “Nambu”, represented by Mposa Thomas within the Ntumba Mvemba Clan of Boko;
- The dispute over the right of ownership of property by Mposa Thomas on the field currently occupied and claimed by him;

Whereas the accusation brought before the sector court is highly complex; that is can be summed up in five main areas, namely:

- Ndombi Louis versus Mposa Thomas and Kimbangala David for the “voka” Kiboma, Kimpolo, Kintima and Kizinga, for the demarcation of the Bengela and for case of fetishes of COMPINO the healer,
- Ngambu Dominique versus Mposa Thomas and Kimbangala David for the issue of the lakes and of “voka” Makukwa;
- Kimwanga James versus Dikoko Isaan for the clan case;
- Ndaka Aaron versus Mposa Thomas for having taken the land belonging to Zinga and having taken the “voka” lakes and fruit trees left by Matula Samuel.

##### **v) Critique**

##### **Discussions and valuation reports**

(46) Whereas as in connection with the discussions, the sector court only proceeded with the examination of accusations in a disorderly fashion that it limited itself to endorsing the statements made by the parties and witnesses and registering the genealogies but not methodically and without providing any clarifications; and that in addition, although having gone through the field and the valuation report it was lacking and the case documents



make no mention of the visit undertaken on the field and that depositions of the parties and the witnesses are not captured in the hearing minutes in a chronological order; that from the way in which the discussions were held the court was unable to have an informed opinion on the dispute.

### **Grounds**

Whereas with regard to the grounds for the ruling by the sector, at best, he judges limited themselves to enumerating the arguments submitted by the parties and the witness depositions and to a presentation of the case; that it was up to the court to rule on the arguments of parties and by formulating an opinion on this basis; that the grounds should touch on all aspects of the dispute...

### **Decision**

Whereas with regard to the sector court's decision that this does not seem to be the logical conclusion of the grounds and one wonders how grounds primarily focusing on the clan issue could lead to a conclusion of simply sharing the land out; that from then henceforth, the sector court failed on the task it was appointed to handle right from the start, namely, to rule on the clan case and ownership of land arises from it.

### **Reason for the Dispute**

Whereas the dispute to be examined can be essentially summarized as follows: (see also (whereas clause N° ...))

- Denial of status of the Ntumba Mvemba of Boko clan lineage to the lineage referred to as "Nambu";
- Denial of status as family member of the Ntumba Mvemba clan of Boko to some persons that issue from the Nambu lineage;
- As a result of the preceding, the denial of rights that this title confers to them in the land property of the clan

## **c) The Clan Issue (and Consequently the Land Issue)**

### **i) Arguments of the Parties**

#### **The three older lineages-**

##### **i) From the clan's viewpoint**

Whereas the arguments of the complainant party can be summed as follows:

- That the Ntumba-Mvemba of Boko clan is solely comprised of three lineages: Zinga Kimpansu, Ntumba Mpamsu and Mpolo Mpansu, issuing from Nzuzi Nzinga and Mpansu Nsaku and presently represented respectively by MAYABU Emmanuel, Kisumba Samuel and Mata Jean;
- That the groups called Nambu and Disi do not in any manner constitute the fourth and fifth lineages of the clan; that the first, issues from a woman of the Mvulanene clan married by a member of the Mpolo Mpansu lineage and who, following the death of her first two children and the battle that resulted between the Ntumba Mvemba and Mvulanene clans was given to the latter one mentioned and who authorised her to build a village for her and her progeny in Kiseyesa; that the second one mentioned issues from the wife of Disi, daughter of Maluasa of the Ntumba Mpansu lineage, that is to say, a fraction of this lineage but which dispersed after a hearing initiated by the son of Ngyumbila;
- That the two groups, at the behest of chiefs Disu and Nsyesyey, constituted themselves





into lineages with the support of foreigners and slaves at the clan, namely: Nsyesyé, Disu, Mposa Thomas, Ngelesi Pierre, Nsangu Percy, Nsonsu Louis, Bamba André, Kifulu Antoine and Nuni Abraham;

- That Nsyesyé and Disu are slaves of the clan and were bought respectively by Makanda and Ndolumingu Sangu, whilst the others issue from different clans, that is: Mposa Thomas of Mbarnba Kalunga of Kipako, Ngelesi Pierre and Dissu Nsangu Percy of Ntumba Muemha of Kimanguna, Nsonsu Louis and Nkenzi Nzinga of Ndemba, Bamba André and Kifulu Antoine of Nkensi Nzinga of Kinkuadi, Nuni Abraham of Ntumba Mvemba of Mvuila.

### **ii) From the land viewpoint**

That following the preceding, the representatives of the first three lineages do not acknowledged any rights accorded to the latter in regard to the land property of the Ntumba Mvemba of Boko clan. That in addition, they request that they unconditionally clear off from the land they are occupying.

### **iii) Arguments of the Nambu lineage**

#### **From the clan's viewpoint**

Whereas the defendant party, "Nambu" represented by MPOSA Thomas responds to these arguments:

- That they ancestress, wife of Ntumba Mvemba of Boko and Suzi Nzinga issuing from the union of the woman Ntumba Mvemba with Na Mawangu of the Nzinga clan;
- That Nzuzi Nzinga married to Na Kutola of the Mpansu Nsaku Nzela clan give birth to: Nzinga Ki Mpansu, Mpolo Mpansu, Nambu Mpansu, Disi Kimpansu and Tambi Kia Sina;
- That Nambu Mpansu married to Na Bitana of the Nzinga clan of Kinlcwanga give birth to a girl, Nambu II

## **Respecting women and children's rights**

### **a) Introduction**

In our traditional societies, the death of a marriage mate did not give rise to many conflicts since the spouses did not have much in terms of property. On the hand, some tribes applied levirate or sororate.

During the colonial period, the legislator had not yet legislated on matters of inheritance. In this regard, the Congolese were under the customary law. However, the colonial authorities had to intervene on two occasions in view of protecting children and the surviving mates.<sup>8</sup>

The introduction of modern economy and education by the colonialists created new needs and led to profound changes in family structure. Demographic movements following modern economy motivated people to move from rural to urban areas thus fostering urbanisation.

In some urban centers, Léopoldville, Luluabourg, Elisabethville, the Congolese man was able to amass some assets and riches (house, bicycle, radio, and bank savings). This triggered covetousness among the traditional heirs remaining in the villages.

<sup>8</sup> As well as that of matrimonial regulations







Hence, since the accession of our country DRC to independence, we can now notice some lamentable situations when a family head dies. The traditional heirs (uncles, aunts, nephews, nieces...) take away all the assets leaving the widow and children completely destitute. Examples abound in Lubumbashi as well as in Kinshasa.

In the face of such a situation, the family code legislator reacted by clearly stating the rights of children and the surviving spouse. Many perpetrators thus continually stigmatize this.<sup>9</sup> It is true as we stated that above that the rights of children and especially of women are criticized by traditional heirs. These continue to consider widows and children as strangers in the family. They confiscate everything in total disregard for the provisions in the family code and even the contents of the will.

The question that we need to raise is: what is it that moves these traditional heirs to act in this manner? Does the family code provide a solution to this issue or does it provoke them?

## **b) Rightful heirs and their rights<sup>10</sup>**

### **First category heirs: rightful heirs**

Article 758 of the family code stipulates that the children of the deceased born in marriage and those born out of wedlock but affiliated in his lifetime as well as the children he adopted comprise the first category of heirs of the estate. They receive three quarters of the inheritance<sup>11</sup>.

The family code allots a reserve to the heirs of the first category in Article 779 which stipulates: "The share to which the first category heirs are entitled shall not be affected by the testamentary provisions of the deceased where that he made in favour of heirs in other categories or other universal or individual legatees." This actually means that the three quarters share of the inheritance cannot be interfered with.

In addition, Article 852 stipulates that the rightful heirs include children born in marriage and outside marriage, adoptive children as well as their descendants if these come by representation.

We can clearly conclude that articles 779 and 852 of the family code are important since they respect the current tendency of favouring mostly children above all else.

### **Second category heirs**

The surviving mate, the fathers and mothers, the brothers and sisters constitute the second category of heirs to the estate. They receive the balance of the inheritance if the heirs of the first category are present and the total inheritance if there are no first category heirs.

The second category heirs are also rightful heirs. They only fall into this category at the withdrawal of the first category heirs.

In fact, Article 853 of the family code stipulates that if the testator has no children, the disposable portion cannot exceed half the assets if there are heirs of at least two groups of the second category or the two thirds if there is only one group.<sup>12</sup>

<sup>9</sup> Prof. MBOPAKA N: Rights of the surviving mates, conference-debate held for all members of the Rotary Club, Park Hotel in Lubumbashi, 200 (unpublished) and Ass. KATAMEA, Critical Analysis of the rights of the surviving mate in the family code, JUSTITIA, UNILU, PUL., Vol. III, N° 1, June 2000. pp 75-90

<sup>10</sup> In this document we are dealing with the first three categories of Article 758 of the family code

<sup>11</sup> Article 759 of the family code

<sup>12</sup> Also Article 782 of the family code





The assets thus reserved are collected by the heirs following the order stipulated by the law.

We must underscore that the surviving mate enjoys protection from the legislator under the family code. As mentioned in the foregoing, the surviving mate is part of the first group of the rightful heirs and in addition to other special rights<sup>13</sup> (usufruct of the house inhabited by the married couple and the household furniture).

### **The family code and traditional heirs**

#### **Status of Issue**

As previously mentioned Congolese back in time did not have significant assets. Women and children were their only wealth. Hence, at the death of a person the attention of uncles, aunts and other relatives was drawn towards the protection of these women and children.

Currently, such is not the situation. Congolese possess quantities of assets that traditional heirs are eying and they go as far as grabbing the entire property or a large portion of the deceased's estate while neglecting the surviving spouse and children. Fortunately, the family code solved this by giving preference to the latter.

#### **Rights of the third category traditional heirs**

The paternal or maternal uncles and aunts make up the third category of heirs to the inheritance. When the deceased's paternal or maternal uncles or aunts or one of them die before the deceased but leave behind descendants, they shall be represented by these descendants in the inheritance.<sup>14</sup>

According to Article 761 of the family code, when the deceased is not survived by the first and second category of heirs, the paternal or maternal uncles and aunts are admitted to the inheritance pursuant to Article 758; the share is equally distributed among them.

It therefore emerges from these articles that traditional heirs shall only be admitted to the inheritance when there are neither children<sup>15</sup> that make up the first category of heirs nor the second category (surviving spouse, father, mother, brothers and sisters). Nonetheless, it is rare to have an inheritance situation where both the first two categories are lacking.

#### **Does the family code provide protection?**

Although the family code grants rights to both the children and the surviving spouse these are challenged by traditional heirs. They continue to consider widows and children like strangers in the family. They confiscate everything with no regard to the provisions stipulated in the family code.<sup>16</sup>

They justify such attitudes by the fact that in most Congolese customs, uncles and aunts play a major role in the upbringing, marriage and development of their nephews and

<sup>13</sup> Article 785 of the family code, see also Prof. Bompaka N, women's right with regard to the family code, JUSTITIA, Op,cit pp.12-13. Article 758, al, 5 and 6

<sup>14</sup> Senior Lec. José YAV KATSHUNG: Right of succession of traditional heirs in the family code: solution or challenge?, 12/04/2001, Unilu

<sup>15</sup> See, Paul VAN DEN WIELE, Private Customary Law and its Development in Negro-African Societies. Vol. I (persons), ed ENDA, Léopoldville, 1961, p.59 and others

<sup>16</sup> Senior Lec. José YAV KATSHUNG: Right of succession of traditional heirs in the family code: solution or challenge?, 12/04/2001, Unilu





nieces. Based on this they feel they are entitled to the inheritance of their nephews and nieces.<sup>17</sup> To crown it all, in the face of various forms of abuse from traditional heirs,

the children and the surviving spouse do not have the capacity to prevent them out of ignorance of the law aside from their rights they also fear witchcraft. In the face of such a predicament what attitude needs to be adopted in order to mitigate the crisis? Should they yield and seek a common ground for the sake of social peace and tranquility.

The family code of course aims at protecting the surviving spouse and the children against traditional heirs, but can we today, after more than a decade after its promulgation<sup>18</sup> affirm that there exist no conflicts among the various heirs? Traditional heirs feel they have been relegated to a position where they are no longer part of the deceased's family (their nephew, niece...) and therefore have no value before others.

This is simply because according to Article 761 of the family code, they are only entitled to the inheritance of their nephews and nieces when the heirs of the first two categories are not there, knowing very that in Africa and particularly in DRC, it is rare to find families without any member of the first two categories. It is a polite manner of preventing them from getting the inheritance.

It is therefore extremely rare for them to receive any inheritance, what an insult, or better said, what a provocation! As if that were not enough, instead of being consistent, the family code stirs up the conflict by stipulating the following in Article 854: "where there are no heirs of the first two categories the bounty of the testator may be through deeds or testamentary instruments deplete his entire estate"

This actually means that if there are no heirs in the first and second category, the nephew or niece (the defunct) may give or legate all his assets to whomever he shall so wish without any preference (friends, acquaintances, associations, churches...). why not clearly and directly grant these bequests and donations to uncles and aunts, traditional heirs, and appease ever so slightly the tension and prevent conflicts especially since they only inherit when there are no heirs in the first two categories? What is the point of creating frictions with them? That is the issue that traditional heirs are having.

### **c) Partial Conclusion**

With the aim of protecting the children and the surviving spouse from traditional heirs, the family code should develop its argument much further so as to ensure their protection to a greater extent and restore social peace and tranquility among the various heirs.

In order to achieve this, should the family code review the criteria for sharing out entitlements among the various concerned parties or should it seek a common ground so that its crucial mission may succeed?

- Customarily by the chief and his advisors that the surviving spouse and the children only got the house and the rifle, the goats, sheep, cows, fields...of the deceased, were taken by the brothers and sisters;
- In Musumba, Reverend Pastor KAJIK TSHITEM my father-in-law died and was survived by a widow, Mwad and three children, two girls and one boy, the deceased's brothers, after the ruling and in spite of the decision made the customary chief to share the property between the children, the spouse and the brothers, decided to seize everything including even the bed sheets and general items for children;

<sup>17</sup> Born in marriage, born outside marriage and adopted

<sup>18</sup> The family code was promulgated on the 1st of August 1987 and entered into force twelve months later





- At the death of the MBAKO community chief in Sandoa, a court was established to settle the issue of inheritance, unfortunately, as usual, the poor widow and the children were chased away from the royal residence without any asset;
- At the death of father of the substitute public prosecutor of the Lubumbashi Court of Appeal, Mr. MUZAIVIA had left for his family members, in the presence of his mother, a firearm to be given to his son bearing the name Joseph MUZAMA, who was Studying in Kinshasa. When he returned to the village for holidays, the message was given to him by one of the paternal aunts who loved him dearly. But this firearm had never been given to him because his uncle, a renowned great hunter liked it very much. After completing his university education, he courageously threatened them he would join his father in death if the firearm was not surrendered to him. Faced with such a dilemma, his uncles decided to give him a goat instead of the already damaged firearm.

Often, at the death of a father or husband, the children and the widow are treated like sorcerers, plundered of the property left by the deceased, threatened with death by witchcraft in case they claimed the property and even chased away from the marital home by the uncles, brothers and sisters of the deceased immediately they get back from the grave. Concrete examples of such cases abound.

### **Conclusion**

We have now reached the end of our reflection after having dwelt of the subject of inheritance conflict before a customary court.

In fact, based on the field of succession, our analysis focused in its theory section, on an inventory of legislated rights by the legislator for heirs and in the practical section, the evaluation of the level of implementation of these rights by the courts and tribunals and by the population in general through wills, regulations and friendly settlement of inheritance issues.

It is noteworthy to emphasize that in the case of an inheritance conflict before a customary court, the heirs, namely, the spouse and the children of the deceased suffer bias to the benefit of the brothers, uncles, aunts, while being subjected to death threats by witchcraft with no respect of human rights.

You will agree with me that after the death of a husband, a conflict arises between traditional wisdom and human rights, this is explained by the fact that in many customs, whatever will was issued, the deceased's wife and children always suffer. The above-mentioned cases provide concrete examples.





# HANDLING GUILT UNDER CUSTOMARY LAW-CONCEPT AND BASIS

by Jean Salem Israel Marcel Kapya Kabesa<sup>19\*</sup>

## Introduction

Dealing with guilt under customary law brings us back to the notion of penalties in historically organised primitive societies and the applicable legal system according to customary pre-established regulations and standards.

In fact, apart from extremely serious crimes that required the involvement of the customary or tribal chief, customary law was civil and its punishment scheme resembled arbitration rather than punishment as long as the damage was repaired as fully as possible.

How then is guilt perceived? The notion of guilt in societies under the customary authority varied from one category of individuals to another. It is to be noted that customary law was a sacred and mystical law and was also expressed through the law on magic and religion and as a result the punishment scheme was a reflection of customs in which this law was justified and expressed therein.

For example, in the case of the inhabitants along the banks of Lake Moero (in Katanga) and River Luapula (the Balamba, i.e. the riparian population), stealing an egg was a serious moral crime and whoever was guilty of such an offence would be subjected to an equally serious or heavy punishment since he/she would be viewed as a blatant thief.

In fact, sexual offences involving youths was not so much the sexual haggling but rather the attraction they had between themselves, on the other hand anyone undressing a girl of marriageable age and attempting to have intercourse with her with a flow of blood would be guilty of rape and subjected to payment of damages to the concerned family for deflowering a girl and would pay the accepted value of assets set for the dowry<sup>20</sup> owed for marriage<sup>21</sup>.

It would be necessary to specify that in the perception of guilt would be the prerogative of the one advancing the allegation to furnish the proof (*actori incumbit probatio*) and this would have to be administered by the team of chief's representatives with the mandate on such matters.

The basis of the guilt under customary law was expressed in the community spirit of the society to which the individual belongs and which incorporated his social position in the customary beliefs in force in that particular area.

Thus, repeated cases of adultery for instance with the chief's wife could lead to a death sentence, but quite often the court would limit itself to mutilations (particularly removal of ears, hands or eyes or even the penis).

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<sup>20</sup> Dowry: value of property in cash or in kind that the fiancé gives to the family of the fiancée or her parents. This amount is the marriage settlement between the two families. Law n°87-010 of 1st August 1987 on the family code in article 363 states that "there shall be no marriage without dowry".

<sup>21</sup> Marriage: public, solemn and consensual act by which a man and a woman commit themselves to each other until death for a common and perpetual destiny (article 33 of the family code)





The death sentence, to which the chief would never be a witness, could be applied in the following cases:

- Crime of witchcraft: the accused is convicted after trial;
- Unjustifiable homicide or rather justified by an objectionable reason;
- Repeated adultery with the spouse of the chief.

### **Notion of Guilt under Customary Law-Concept and Basis**

#### **Origin of Congolese Customary Law**

It would be appropriate to review the past before embarking on a definition of the historical development of customary law in our legal arsenal. Actually, at the period of the Congo Free State (E.I.C-French acronym), it was the Sovereign King's decree of 14<sup>th</sup> May 1886 that acknowledged the existence of the Congolese customary law which stated as follows: "when a matter is not stipulated by a promulgated order or decree, disputes submitted to the jurisdiction of Congo shall be determined in accordance with local customs"

Article 4 paragraph 2 of the Colonial Charter of 18<sup>th</sup> October of 1908 stipulated that natives who were not registered in Belgian Congo enjoyed the rights acknowledged by the colonial legislation and their customs as long as such were not in conflict with either the legislation or the colonial public law.

Similarly, the 1938 decree in article 18 stipulated that indigenous courts would implement their customs as long as they were not in conflict with universal public order<sup>22</sup>.

More recently, article 149 of the 05/04/2003 Constitution stipulates that "civil courts and tribunals as well as the military shall enforce the law and regulatory acts including customs as long as such are in accordance with public order and morality".

#### **Legal Basis of Customary Law**

Whereas criminal written law is based on penalty, the Congolese customary law is rather founded on solidarity which sublimates life and more specifically the life principle of an individual whose destabilisation and desegregation in his private life - empties every substance from the individual as well as the group and exposes all of them to hazards. Therefore depriving an individual of this solidarity is the most serious penalty one would inflict<sup>23</sup>

Professor KAMPETENGA believes that customary law like any other law is based on people and their legal responsibilities as persons (individuals) or as entities (parental, lineage, clan).

However, as M'BALE KEBA<sup>24</sup> states, we need to acknowledge as Major G.S. ORDRE BROWN does that "customary law was rather civil than penal" and that any offence, aside from the most serious and exceptional offences was punishable under a system that resembled arbitration rather than punishment and as long as the damaged caused was repaired as fully as possible, other sanctions were not stipulated.

<sup>22</sup> A. SOHIER. Summary of leading cases and customary doctrines in Congo and Rwanda-Burundi up to 31/12/1953, Ed F.LARCIER, Brussels, 1987, p.23 and others

<sup>23</sup> KAMPETENGA LUSENGU B.M. Foundation of life in a society: From clan to nation. Thesis-Advanced studies in Anthropology, UNILY, Lubumbashi. 1999.

<sup>24</sup> M'BALE KEBA: "Black Africa: Law" Encyclopaedia Universalis, Corpus, France, S.A., Paris 1989 p.60 and others.







Similarly, A. SOHIER (1954) wrote that, “any breach of the law that is condemned by the conscience to the extent of deeming that it should not only lead to indemnifying the victim but also a punishment even when the punishment is not inflicted by official representatives of the society, but by an individual duly mandated by it. It would be vengeance if it were to be administered by an individual or his group, however, the sentence is pronounced by the courts. Vengeance or punishment is different from civil redress in that their aim is not to compensate the victim but to subject the offender to punishment.

This author believes that customary law is also expressed through magic and religious laws, the mystical sacred law of fortune and misfortunes by which matters are handled and that men can settle only by and with shades of the ancestors, spirits of the gods where “sorcerers” and “fetish priests” operate, thus triggering good or harmful, lucky or unlucky currents in the life principle of offenders and victims. Therefore, the law is referred to as “customary” not because it is derived from customs but rather because it is expressed in or through them<sup>25</sup>, whereas law N° 87-010 of 1<sup>st</sup> August 1987 on family code is based on irreparable damage to marital union<sup>26</sup>.

In A.SOHIER’s publication it is noted that “in adultery cases the custom stipulates payment of compensation by the wife’s lover to the deceived husband. Would it not be appropriate to replace such compensation with a fine?<sup>27</sup>

### **Guilt under Customary Law (Notion and Basis)**

It is fitting to understand the basis of criminal penalty in customary criminal law within the context of solidarity as expressed by AKELE and SITA (1999) in defining it as “the profound feeling of mutual dependence that is shared by all members of a group (of a society), and as the life principle uniting both the living and the dead”. He goes further on this by referring to A.SOHIER (1954) - whereby it is based on “actually enhancing the value of individuals within a group (in society) through logic and metaphysics and on the life principle, namely, as R.P. Placide TEMPELS explains that this interactive relationship in which man masks when he is in contact with the shades of ancestors, the higher force and other so-called lower forces (animals, plants, minerals, etc.<sup>28</sup>

As far as A.SOHIER is concerned, customary law is also incrimination, punishment and compensation law both for sacred and invisible matters as S. COMHAIRE and Alii brand it and add that penal, civil, magic and religious regulations all merge in the same precepts which in these verb-and-word, rhythm and symbol civilisations<sup>29</sup> as A.SOHIER (1954) says, are transmitted primarily by means of proverbs, maxims and songs, thus vaguely regulating all aspects of social life.<sup>30</sup>

Understandably, man, as A. SOUPIOT wrote, is a metaphysical animal<sup>31</sup> and judging from what has been stated there is no doubt that the notion of guilt in customary law falls within the province of ancestral power which in turn is incarnated in orally transmitted

<sup>25</sup> A.SOHIER. Marriage in Congolese Customary Law, Institut Royal colonial belge. Thesis, coll. In 82. Volume XI, fasc.3 and the last. Librairie Falk, Brussels, 1943, p.3.

<sup>26</sup> Law N° 87-010 of 1st August 1987 on Congolese family code

<sup>27</sup> AKELE and SITA. Congolese customary criminal law, IN Rule of Law, Review of the faculty of law, n° 1. Protestant University, Congo, Kinshasa, 1999, p.25

<sup>28</sup> AKELE & SITA. Congolese Criminal Law, in Rule of Law, Review of the Faculty of Law N° 1 Protestant University of Congo, Kinshasa, 1999, p.25.

<sup>29</sup> S. COMHAIRE and Alii, New African Issue, Situation and Perspectives. Marabout Université, Paris, 1971 p.36

<sup>30</sup> A.SOHIER . Basic treatise of Belgian Congo customary law , 2nd Ed. Ferd-Larcier, Brussels, 1954

<sup>31</sup> A. SOUPIOT. Anthropological Essay on the Function of Law. Seuil Edition. Paris 2005.p.2







popular tradition by those invested with magic-religious power (tribal chiefs), but its legal basis rests on the notion of solidarity or group rather than punishment inflicted to those acting against social norms, customs, moral values deemed to be law in themselves.

The notion of guilt is difficult to establish since customary law does not distinguish between civil matters and penal matters, the latter being the prerogative of the individuals who submit them to customary courts as well as the tribal chief. The chiefs only get involved when a gating procedure is interposed, as would be the case with proof of witchcraft, land conflict between two clans or a group of people.

### **The Notion of Guilt and its Basis**

At this point we shall focus the research on the main court in Kisamamba-Kampombwe Chieftainship (Kasenga Area, Upper Katanga District) acknowledged by decree N° 128 of 30<sup>th</sup> November 1933 by the Commissioner of Elisabeth Province.

### **Geographical and Administrative Situation of this Jurisdiction**

Kisamamba Kampombwe Chieftainship is located about twelve kilometres north of Kasenga bordering Luapula. It has a surface area of 150km<sup>2</sup> and a total population of 1750 persons spread in 19 small villages.

Kisamamba Kampombwe represents the older branch of Kisamamba that forms three chieftainships all three spread out along Luapula: Kisamamba Kibale south of Kasenga, Kisamamba Kikungu between Kasenga and Kampombwe.

These three Kisamamba have a common origin. As part of the mwina ngoma (ngoma is a drum used for dances), probably of Lunda origin, if the tradition is correct, that would mean they originally came from the West, these Kisamamba left Chief Kifumbe's land about a century ago and settled in Bangwelo, ending up on the left banks of middle area Luapula which at the time was not occupied. The name seems to have issued from the fact they originated from Lake Bangwelo, the direction from which the wind known as "Kisamamba" comes.

It was round about this time that there occurred incursions of various indigenous groups coming from the East and which formed the nucleus of the population that presently lives on the western bank of Luapula-Moero.

In this entire region made up of a single geographical entity an almost similar custom gradually developed. The first nucleus of the population was grafted with elements of various origins which led to a continuous intermixture of races and to the emergence of a new custom, the Kishila (Bashila means fishermen and the general term designated all the residents of Luapula-Moero) custom where the Mubemba feature dominated. The various Kishila dialects that were spoken in Luapula Moero closely resemble Kibemba to such an extent that they are commonly referred to as Kibemba.

### **Kisamamba Kampombwe chieftainship therefore has a part in all these features.**

As in all the neighbouring regions the social structure is matriarchal and succession of chiefs is matrilineal. Kampombwe chiefs therefore still belong to the Bena Ngoma clan. The particularly numerous clans represented in the chieftainship are quite mixed and the family (in the more general sense of the term) is the only social entity that presents a measure of homogeneity





## **Composition of the Court**

Customarily, the court is composed as follows:

### **a) The Bakabilo**

There could be one or several. They can be from any clan but are never chosen from that of the Chief, namely the Bena Ngoma.

They are chosen from among the natives displaying exemplary sensibleness and the highest capacity in providing solutions during discussions. Theoretically this office is hereditary but on a practical level it may be that the one called upon to assume responsibilities in the Kabilo (through family ties: brother, maternal cousin, maternal nephew or maternal grand nephew) is not capable of undertaking the duties assigned. He is then struck off and another Kabilo is designated. This other Kabilo may be either of the same clan as the previously selected candidate or from another clan. The only criteria used in selection would be his merit as a person.

The Kabilo neither bears nor receives any particular emblem representing his title and duties. He is chosen and elected by the chief together with his Bamushika and the Council of Headmen. The Chief cannot nominate him by his own authority; in any event, the Kabilo must be approved by the Bamushika.

This institution still exists. It has been sustained under the influence of Lunda and Muyeke. Under the latter, the name Kabilo tended to disappear in favour of “Mtoni” which among the Bayeke, refers to the dignitary appointed to settle disputes in hearings.

Since the European occupation, the common language by imitation refers to them as “bajuges” (judges). This term should not be used since it can create confusion in the minds of natives who are all too happy to imitate our judiciary structure (in deed our entire organisation generally speaking) whereas the legislator is willing to restore and formalise their own structure.

Currently, there are two Bakabilo in Kisamamba Kampombwe. These are, in order of precedence and importance:

KAPITENI KAOMA, illiterate-of the Mwina Mumba clan. Mumba means pottery clay. The Bena Mumba belongs to the Baushi tribe, represented in Congo by Chief Kiniama of Upper Luapula.

KIMBOKOTO MWANSA, also known as KAFWANDA, of the mwina Nsofu clan. Literate-Nsofu means elephant. This clan belongs to Chief Pande’s Baluba Sanga tribe.

### **b) The Bamushika**

Some still exist. They are chosen from among the influential headmen of the chieftainship displaying the highest level of integrity.

As with the Kabilo, they can be from any clan but are never selected from the Chief’s clan. In theory, this is also a hereditary duty (through bloodline), but if the successor is not capable, another one is appointed either from the clan of the previously selected candidate or another clan.

The appointments of the Bamushika among the Kampombwe. These are, in order of precedence and importance:





KIBIMBI LWINO, illiterate - from the Mwina Nsofu clan (Basanga of Pande);  
MFUTA MWILUNDE, illiterate-of the Mwina Boa Clan. Boa means mushroom. The elder of this clan is Chief Katanga, in the Northern part of Elisabethville:  
SHIENKE KALEMBWE, illiterate-of the Mwina Lungu clan. Lungu is a sort of gourd vegetable. The elder of Bena Lunguis Rhodesian Chief Kilembwe near Lake Bangwelo.

The Mushika and Kabilo correspond to the “Kapingula ya Milandu” (examiners, instructors, arbiters in hearings) the Babemba. They are nominated by the Chief according to the number he chooses with the assistance of the Council of Headmen. The only criteria in this selection as well as the order of precedence is integrity and good sense of judgement of the individuals, meaning that genealogical factors are not inviolable.

The Mushika ranks before the Kabilo. He occupies a higher rank on the judiciary ladder; which does not mean that he forms a higher jurisdiction with possible power of review or appeal. They are all part of the same jurisdiction.

The Kabilo hearing a matter would first attempt conciliation. If this succeeds, the concerned parties are dismissed and the dispute would not be submitted to the court. If it does not work, the Kabilo refers the matter to a Mushika, who has the liberty, either alone or with the assistance of his colleagues, to attempt conciliation again. If this attempt succeeds the matter is not submitted to court.

In the instance where the Mushika to whom a dispute has been referred submits it to a court and if it is a matter that is not particularly serious in character, he would simply have a hearing at his home assisted by one or several other Bamushika and one or several Bakabilo.

The absence of the Bakabilo would not serve as a cause for rendering the procedure null and void. But the court can only legitimately sit if there are two judges one of whom is a Mushika.

We already mentioned that there is certain hierarchy among the judges. It naturally follows that in fairly serious matters the first of the Bamushika would always be invited to serve. When it is a serious dispute, the Bamushika would directly refer the matter to the Chief who would sit with all his court and the headmen.

### **c) The Chief**

The Chief’s presence is therefore an absolute necessity in order for the court to be constituted. We noted that the composition of the court will vary according to the nature of the matter referred to him and that the Chief would only be called upon to sit in the first instance in significant matters.

Nonetheless, the parties still have the right to turn to the Chief for redress if he was in the hearing. Actually these are not two separate jurisdictions since it is indeed the very same court that would take up the matter in the second appeal proceedings; its only the composition of the court that would be modified in addition to the original judges, the Chief and the headmen that he may choose to assist him.





## **Procedure**

### **a) Introducing the matter**

The party that wishes to initiate legal proceedings first goes to one of the Bakabilo, the bearer of its “Lupango”, the tribute required of any seeking to lodge a legal proceeding. This Lupango would be several hens, one or several hoes or a piece of fabric. Its value would depend on the social status or wealth of the defendant or the significance of the matter.

It is only in the absence-highly unlikely to happen at a similar time- of all the Bakabilo, that the parties would directly go to a Mushika.

The Kabilo to whom the matter is submitted would either alone or with his colleague(s) make the first attempt at conciliation.

If this fails, the Kabilo would refer the matter to a Mushika where a second attempt at conciliation is made. If this works, the Lupango is surrendered to the defendant and it is only the chief who has the mandate to receive this tribute but the parties would normally give to the mediator a small gift of some sort for example a mug of beer.

If conciliation were to prove impossible, the matter would be referred to the court and a Lupango was required. Whether the Chief attended the court proceedings or not the Lupango was still surrendered to him

When a defendant was too poor to afford paying the Lupango this would not mean that matter was not to be submitted or heard with lesser rigor but he would be expected to work for the Chief until such a time as the chief would deem that he is acquitted or until his parents would pay the value of the due Lupango to the Chief.

Where the dispute involved compensation for battering, injuries or mutilations inflicted to the defendant or one of his relatives, or vengeance for death, the Lupango would be a piece of Nkula that would be given to the Chief and its red colour would indicate that it was a blood matter. (As we shall see later, in KILOPA matters, the concerned party would rub his body with Nkula). The Nkula is obtained as follows: two parts of the Mukula tree are cut right up to the core. They are then rubbed against each other just as millet is crushed and the friction produces a red powder. This friction is enhanced by a bit of sand which removes wood particles during the process. Next the powder is used to make some paste by mixing with a decoction of Musishia tree leaves. Once the paste dries it resembles a red earth block that is called Nkula. In olden days, Nkula was commonly used for body treatment; natives used to mix it with oil and apply to the body. Currently they use it by mixing a layer of Nkula with oil to help treat umbilical scars and for protection against adverse weather and to ensure that a new-born's head suffers no harm.

The above-mentioned procedure, whose purpose was to ensure that only matters that fail to reach any consensus on conciliation are referred to the Chief's court, is still in force as far as initiating proceedings is concerned. The only aspect that is no longer present is the Lupango which used to be given to the Chief. In fact, by 1931 (i.e. before the administrative authority recognised this procedure, the Lupango had already been replaced by a fixed registration fee that was paid to the Chieftain's fund.

### **b) Hearing and Judgement**

There was no set day for court hearings. A day was set as matters came up. The hearing would be held near a Mushika's home or in the Chief's compound whenever he would sit





in court. The Chief would take his place on his low chair (kipona). The Bamushika and the Bakabilo sat beside him on mats. The parties to the hearing would sit on the floor at a distance.

The public had no access to this compound and would remain outside but they would be able to follow through the slits of the fence and could hear the sentence imposed. The public was kept out solely out of respect to the Chief. No one could enter the Chief's compound without being authorised to do so.

It is to be noted here that whenever the court went into session, all activities were suspended and all the indigenous people would meet nearby to wait for the verdict. The Headmen, Chief's relatives could attend the hearing. They always did so when the matter was of significance. Actually they were often summoned by the Chief himself.

The hearing would start with statements from the parties followed by cross examination of witnesses. When all had expressed their viewpoints, a question and answer session would begin. The parties could obtain help from family members or any other person that was aware of the issue. This should not be viewed as being identical with the current practice with our lawyers. The defence for the parties were invited by their relatives and friends but this was strictly private without any connotation whatsoever of professional public advocates or payment.

The Chief would not get involved in the hearing apart from chairing without participating in the discussions. It was only the Bakabilo and the Bamushika who would handle the interrogations.

No oath was required; it could not be imposed by the court but the parties and witnesses could do it. Usually it would be done by stepping over the body of a small child lying on the floor (a child belonging to the family swearing) and saying "if I lie, this child shall die".

The seriousness of the oath was such that it was only taken for fairly weighty matters: theft allegation, adultery and homicide. The party that so desired was at liberty to do so in any dispute but in most cases the disputes were minor in nature. In view of the serious consequences in the locals' eyes relatives would prevent disputes.

When such an oath was taken it would undoubtedly influence the court's decision but there was no other legal value except for a simple statement. It would only bind the person upon whose life the oath was taken (and of course his family).

If the child ended up dying it would be an internal family matter which evidently could be submitted to the court but it would be a separate issue and independent of the first one.

However, it is clear that if the other party lost before the court it could still resubmit the matter using the death of the child as grounds to press charges of false evidence and thus have the first decision amended in its favour.

Proved false evidence as far as the natives were concerned was not different from simply lying. If the false evidence or lie delayed are distorted the settlement of a matter, and was thus established as being the case, the consequence was that the compensation to be paid to the other party was increased; but this did not include any penal punishment when the false evidence or the lie was stated by the accused. If it originated from a witness, a





sentence could be determined besides compensation, and in the event of a repetition of the offence this could go as far as physical mutilations.

A second form of oath was the Mwavi test, that is, the test of boiling water. Just as in the case of the oath itself, this test was never ordered by the court.

It was always the accused himself who would request to go through this test in order to prove his innocence or who was pressurised by his family members. An accused native was never forced to undergo the Mwavi test, but if he refused, the court as well as the entire community would conclude that he was afraid because he was guilty and would render its verdict accordingly. This really means that for the accused, aside from the material obligation there was a moral obligation for accepting to be subjected to this test.

**The test was conducted in two ways as follows:**

1. The one wishing to undergo the test would call the sorcerer and would prepare wood and water. The sorcerer would boil the water in a container that could be as much as about 40cm to 50cm deep. Next he would drop in a metal bracelet. The test consisted of removing the bracelet right from the bottom of the water without any trace of burns affecting the skin. This process was repeated several times with each hand. The accused would then go back home for the night. The next morning his arms were examined and he was pronounced guilty or innocent depending on whether any traces of burning were found on his skin.
2. Instead of dropping the bracelet in boiling water, the sorcerer could place in dry fruits of the Lukusu and Lusombo trees. These fruits would float on the water surface. The test consisted of removing them without getting burnt. According to superstitions, if the accused was guilty the fruits would sink and the water would go up on his arm burning him.

It was up to the sorcerer to choose the test. This was conducted outside the village and the Chief could not attend. The ceremony was organised by the sorcerer who would dress ceremoniously for the occasion.

One or several Bamushika, the parties' families as well as all those who wished could attend. It was therefore conducted whilst the community and at least one Mushika monitored the process.

If the results were negative, the concerned party could of course claim for damages which at times could be quite high from the accusers.

According to the information I gathered, the poison test (the Kilapo or oath among the Baluba) consisting of administering it either to the accused or a domestic animal such as a hen was not practiced in the region.

Once the hearing had gathered enough facts on the case the court would deliberate in camera. That would be the only time that the Chief would be involved. Each judge would express his opinion and the court would adopt the decision on which there was unanimity.

If the hearing went on till the end of the day or if the judges could not agree for instance due to lack of information to make a decision, the matter would be adjourned until the next day or to a future date.







The decision would always have to be unanimous. The Chief had the casting vote and if need be, he would impose his will. It goes without saying that the Chief would take care not wilfully make a decision opposed to the opinion of his judges.

This sentence was evidently immediately announced to the entire village and would be the opportunity for the winning party's friends and relatives to celebrate with endless shouts, songs, dances and drinking bouts.

When the court sat without the Chief in a Mushika's home, the same procedure was followed and everyone was allowed in. The cross-examination, the deliberations and any verdict all followed the same rules.

### **3. Punitive Sanctions and Enforcement of Orders**

**Imprisonment.** The most common mode of imprisonment was detention for non-payment of debts. The individual sentenced by the court who would not pay the fine or damages ordered within the time limit determined by the court was sometimes immediately arrested and kept in custody until he would pay off the debt. If he delayed too long in paying off the debt he could be reduced to slavery.

There were no specific detention facilities. The prisoner was entrusted to a Mushika or a Kabilo who would accommodate and feed him. He was compelled to work for the Chief and his guard. If it was feared that he would flee his hands would be tied behind his back and a log would be tied to his feet.

In the event of a serious offence, the Chief could have the accused to be detained until the verdict day.

**Fine.** As a general rule, disputes were settled by the payment of damages to the injured party. The payment of a fine to the Chief would only apply in the following specific cases:

**The Kilopa:** this would be the fine prescribed for one becoming guilty of a crime, injury, any mutilation whatsoever (gouging someone's eye, breaking a body member, and any spilling of blood). The land was tarnished and the guilty person would have to pay compensation to the Chief, aside from what he would probably have to pay to the injured party.

No one was allowed to take the law into his own hands and whoever, with the intent of avenging, killed another in the bush without having lodged his complaint to the Chief's court, even if vengeance was justified, would be forced to compensate the victim's family or if not, pay to the Chief the Kilopa fine. The same would apply where the vengeance involved injury and mutilations.

The concerned person would in fact almost always be willingly go to the Chief claiming responsibility over his action and offering to pay the Kilopa to the Chief. In such a situation, he would smudge his body with Nkula to indicate that it was a blood matter and that he was appearing before the Chief.

1. Failure to pay the tribute to the Chief, this would be for instance when a hunter who upon killing a lion or an elephant, hides it and does not surrender the skin to the Chief.
2. The act, of a foreigner of hunting or fishing on the Chief's land without permission



3. In extremely serious cases, especially in repeated offences (raping minors, adultery, theft...), apart from other penalties, a prescribed fine would be paid to the Chief.
4. Direct contempt of court: see further down.

Fines would range from a few hens or a hoe to several slaves according to the seriousness of the offence.

Imprisonment for non payment was applied until payment was made. It involved working for the Chief. If the concerned person was unable to pay he would end up becoming the Chief's slave.

#### **d) Damages**

These would actually constitute the most often rendered sentence by the court. They would be proportional to the injury caused to the social status of the defendant or plaintiff, and to the expectations of the latter and as previously mentioned, would result in imprisonment until the full settlement of the compensation.

In some cases like theft or adultery, the guilty party who would be unable to pay the compensation ordered would be reduced to slavery.

Corporal Punishment-In significant cases, the Chief could decide that aside from other sentences rendered by the court, the guilty person would be subjected to corporal punishment, for example:

Ablation of ears eyes or hands such as in the repeated cases of frequent thefts, lying or slander. These punishments could apply both to men and women: Ablation of the penis for repeated adultery. When the guilty person was a woman she would fall under the province of marital law that could be expressed in various forms of abuse. Mostly this would be followed by repudiation. The DILANGALA (plural: Malangala) was responsible for administering corporal punishment. He would do this away from others, in the bushes and the Chief could not witness it.

The whip: if the Chief decided the Dilangala would whip the guilty in front of him after the sentence was rendered. The whip was made up of some sort of rush: the Kamama also known as Nkodi. The number of strokes was not specified and offender was not held still and in a laying position. The Dilangala would administer a few strokes on the body until he would manage to flee.

The whip could also be administered upon the Chief's order and still be the Dilangala on the spot to anyone causing disturbance at the hearing, disrespecting the court or complaining bitterly against the rendered sentence. In addition to these, the guilty person could also be fined. Aside from his judiciary functions, the Chief could not resort to the whip or to any other corporal punishment otherwise it would be deemed to be an arbitrary act or abuse of power for which his headmen and the entire population would without fail hold him accountable.

**Death Sentence-** The custom was not inclined to prescribe the death sentence. However it could be applied although in most instances banishment was preferred. The death sentence, to whose execution the Chief could never be a witness could be applied in the following cases:

**Witchcraft crime-** The person accused and proved guilty (the proof could involve 1) the Mwavi test using boiling water; 2) to let the matter be settled based on the gender of the first animal killed by a hunter sent in the bush by the Chief; if it was male, the accused



was deemed guilty and was handed over to the sorcerer who would dismember him alive and cast his body on a log that he would burn in the bush.

**Unwarranted homicide** or rather one that was justified by an objectionable reason. The victim's relative could seize the guilty person and bring him before the Chief. If he did not demand that he be sentenced to death, the Chief and his court could order him to pay a high compensation; several slaves, for example two women and two men from the guilty person's family. In order to accomplish this, one of these would appear before the Chief (more likely the Kilopa). They would only opt for the death sentence if this was formally requested by the victim's family. In order to do this, one of the latter would come before the Chief after having covered himself with Nkula, then violently uncovering his private parts, slapping the Chief's face and saying: "you shall kill this man; otherwise you are not a Chief".

It would then be the Dilangala's responsibility to go and kill the guilty person in the bush, using a spear, an axe and surrender his corpse to his family for burial.

**Repeated adultery with a Chief's wife:** this could also lead to the death sentence but often the court would limit itself to mutilations. It is noteworthy to mention that the Chief could never issue a death sentence contrary to the opinion of his headmen.

Apart from cases of witchcraft, the death sentence was therefore never issued by the Chief's court, unless it was in very exceptional cases, when it was requested, to compensate for homicide according to the fore-mentioned manner. It could only be a very powerful man who would make such a demand and whom the Chief and his headmen had reason for fearing in that he would alienate himself or leave their land together with his people if they did not satisfy his demands.

We already mentioned that a native affected by the murder of his relatives or a case of adultery and who would take vengeance on the offender by killing was not liable to pay any compensation to the family of his victim but had to pay the Chief the Kilopa<sup>32</sup> compensation.

## **The Status of Case Laws in Comparative Congolese Law**

### **Status of the issue**

In customary law, the concept of guilt is of primary significance since fundamentally it is not only the custom that is violated but in essence the very social order based on solidarity. In the South of Katanga Bemba customary law, stealing an egg constitutes a serious breach of morals and is deemed to be compound robbery; on the other hand witchcraft in primitive customs was not harmful, it was a means of correcting or punishing individuals that acted outside the established rules of the tribe and custom.<sup>33</sup>

Under the penal law, only the acts already defined as offences by the legislator would fall under the law. Professor NYABIRUNGU feels that the legality of incriminations has consequences both for the legislator and the judge. He believes that this principle of mandatory prior definitions of offences is a guarantee of freedom and legal security since it can correctly be assumed that in that event, such definitions were developed without bias and without knowledge of who would possibly be subjected to their enforcement.<sup>34</sup>

<sup>32</sup> Indigenous Jurisdictions Bulletin of 1930 and 1931, Elisabethville, p.154-170

<sup>33</sup> Interview conducted with Tribal Chief Shula KAMAKOBWE MWELWA of PWETO area, on 24/01/2008 a 12pm (Katanga DRC).

<sup>34</sup> NYABIRUNGU. Op.cit.p.36





This principle was tempered by the 30<sup>th</sup> January 1940 Decree on the penal code and Article 1 which read as follows: “No offence shall be liable for enforcement of punishment by the law if such sanctions were not stipulated by the law prior to the offence being committed; and stated in the 18/02/2006 Constitution; this is the same case with Article 11 of the UNO Universal Declaration of Human Rights to which our country adheres as shown in the preamble of the Constitution.

Under customary law, this is not the case since the concept of guilt is the prerogative of the traditional wisdom of some people (headmen) who have personal or moral experience.

As is stated in NYABIRUNGU’s writings (op.cit.p.9): a murderer would start wondering here and there tormented by the remorse of his act like Cain after he murdered Abel. In “La Légende des Sciences”, Victor Hugo states the following: “this eye that is always watching me”, this eye is none other than the conscience, the sanction of a transgressed moral rule.

One could say that such a man was ruined and unhappy because his father or uncle cursed him and he would receive no respect or assistance at all. In addition, all the elderly persons in the village who were of the same age as his abandoned father or uncle would start to ignore and avoid him since he was a disrespectful and unworthy son.<sup>35</sup>

Social sanction under customary law issues from the manner in which each could lead his life as he pleased while respecting the law and customs established by the elders of ancestral tradition. It was founded on solidarity or group principle.

To illustrate this point, it would be appropriate to mention an example. We could have an unmarried 40 year old man. During a hearing on marital life or divorce, the elders would not give him a chance to speak because he is unworthy.

## **Status of Congolese Case Laws**

### **a) The Case Of Amisi Tubila And Mauwa Safalani**

#### **Verdict**

The Supreme Court of Justice (DRC) has had the opportunity to restate the importance of the principle of the legality of incriminations in the case shown below:

On 04/10/1976, the Court in Maniema Sub-Region in Kindu sentenced AMISI TUBILA to a fine for having violated the custom by withholding the National Certificate and other personal effects belonging to MAUWA SAFALANI, his spouse.

The Supreme Court reversed and dismissed the case with the following terms: “without having to examine the grounds of the plaintiff, the Supreme Court of Justice raises, as a matter of course in law, the grounds derived from the violation of Article 1 of the Penal Code and Article 1 of the 14/05/1886 Edict on the application of general principles of law in that the verdict under appeal issued a penal sentence while disclosing neither the law condemning the acts that were submitted to the judge, nor the custom stipulating it, whereas a person shall not be sentenced for an offence that is not stipulated by the law and for which the custom prescribing it has not been established.”<sup>36</sup>

<sup>35</sup> NYABIRUNGU, MS op.cit.p.9

<sup>36</sup> C.S.J (Kinshasa), 28/12/1979, Bull, 1984, 357, NYABIRUNGU M.S. Thesis on Congolese Penal Law. Ed.





### **Critical Analysis of the verdict**

By applying customary law in relation with the written law, it is unfortunate that the Supreme Court of Justice did not use as basis the facts accepted by the sub-region court (customary court), since the fact is that written Congolese law experiences difficulties in stating the law and many end up neither being sentenced nor acquitted for acts deemed either reprehensible by the penal law or irreprehensible, and this to the detriment of customary rules.

The customary court maintained that Mr. AMISI had not only violated the custom by taking the certificate of his wife but had also infringed on moral standards and good sense by taking other personal effects (clothes, etc..) that are sacred to the traditional value of his wife and therefore a serious infringement of customary rules.

It is therefore in order to specify that the gap between the required law (stated in the jurisdictions) and the actual law (Customary) leads to problems as far as understanding our law is concerned and in fact this very law is authenticated by our customs and should be above all, the original customary law in Africa.

### **b) The case of the black cat**

#### **Status of the issue**

Traditional doctrine and jurisprudence deems supernatural offences as not being able to constitute a punishable attempt<sup>37</sup>. It is, as noted by NYABIRUNGU, an absurd crime, since the means undertaken is imaginary and there is no appropriate link between life experience and the results sought.

The doctrine mentions for example the act of a farmer going on a pilgrimage in order to kill his enemy or using a prayer or a magical formula to obtain the same result. Such was the viewpoint of the Kinshasa Court of Appeal in the case known as the "black cat" where the absurd crime was punished.

#### **Presentation of the facts**

A, Customs Chief Officer is transferred and leaves there two colleagues B and C. D who replaced him notices some financial irregularities. Alerted by B and C and sensing danger, A decides to kill D using witchcraft. He entrusts this matter to his former colleagues B and C and they in turn contact a powerful witch doctor who agrees in return for money.

The witch doctor attempts to kill D using a black cat provided by B and C. He utters incantations over it but unfortunately he does not succeed. He contacts another witch doctor who he believes is more powerful but still there is no success. Finally he decides to use another method and kills D with a rifle shot.

The Kinshasa Court of Appeal <sup>38</sup> to which this case was submitted convicted the witch doctor E on two charges, namely, the murder of D by rifle shot and attempted murder by witchcraft.

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Law and Society (DES) Kinshasa 2001.p.61

<sup>37</sup> Emile LAMY Penal omission in Congolese criminal law and legislative proposals, in R.J.C., 1964

<sup>38</sup> Kinshasa Court of Appeal Order, unpublished, 4th page, rendered 08/01/1970, involving Mr. M. c/Matu-tu Nganga, Mavungu, Bunga and Bongo, cause list 415 cited by BAYONA, speech at a formal hearing at the judiciary reopening on 16/10/1976, in Bulletin of Supreme Court of Justice Arrests, 1977, 227-238.





### **Status of the doctrine**

It is fortunate that the Court of Appeal maintained this solution for two reasons:

- A. First, even in the case of an absurd crime, the offender showed that he was perverse and a danger to the society;
- B. Next, modern science, in the field of “parapsychology” admits to the possibility of action from a distance through word and thought.

“When, in the light of science, one considers the philosophy that is current and that believes in the possibility of acting against someone from a distance through thought and actually form words, it is clear that such a concept of things is a reality today even in the field of official science. In fact, currently, scientists and thinking men are aware of the reality of a para-psychological universe”<sup>39</sup>

However, it is unfortunate that the Supreme Court of Justice, handling the same case did not use this opportunity to further develop the law on this issue. It evaded the issue by simply considering that a murder was committed, the means used for killing but at no point did it raise the question as to the attempt to murder through witchcraft.<sup>40</sup>

#### **c) The Case of Witchcraft of involving a Couple-Makonga And Mpolo**

In another case ruled by the Kinshasa-Kalamu High Court, the issues of ruling on witchcraft were raised.

### **Presentation of facts**

A married couple, MAKONGA and LUYINGA were prosecuted for, among others, giving to the person bearing the name MATADILA MPOLO a banana which was alleged to have mysteriously turned into meat and resulted, firstly in a change of the mental state of the young girl and secondly, night visions of the couple. Having accepted this as a poisoning offence which actually is a charge that should be completely rejected given the terms of our penal code (1940 Decree in DRC) that defines this offence as homicide, the judge said that there were no grounds in that the mysterious night visions could never be submitted in practical terms.

### **Assessment of the Theory**

The witchcraft issue featured on the National Supreme Conference agenda and was handled by the legal affairs committee. Based on the study conducted the sub-committee and legal reforms, the plenary noted the following:

The issue of witchcraft is real “given that a large portion of the population is convinced that death or harm can be caused by bewitchment”. Nevertheless, it is still difficult to submit evidence. In view of the preceding it would be wise to legislate and refer to current laws each time specific circumstances (confession, witness...) require that evidence be submitted as to the intention and material acts in connection with the offence.<sup>41</sup>

Since guilt both in customary law and written law is difficult to establish due to lack of evidence, though customarily it is agreed that through some practical and imaginary acts killing is possible by use of magic or mystic forces and due to the vastness of our Country as well as the cost of developing and codifying, our old legal

<sup>39</sup> BAYONA -BA-MEYA, Parapsychology and law, in Research Journal, “PSI” n° 3 Series III, 1982.

<sup>40</sup> C.S.J 02/06/1971, R.P 24. Unpublished, quoted by BAYONA-BA-MEYA, Loc.cit

<sup>41</sup> Report by the Legal Affairs Committee of the National Sovereign Conference, Palais du Peuple, Kinshasa 1992, pp 109- 110







arsenal, which did not take into account the realities on the ground, is quite well known in our society.

In the case of the black cat and that of the MAKONGA MPOLO couple, the jurisprudence only confirmed witchcraft, but was not able to use this opportunity to clarify the means by which prosecution can be undertaken, the evidence envisaged to enable the public to have the required constituents for the development of legal standards within a customary scope and that can be applied in community life.

## **Status of Jurisprudence in Comparative Law**

### **French and Belgian Jurisprudence**

#### **Status of the issue**

Three components are necessary in order for a person to be found guilty: the offence, the harm and the causal relation. However, the legislator did not stop at including harm as a component of a chargeable offence. He actually made it the “keystone of the enforcement system”<sup>42</sup> since sentences are determined and vary according to the results.

The issue at hand is that of determining the causal relation in written law or in customary law. R.SAVATIER believes that each act is by itself due to several activities or observations and so forth. As we go further into the past the numbers of causes of harm increase in geometrical progression. It is true that if one of these acts were missing the injury would not be produced.<sup>43</sup>

In Africa, causal relation is still the cause of the injury and this relation is still presumed to have an imaginary or magic motive from a black hand acting from a distance through incantations aimed at either causing the victim’s death or casting a curse of an evil spell on one’s adversary.

CARBONNIER wrote that limits should be established to this infinitely long and complex scope of any damage for fear that each man is involved “in all the evil tearing apart the universe”<sup>44</sup>

#### **The HAZARD Case**

The HAZARD case falls within this framework<sup>45</sup>, the accused was a person who caused an accident and his victim suffered a rib fracture. Once admitted in hospital she died following purulent meningitis.

Hazard was convicted of manslaughter and with regard to causal relation the Supreme Court stated as follows:

Given that between the trauma caused by the accident and the lesion, an uninterrupted sequence of consecutive complications arose one from the other and that from then onward the plaintiff’s previous offence does show the damage as well as the required

<sup>42</sup> ROKOFYLLOS. The concept of lesion and controlling delinquency by negligence (essay and critique)

<sup>43</sup> R. SAVATIER, *Treatise of public liability in French Law*, 11th Ed. L.G.D.J., Paris, 1951, n° 457.

<sup>44</sup> S.CARBONNIER, *Civil Law*, 4th Ed., P/U.F., Coll. Th’emis, Paris, 1972, p.322

<sup>45</sup> Cass. Belgian, 15/10/1974



causal relation which is both direct and certain. This case presents difficulties if the causal relation was to be established under customary law since it is implied that a youth was killed by mystical words.

## **The KASONGO and TSHIBOLA Case**

### **Presentation of the facts**

In an interview with the Customary Chief KOMBO of the Sakania Area, Upper-Katanga, Katanga Province DRC. A case was pending with the Kombo customary chieftainship and it involved Mr. KASONGO, a young man aged 20 years alleged to have stolen maize in the field of Ms. TSHIBOLA. After noticing this damage, TSHIBOLA kills young KASONGO using a magic formula. Before the burial, the coffin was flying over in the air seeking the alleged killer of the young man right up to TSHIBOLA's house. She admitted that she killed him using a magic formula and the customary court convicted TSHIBOLA of witchcraft on account of the flying coffin commonly called "Londola" in the Bemba language which means look for the killer.<sup>46</sup>

### **Cameroonian Jurisprudence**

Verdict N° 831/Cor/Of 27/06/1966 of the Ngaoundere High Court

#### **a) The case of DILLA SOMON vs. KEREBAI Noël**

##### **Presentation of Facts**

DILLA, a child, was sick and taken to a traditional healer who finds out that the child was is a victim of bewitchment arranged by the said KEREBAI Noël. Mr. DILLA Simon submits the matter to Nouaundere Court with the aim of having the accused convicted of practicing witchcraft in accordance with Article 251 of the penal code. The preliminary hearing led to the discovery of a black plastic bag containing evil products in the house of the accused, KEREBAI Noël that he had used for his spiritistic practices.

Having acknowledged these facts, the accused claimed that a certain person called ZAKI, who was on the run, had given him the package in order to harm Mr. DILLA Simon.

The court found him guilty of practicing witchcraft in accordance with Articles 74 and 251 of the Cameroonian penal code. However, it granted him mitigating circumstances in view of his spontaneous confession and he was sentenced to one year imprisonment. The Attorney General's Office files the appeal on 05/04/1999 and the appeal summons, a fundamental critique is fulminated against the trial judges. Basically, the Attorney General criticizes the High Court judges for having ordered a very light sentence for an offence as serious as the practice of witchcraft.

#### **b) Verdict of Ngaoundere Court on the 27/06/1996 ruling on corrections**

##### **The High Court**

##### **Considering the documents in the case:**

C. Whereas following the return of the examination of the Prosecutor in the case

<sup>46</sup> Interview with KOMBO customary chief of KOMBO chieftainship, Kasumbalesa town, 95km from Lubumbashi town. Katanga province in DRC.



of the flagrante delicto of the State Prosecutor to the Court House ruling on corrections, to answer to the facts of the practice of witchcraft, stipulated and punishable by Articles 74 and 251 of the penal code, committed this year of 1996 at Sindere (Belel) to the detriment of DILLA Simon;

- D. Whereas it is necessary to rule in absentia in connection with the plaintiff who is not appearing and to issue ruling after due hearing in regard to the accused;
- E. Whereas it arises from the facts that in April 1995 in Sindere (Belel) village, the child, DILLA Simon fell sick and was taken to a traditional practitioner who revealed that the child had been bewitched by two persons, namely, the accused KEREBAI Noël and the person named ZAKI, the latter having fled after the accused was arrested;
- F. Whereas in the preliminary hearing, as well as the trial during the public hearing, the accused partially acknowledged the facts and stated that the person bearing the name ZAKI had given him a sachet containing evil products in view of causing harm to DILLA Simon;
- G. That upon the insistence of his friend ZAKI, he had taken the package to keep it in his home; that he does not know much about how the victim was informed and came to inquire about this matter;
- H. Whereas during the hearings there was an exhibit of a sealed case containing the sachet in a black plastic bag containing the said evils effects that the accused acknowledged having received from ZAKI, his associate who fled after the accused was arrested;
- I. Whereas from the preceding, there is enough evidence against KEREBAI to the effect that he went to Sindere, which falls under the jurisdiction of this Court in the current year of 1996, and was involved in witchcraft, magic and divination practices likely to disturb order and public peace or to harm persons in possession of the evil objects that were used to bewitch DILLA Simon, a child, the complainant;
- J. Whereas these acts constitute the practice of witchcraft and it is necessary to find the accused guilty;
- K. Whereas, on the other hand, his confessions were voluntary, there are grounds to grant him the benefits of the kind provisions of Article 72 on extenuating circumstances;
- L. Whereas the costs shall be borne by the losing party

**On these grounds,**

Ruling on the corrections and this, with the possibility of appeal through a judgement after trial with regard to the accused and in absentia of the accuring party:





- M. Find KEREBAI Noël guilty of practicing witchcraft;
- N. Grant him extenuating circumstances for his voluntary confessions to sentence him to one year imprisonment and to pay costs;
- O. Order the confiscation and destruction of sealed items n° 88/CT/NG of 14/05/1996

**c) Order n° 80/COR of 16/12/1996 of the Cadamaova Court of Appeal**

Attorney General's (appellant) case versus KEREBAI Noel (accused) and DILLA Simon (respondent)

By Victorine KI  
Court attendance for verdict n° 831/COR of 27/06/1996

- Considering the appeal of 28/06/1996;
- Yes, your honour on reading his report;
- Yes, the Attorney General in his requisitions;
- None for the parties not appearing;
- None of the court case documents;
- And after having deliberated in accordance with the law

**With regard to the format**

Considering that the appeal lodged on the 28/06/1996 by the Attorney General against verdict n° 831/COR issued on the 27/06/1996 by Ngaoundere High Court having been prepared according to the legal format and timeframe. Considering that the parties did not appear although they were properly summoned; it follows that the decision was made against them in absentia;

**The substance of the case**

Considering that the Attorney General has imputed an injury to the first judge for having ruled a light sentence for an offence as serious as the practice of witchcraft. Considering that the grievance is relevant and that the sentence of one year inflicted to the former is not of a nature to dissuade against repeated offence.

In relation thereto it is appropriate to confirm the conviction and the order for the destruction of the exhibit and to amend the sentence in accordance with its seriousness; and considering that the accused is paying the costs, the costs should put to him;

**On these grounds**

Publicly ruling by order and in absentia with regard to the parties on corrections and without appeal.





## **With regard to the format**

Receive the appeal

## **Substance**

Confirm the conviction;

Convict the accused to two years imprisonment and a fine of fifty thousand Francs to 100,000 Francs in accordance with article 251 of the Cameroonian penal code;

**Confirm the surplus;**

Issue an arrest warrant against him.

## **Comments**

Article 251 of the Cameroonian penal code that deals with witchcraft states as follows: “whoever practices witchcraft (magic or divination likely to disturb public order and peace or harm individuals, goods or the wealth of another even in the form of retribution shall be liable to two to ten years of imprisonment and a fine of 5,000 to 100.000 Francs).

Based on what is written in Article 251 of the penal code, it is evident that witchcraft can be practiced in various forms; the retention of evil objects related to magic or divination.<sup>47</sup> The Cameroonian penal code clearly acknowledges the practice of witchcraft as recognized by customary law and legislates directly. It is therefore desirable for the Congolese legislator to focus on this issue instead of creating obscurantism that could endanger family peace and lead the community to establish popular courts in defiance to legal provisions to that effect.

## **Conclusion**

Handling guilt under customary law, its concept and basis is the issue that we focused on particularly in concluding our scientific process. Incidentally, the concept of guilt under customary law boils down to the legal framework that can be used to punish, correct or sentence any person who behaves contrary to the rules and traditions based on customs.

In fact, we have to admit that in spite of the written penal law characterised by punishment in virtue of the principle “*crimen nulla poena sine lege nullum*”, the customary penal law on the other hand is expressed through a system based on arbitration rather than punishment (sanction).

It goes without saying that customary law is a set of sacred values, a law that issues from religious mystics of magic in which the divide between the sacred and the reality is superimposed through recourse to the shades of ancestors, wisdom incarnated in the traditional authorities in the person of the tribal or village chief. Understanding the concept of guilt and its basis under customary law is actually a process of reflecting on the very notion of custom that is violated by a member of a community or social group.

Now, since customary law is primarily clan-based where the sense of communitarianism reigns rather than what individuality reflects, each person being considered in connection with the society which creates him, brings him up, initiates him, its basis lies in the spirit of solidarity and the group.

<sup>47</sup> Witchcraft in Cameroon: <http://www/afrilex.ubordeau.4.fr>





In legally and customarily organised societies for example, the theft of an egg was a serious offence since it is believed that a person stealing an egg is deemed to be a blatant robber; the same applies to stealing meat from a pot boiling over fire.

Similarly, repeated adultery with the wife of the chief can be punishable with death or mutilations, ablation of ears, hands, eyes or even the penis. On the other hand, witchcraft in Bemba and Sanga customs in the southern province of Katanga in DRC was not considered harmful but rather it was a mechanism by which the elders could punish those who were recalcitrant or who deliberately went against the custom.

As can be noted, the concept of guilt in primitive societies was based on the notion of distribution founded on arbitration and not on punishment and its foundation was incarnated in the system of solidarity and adherence of a person to a group in a traditionally organised order.

It would be appropriate to clarify that customary law, being sacred, mystic, religious and original proceeds from settlement of disputes between individuals or groups of individuals making up a community of a system based on arbitrage rather than punishment; its concept of guilt reflects the elders; popular wisdom and thoughts rooted in customs, traditions and practices viewed as being law both for moral order and a sense of communitarianism.

Its legal basis is also characteristic of the psychological component that highlights belief in the wisdom and experience of the elderly whose initiation to secret, customary or ancestral practice serves as the bedrock of incarnated values by customary chiefs through the shades of dead ancestors who are not dead but exist in the hearts and minds of those that call upon them as they respect the custom.

Handling guilt under customary law is the prerogative of customary courts in which public figures played a significant role. It is appropriate to mention that the procedure followed differs from that envisaged in written law that stems from civil or penal evidence and grounds (presumption, witness, confession...), whereas customary law does not recognize evidence as such, since this was administered by secret practices incarnated in the realm of the sacred, fetishism, mystic and religious processes mastered and correctly used by soothsayers, old sorcerers and public figures that supported village or tribal chiefs.

Consequently we can conclude that the sacred is the foundation of customary law and customs are the primary and original source of this law which the quintessence of the oral character of trials and traditional wisdom of the elders and serves as the basis for social and community peace.







# IMPORTATIONS FROM THE EUROPEAN UNION TO DEMOCRATIC REPUBLIC OF CONGO

BY Lwete Lwenkomba Freddy

## Introduction

Following the failure of the APE, trade relations between the European Union and the African, Caribbean, and Pacific countries were mostly characterised by the absence of a multilateral legal framework following the example of and replacing the Cotonou Accords that in turn had replaced the Yaoundé and Lomé Accords. In their place, some interim accords were concluded between the EU and certain ACP countries in their own individual capacities.

Being a Central African country and therefore an ACP member, the Democratic Republic of Congo is to date one of the “unequal partners” having been so named by certain international actors. According to OXFAM International, one may read the following extract regarding this kind of commercial treaty on the Europa website:

Our experience shows us that the free trade agreements are venturing into a huge market such as that of the European Union and the smaller economies that are not easily supported and often contribute to a deficit on the part of the weakest partner.

If, in spite of their number, the ACP countries cannot be considered as “partners” on an equal footing as, and therefore able to negotiate with the EU, one would be within one’s rights to ask oneself about the role being played by a given African country which, large though it may be, is isolated yet in the past acted in concert with other African countries.

The following is proposed, without any bias owing to its theoretical and consequently practical values, as a way of emerging from the current deadlock in which trade relations between the European Union and the Democratic Republic of Congo, not to mention the ACP, appear to have fallen. Certainly, a discussion of imports from the EU into the DRC appears to necessitate an examination of the legal framework of the trade relations that they maintain. However, at the start of this document we had stated the fact that African, Caribbean and Pacific countries negotiate as one sole entity with the European Union, and that only when there was failure of the Economic Partnership Agreement were the interim accords concluded with certain African countries in their individual capacity. One can therefore ascertain that the aim of the present survey continues to be limited to the EU-DRC framework whereas the results, all things considered ..... and the ensuing suggestions that are devoid of any subjectivity connected with that specific Congolese context as well as shortcomings inherent in the methodological orientations could, subject to their generalisation, arouse the interest of other ACP countries.

Initially, one could be tempted to affirm that imports from Europe do not benefit, under Congolese substantive law, from any particular status that would confer upon them some facilities or impose restrictions different from those that come into play during the processing of import documents arriving from other regions of the world. This position may be arrived at owing to the principle of freedom of trade within the “Congo Basin”, a legacy from the colonisation era. But it is also possible to affirm the contrary by asserting that trade relations between the EU and ACP countries that traditionally give rise to free





trade agreements between them are therefore privileged relations. Consequently, goods imported from Europe into the DRC do benefit no doubt from a particular status.

Given that this is stipulated by multilateral treaties such as the Cotonou Accords, this framework is not specific to the Democratic Republic of the Congo, and should feature in all member states of the ACP. When the status quo is determined by some “specific” bilateral treaty such as the interim EPA concluded with a certain number of individual African countries, these statutes may differ from one state to another. In all cases, we cannot permit ourselves to assume that the legal framework to be examined during this undertaking is the one that international law underlies even while the latter is crystallised within a multilateral or bilateral agreement binding the DRC. This viewpoint is anchored around two pillars; firstly, the Cotonou Accords do not govern the said trade relations any more. These Accords should be replaced, in their role, by the ill-fated EPA. Secondly, these interim accords are actually a temporary emergency framework implemented following the failure of the EPA. We therefore assert, in this context, that the framework to be examined in this process is the one that pertains to Congolese national law.

Henceforth, the national law is to be scrutinized, however the same applies to the related field/terrain, in what could be called in collaboration with Raoul Kienge Kienge Intudi the “empirie du droit” ..... so as to locate the new blood required to revamp this failing process or to initiate another one altogether. It appears to be more difficult to expect to manage the renewal of the current unsuccessful negotiations based on an examination of the DRC’s particular situation. We are much rather looking towards a change of framework by changing the way we perceive the program, thereby seeking to solve it. In the arguments that follow, we shall attempt to understand how European goods imported into the DRC function in terms of the legal and actual context, the formal and the informal, the forbidden and the permitted, the orderly and disorderly, the predictable and unpredictable, ... all in all by considering them as E. Morin would, as a “complex reality”; an “organized whole”, an “active organization” or an “organization”.

This change of perspective or, to put it more appropriately, this change of paradigm enables us to design the legal framework of imports not as a simple, inactive and isolated act but rather enables us to consider it as a whole; as a system that integrates the interaction between parties as well as emergent situations at all levels, within its “complexity”, as a whole. We wish to be acquainted with the law governing imports from the European Union into the Democratic Republic of Congo from another perspective altogether, in what S. Diebolt terms as “le paradigme de complexité, un outil pour savoir c’est-à-dire pour faire” (“the paradigm of complexity, a tool of knowledge, i.e. a tool of know-how”). Complexity, he claims, is a paradigm that brings opposites together in some form of graceful harmony.

In the thesis he submitted for his Doctorate in Laws, he postulates that “the knowledge of the only right/law, even for a considerable period, is not self-explanatory in itself.” We agree with Honoré Mazwan when he affirms the following: “Our research lies within the qualitative logic that considers the context as an element that cannot be circumvented when understanding phenomena; this research takes into account the reciprocal influences of that environment with regards to the behavior of relevant actors and vice versa.” Citing Pierre Ansart, he defines the context in the following terms: “set of circumstances and relations external to the phenomenon under study, and on which the latter partially depends.” In the definition provided by the online lexicography portal of the Centre National des Ressources Textuelles et Lexicales (CNRTL), one reads, “set of linked circumstances, a situation whereby a phenomenon appears or an event occurs”. This shows evidence of a





context that is historical, geographical, political, and economic, among other aspects. Historically speaking, one notes that freedom of trade within the Congo Basin can be traced back to the independent State of the Congo (ISC). Indeed, it is stipulated within the Acte Général ..... of Berlin of 26<sup>th</sup> February 1885, and the young state was charged with guaranteeing free trade to all citizens of signatory states. Numerous goods of all kinds were henceforth marketed within the territory of the ISC by Europeans who had come to “civilize the natives”. A few years later, some limitations to this principle of freedom of trade were imposed over the territory, now a colony of the Belgian Kingdom. Henceforth, bilateral followed by multilateral agreements were to define the legal framework of trade relations with the European powers.

During the wave of independence ushered in by the 60s, the Republic of Congo (Léopoldville) acquired its international sovereignty. In alliance with 17 other African nations, it negotiated the Yaoundé Accords and signed it on 20<sup>th</sup> June 1963. The first article defines the purpose of this agreement in the following terms: “to promote the growth of exchanges between associated and member states, to strengthen their economic relations as well as the economic independence of associated states, and thus contribute towards the development of international trade (...)”. This agreement thus created a concerted framework that would undergo a series of renewals until 2007, the last year during which the Cotonou Accords, then the latest agreement, still governed trade relations between the ACP and the EU and would eventually pass the reins to the famous EPA, Economic Partnership Agreement.

One goes on to read that the legal framework thus instituted is an international framework required by the national laws of African, Caribbean and Pacific states by means of ratification. Article 214 of the Constitution of the Democratic Republic of Congo provides that “peace treaties, trade treaties, treaties and agreements concerning international organizations and the resolution of international conflicts, those involving public finance, those that modify legislative provisions, those relative to the state of individual persons, those that include exchange and addition of territory may not be ratified or approved except by virtue of a law.” The Nouveau Petit Robert defines ratification mostly as “Approval, formal agreement by an organ (political, administrative) that is indispensable to the validity of an act/bill”. “Act/bill through which the procedure to conclude an international treaty is closed.” The latter comes within the competence of Parliament.

Through the mechanism of ratification, international trade treaties and agreements acquire, under Congolese law, an authority superior to that of laws. Consequently, the provisions of contrary pre-existing laws are automatically repealed, or should be modified in order to conform; whereas future legal provisions shall integrate the principles and affirmations of pre-existing laws, or refrain from contradicting them. Given the scope of the issues tackled by these agreements, one would do well to deduce that in the DRC, the legal framework that oversees imports from the European Union is strongly dependent on the framework of agreements that make up the Yaoundé series, the last of which is the Cotonou Accords. Consequently, the law that governs imports as they are perceived here is a slightly “harmonized” law given that it is an offspring of the Cotonou Accords’ framework, i.e., this international framework that is common to all ACP countries. A study of this framework would be valueless if it was limited to the analysis of legal texts.

The originality of the present survey could stem from the importance of the power of information whose presence we acknowledge within the context, administrative procedures and practices even when informal. Particular emphasis shall be laid on empirical data that we shall deploy in our analysis.





Politically and economically, the crisis that shook the DRC ever since independence has its consequences: certainly one cannot ignore the damaging effects of the secessions that followed independence; those attributed to Mobutu's dictatorship including the destruction of the infrastructure and the loss of the economic fabric, the low purchasing power and inflation, to cite only a few. The 1997 power take-over by Laurent-Désiré Kabila leading the Alliance des Forces Démocratiques pour la Libération du Congo (AFDL) brought hope and joy that disappeared almost as fast as they appeared, amid the unrest caused by civil war and aggressions. The presidential and parliamentary elections of 2006 led to the installation of democratic institutions and the restoration of peace, at least in principle, throughout the national territory.

In a more detailed account, Albert Ndele Mbamu, H. Mazwan, subdivides the monetary, financial and economic history of the Congo into five periods:

- **The period of “Political confusion” (1960 to 1966);**  
This period mostly features movements of rebellion and secession, as well as civil wars, and the steep increase in prices. During this period, as a result of the discipline imposed on management of state resources by the Central Bank; despite the dark periods described above, “The Congolese of that time lived in greater dignity than the Zairois of today”. (This was stated in 1992, during the period of ‘Zaireanisation’)
- **The period “of prosperity” (1967 to 1970)**  
The above period is characterized by monetary stability, financial balance and economic growth, with the consequence of an improvement highly sensitive to the social situation and the significant increase of state revenues, as well as GDP and price stability.
- **The period “of dilapidation” of assets acquired during the 1967 reforms (1971 to 1974)**  
This period is marked by the very strong deterioration of principal economic indicators, prestige-related expenditure and lavish consumption.
- **The period “of adjustment programs” (1975 to 1989)**  
This period is marked by a profound deterioration of principal economic and social indicators following two main principal phenomena: the damaging “zairianisation” and “radicalization” measures, as well as the complacency of the country's leaders in managing the economy; mostly leading to a strong increase in inflation, aligning the purchasing power of wage earners, particularly those of civil servants, with the dramatic social consequences expected, embezzlement of state funds:
- **The period “of political adjustment” (1990 to 1992)**  
This period is mostly characterized by anarchy and vandalism in the management of state finance.

This excellent analysis ends with the period of 1992, the year in which the results of the study in question were published. The same study is credited for having given a detailed and chronological background of the economic and financial situation of the Congo, featuring its main events.

Should it be possible to affirm that this political and economic crisis that continued well beyond 1992 and to some extent, still rages within the DRC has not prevented the





establishment of a legal framework for trade relations with the UE, one would not easily say the same regarding its efficiency. Indeed, the above-mentioned difficulties did not fail to influence trade relations with European countries, albeit in an indirect manner. The weakening of the purchasing power of wage earners including civil servants impacted on expenditure on industrial products of which the European Union was until recently the market leader.

“Until recently” because the emergence of numerous Asian countries boasting very cheap and abundant labour has attracted and steered the supply requirements of Congolese traders towards China, the United Arab Emirates, Hong Kong, Vietnam, India, etc. This competition did not fail to shake-up things on the old continent that is currently suffering the consequences of relocation of European companies towards these new sites that boast more competitive production factors.

One would not end this assessment of the Congolese context without mentioning the deterioration of the investment climate despite the numerous legal and regulatory measures taken. Tax and customs-related exemptions of successive investment codes as well as of the Mining code did not produce the desired effects; they often served to facilitate customs fraud in the area of imports and exports as well as controlling of foreign exchange transactions. Nevertheless, we are witnessing a modest renewal of confidence in banking institutions, savings and therefore in an economic recovery whose pursuit is becoming more and more doubtful due to inflation and the loss of purchasing power.

Thus this study on “the legal framework” of importation of European goods into the Democratic Republic of the Congo does not claim to be a historical critique of trade relations between the two customs territories neither does it claim to be a quantitative analysis on which we can rely due to a lack of reliable statistics; neither still, is it a set of legal and regulatory provisions relating to the subject. It claims to have a “different outlook on the legal framework, a complex outlook on the complexity of this framework which does not isolate the imports from their own ecology, but considers them as one whole, as well as an integral part.

This requires that there be a definition, in one of the first chapters, of the notion of importation, the conditions of its implementation or validity, its legal nature as well as its fiscal .... Nature. An essay ... on a model of trade relations between the EU and the DRC, the second chapter includes some free suggestions, determined by and within the paradigm of complexity such as is understood by S. Diebolt, “a knowledge tool, i.e. for the purpose of doing” which will also bring us to the conclusion of the study.

## **Chapter 1. Notions of Importation**

### **1.1. Theoretical Considerations**

#### **1.1.1. Definition**

It would be worthwhile to agree on what is understood by importation. The Petit Robert 2007 takes importation to mean the action of importing; whatever is imported; action of introducing an animal species, a plant species into a country; introduction. The term ‘to import’ in this case has various meanings, mostly “to bring into a country (products originating from foreign countries).” Importation, therefore, should be defined as the introduction, into a country, of products from foreign countries.

Kacem Taj has not bothered to give meaning to the term ‘importation’. He goes beyond this framework in order to distinguish, according to the type of transportation, among







importation by sea, importation by road, importation by air and importation by postal means.

In their henceforth famous “Le droit douanier” (Customs Law), C.J. Berr and H. Trémeau affirm that “the code cited as the first instance resulting in the conception of Customs Debt, the act of putting merchandise to fee use, or the placing of a good under the system of ‘temporary admission as partial exemption from import duties.’”

The specific law No. 73-009 of 5<sup>th</sup> January 1973 on trade, reserves for the Congolese and in an exclusive manner, the exercising of certain types of trade, notably trade in imports. Trading in imports and exports are classified as external as well as wholesale trading.

From the above, one gathers that imports are/importation is, first and foremost, an operation or set of operations aiming at introducing goods into a customs territory. Consequently imports are/importation is linked to a mode of transport that conditions their supervision by customs authorities. Being a customs operation, given that it acquires this state organically, importation in an act that generates the custom debt, i.e. customs tax. Lastly, when this operation is carried out within the framework of a trade, or when this involves an imports trade, commercial law is hereby applicable.

These characters that can easily be attached to the notion of importation lead us to another preoccupation on importation within the field of law: is it a legal transaction or fact, a commercial or civil transaction?

## **1.1.2. Legal nature of the act of importing**

### **1.2.1. Legal transaction or fact**

A legal transaction is an expression of will destined to produce, consciously and deliberately/freely, a legal effect that is sought for and wanted by its author or authors. It may be individual or collective, authentic or under private seal, unilateral or synallagmatic. The same applies to a grant, purchase, statement/minutes of proceedings/report, payment, etc. It is therefore characterized by an intentional search for the said legal effects.

Such an act does not go well with a juridical fact understood to be an event, voluntarily or involuntarily, that produces legal and unsought for consequences; any fact situation, or any voluntary or involuntary action that gives rise to (by its very existence) a creation, a modification or unintended transmission/communication/transfer of rights. Such is the case of a fist blow aimed at a person, or a natural catastrophe that destroys someone’s property, etc.

Applied to the notion of importation, this distinction appears not to be easy. Certainly, we could apply to this notion of importation a double meaning: on one hand, importation is the introduction into the territory, the crossing of borders or the action of a foreign good passing through the borders of a state. In this context, the notion is ‘captured’ by the very act of crossing, i.e. the material act of passing through. The customs authority retains this meaning in order to monitor the repayability of the customs debt. This is the generating activity for customs duties. On the other hand, importation groups together all operations ranging from the acquisition (order, purchase, grant, consignment, etc.) of products or goods to their clearing within the country they are imported into, using their specific mode of transport (logistics chain). This second meaning leads us to a succession of various operations (financial, legal, negotiations, control, etc.) involving acts or facts







that may involve at least two states, therefore susceptible of falling under the competing legal or administrative authorities of several states.

In its first accepted definition, importation is a material act, voluntary or involuntary, that produces some legal effects (repayability of the customs debt, obligation to declare, etc.). These are linked to the very nature of importation. We may therefore say that importation is a juridical fact. It could occur in the absence of the will to shake up the legal order/system. This is the case of a person who inadvertently crosses the border of a neighbouring state with game after having been lost in the forest: Importation in this case is crystallised by the crossing of the border, whereas this very action was undertaken without the knowledge of the doer, his/her game thereby becoming a good for which the customs officers of the neighbouring country shall reserve a treatment corresponding to its value, quantity and quality. The importer, in this case the hunter, who crosses the border unknown to the authorised customs office, could be prosecuted for smuggling.

The second meaning refers to a process, or a succession of operations. The preceding definitions of a legal transaction or fact do not relate to the processes in their dynamism. Unless they are grasped within the space of an instant so as to enable them to conform to these terms, processes are acts that are spread over a given period. In our opinion, the classic distinction of the legal transaction and fact is incapable of answering to the dynamism that characterizes the process of importation. Dynamism, according to E.M. Banywesize, as he speaks of the science of the complex, does not only concern its contents, but also concerns its meaning as the packaging. The dynamism of the process of importation therefore emphasizes the meaning of this notion in its capacity as carrier of several acts undertaken abroad just as in the country of importation, but also teaches us that no element of the process should be neglected in the definition of the importation.

We may henceforth deduce that when acts preliminary to importation show evidence of a deliberate intention to cross the borders of a state so as to introduce foreign goods, the importation process may be qualified as a legal transaction. Nonetheless, this qualification should not be considered as autonomous, and is hence excluded together with that of the juridical fact attached to the material aspect of crossing of borders. The paradigm of complexity in whose framework we have placed this undertaking is “an interconnection that reconciles opposites”. Together with E.M. Banywesize, we assume that a complex thought is not that which seeks certainties sprinkled with uncertainties for good measure or, on the other hand, that which does not produce any exclusive disjunction between the orderly and the disorderly, it is rather that which articulates them and “con-fuses” them. Thus, be it a legal transaction or fact, the important aspect is not to determine things once and for all; but to have an assurance on a case-by-case basis, that the wish to produce some relevant legal effects is “capital, fundamental” in order to determine the origin of the problem that requires solving. One could thus acknowledge to the judge presiding over a court case, the power of deciding on the nature of the legal transaction or fact surrounding an importation. This could be a judge of the commercial court, provided he is presiding over the case and is declared to be competent.

### **1.1.2.2. Commercial transaction or transaction under private law**

The Decree of 2<sup>nd</sup> August 1913 with regards to traders and evidence of trade commitments defines the commercial bill as well as the trader within a recursive loop: the following are considered to be traders; those whose profession comprises acts qualified as commercial by the law; the statement outlined in Article 2 being considered by some as being limitative, whereas Article 3 renders all profitable companies commercial regardless of





their objective, and structured in conformity with one of the structures provided for by the Code of Commerce.

It so follows that the notion of commercial transaction is defined, under Congolese law, either according to its nature (legal statement), or according to the quality of the trader recognized by the author of the transaction. This double, subjective and objective conception of the commercial transaction does not, however, give rise to any problem on the practical aspect; even when certain authors, notably TSHIZANGA MUTSHIPANGU, would like to see the lawmaker take up a specific position on their behalf. This double definition takes into account the complexity of the commercial transaction.

Importation does not feature in the legal terminology of commercial transactions. The specific law 73-009 of 5<sup>th</sup> January 1973 on trade, without deciding on its nature (whether commercial or not, speaks of import trade. Importation is therefore not an objective commercial transaction (by nature). It is therefore a non-commercial transaction by nature. This is to say a civil transaction. Hence, if a non-commercial Congolese residing in Berlin returns to Lubumbashi to settle there permanently and brings with him new and used property for his domestic and personal requirements, he is not carrying out any commercial transaction.

This law does not define import trade, rather, it opts to reserve for a certain category of traders, the nationals, and to position it within wholesale trading. Would import trade be the importation of professional goods by a trader, or rather any importation undertaken by a trader? These criteria that are initially defined as an objective or subjective commercial transaction; could they take the commercial nature of import trade into consideration?

If it is accepted that the import transaction is not, by nature, a commercial transaction, this answer cannot be satisfactory with regards to import trade. The law places import trade under the competence of commercial law: import trade is therefore, if the tautology is acceptable, commercial. It therefore falls under the competence of the commercial court. One may henceforth forego the necessity of establishing with certainty and exclusion the nature of the commercial transaction or that of the import trade.

Regardless of whether it is a commercial transaction or not, does importation present a problem of validity, this is to say the conditions of validity within the context of civil or commercial legal capacity, as well as that of the object?

### **1.1.3. Importation: Conditions of validity**

**1.1.3. The decree of 30<sup>th</sup> July 1988 (Congolese Civil Code Book III) entitled "conventional contracts or obligations"** provides in its Article 8 four conditions not considered while determining the validity of contracts: The consent of the party being obliged, his/her capacity to contract, a sure object that makes up the matter of commitment and it a legal cause within the obligation. *Can these conditions be demanded for importation with the same ardour?*

#### **1.1.3.1. Consent**

We have noted above that importation, understood as the material fact (equivalent) of passage through the borders of a state by goods originating from a foreign land is a legal





fact, given that it could be accomplished even in an inconsistent manner, in the absence of any deliberate intention. Consent therefore, is not a conditions of validity required for importation. In the example of the lost hunter, no consent for importation was given prior to this.

The viewpoint differs when it comes to import trade: import trade is a commercial activity that is presented as such when facing the conditions of exercising the commercial profession. To this effect, the decree of 2<sup>nd</sup> August 1913, through its silence, appears to acknowledge to this concept of consent the value that it holds within the Congolese Civil Code Book 111. In this case, is the required consent the one required for one to have the quality of trader or trader about to undertake the required transaction?

Considered as a commercial activity, import trade requires the prior consent of the trader. The latter expresses this through the choice that he or she makes in exercising this type of trade. The ensuing import transactions that are accomplished are validated by the sole fact that these transactions lie within the framework of the considered type of trade.

### **1.1.3.2. The Capacity**

This is to be found in the Congolese civil law, for the benefit of adult persons, emancipated minors, and the guardian in the case of guardianship. It is limited in the case of married women, even though the constitution of the republic affirms equality between men and women.

Articles 4 to 7 of the decree of 2<sup>nd</sup> August 1913 concern the capacity of carrying out trade. One may read the restrictions with regards to the capacity of married women and minors, be they emancipated minors or not. One deduces therefore that the capacity of the common law extends to the official voting age (18 years).

Concerning importation as a legal fact, no capacity may be validly demanded of the importer. On the other hand, the statement, an obligation imposed on the importer or his or her agent, to inform the customs authorities of the imported good, being a legal transaction, should be reserved for the importer who is of age. In practice, by virtue of the theory of the accessory, once the statement is oral, it can be made by any person, regardless of his or her legal capacity. The statement written for signature is subjected to maximum rigour according to the capacity.

The new Customs Code adopted by the National Assembly, and not yet promulgated provides that even when written or computerized, the customs statement can be made by the importer personally, and without any regard for his or her capacity.

### **1.1.3.3. The cause**

In order to deal with the cause, in terms of importation, we resort to à contrario interpretation (counterpoint interpretation) of the provisions of article 100 bis of the decree of 29<sup>th</sup> January 1949. Certainly (indeed), the sanctions established are applicable regardless of any intentional element. One may deduce that the purpose of importation is indifferent/ has no bearing whatsoever with regards to the validity of an act of importation.

Nevertheless, for an importation benefiting from a privileged system/position of privilege (total or partial exemption from payment of duty, conditional importation, temporary





importation, and active perfection) the customs authorities ensure that the good is used in conformity to the cause of privilege/advantage granted, by means of destination checkpoints. Fines are to be imposed in the case of offences committed. This way, line 4 of Article 92 of the decree mentioned above provides for the imposing of a fine that is equivalent to twice the amount of the good involved in the particular offense, all forms of deployment of a foreign good under conditions that differ from the special usage anticipated following the declaration made at the customs office, during the actual importation that justified the granting of a status more favourable than that which would have been applied if the actual use had been declared to the customs authorities.

#### **1.1.3.4. The object**

The object of the importation must be a thing, a product, all in all, a good. The Decree of 29<sup>th</sup> January 1949 intended the term “good” to mean all things without any exception - such as raw source materials, commodities, animals, vehicles, payment instruments (hard cash or fiat money/paper money), public goods, corporate securities - whether they originate from the Democratic Republic of Congo or not - tradable or not, whether or not they have a commercial value, and whether or not they are declared for payment of import or export duty.

It may concern a living animal, plants and vegetables, processed or non-processed, etc. Till recently it was, according to Congolese law, a material object. Indeed, Congolese law requires that electricity be exported, and the customs are charged with determining the quantity, in gigawatts, exported and the amount to be paid as export duty.

Nevertheless, when importation occurs, given the current status of Congolese law, intangible goods are not considered as goods/merchandise. Thus, law number 009/03 of 18<sup>th</sup> March 2003 concerning customs evaluation of imported goods stipulates the following: To determine the customs value of imported computer accessories destined for data-processing equipment and carrying data or instructions, the cost or value of the computer accessory itself are what are taken into account. Furthermore, Article 5 of the same law requires that when it falls due, one should consider as a mandatory adjustment the value of the engineering works, art and designing, plans and sketches executed abroad or within the DRC, and necessary for the production of imported goods, royalties and license payments relative to goods to be evaluated; that the buyer is called upon to undertake, when these royalties and license payments have not been included in the price that has been paid, or remaining to be paid.

The law establishes restrictions to freedom of importation with regards to the object of the latter. These restrictions may range from simple authorizations preliminary to a total banning of importation of certain goods. The decree of 29<sup>th</sup> January 1949 provides for fines in case of bypassing of these restrictions.

This kind of circumventing or, better still, offences fall under the competence of the customs, who are to carry out observations upon the accomplishment of missions assigned to them; the most important being the fiscal/tax-related mission. This is to say, the establishment, the liquidation and tax collection.

### **1.2. Taxation in the area of imports**

The establishment, liquidation and tax collection during importation or exportation of goods is one of the most important missions reserved for the Congolese customs authorities.





As a statutory body, the Office des Douanes et Accises (OFIDA) was created by Ruling No. 79-114 of 15<sup>th</sup> May 1979, in order to replace the old customs authority. OFIDA is equipped with a legal/corporate personality as well as financial autonomy. The office has the power to negotiate for the waiving of fines whenever this action is not banned by a legal provision.

In addition to customs import duty, OFIDA is responsible for collecting ...income tax on importation, by virtue of Article 8 of the ruling-law 69-058 of 5<sup>th</sup> December 1969. This article entrusts the running/management/administration of this tax to legal and regulatory provisions concerning import duty.

This way, law No. 002/03 of 13<sup>th</sup> March 2003 introducing new tariffs for import duty and taxes determines not only the rate of import duty to be collected, but also those of the corresponding turnover tax.

Apart from these taxes; in the case of import trade the importer is subjected to the tax provisions corresponding to his field of activities and currently in force, such as those relative to the BIC deduction at source, taxes on salaries, Etc.

Within the framework of simplification and harmonization of customs systems, OFIDA implemented a wide-ranging computerisation program with the support of several partners such as the European Union and the World Customs Organisation. This programs aims at installing a unique counter for imports and exports so as to improve customs and clearing operations in terms of efficiency and promptness, in the process facilitating international trade exchanges. This system which is operational in Matadi and Kinshasa is being tested before its launch in Lubumbashi and Kasumbalesa, slated for the near future. It consists of supervision and computerized management of the customs declaration. The declaration is named "unique administrative document (DAU), unique customs document (DDU) or COMESA customs document (DDC).

This axis of customs modernization is undertaken in collaboration with another program that promotes inspection before loading.

### **1.3. The PVI BIVAC**

Since 16<sup>th</sup> November 2005, the DRC, represented by the Office des Douanes et Accises (OFIDA) on one hand and the Office Congolais de Contrôle (OCC) on the other, has signed a contract with the company carrying out verification before loading named Bureau Veritas Bivac BV. This contract relates to verification before loading of goods imported into the DRC. The contract is concluded for a period of three years, twice renewable by tacit renewal except in the case of deliberate termination or denunciation at the end of the initial stipulated period. It was approved by the inter-ministerial decree No. 106/CAB/MI/FINNANCES/2006 and No. 004/CAB/140/MIN.CE/2006 of 16<sup>th</sup> June 2006 concerning application regulations of the contract of verification before loading of goods imported into the DRC.

This concerns the following, in the case of OFIDA:

- To verify the prices charged for goods inspected in conformity with the customs value as is defined in customs-related laws.
- Verify the accuracy of the quantity, using the invoice and any other document accompanying the good;
- Take into account all cases of over and under-pricing, and charging of commission by intermediaries, on sales of inspected goods.





On behalf of the Office Congolais de Contrôle (Congolese Office of the Comptroller), a state organ responsible for quality control, the required services provide verification to ensure that the quality and quantity conforms to the order, as well as to the commercial, health and environmental regulations currently in force in the DRC.


The concluding inspection is approved through the awarding of a certificate of verification (AV), whereas in the case of an unsatisfactory verification, the Inspection company issues a certificate indicating refusal to award certification (ARA).

The certificate of verification as provided for by Article 8 of this inter-ministerial decree, accompanied by the supplier's bill are presented to the customs office for clearing purposes. The intervention of the company BIVAC International does not cost the customs office of its prerogative with regards to evaluation of goods according to Law No. 009/03 of 18<sup>th</sup> March 2003, concerning customs evaluation of imported goods.

In practice, the PVI Bivac gives rise to a few problems:

- a. The period of five working days as required by Bureau Veritas Bivac International BV leads to additional difficulties with regards to traders' stay abroad. Certainly, when importation occurs following the preliminary issuing of an order, and the exporter or marketing intermediary residing in the exporting country have to submit the good for inspection, the only consequence of this waiting period could be none other than the usual delays caused by shipments/the process of dispatching. However, for a Congolese trader who replenishes his stock/renews his supplies in Dubai for a maximum period of 14 days, the required period is not only exaggerated but also hazardous to trade given its antinomic slowness in terms of achieving celerity.
- b. Another difficulty would be linked to the nature of trade with Asian countries such as China, Thailand and the United Arab Emirates. This difficulty concerns the precondition of acquiring an import license as well as the declaration of intent to import. Instituted by the Law-order No. 67-272 of 23<sup>rd</sup> June 1967 regarding the powers prescribed by regulations within the Central Bank of Congo in terms of the regulation of foreign exchange, the application for an import license involves prior knowledge of goods to be acquired, the supplier as well as the prices. This classic form of trade is difficult to undertake when the goods being imported are bought in markets or shops that are not equipped to sell goods for export. Moreover, in many of these Asian countries, the conditions of sale and export are not rigorous. This renders inspection work difficult, the economic operator having sincerely forgotten in which shop he/she bought a given article. In answer to this, the authorities are proposing that a statement be made as a precondition to importation, at any bank of the trader's choice.
- c. In conformity with the DRC's international commitments including the Kyoto Convention, revised with regards to simplification and harmonization of customs systems, one can maintain that it would be self-destructive for a customs authority to seek capacity building within the Customs, aiming at eliminating cases of false value declarations, and to entrust the control of the customs value outside the DRC to an inspection company before loading of the goods. The Customs -to-Customs pillar of the SAFE norms framework of the World Customs Organisation proposes mutual administrative assistance for information exchange regarding the circulation of goods.



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- d. Despite being exceptional and limited to three months, the inspection carried out upon arrival of the goods has been revealed to be more problematic than anticipated. It occurs in conditions that do not guarantee its efficiency. Being a source of bureaucratic delays, it is the origin of a particular form of corruption, that committed by inspectors during verification, on arrival of the goods, aiming at under-invoicing or, alternatively, validating not only the value, quantity and nature of the goods as declared, but also avoiding inspection.

These few problems encountered during implementation of the program for verification of PVI Bivac imports indicate its relative, or rather doubtful efficiency. To claim a struggle against false statements regarding the value, quantity, as well as false banknotes by resorting to the services of an inspection company before loading of the goods, has been shown to be incapable of solving the problem; complex as it is, as exposed in results of the recent criminological research undertaken by H. Mazwan. We look to capacity building within the customs authorities as well as the implementation of mutual administrative assistance.

In the comments that follow, we would like to conclude the first chapter: far from being simple, importation is a complex reality. Certainly, the different aspects examined have demonstrated the complexity of this notion that is both theoretical and practical, fiscal and customs-related, legal and material. Henceforth, dare we ask ourselves whether in the trade relations between the European Union and the Democratic Republic of Congo, imports shall be considered within the context of their complexity?

## **Chapter 2. Imports from Europe: A complex legal framework**

### **2.1. EU-DRC Relations: Tests of the model**

In the first lines of this undertaking, we pointed out the interlocking/overlapping, In the Democratic Republic of the Congo, of the national and international legal frameworks for imports of European origin. A positive national law coexists with an international law; a result of the Yaoundé Accords among which the Cotonou Accords were the most recent in the series to date.

Through the mechanism of ratification, or should we say, in interpreting the Constitution of the Republic, the international trade treaties and Accords acquired, under Congolese law, an authority that is superior to that of the laws. These commercial treaties are both bilateral and multilateral, according to the number of positions of interest they subscribe to.

When they are multilateral, these agreements aim at creating a certain harmonization, rights or practices, within the territories of signatory states. This way, trade agreements between the countries of Africa, the Caribbean, the Pacific and the European Union aimed at creating a harmonized view of these relations, a vision common to all the countries of an economic grouping, like similar poles of interest within one group. The economic grouping thus considered is in some way overhung by the legal framework that creates and controls it. National rights are therefore steered towards integration within the principles affirmed by these agreements, towards legalization of “communal life”. Henceforth, we may not validly exclude the ACP of the study: the EU-DRC trade relations being a hologram of those that link the EU with the ACP.



These EU-DRC relations are based on the highlighting of the market's autonomy thus created in a way as to benefit other markets that could exist. This autonomy justifies the application of a system of mutual advantages between the two economic aspects: the opening-up of markets and development aid. The various successive agreements therefore, sought to articulate these two realities. The trade relations of countries of Africa, the Caribbean and the Pacific with the European Union are therefore an articulation of the launching of markets, bearing in mind the necessity of developing the countries of the south. Such is, in our opinion, the model governing the EU-ACP trade relations and therefore, the imports from the European Union into the Democratic Republic of Congo.

One can therefore deduce that the various agreements under the Yaoundé series put together some compromise on this articulation. Considered as madness by the globalists, the total opening of ACP markets can only be an utopia, since it will make the privileges as well as the very essence of the EU-ACP relations disappear, unless there is some articulation.

The evolution of this articulation is captured within and by the texts of these agreements; this, however, has not failed to reveal the limits of such a model in taking account of reality and through this, in attaining the goals that had been fixed.

## **2.2. Reassessment of the model**

In the search for an ideal framework, the EU-ACP trade relations have not ceased to evolve within their own texts. From the Yaoundé Convention to the Cotonou Agreement, advantages have not ceased to stretch even further, yet the responsibility of the countries of the north with regards to the immobilization of the ACP countries is translated into commitments that continue to grow, as well as development aid.

Though it may be limpid, this model has not succeeded in bringing development to the countries of the south. Several causes of underdevelopment have been offered, the countries of the north invoking poor management of public property within countries of the south, and the latter accuse the former of carrying out economic colonialism.

Be it a simple divergence of views, or a total separation, these quarrels are brought along to the negotiation table to the point whereby partners are alienated from each other, instead of reconciled with each other. The recent failure of the EPA and the stagnation of trade negotiations are a stinging reminder of this.

We therefore find this simplistic representation of the reality to be at the heart of the model in force. However, as E. Morin, S. Diebolt and E.M. Banyesize affirm, the reality is complex and any attempt at simplification is a mutilation that leads to its deformation. We believe, in accordance with these writers, that the paradigm of complexity can prove to be "more heuristic" for the trade relations currently being studied.

## **1.3. To render more complex in order to understand**

This title is taken from the thesis for Doctor of Laws by S. Diebolt. He sought to demonstrate that the science of law is not, in reality, simple, but it is complex and dynamic. He affirms that he understood the necessity of upgrading from "the science of simple law to the science of complex law". This passage, he suggests, should be done by laying the science of laws within the "paradigm of complexity".





“One form of reflection, he writes, facilitates joining instead of disjoining, uniting the local to the global, the hazardous to the intentional, command to autonomy; this form of complex thought, within a scientific but also literary acceptance. The two approaches that have not yet achieved their fusion are necessary for thinking of an open method linking knowledge and action, as well as rendering the object appropriate to the project.”

The weakening of trade relations between the European Union and the countries of Africa, the Caribbean and the Pacific, towards articulation of the opening of markets with the help of development showed its limits in attaining the objectives earlier fixed. It is comparable to an image of two dimensions (2D). The latter only takes into account the partial reality. Each image is one integral part, and at the same time one whole; one facet and at the same time, the entire facet.

Modeling into three dimensions (3D) appears to be more informative. It facilitates the linking of different views and enables us to have a general representation of the object envisaged.

The envisaged trade relations are not independent of their environment. They are themselves independent of it. Their autonomy is only relative. Indeed, the market that regulates the EU-ACP legal framework is itself influenced by third-party trade relations, as well as relations with a different economic position together with third-party countries or regions; hence participating in economic regulation at a global level. We should also point out that this market also influences third-party markets and, within its own structure, signatory states.

#### **2.4. A complex legal framework**

Thus, the EU-ACP trade relations should be based on an evolving model that is not entirely closed off ..... Opening of markets and the necessity of development among the countries of the south, together with globalization of instruments of production and financial means.

The legal framework to be put in place should, for example, integrate a redefinition of important concepts such as the origin of goods, and should then deduce the consequences. Actually, it is important to place the origin of goods within the current context of globalization, in consideration of the fact that the actors are “unequal partners”. The strength of the European economic space mostly comes from its capacity to mobilize other regions of the world through the mechanism of delocalization/transfer, in producing cheaper goods that they immediately retail under the label “made in Europe”. The number of European industries transferred to Asia is currently growing and yet simultaneously, the same goods that are produced are re-introduced into the EU in order for them to receive the final touch, i.e. the trademark, the brand and therefore, the origin.

In considering goods produced in countries with cheap labour as being goods of European origin brings us to recognizing the right of one of the parties to this legal framework to be assisted, in production of goods on the market, through by one or several third-party states. On the contrary, the party that is incapable of this manoeuvre will find itself weakened, in the absence of any compensation.

The legal framework to be implemented should therefore integrate some interactions with third-party markets, in an articulation that guarantees dynamism. One can, henceforth, without aligning oneself with the WTO, manage to reconcile globalization with privileged trade relations.





Without claiming to have exhausted the subject, we may envisage, within this complex framework, that trade relations with third-party countries or regions be considered as revelators of the limits to this framework, and are therefore heuristic. Thus we may accept that such goods be admitted into the market, with as compensation, wider-reaching measures for access to the European market, or some subsidies granted to producers of ACP countries.

## **Conclusion**

Imports from the European Union into the Democratic Republic of Congo enabled us to make a quick review of the notions of importation as well as the legal framework of these commercial relations within the Congolese context.

We have revealed that importation is both a transaction and a process. As a transaction, importation is a passage to the border which is the entry point of a good of foreign origin. As a process, it is a set of operations, transactions and successive as well as parallel facts ranging from the issuing of the order to the delivery of goods in the importing country, having passed through the transportation process and customs control.

Consequently, the notion of importation has been discussed alongside the notions of transaction or legal framework, as well as those relating to the commercial transaction. This confrontation enabled us to place the notion of importation among legal transactions, in the first sense of the word that we explored. For the second sense being explored, the distinction is not that obvious, given the dynamism that characterizes it. We thus suggested that the decision be left to the judge for his own appreciation of the matter, each time that it is important to determine with certitude whether the effects of the relevant law attached to the process of importation are the result of a deliberate intention to shake up the legal order/system.

The other distinction, that of a civil or commercial transaction, revealed that importation is not a commercial transaction by nature (criteria as per legal account), even though import trade constitutes a commercial transaction in the following tautology: import trade is commercial and therefore falls under the competence of the tribunal court.

These distinctions have steered research towards the conditions of validity, or better still, the achievements of importation. With regards to the model of the Civil Code Book III, we diagnosed very carefully the consent, capacity, cause and object of importation. This overview, specifically with regards customs legislation, revealed to us the program dealing with verification of imports, PVI Bivac.

In the second chapter, within the context of the paradigm of complexity, we attempted to model the trade relations currently under study; relations structuring the launching of markets as well as development issues faced by countries of the south. This model is incapable of taking into account the dynamism of trade relations, a dynamism as much in relations with other markets of the world as with internal markets of member states. The process of rendering these relations more complex is aimed at laying the groundwork for the implementation of a new framework, an impossible undertaking within the framework of this practical work, but nevertheless one in which we have attempted to give some orientations.





This brings us to the conclusion of this undertaking, in the following terms: Imports from the European Union to the Democratic Republic of Congo are a result of the legal framework of ACP-EU economic relations. To bring in some fresh blood, the partners who are, moreover, on an unequal footing, should seek to consider as more heuristic the complexity of their trade relations, thus laying the foundation of a new legal framework; a complex framework for complex realities.



# EXPORTS FROM THE DEMOCRATIC REPUBLIC OF CONGO TO THE EUROPEAN UNION

BY Ngoy Ndjibu Laurent<sup>48\*</sup>

## Introduction

“The subject of a research is often defined as a chasm that needs to be filled: a research problem is perceived as an evident gap that we want to close between what we know and feel is inadequate and what we desire to obtain that is deemed desirable. It is therefore part of the issue of development of knowledge: the researcher selects his subject in relation to the gaps he identifies in the constituted corpus of social science. To begin, before the researcher moves on to the actual development of his research subject, an issue must be addressed. It could be general or specific, simpler at the beginning and much more complex thereafter, but it does not have the specificity that the subject shall portray at the end of the process. In some cases, the issue remains as exposed at the onset while the researcher explores some of its facets; in another scenario, the issue is completely transformed in the process. One thing is for sure, in all types of research but more particularly in qualitative research, the subject of research is both the start and end point.”<sup>49</sup>

This research fall within the scope of a post-graduate degree in Law. The notion of a developed subject is commonly used these days but it has become an ambiguous notion. “In the first sense it refers to the development of a disciplinary subject. Here it is said that each discipline develops its own subject. In the second sense, the notion of a developed subject brings us back to the phenomenon of social pre-development of the study subject. By pre-development we mean that the subject was designed by mental effort or created through institutions and social practices in a certain measure before the researcher undertakes his research on this subject. In the third sense, the notion of developed subject also designates the methodology followed by the researcher. In fact, whether we like it or not, the researcher selects facts, chooses or defines concepts, interprets his results, etc. Basically, he in turn technically and theoretically develops his on subject.”<sup>50</sup>

The development that follows will focus on the two last senses of the research subject. Consequently, it is quite appropriate for us, given the importance of exports for the development of a country, to carry out a critical study on the customs legal conditions affecting exports.

In fact, it has been noted that one of the major factors that constitutes the basis of poor performance of DRC in international trade is the limited size of its trade network and that is in relation not only to exports but to imports as well. This federative factor is the underlying cause of dilapidation of its export market prices, the decline in subsequent revenue, the excessive rise in import prices and in fine, DRC’s commodity terms of trade.

Over a period of more than decades after independence, DRC’s external trade played a crucial role in the DRC’s public finances and monetary stability. On average, more than 50%

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<sup>49</sup> (MUCCHIELLI, 2004, P.75)

<sup>50</sup> (Pires, 1997, p 19 and 20)





of the Congolese Government's revenue stems from the exterior, whereas the stability of rate of exchange of Congo's currency is catered for primarily through on-lending of foreign exchange to the Central Bank of Congo (BCC) from export revenue and this has allowed it to participate in the foreign exchange market in order to stabilise national currency.

Currently, the instability in the two above-mentioned sectors (Public finance and monetary sector) has, among other reasons, led to the collapse of external trade in the DRC. In fact, the latter sector provides neither the foreign exchange to the BCC so as to help it face the turpitudes that characterise neither its currency nor the tax resources to enable it raise the level of public revenue.

In this field of exports, in spite of the State's intervention through legal policies aimed at optimising the revenue to cover public expenditure, stakeholders in this area resort to several resources each one according to their needs so as to further optimise their funds given that the law is not the sole source for these stakeholders.

“This recourse can be justified by the fact that while acknowledging the existence of these practices it is appropriate to consider them as exceptions that the system can tolerate since they do not question its efficiency and that they only slightly mitigate its oppressive characteristic. But if men are able to fight the system in very extreme situations how is it that they allow themselves to be dominated by it in much less restrictive situations. That is how even in very dire circumstances, men always maintain a minimum measure of freedom and cannot restrain from using it to fight the system.”<sup>51</sup>

Similarly, this freedom is evidently not unlimited. “In a context oversaturated with rules, men would use their margin of freedom, although not necessarily in a rational manner that is to say, a pre-established plan depending on clear and sustainable objectives, but rather in a contingent manner taking into account opportunities that can be seized in any specific given situation.”<sup>52</sup>

Recourse by stakeholders (exporters, customs and Government officers) to resources other than the law (relations, situation, profession, authority, etc) significantly reduces revenue by making it difficult to cover public expenses.

This lack of evaluation of goods by customs can in turn create various forms of corruption, which according to certain researchers can “impose not only a bilateral but also a triad or trilateral corruption which takes into account the briber and the corrupt as well as the excluded third party (the population) through their trading. In such trading where the reciprocity of benefits derived from corruption strengthens the bond between the briber and the one receiving the bribe to the detriment of consumers who are considered like a third party”.<sup>53</sup>

In trade, each trader maintains the spirit of maximum gain and to reach that goal he is compelled to use all the available means he may have. Thus, one of the easiest means used to optimise revenue is to infringe export control with or without the assistance of customs officers in charge of regulating the conduct of economic operators in various aspects. Thus, the founder of western democracy, Aristotle perceived trade as one of the activities that cannot be undertaken without breaking the requirements of law.

<sup>51</sup> (Crozier and Freiberg, 1977, p.42).

<sup>52</sup> (Digneffe, 1990, p. 359)

<sup>53</sup> (Nicolas and Cie, 2000, p.9)





With the subject thus developed, our research focuses primarily on three main actors: the exporter, customs and political representatives. To address our research issue and understand illegal practices in connection with exports on the ground, it seems quite appropriate to select resource persons capable of providing the required information.

However, before dwelling on that, the first choice is one to do with the observation site. With regard to this site, inasmuch as the issue deals with customs outwards, customs is for us the best place to conduct the desired interviews.

With regard to resource persons, we selected, according to the needs of the research, customs officers. This choice of resource persons has a rationale based on the notion of a social actor in criminology where a choice place is reserved for comments from interviewees (players).

“The starting objective of using the concept of social players in the field of criminology and penal law is to develop criminology research and analyse the application of criminal law from a perspective other than the classical or neo-classical school policy of penal law and the scientific and determinism perspective of Italian positivists. The first one tended to acknowledge any subject as a bearer of rights and a subject engaged by the social contract to respect rules that enable the society to constitute itself and to maintain itself and as those having transgressed. In addition, it considered man as a subject endowed with free will and consequently as being accountable of his actions and therefore liable to a sentence in the true sense. The second, whose starting point was affirmation of an absolute determinism explaining human behaviour and tending to develop not so much a penal code based on the notion of sentence but rather a social defence code whose measures would aim at avoiding a delinquent conduct from being repeated or even produced by seeking to reach its root causes and applying criminology intervention on them”<sup>54</sup>

In order to attain this we are first going to analyse customs generalities and then the causes that prevent appropriate exports.

## **Generalities on Exports Customs System**

### **Introduction**

Customs issues have always occupied an ambiguous position in social sciences. At the crossroads of international economy and taxation, they can be addressed under more diverse angles from a trade viewpoint; firstly, the amounts for custom duties and the costs of customs clearance are generally seen as unavoidable charges and with no returns. As far as economists are concerned, they constitute the battle ground where partisans of free trade and those of protected economy meet. From a politicians viewpoint on the other hand, they are among other things, one of the issues of balance between the developed world and developing countries.

In order to better understand the current customs mechanisms and their complexity we must take note of changes, in the course of history, that affected the environment in which international trade in goods take place.

The charge of duty and tax when goods cross a border goes back to ancient history and in those past centuries it only served as a rationale for tax. In a financial system that was still primitive, entrance and transport fees were the simplest means of paying tax. Up until

<sup>54</sup> (Kienge R.,2005, p 70)





the renaissance, custom duties were actually only charged on departure. It was better to charge for commodities going to foreign countries rather than foreign commodities bought by nationals. To this concern we can add the need to ensure that there were provisions for the country and to avoid famines.

Towards the 17<sup>th</sup> century custom duty played an economic role by fostering the birth and development of some manufacturing industries. Without being based on doctrine but under inspiration from marketing concepts at that period, protectionism used custom duty as an instrument to enable it to apply differential treatment to imports according to the nature of goods (manufactured goods and raw material)

During the XIXC century, under the influence of doctrinal currents of free traders inspired by the British, mainly by Ricardo, a debate was raised and this left traces until our time for the rationale of custom duty itself in view of the well understood interest of international trade. These were criticised as obstacles in the game of international trade and did not always appear to the States as a efficient means of ensuring at least partially, the regularisation of external trade.<sup>55</sup>

Following the Second World War, at the time when international relations were being standardised, customs duty got its privileged role in the protection of developing national economy. This took place in a profoundly modified environment and we witnessed the restoration and expansion of trade between nations. This led to the acceptance of a certain number of principles of liberal inspiration by participating nations to the Atlantic Charter directed by the UNO: progressive lowering (of custom duties, suppression of prohibitions and contingents, removal of discriminatory trade practices).

Custom duty progressively began to serve as an instrument to economic liberalism and to be used in verify whether trade currents were not artificially distorted or diverted, customs thus come to be entrusted with a sort of an economic oversight mission indeed it is fulfilling from that time henceforth. We can even imagine that customs duty will increasingly serve as a support mechanism for the set of measures aimed at curbing illicit trafficking of goods (drugs, arms, etc...). For example, the movement of some people suspected of conducting criminal activities or in an illegal situation with regard to immigration regulations and international fraud in general.

### **Customs Procedures under Common Law**

The Congolese Customs Authorities, namely, Customs and Excise Department (OFIDA), is in charge collecting the two types of indirect taxes. Firstly, custom duties and secondly consumption duty or excise duty.

Customs duties are “financial charges born by goods while crossing the border. Charged on imported goods on the national territory (entrance duty) or on exported goods going overseas (exit duty), customs duty is a principle payable in cash while crossing the border and its payment conditions their removal” (Barilari and Drap, 1992, p.71), aside from exceptions.

In contrast with industrialised nations where customs duties play a limited fiscal role, in the Democratic Republic of Congo, the fiscal factor is featured predominantly and up to 60% of the national budget is funded by this means. Hence, before leaving the borders of the country, any good destined for export (goods listed by customs regulations) should

<sup>55</sup> (Mukalay, 2004)



aside from paying the duty to the Congolese Control and Export Authorisation Department, pay the exit duty as well as the export turnover tax.

### **Export Turnover Tax**

#### **Tax base**

The tax is levied on operations involving the sale of goods destined for export<sup>56</sup>. Mine products

- Crude oil
- Coffee
- Timber

The tax is based on the net value expressed in Congolese Francs according to the amount of the transactions supported by receipts and export documents.

#### **Liable persons (Art 60) and payment of tax (Art.61)**

The persons liable to pay the tax are individuals or entities that carry out export sales.

The tax is collected either by deduction at the source by the bank involved at the time the repatriation of foreign currency or by scheduling in the case of tax adjustment of the taxable base or automatic deduction.

#### **Tax Rate (Art.62)**

The tax rate is fixed at:

- 0.25% for gold and diamond from small-scale mining
- 3% for other products

#### **Customs Outwards Duty**

These are found in law number 3/03 of 13<sup>th</sup> March 2003 instituting a new tariff for export duties and taxes.

Exports include all types of national goods towards a foreign country. It may or may not be subjected to customs outward duty according to export circumstances. Article 62 of the law order n°70/089 of 23<sup>rd</sup> December 1970 on customs procedures stipulates that goods subjected to customs outward duty shall be levied according to the rates set in the outward duty and following the criteria established by the Minister's of State in charge of Finance decree in force at the date of regular deposit of the declaration date for export whether temporary or permanent.<sup>57</sup>

The Minister of Finance designates the goods for which the declared value shall not be below the value set by the decree. Where the value of goods is not set by the decree, the value to be declared for applying customs outward duty is that which the goods normally have at the point of departure from the Republic, that is to say, the border value or the value at the port, this value cannot be lower than the realised price overseas represented by the average known world prices. This export practice is still being applied currently. But it is possible at times for the price to be given by the management and not by the decree issued by the Minister of Finance.

The new tariff of duty and tax was instituted by law n°003/2003 of 13<sup>th</sup> March 2003 instituting a new tariff on export duty and tax. This law aims at getting better taxation

<sup>56</sup> (Art. 58 of the 1969 Law):

<sup>57</sup> (Customs legislation 1950, p.19)

for timber by differentiating the position of some types of petrol and electricity and to consolidate taxation of diamonds and gold in the tariff<sup>58</sup>.

### **Taxable goods**

- Raw coffee;
- Electrical energy;
- Mineral products and their concentrate;
- Timber;
- Scrap metal

### **Duty calculation base**

These are base values set by an order from Minister whose portfolio includes finance and they are set based on the proposal from the Customs Administration.

If the value of goods is not determined by the ministerial order, the value to be declared for applying customs duty outwards is the normal value of goods at the time they leave the Republic, that is to say, the border value or the port value or embarking airport<sup>59</sup>

### **Investitive fact**

It is the export of targeted goods

Persons liable to pay duty.

Exporters of targeted goods

### **The rates vary as follows:-**

- 1% for coffee
- 1% for electric energy per 1000 KWH;
- 1.5% for diamonds and gold by small scale mining: per carat (diamond) or kg (gold);
- 3% for gold and diamonds from industrial production;
- 5% for mining products, apart from zinc, cobalt, calcium, copper, malachite, germanium, platinum, minerals and concentrates of some types of resins as well as minerals and their concentrates from primary mineral deposits obtained by crushing and these are levied at 10;
- 6% for rough timber

### **Exceptional Taxation Systems**

The Congolese taxation system has some dispensatory taxation systems that can be applied in the common law system. These systems are:

- Investment code;
- Mining code;
- Forestry code.

### **Investment code system.**

Law n° 004/2002 of the 21<sup>st</sup> February 2002 on the Investment Code<sup>60</sup> instituted a taxation system of benefits granted to investment projects presented and approved in the stipulated legal formats.

<sup>58</sup> All the same, Law n° 004/2003 of 13th March 2003 on reform of fiscal procedures has been published.

<sup>59</sup> (Art .2 of law n° 003/2003 on duty and tax tariffs)

<sup>60</sup> (Larcier Code DRC T3)

These benefits are linked to customs, taxes and special taxes.

### **Customs benefits**

Exoneration from export duty and taxes for investments that include exports of all or part of the finished products, manufactured or semi-manufactured in conditions that are favourable for balance of payments<sup>61</sup>

### **Mining Code System**

Law n°007/2002 of 11<sup>th</sup> July 2002 on the Mining Code instituted a taxation waiver system in the common law system whose basic principles both for direct or indirect taxation as well as duties and fees are as follows:

#### **Customs system**

A mineral title holder is exempted , at the exit, for his regular exports in connection with the mining project of all duties, taxes and fees of any nature whatsoever;

He shall only pay, in respects of fees and costs for in exchange of services rendered for the exportation of business products or goods for temporary export, an amount not exceeding 1% of their value<sup>62</sup>

#### **On importation**

- All goods and commodities that are strictly for mining purposes as featured on a prior approved list and imported by the holder, his affiliates or sub-contractors shall be subjected to an entry duty at a rate of 2%<sup>63</sup>
- All goods and products strictly for mining purposes, featured on a prior approved list and imported from the time the mining was began by the holder, his affiliates and sub-contractors, shall be subjected to a single rate of 5%<sup>64</sup>
- Fuel, lubricants, reagents and consumables destined for mining activities shall be subjected to a single entry duty of 3% during the entire duration of the project<sup>65</sup>
- Fuel and lubricants destined and exclusively linked to the mining activity shall be exonerated of excise duty<sup>66</sup>

With regards to the Forestry Code System, the 29<sup>th</sup> August 2002 law 011/202 on the Forestry Code instituted a special tax system as compared with the common law, investment code and the mining code. Actually, in Article 120 the law stipulates that no forestry developer, no exporter or processor of forest products shall be, whatever the tax system he is subjected to, exempted from paying duty, tax or fees stipulated by the law.

The fees for the granted surface are, namely:

- 60% to the Treasury
- 25% to the Province
- 15% to EAD at the concerned base

As far as Customs Clearance is concerned, pursuant to provisions of Article 112 of the customs code, goods destined for export should be taken to a customs office or a place designated by Customs. At the borders, transporters are not allowed to take any route that

<sup>61</sup> (Article 12)

<sup>62</sup> (Article 234)

<sup>63</sup> (Article 232, par.1)

<sup>64</sup> (Article 232, par.2);

<sup>65</sup> (Article 232, par 3);

<sup>66</sup> (Article 235).



aims at going around or avoiding the Customs office. While waiting for customs clearance, the goods destined for export can be placed in the customs warehouse or customs clearance areas in accordance with the provisions of Articles 106 to 111.

### Customs Formalities

The customs clearance procedure in the common law is based on a certain number of rules derived from the past or traditionally applied in a uniform manner to all customs clearance operations. It involves primarily the obligation imposed on the person liable to pay to issue a “accounting declaration form” of each of his operations at the very time he performs them<sup>67</sup>.

Basic characteristics of the declaration- According to Articles 113 and 114 of the customs code, all the imported or exported goods should be included in a goods declaration assigning them to a customs system. Exemption from duties and taxes, whether for imports or exports does not exonerate one from submitting a declaration.

The only goods exempted from a declaration are the following:

- Commercial liners and warships flying a foreign flag and undertaking commercial missions, stops or visits in the Democratic Republic of Congo;
- Commercial liners and warships flying the Democratic Republic of Congo’s flag that have made a “for home consumption” declaration form during the first importation; however, these ships and vessels should make an export declaration in the event of transferring to a foreign flag;
- Aircrafts with regular international flights but with foreign registration;
- Military aircrafts registered in a foreign country carrying out commercial missions, stopovers or visits to the Democratic Republic of Congo;
- Aircrafts registered in the Democratic Republic of Congo having made a “for home consumption” declaration at their first import; however, these aircrafts should make a declaration of goods in the case of exports;
- Locomotives on international traffic including wagons.

The declaration of goods must be submitted to the relevant customs office for the targeted customs process. The declaration of goods should be submitted at for exports as soon as the goods reach the office or in the places designated by the customs office or, if the goods reach before the office opens, as soon as they open. The set regulatory time limit for the storage of goods in the warehouse or customs clearance areas shall be adjusted upward if the goods were placed in a temporary depot.

Our custom regulations stipulate that any good destined to be placed in a customs system should be declared and show all the necessary information for the application of the provisions governing that system. This declaration is referred to as “accounting declaration” to emphasise its specificity and to distinguish it from declaration forms used in customs

Principle of checking declarations- This principle states that the customs clearance procedure is carried out by a declaration checking process according to which the process is undertaken upon the declaration of the liable person and checked by customs department. Actually, apart from the fact that the production of such a document has the advantage of unambiguously determining the responsibility of the liable person in connection with the customs and to increase the tax security, it serves to avoid the systematic verification of

<sup>67</sup> (Loko Mutuano, 2004)



all the goods and enables customs to limit its interventions to simple checks through proof or as the case may be to simply go by the statements made in the submitted by the liable person. In this manner, customs clearance formalities move faster<sup>68</sup>.)

Principle of submitting a declaration at each operation- Each import or export operation should be accompanied by an accounting declaration and the presentation of goods for customs clearance. This principle of a “step by step” declaration is evidently, among the particularities of customs laws, the one that completely distinguishes customs clearance methods from the ones commonly used for indirect taxation where checking the goods is exceptional and or, when such a verification is conducted, it is never, unless in rare exceptions, done on the moving goods, that is, at the very time that the tax generating economic act is performed.

Principle of a written declaration- The need of subjecting the liable person to a written declaration is less clear since there is concomitance between the tax generating act and the declaration of goods to the department responsible for applying this regulation. The ones subjected to this process would simply have had to make a verbal declaration to the authorities concerning their goods and any other relevant information needed for the application of regulations. After the declaration is stated, the authorities who would in turn do the paper work.

He could be dispensed from the principle of the written declaration when the significance of the interests does not justify its application. This is how, for instance, travellers transporting goods with no commercial interests and persons occasionally importing goods whose value does not exceed a certain amount may be allowed to make a verbal declaration.

The declaration renders the person making it accountable- The accounting declaration constitutes an act by which the declarant manifests his willingness to place the goods under an import or export customs system and undertakes to abide by the obligations issuing from the declared system. Through this act, he is required to provide to the customs office under which he falls, all the necessary details to enable the identification of goods to be made and the subsequent regulations to be applied to them.

Since the declaration only makes the liable person accountable and that it is under his sole and full responsibility that it should be issued, it emerges that the customs department can under no circumstances be involved in the writing of the declaration. All through the process it can however provide the necessary information to the declarant so as to facilitate the process for him and inform him of the official publications<sup>69</sup>.

The principle of irrevocability of the declaration-The principle of irrevocability of the accounting declaration was for a long time considered as an intangible principle by most States. The rigor of this principle has progressively subsided without fundamentally challenging it. The current regulation in DRC allows for the modification of the declarations after they have been registered. But the possibilities given to the declarants for accomplishing this are limited in time. Any possibility of rectifying declarations is prohibited after certain stages of the customs clearance process have been completed even if the declarer notes an honest mistake. Of course, to protect himself from inaccurate entries, the liable person can ask customs for permission to check goods by probably removing a sample before the declaration is submitted.

<sup>68</sup> (Buabua, 1993, p.273)

<sup>69</sup> (Mukalay, 2004)





### **Clearance formalities**

As a general rule, any person holding goods can carry out clearance formalities when crossing the border. It can therefore only be first the owner and frequently the transporter. The duties of the customs clearing agent often go hand in hand with those of the transporter. In some cases the formalities can become complicated and under such circumstances, individuals can stop and hand over to more qualified people.

In DRC, the law grants the customs clearing agent a real legal monopoly since only luggage and individual vehicles can be cleared by the travellers or the owners. All other categories of goods are entrusted to a clearing agent who can either be public or private. In order to transfer the effect of the monopoly the law acknowledges that duly empowered individuals or entities can clear goods for themselves. Individual clearing agents are the ones who do not have the right to clear goods for someone else and they can only do it for themselves.

The customs clearing procedure includes several points, namely:

- Examining the admissibility of the declaration
- Registration
- Validation (issuance of receipt)
- Checking goods
- Counter-checking<sup>70</sup>

### **Checking admissibility and registration**

The declaration should be written by the person presenting the goods for clearance and that is referred to as the “declarant”. In the strict sense of the word the declarant is an employee of the customs clearing agent. To simply matters we shall use the term “declarant” without any other specification. The declaration written by the declarant is presented to the department called the admissibility or acceptance where is formally checked.

- The declaration is written on a ad hoc print
- It should be completely filled out in all the spaces and especially include pricing of goods, their value, the rates of taxes and their amounts
- It should bear the date of submission
- It should be accompanied by other requires documents
- It should bear the signature of the declarant.

This function is important for the next clearing procedures. As long as a declaration is not admissible, the declarant can withdraw it and redo it. At this point the declaration does not yet have any legal value for customs.

Once the declaration is considered admissible, it is registered, that is to say the department will issue a number for it within a continuous series, the date and day and entered the main details of this declaration in an ad hoc register.

### **Validation and declaration**

After validation, the stamp of the customs receiver is affixed and the declarations for consumption are equivalent to the import permit; these are the documentary titles that must be enforced and this explains the irrevocable nature of the declaration.

<sup>70</sup> (Kitopi, 2006)





These documentary titles as well as the warehouse declaration validated by the receiver are valid for checking during ten days starting from the validation date. The duty is calculated by the receiver based on the entries in the declaration. It should be paid in full on the basis of and in accordance with the rates stipulated by customs tariffs. No reduction can be granted due to damage in transit or any deterioration whatsoever.

Checking the goods.

After collecting duty and tax, customs will proceed with checking whose legal basis is found in the Congolese customs code in Articles 7 and 8 of the 29<sup>th</sup> January 1949 decree in Articles 31 and 32 of edict n° 3319 of 6<sup>th</sup> January 1959.

The purpose of checking is to ensure that the declaration actually tallies with the goods. That is to say the statements in the declaration correspond with the goods. The value, weight and volume are therefore checked.

This checking is prescribed only in view of the accepted and validated declaration in accordance with legal provisions. During a verbal declaration, checking is only done following an unequivocal response to the question concerning goods susceptible to taxation.

### **Customs Valuation According to the Convention of World Customs Organization**

When it comes to customs valuation of goods, law n° 009/03 of 18<sup>th</sup> March 2003 on customs valuation of goods will probably be in harmony with international treaties domesticated in the Congolese customs legislation. These are the provisions for the implementation of Article VII of the General Agreement on Tariffs and Trade (GATT).

Since the 24<sup>th</sup> of April 1995, the Democratic Republic of Congo DRC is a full-fledged member of the World Trade Organization (WTO). This organization was established, in the place of GATT, following the multilateral negotiations of the Uruguay Round (20<sup>th</sup> September 1986-15<sup>th</sup> April 1994).

In this capacity as a member, DRC is committed to respect GATT 1994/WTO multilateral agreements including the implementation of Article VII of the General Agreement on Tariffs and Trade.

This agreement determines the customs value of imported goods which serves as the taxable base for calculating duty and taxes on imports. This value is the transaction value, i.e., the actual price paid or to be paid for the goods, when they are sold for export destined for an importing country after possible adjustments.

In order to determine this value, the agreement stipulates six methods, namely:

- the transaction value of imported goods;
- the transaction value of identical goods;
- the transaction value of similar goods;
- deductive value;
- computed value;
- the method of last resort or reasonable means

The domestication of these provisions in the Congolese legislation led to the amendment of Article 43 of 29<sup>th</sup> January 1949 thus coordinating and revising the customs system. This article refers to the Brussels definition of value (BDV) for the determination of the custom





value. Actually, the latter is defined as being the normal value of goods at the place of origin added to the costs of packaging, transport, insurance and commission, duty and exit tax exempted abroad and all other necessary costs for the importation up the place they are introduced in DRC.

Such a definition is disadvantageous since it gives checking officers the leeway to determine the customs value. Often they arbitrarily impose fictitious prices to the detriment of economic operators. This does not foster international trade.

Thus, in June 2000, through its ambassador to the Kingdom of Belgium, the Democratic Republic of Congo denounced the convention on value (Brussels Definition of Value), whose acronym is BDV, by depositing instruments of denunciation at the Belgian Ministry of Foreign Affairs which in turn notified the Secretary General of the World Customs Organization (WCO) of DRC's denunciation.

A year after its notification, the Secretary General of the World Customs Organization (June 2000 to June 2001) the denunciation of the BDV became effective. The goods valuation system according to the Brussels Definition of Value was thus rejected in DRC in favour of the WCO system (Article VII of the Agreement. This Article stipulates that the members shall ensure, at the latest by the date of implementation of the Agreement, that they conform their laws, regulations and administrative procedures to those of the stipulated provisions in the agreement. Since the five years time limit that DRC had for the implementation of this Agreement expired had expired on 31<sup>st</sup> December 1999, the current law will allow for the integration of the provisions of the above-mentioned agreement into the Congolese legislation<sup>71</sup>. Brussels Convention System.

According to Article 1 of the Brussels Definition “a normal market price, defined as the price that a good would fetch in an open market between a buyer and seller independent of each other, was determined for each product, according to which the duty was assessed.”

Within the framework of the Brussels definition, the value is based on the normal price of the imported good. That is how, according to Article 1 of the Brussels Convention:

- The goods are deemed to be delivered to the buyer at the port or place where they are introduced in the territory of the importing country
- The buyer is deemed to bear and have included in the price all the costs related to the sale and delivery of goods at the port or place of introduction
- On the other hand, the buyer is deemed to bear, in the country of import, the required duties and taxes which, from that point henceforth are excluded from the price.

### **Tokyo Convention System**

The concept of customs value which finally prevailed in the Tokyo multilateral trade negotiations seems to have in more than one way made a radical overhaul. The inspiration of this text is indicated by the presentation of the grounds for the regulation. It aims to facilitate international trade by ensuring that this is not hampered by the application of diverging custom valuations.

Henceforth we would witness a “fair, uniform and neutral system for the valuation of goods would exclude the use of arbitrary or fictitious values; thus the value for customs purposes of imported merchandise would be based generally on the transaction value”

<sup>71</sup> (Law on customs valuation)



The main innovation of the new system is acknowledging the existence of widely differing methods of valuing goods and it would simply suffice to describe the said methods and at the same time express some reservations on the development of laws inspired from the Anglo-Saxon legal technique (absence of general principles, long lists of muddled definitions, repetition of similar rules applied by neighbouring countries, etc)

#### **Article VII of the GATT agreement**

1. The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The Contracting Parties may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

2. (a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.

(b) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.

(c) When the actual value is not ascertainable in accordance with subparagraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.

3. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.

4. (a) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognized by the Fund, or on the par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement.

(b) Where no such established par value and no such recognized rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.

(c) The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting





party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the Contracting Parties, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions.

- (d) Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory on the date of this Agreement, if such alteration would have the effect of increasing generally the amounts of duty payable.

5. The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

### **Issues that Prevent Exports**

#### **Inefficient Control of Exports**

After observation and analysis we realised exports are hindered in practice by:

- An economy that just tries to fend for itself
- Poor remuneration policy
- Customs fraud
- Lack of funds for State trade activities
- Favouritism system

This observation and analysis was conducted based on the theory of anomie, i.e. I observed and analysed while bearing in mind that due to lack of resources to work effectively the stakeholders are endeavouring to have innovative practices to adapt to the system.

Indeed, after our observation on the manner in which customs generally operate and in particular the export division, I noted that there are reasons with root causes in the anomie that the country is experiencing. These grounds move customs officers to engage in a behaviour that is contrary to the regulations.

#### **The economy of fending for oneself**

Overall, the Congolese economy has collapsed. Nothing, including customs control works any more. Standards are capitalised for the benefit of powerful players. Our informal interviews helped us understand that the economy of fending for oneself or precariousness does not enable officers to effectively do their assessments. In this connection one of our respondents stated: "there are too many obstacles. We have issues on the ground since the economy has collapsed, if the economy was doing well everyone would be comfortable where he is, you would be able to work as you should"

An economy where traders have to do everything on their own, an economy where public authorities have no monopoly and an economy that not operate y the rules of the game due to the nationwide crisis. It is quite apropos to state that nothing in terms of regulations can be enforced. In summary, in an economy that fends for itself nothing can be done in terms of control where everyone is outlawed and offside.





Over the past few years formal traditional system has proven to be incapable of satisfying the primary needs of the population. In order to survive in such a situation, the population including the Government has plunged into a fend-for-yourself style of life that cannot be controlled at all. The philosophy that is so well known in Lubumbashi town and in the entire country is that you have to blatant, that is, to struggle hither and thither as much as one can in order to earn a living. Traders also while conducting their businesses are caught up in this blatant philosophy. It is becoming increasingly difficult for them to be in subjection to the authorities and to adhere to export regulations.

The economy of fending for oneself or of precariousness is expressed in various ways. It can be especially characterised by:

The informal sector or informal economy which is justified by the absence of standards that can be integrated in this economy that lies within the formal economy. Informal economy can be defined as the set of activities slipping the institutional, regulatory and official economic framework and that are no longer controlled or registered at various levels in spite of the fact that they are most often conducted in broad daylight and are illegal<sup>72</sup>.

### **Lack of Government Funding**

Control is prevented by the fact that the Government does not finance commercial activities. Economic operators fend for themselves with their own resources. That is why it is impossible to undertake an effective control. Previously, market supply used to be done with an import or export licence while granting credits to traders.

In a fending for oneself economy, where everyone is thrown in a shock including the State, it would be difficult for the latter to cater for traders in need of assistance to facilitate import or export transactions. The granting of credit by the Central Bank is dependent on the import-export number. The conditions for import/export registration are determined by the edict of 9<sup>th</sup> January 1987 on establishment of the conditions for granting an import-export number.

### **Favouritism system**

Customs officers do not have a free hand in carrying out their duties. Control is prevented by interference by some administrative and political administrations in favour of economic operators. Even the public prosecutions office which one should depend on to curb economic crimes has friendly relations with economic operators. This interference is for the purpose of benefitting large scale traders who have the monopoly over the market. Hence, these important traders use their relationships each time the customs officers ask them for explanations on their irregularities.

### **Poor remuneration policy**

Poor salary policy in general and in particular for customs officers contributes to their inability to carry out their duties. They have a tendency to capitalise on control for the sake of daily bread.

For any country to develop there would be a need to facilitate this process by means of a good salary policy to motivate staff. Such is not the case of the Democratic Republic of Congo.

As far as we are concerned, customs officers are poorly paid since they have a pittance salary that cannot enable them to make both ends meet. In the face of this situation these officers allow themselves to be corrupted as long as that would enable them to earn their

<sup>72</sup> (Cahier Africain, 2002, P.11)





living. Hence, officers try to capitalise on the control with traders that are not bound by a favouritism contract with our administrative, judiciary and political authorities.

The least we can say is that the salary policy in the Democratic Republic of Congo is virtually non-existent and the contents of this salary policy, basic salary, various allowances, bonuses, leave allowance and housing allowance only exist in name.

### **Customs fraud**

Customs fraud prevents the normal valuation of goods. This fraud is manifested in various forms, either the amount to be paid to customs is reduced or the exported product is changed for one that would cost less customs duty or the customs declaration is made out under the name of a powerful trader since the customs officers cannot touch it.

### **Theory Supporting the Developed Causes**

The causes like the ones we developed are explained through the theory of anomie that we mobilised according to the nature of the data.

The term anomie is derived from the Greek term *anomia*, which is related to the adjective *anomos*, “without law”<sup>73</sup>

“From this one can understand that anomie proceeds from deficiency and shortage of rules that would normally govern the harmonisation of relationships between different players, individuals and groups in the social game and their internalisation for each of the individuals within the social corpus”<sup>74</sup>.

The term anomie reflects three acceptations. In some cases, it designates the absence of human qualities of an individual, in others the individuals disregard for religious norms or Divine commandment and in the third acceptation, revolt against rules of justice and good conduct. This last acceptation is the most suitable for our research.

Durkheim<sup>75</sup> conceives anomie when the set of common rules that was the main mechanism for regulation of relationships between the elements of social system collapses. One no longer knows what is possible and what is not, what is just and unjust. What are the legitimate claims and what are those that go beyond the measure. Here, anomie would signify in a word the fact that a society which has rules of conduct that are not being implemented and their players to whom this rules are destined use other rules aside from those prescribed by the society.

Kaminski, in his handouts of contemporary theories in Criminology believes that an anomic society, for Durkheim, is a society that lacks the required constraints to ensure social control of its members. This situation is temporal and affects the society as a whole<sup>76</sup>.

For Marco<sup>77</sup>, Durkheim’s notion of anomie emerges from the moral philosophy since, as far as Durkheim is concerned, morality originates from society. The individual has no other choice than to obey rules of conduct that it establishes. The term now designates any form of misconduct or lack of cohesion that could cause a wrong to the society. Any deviation from social rules whether moral or legal can be termed as anomie.

<sup>73</sup> (Orru M., 1998, P,29).

<sup>74</sup> (Balle F., et alii, 1975, p.76)

<sup>75</sup> Albert Cohen, (1971, p. 150).

<sup>76</sup> (Kaminski, 2005)

<sup>77</sup> (1998, p 164-165)





According to Faget<sup>78</sup>, Durkheim develops the theory of anomie in two research projects, one being on a society deprived of moral and legal rules leading to disaggregation of solidarity. The other is on suicide (1897) where he presents anomie as the condensation in an individual of a collective problem. The instability in economy or in the family distorts social rules and contributes to increase in the rate of suicides.

From the preceding we note that for Durkheim, anomie is characterised within a given society by the lack of standards that can be either moral or legal. This lack of standards, which should organise the society, leads the players to adopt behaviour contrary to that prescribed by standards.

As for Merton, he approaches anomie in different angle from Durkheim where instead of starting with the standards he focuses on social structures.

For Jacques Faget<sup>79</sup>, Merton views anomie not as a consequence of a morbid or abnormal society but rather as the product of social structure. Social structures can, in some cases, push individuals to adopt a deviant conduct when the goals, intentions and interests defined by the society do not correspond with the legitimate means of attaining them. Anomie then becomes one of the forms of overall tension between the goals set by the culture of a society and the acceptable social means of attaining them.

These two concepts of the theory of anomie can correctly be applied to our data especially in connection with exports and particularly the lack of control. This moves us to believe that the two concepts can at a certain time and for a specific case like that of the Democratic Republic of Congo complement each other.

The contribution of the theory of anomie on the analysis of data can easily be explained by means of the research subject, that of seeking the causes that prevent control and accurate valuation of goods being exported. The aim of my research is not to confirm the theory of anomie but rather as Walgrave said: "organise a sort of dialectic between the theory and the empiric by trying to bring together the thesis and the data"<sup>80</sup>

Thus, fiscal standards in connection with exports such as they are enacted do not currently have the means required for their implementation. Officers who are authorised to implement control do not have the policy and means of carrying out their duties. On this basis, traders and clearing agents who are aware that the laws cannot be enforced, capitalise to the maximum on this and use other resources aside from the law.

The proliferation of informal economic activities can be interpreted as a response to the crisis of standards and economic means that the country is facing. These activities that run against the spirit of the legislation are considered as survival strategies developed by perpetrators, especially traders, customs officers and administrative authorities in this state of blatant anomie.

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78 (2002, p 52)

79 (2002.p. 52)

<sup>80</sup> (Walgrave, 1992, p.16)





## Conclusion

In the everyday life of any State, exports of commodities plays the most significant role in providing foreign exchange in order to enable the Central Bank to finance imports. The Congolese State has not remained unaffected by this issue.

In order to safeguard revenue issuing from exports, which are subjected to the spirit of profit or exaggerated capitalisation by exporters, the Congolese State, through the legislator, established a series of measures to regulate the mode of customs valuation of goods.

In spite of the presence of this customs regulation with the objective of ensuring economic and social stability through the redistribution of revenue, we bitterly observed that the rate of exports on the market is still at low ebb due to a number of reasons particularly the lack of customs control. It is therefore from this customs instability that we attempted to identify the practical causes that prevent customs valuation from running effectively and thus affect the economic stability.

In order to appropriately conduct the research, we opted to use a qualitative method based on observation and informal interviews.

In fact, as in most under developed countries, DRC resorts to a very narrow market for the export of its goods and services and remains highly dependent on a limited network for its imports. Consequently, it is subjected to world prices (price taker) for its exports in view of its limited outlet (especially because it is targeting industrialised nations and particularly the European Union, 58.8% in 2002)

Consequently, one of the main ways for reviving DRC's external trade is to correct this high dependence on a limited network and this would be by expanding its outlet to other continents other than the European Union (Asia, Latin America...), in order to avoid continuing to suffer reduction of export revenue as a result of the strong market position of this exclusive trade partner that controls both our exports and our imports.

On the other hand, as mentioned, we need to face all the causes so that the exports revenue can lead to economic stability, since DRC's external trade seems to have been left to fend for itself at this point. Yet, it represents one of the major pillars of macroeconomic stabilisation through the retrocession of the Central Bank's foreign currency that would enable it to effectively manage its foreign exchange policy.

We can think of two major solutions to mend this sector. First of all we need to understand how to catch up with the train of international trade which currently focuses on manufactured goods and services rather than raw materials (mining or agricultural) and secondly, policies can be developed at mid and long term basis in order expand DRC's outlet to other areas apart from the European Union to avoid subjection to its prices.





# THE CONGOLESE CONSTITUTION DOES NOT RECOGNISE WITCHCRAFT

By Wikha Tshibinda Baudouin<sup>81\*</sup>

## Introduction

This discussion is based on the position of the Congolese legislation on witchcraft, the view on this significant social phenomenon drives us to examine this issue head-on as a reality that faces our community today, a social issue known and governed by customary law yet ignored by the written law, witchcraft, magic, fetish and divination are realities that we live in our Congolese society.

The task at hand is to explain the social issues that we experience in the face of the law and to draw the attention of not only the Congolese legislator but also to allow the victims of this phenomenon to understand that this custom exists in Africa in general and the Democratic Republic of Congo in particular. The approach is to give meaning to this phenomenon, interpret it and understand it; these activities are truly known from the society and even from the legislator but the latter does not seek to think about it in order to see how we can find a solution.

When we look at our society, we notice for example that: Mr. X goes out with the wife of Mr. Y, the latter decides to go see Mr. Z who has the “Kapopo” which is simply a bad spell, that consists of sending someone to his/her grave through an incurable disease; the victim is taken to hospital very often and each time, he/she is asked to seek traditional medicine. Today we find traditional healers in hospitals working side by side with modern medicine.

We could add more examples just to enumerate certain incidents that we know but the list is long thus we can give the example of lightning, the “Kapopo”<sup>82</sup>, the “tenta”<sup>83</sup>, the “Londola”<sup>84</sup> the “bizaba”<sup>85</sup>, the “Majende”<sup>86</sup>, the sacrifice of a close relative in order to enrich one’s self, bewitchment, the destruction of harvests, fishing, bankruptcy, sterility, etc

It is worth noting that the colonialists encountered the same problem and they thought of solving this issue by taking measures that were meant to settle this phenomenon. We can say that during the colonization era, there was significant progress in the resolution of problems related to witchcraft. This is seen by the presence of indigenous courts next to the modern courts which were called upon to settle disputes linked to witchcraft.

It was the French and Belgian government officials who made rulings without seeking to

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<sup>82</sup> Kapopo: a known phenomenon in the Upper Katanga region which consists of casting a bad spell on someone

<sup>83</sup> Tenta: is a form of a magical trap which catches the person responsible for behavior which is considered undesirable

<sup>84</sup> Londola: is a practice which we find among the Bemba of Katanga which consists of describing and identifying the perpetrator of death by witchcraft.

<sup>85</sup> Bizaba: is a fetishist practice which consists which consists of undergoing rites during a ceremony which make a person untouchable by bullets or any other object that could harm him. This practice is common in Katanga, precisely among the Luba of Katanga. 11Lubumbashi, 10th April 2008

<sup>86</sup> Majende: simple magic used by the market thief to magically take money from people. A practice common in the urban centers of DRC







adapt their decisions to customs and mentality of the people who were being judged...with time, there were more and more interferences by the colonial criminal laws in all matters which in principle would fall within the traditional law. In 1940, Belgium instituted a strict legality of penalties and infringements for all the population and in 1946, France generalized the application of the French Criminal Code to all the inhabitants of its colonies in Africa.

Special provisions punished magic and charlatanism, the purchase and sale of human bones, cannibalism, ordeals, dowry fraud etc<sup>87</sup>

Current legislation is silent on the problem of witchcraft yet the problem exists and is known. Article 78 of the penal code talks about the accusation of witchcraft which constitutes an offence if the following takes place:

- A person is accused without any basis;
- This accusation is solely based on superstitious beliefs;
- This accusation leads people to commit an offense against the accused person

Our problem revolves around the following questions: What do the indigenous courts follow on witchcraft in the rural areas? What are the motives for accusation on witchcraft? What are the grounds for a charge of witchcraft? What is the evidence in case charges of witchcraft?

As in the case of any scientific thinking, our working hypothesis is as follows: the Democratic Republic of Congo has a dualism in its system, we see in it, the coexistence of the customary courts alongside the modern courts, and certainly priority is given to the written law but the conflicts on matters related to witchcraft are still very frequent in our rural and even urban areas, in the customary circles, these problems are resolved by customary law and peace is established by the customary authorities.

Difficulty is experienced when the conflict persists to the point whereby reference has to be made from the written law. The primacy of the written law then appears as it totally ignores witchcraft and pursues the victim of witchcraft under the pretext that the law does not recognize witchcraft, hence the need to regulate this matter. Our concern is to lead the legislator to create a section or a chamber which could handle all disputes related to witchcraft.

Pierre de QUIRINI in his book "Petit dictionnaire des infractions" (Small dictionary of offences) states that the law does not prohibit belief in magic, "ndoki"<sup>88</sup>. It prohibits charging someone of witchcraft, "Kindoki"<sup>89</sup>. These charges may encourage them to commit serious crimes.

He gives an example: a sorcerer identifies the person responsible for a misfortune that befalls a village. The villagers harm this person. The sorcerer is an accomplice to the crime committed by villagers.<sup>90</sup>

Another important aspect is the dualism of the Congolese Law, when the colonialists arrived, the Congolese society was governed by customary law, the colonialists brought in a new system, the written law which governed the western population. This situation

<sup>87</sup> Brillon Y., *Ethno criminology de l'Afrique noire* (Ethno criminology of black Africa) P.U.M, Montréal, 1980, p58

<sup>88</sup> Ndoki: means sorcerer in Lingala, the language spoken around the Equator and in Kinshasa in DRC

<sup>89</sup> Kindoki: means witchcraft in Lingala.

<sup>90</sup> Quirini Pierre - *Petit dictionnaire des infractions*, CEPHAS, Kinshasa, 1991 p18





persisted until the unification with the Congolese law through the integration of the customary courts in the judicial system which at least settles various problems related to witchcraft.

In his book “Ethno criminologie de l’Afrique noire” (Ethno criminology of black Africa” Yves Brillon talks about Customary Law which has not been abandoned and concepts which differ in their acceptance from those in the industrialized societies. Presently, we impose a modern criminal justice in social contexts which are incapable of receiving it because the social structures being archaic in their architecture are forced, if they integrate the new law to modify themselves even self-destruct. We thus understand that in African States, the establishment of uniform national laws involves de-culturation meaning de-structuring of the primitive societies. As this breakdown will not be completed, to then lead to a different restructuring, the ancestral legal institutions will remain.<sup>91</sup>

Yves Brillon, in the same book says that many communities in Africa do not believe in natural death. The death of a person weakens the group demographically. The emptiness thus created deeply shakes both the inter-personal relationships within the lineage and inter-clan links. Schwaetz (1971) admits that among the guéré apart from the death of children at an early age, the old or people suffering from incurable diseases or people who the natural cause of death is known (for example leprosy and syphilis) any other death is considered suspect.<sup>92</sup>

The same author continues to say that someone dies; we must search for the cause. The death could be a result of his own misfortune due to breach of a rule or doing something which is prohibited or he could be the victim of a curse made by witchcraft, questions that the relatives of the deceased asked themselves are not those that come to mind when such an event takes away one of our relatives: what disease killed him? What mistake did he make to be a victim of such an accident?

Whilst searching for the cause of the misfortune, people first ask themselves; to recapitulate the questions of Davidson (1969), what bad did he do? With whom did he dispute? Who was jealous of him? In other words, who killed him?

Professor Zola of the Protestant University of Congo does a retrospective, based on the Bible. According to this theologian, witchcraft has existed since antiquity. The Old Testament presents comparisons between the children of God coming from Israel and the others from Egypt and Canaan who showed their strength through practices of witchcraft and magic, incantations, interrogation of the spirits and invocation of the dead.

In the New Testament, he continues, we see how evil forces, unclean spirits possess people. Without making accusations, Prof. Zola notes that, by a simple word of mouth, Jesus Christ ordered an evil spirit to come out of a man. The man was then totally healed. Further to the position taken by Prof. Zola, we also find in the writings of the Middle Ages several practices of witchcraft such as philters of love, metamorphosis and cannibalism. As such, witchcraft manifests itself like a mental, social and pathological phenomenon which existed in various forms in different societies over time.

Professor Bayona Ba Meya in one of his publications on “the law in the face of witchcraft” reports that “witchcraft is a truly social concern, since a month does not pass without

<sup>91</sup> Yves Brillon Op.cit

<sup>92</sup> Idem, p83





the reporting of either the fall of a sorcerer whose plane had experienced fuel problems, or the tragic contract in schools for initiating small children into witchcraft through the consumption of a piece of bread or groundnuts which turn to be pieces of human flesh in the mouth". This former Professor at the Faculty of Law at the University of Kinshasa testifies that "a close friend's family went through tragedy in their life" - his son aged 9 was introduced to witchcraft following the consumption of groundnuts given to him by an old man passing by.

On eating them, the boy realized that he was chewing human flesh. At night the old man came back and told him "from now on you are introduced to witchcraft since you ate human flesh". And this boy used to go out at night in another body which was not his, to accompany the old man, his initiator, to Kinshasa cemetery. There he was asked to deliver his father. On refusal, the small boy was savagely beaten and abandoned in the middle of the cemetery. He could only get back to his father's house by transforming himself into a small leopard through the use of a statuette that was give to him by his initiator. This boy initiated into witchcraft, made his father who is a lawyer, so poor that he was forced to borrow money from his friends to survive because his clients who owed him money refused to pay, and his colleagues had left the firm. This child was taken to a prayer meeting where spiritual anointment was "very strong". He was delivered from the spirits and he told his father: "Daddy it is now finished" And since then the father felt like a stranglehold that was around him had loosened.<sup>93</sup>

Professor Bayana thus believes in the existence of the forces of witchcraft and its capacity to harm. This position is the concern of many Congolese who live this social reality, a position which even lawyers do not agree on.

Before understanding the phenomenon which is the subject of our discussion, it is better to understand through certain definitions, the forms of witchcraft which exist in our community.

This study was carried out in two villages (communities) KAPONDA and CHINDAIKA, situated in the district of Upper Katanga and also in the city of Lubumbashi, Katanga province in DRC.

### **Definition of Witchcraft**

Witchcraft is magic which relies primarily on secret procedures which are illegal or frightening (spells, bewitchment, black mass, pacts with Satan).

According to KAPINGA DIBENDELE, witchcraft is an asset of the cultural heritage of the family. To bewitch means to cast a bad spell on someone. The author emphasizes that witchcraft is a reality; it exists because it is sudden and linked to the condition of human existence.<sup>94</sup>

According to Gilbert MALEMBA M. N'SAKILA, witchcraft is an occult mode or extra ordinary knowledge which allows one to manipulate cosmic elements from their intimate nature for socially destructive motives.

For him, witchcraft is a power or a physical force which emanating from knowledge of appropriate occults, allows the holder to use as he please the elements of nature.<sup>95</sup>

<sup>93</sup> BAYONA BA MEYA, children and society, article in MAGASINE (September-December 2000) p12-13

<sup>94</sup> KABINGA DIBENDELE, Sociology and Anthropology courses, C.U.M, G1 - 2001 Unedited

<sup>95</sup> MALEMBA M. N'SAKILA, la queue du chiot, CELTRAM édition, Lubumbashi, p38





Jeanne FAVRET-SAADA whilst analyzing the witchcraft phenomenon in the region of Bocage in France, studied death, sterility and both animal and human diseases according to him were marked by contrast between ordinary misfortune and extraordinary repetition<sup>96</sup>.

A witchcraft attack shapes the misfortune which reoccurs and hits bewitched people and their household property, blow by blow and at random; a heifer dies, a wife miscarries, a child grows pimples, a family car runs into a ditch etc; The couple agonizes “what will happen to us next?”

The same writer notes that the doctor and the veterinary reply by denying the existence of a series: the illnesses, deaths, problems do not have the same causes, and are not treated by the same remedy, having knowledge on the body; they claim to separately eliminate the causes of the misfortune: Disinfect the barn, vaccinate your cows, take your wife to a gynecologist, give your child milk that has less fat, reduce your alcohol consumption etc. Nothing is said about witchcraft which is closely controlled by the enunciation.

In analyzing the different definitions given by the authors that we have presented, witchcraft appears to a mystical power that certain initiated persons posses and know how to manipulate to harm others. It exists in almost every culture; it is a social issue existing among all people, all countries and all cultures.

### **Social Issue**

Witchcraft is a social issue that we experience in our environment that needs to be presented, observed and studied in order to find a solution in our community just like other events which confront us daily.

Speaking of events, Claude de JONCKHEERE states that the event enables us avoid the pitfalls of substantiality between mind and matter by bifurcating nature. Thus the spirit is constituted of mental events and the matter of physical events. The society is also made up of an infinity of social events. The events cannot be analyzed in terms of the attributes of one thing or of a subject but in terms of relations between things and relations between these things and a subject.

However, examining these events brings out a new problem, the problem of the language available to report, describe or interpret an event without bifurcating nature. We do not have axiomatic certainties from which we could start. The only possible procedure is to start from usual verbal expressions even if they are poorly defined and ambiguous. They are not premises but attempts of enunciations of general principles which will find their illustrations in subsequent descriptions of experiences. It is from this subsequent development that we will determine meanings that can be assigned to words and phrases which one had used. Despite this, language cannot anything other than an elliptical requiring a leap of imagination to understand its significance in dealing with the immediate experience.

When one talks about the concept of witchcraft in our time, it refers to madness, village folk, the delusional, the backward, those who lack a scientific background, strange beliefs, etc. Yet these are activities that experienced even in our large urban centers but nobody has the courage to denounce them in order to protect the people from this social phenomenon, instead we choose to remain silent as if these activities do not exist in our society.

<sup>96</sup> FAVRET - SAADA Jeanne, les mots, la mort, les sorts (Words, death, spells) GALLIMARD édition France 1997 p20.





Let's take the example of the "LONDOLA" known by the majority of lushois. In this case, when an extraordinary death occurs, the family members of the deceased consult a soothsayer, to not only know the cause of the death but to identify the perpetrator who caused this death. The soothsayer thus performs rituals and when the body of the deceased is placed in the coffin after certain ceremonies, the people transporting the coffin are led by the deceased to the person who killed him. Thus the sorcerer is known. The "Londola" constitutes a description, identification or detection of the perpetrators of witchcraft.

We also have the "KAPOPO" phenomenon also known in the southern part of Katanga, which consists of causing death by casting an evil spell on someone, the person caught by the "KAPOPO" develops a disease less known by modern medicine, the mode of treatment is generally through traditional healers, otherwise it is death that follows. It appears here to be a means to bring justice, to settle scores, to revenge by occult processes.

The "Tenta" is a fetish that certain persons have which consists of a setting a magical trap to help anyone who may have a problem, a debt, who goes out with the wife of another, who stole something belonging to someone else etc., the victim may seek to bring justice, to revenge or even to settle scores with the presumed perpetrator by seeking the help of a sorcerer. The mode of transmission of Tenta is generally through the leg, someone may strike something and automatically the magical effects penetrate the body.

There is also the "Majende", this is basic magic that petty thieves use to con passers, also often used by women market vendors. Thus a woman is warned and when shopping at the market, she cannot mix the change she receives with the money that she had on her out of fear that she may lose all the money she has.

Another well known act of sorcery is the "Bizaba" which consists of consulting a sorcerer, who will take you through a rite which will make you untouchable by physical objects which could harm you: be it a bullet, a knife, a spear etc. Whatever strikes a person soaked in bizaba, blood will not spill. These fetishes are often used by the "mai-mai" as a means of invulnerability against bullets.

There is the phenomenon of lightning which is well known in our midst, which is often of a mystical nature, but in some circles of intellectuals this argument is not allowed but rather it is electricity as a result of a physical phenomenon, which created the lightning, but what is known even among the intellectuals is that when it rains and there is lightning, everybody asks himself whether he did something bad to someone. In 1976 in Kolwezi "eleven people were killed by the TSHIPOY lightning", in fact Mr. TSHIPOY had lightning which had originated from witchcraft, which for him was like a trade fund. Anybody who was a victim of theft, suspected his wife of adultery could see Mr. TSHIPOY to settle the problem through the payment of a certain amount of money.

Another issue is when in a village someone walks at night and crosses the mask of a sorcerer, the person could have seen this mask or not but the bad spell already attacks the person. The next day he is attacked by a strong fever and he must consult a soothsayer to be healed traditionally. Generally when this person is taken to the doctor, he is not able to diagnose the disease.

There are other acts that are well known in the city: people who sleep in cemeteries in the search for money, people who sacrifice family members in order to obtain promotion etc.







After analyzing the different acts which originate from witchcraft, we are made to believe that witchcraft is a social phenomenon which exists and merits particular attention from anthropologists, sociologists and lawyers in order to solve the different disputes that we experience in our communities which are linked to witchcraft.

### **Witchcraft and Related Concepts**

Witchcraft refers to other concepts related to it, these concepts related to witchcraft are: magic, fetishism and divination. Magic is a practice through which certain persons have the power to produce super natural effects through the intervention of spirits and especially demons.

Fetishism on the other hand is the morbid and exclusive attachment to certain objects which are given a sense. For examples the case of offensive spells cast on an identified person or on a property or again simply offensive spells which are given a sense to cause the death of a person. It should be noted that due to fetishism, witchcraft may materialize and escape the concept of magic.

The soothsayer and the fortune teller are detectors of the evil caused by the sorcerer. They generally indicate the origin, the causes and may provide guidance on how to heal the bewitched person. Fetish simply means pharmaceutical or medicinal product when it comes to traditional treatment, it becomes spells or magic when by an intentionally identified symbolism, it is considered as a bearer of a curse or bearer of good luck. This remains in the mystical nature.

The ministry of culture and arts officially recognizes soothsayers by granting them legal status. This authorization allows the soothsayers to exercise their work and have now grouped in an organization “Union Nationale des Guérisseurs Traditionnels” (National Union of Traditional Healers”. Among them we identify:

- Herbalists who use plants to heal
- Spiritual healers who are in contact with the spirits and heal through them
- Fortune teller healers who can see the future
- Witch doctors to who is attributed the power coming from the ancestors

From the point of view of their administration, traditional healers are under the Ministry of culture and arts in collaboration with the Ministry of public health. Amongst them there are those who demonstrate knowledge in what they do, i.e. they have wide experience, have good reputation in their field of work, have passed several tests, are often consulted and considered experts by the customary courts who solicit them to determine if there is proof during a dispute on a charge of witchcraft.

We also note that the work of traditional healers is exercised throughout the entire nation by people who have fulfilled the conditions required by the ministry in charge. Thus they are found in towns, districts, regions, villages, locations and cities. It's the law no. 04/015 of the 16<sup>th</sup> July 2004 as was modified and completed by the law 05/008 of the 31<sup>st</sup> March 2005 setting the nomenclature of the acts creating judicial and administrative income, and participation income as well as the modalities of receiving them, in annex A, Inter-Ministerial Decree no. 25/CAB/MIN/MCA/13/2005 and 064CAB/MIN/FINANCES/2005 of the 28<sup>th</sup> June 2005 on the fixing of the rates for fees, taxes and charges to be received on the initiative of the ministry of culture and arts in its article 16 paragraph 1 authorizing the exercise of the profession of healer.







### **Congolese Legislation on Witchcraft**

Congolese legislation is silent on the problem of witchcraft, but recognizes witchcraft; it does not prohibit the belief in witchcraft, condemns the act of accusing a person of being a witch, due to the fact that this accusation could lead the victims of witchcraft to commit offenses affecting the physical integrity of a person accused.

It is important to note the dual character of the Congolese legislation, in conformance to the principle of uniformity of courts, there is the coexistence of customary courts alongside the modern courts. The choice is made according to the position of the western law in relation to the custom and in case of conflict between the custom and the law; it is the law that prevails. This is a conflict area that we hope to analyze in order to solve the issue of witchcraft.

The Congolese constitution talks about customs as the source of norms or legality only in its articles 153 paragraph 4 and incidentally in article 207 on customary authorities. This failure is without doubt one of the major weaknesses of the new constitution that the critics did not however point out. It is not normal that a country which has a hybrid legal system bringing together the written law or the modern law expressed in writing and the customary oral law, does not have a constitution that specifically tackles the conditions for recognition of customary norms<sup>97</sup>.

### **Customary Law in the Face of a Charge of Witchcraft**

Before the advent of colonization, it was the custom which determined the offenses and the penalties, the custom courts had their own penalties: killing, the physical punishment, infamy, ostracism, heritage penalties etc

With the European occupation, which was breaking and invasive, so much so that the application of customary law was dependent on the goodwill of the officer of the ministry of public affairs who could decide to leave the defendant to the jurisdiction of customary law.

Customary law has not lost its place in the organization of the Congolese justice system. This law exists and continues to govern social relations in the rural areas of Congo and even in the populous urban periphery where the homogenous ethnic groups who prefer to solve their problems through customary law live.

Customary criminal law is also manifested as noted by SOHIER through magical religious law, sacred and mystical law, law of "pomp" and "harm" where the settlement and punishment of matters and affairs by man can only be done through and with the intervention of shades of ancestors, spirits and gods, or by operating as "sorcerers" and "fetishists" inducing flows of evil, harm or pomp in the lifeblood of the perpetrators or victims.

Professor KAMPETENGA speaking of customary law says that customary law customary law is manifested through litigation driven in private proceedings or litigation; the latter sets in motion the traditional courts which acting according to specific private or public procedures pursuing various offenses and applying particular punishment in accordance with the rules of singular criminal participation.

He continues by defining customary law a body of legal rules established in a community in the form of use and mandatory social practice carried in the customs. These legal rules bind all members of groups or of communities in order to harmonize their common

<sup>97</sup> AKELE Adau P and SITA-Akele Muila A., Mandatory laws for the application of the constitution of 18th February 2006 of the DRC, CEPAS edition, Kinshasa 2006, p16





life, ensure social order, carry out a number of acts in accordance rules made over time, uniformly and mandatorily.

Regarding sanctions, punishment and holding trial under customary law, similar to the written law, customary law conforms to the rules and regulations related to procedure. The judicial process is informed by the conclusions and findings of experts. In case of a dispute, when the case gets underway, the court brings in an expert who already possesses a long proven track record. In case, the expert can't be found within the immediate locality, he is sought from another locality; this is to say from a locality where the local chief could have such an expert at his disposal. However before he can assume his duties, he is subjected to a test prepared by the court and it is only after succeeding that he is allowed to address the court or the tribunal with regard to a matter related to witchcraft.

### **Courts in Rural Areas**

The basis of the existence of customary courts is article 163 of the ordinance law number 82/020 of March 31, 1982 on the organization and judicial competence code which stipulates that: "The police courts and customary courts will remain in place until the establishment of peace courts".<sup>98</sup>

The customary courts function and handle litigations involving the people living under the authority of chiefs, in collectivities, sectors or even social groupings. In all constituencies, there is to be found some sort of a customary authority that is charged with regulating social life.

It should be noted that being part of a village or collectivity is proof of each individual's attachment to his/her soil, land and ancestors, and as such relocating from one piece of land to another always raises questions. People seek to know the reasons that pushed one to abandon their piece of land for another one. This means that any movement is viewed with suspicion. Contrary to urban migration, where both the young and old move for varied reasons ranging from studies, village poverty, employment or even modern pleasures that villagers find irresistible, some people manage to integrate themselves while others fail.

Currently, the Democratic Republic of Congo does not have the necessary infrastructure to spur the establishment of peace courts in all territories, thus customary courts continue to resolve customary disputes, with the people accepting and respecting resolutions and judgments customary sentences. This helps to ensure harmony among the people, and particularly when it comes to dealing with matters touching on witchcraft.

### **Prosecution of Witchcraft**

As it has been shown in the course of this research work, witchcraft is present in all societies; some people are accused of practicing witchcraft owing to their conduct, this is the case of anyone who always seeks to live apart from others, who doesn't love others, especially children, who has a complicated character, etc. The villagers can easily accuse such a person of being involved in witchcraft.

According to the other theory, this is effectively the case of a person who actually practices witchcraft within the society by causing death or casting bad spells on others, or causing disease outbreaks within the community. This situation leads to a state of panic, desolation, fear, discouragement, vengeance and rebellion within the society.

<sup>98</sup> Article 163 of the code on the organization of judicial competencies





Investigations carried out in the villages of KAPONDA and SHINDAIKA have revealed that people believe in the existence of witchcraft and attach a lot of significance to it. The involvement of customary authorities facilitates the resolution of a lot of problems, therefore helping people to reconcile.

Two cases attracted our attention. The first involved a notable of Chief INAKILUBA, who is a chief of a grouping within the village of KAPONDA. The honorable was a great sorcerer and managed, through the use of magic, to completely dominate Chief INAKILUBA, who found himself helpless in the face of this notable who practically assumed the role of the chief, himself a member of the family of the chief. The family started recording deaths, bad curses, bewitchment, etc. Certain members of the family decided to consult a soothsayer secretly. The soothsayer confirmed that this notable was indeed the cause of their woes. In the middle of a ceremony, the soothsayer would be surprised, all his powers eliminated, he declared himself helpless in the face of this permanent threat. The concerned family members thus decided to address their worries to the chief of the collectivity.

After a meeting with his aides, the chief gave them the authority to consult three soothsayers separately. All the three confirmed that the honorable was indeed a great sorcerer. On their return, they reported their findings to the chief of the collectivity who then summoned a court session in which the honorable confessed his deeds. He then agreed to pay a fine as well as damages and expenses incurred by his victims and after the wise counsel of the chief, people managed to forge ahead with their lives as usual.

The second case, which was also tried in the village of KAPONDA, involved an inhabitant who used to tend his farm but decided to turn to witchcraft in a bid to improve his yield. But sadly, this witchcraft would turn against the members of his family who started to die suspiciously. The family singled him out as the guilty party and the whole issue was taken before the chief of KAPONDA for direction. The chief summoned his court to discuss the dispute. However, the accused person well aware that the written law does not recognize witchcraft reported the matter to the court, which in turn made “a requisition of information” to the chief and his aides.

They went to the public prosecutor’s office to explain the issues surrounding the case and asked the prosecutor to give them time to get to the bottom of the matter. The prosecutor would afterwards be free to investigate offenses committed by the brothers who had accused the other of witchcraft.

The customary court gave the accusers the authorization to consult the three soothsayers and report back their findings. All the three, who were consulted separately, confirmed that the accused was indeed a sorcerer and agreed to give their findings to the court in person. After being confronted by the court, the accused person confirmed that he had turned to witchcraft to enhance his yields, but he himself regretted the sad turn of events and agreed for a cleansing ritual to be held. This was done. The accused then was then fined by the court and also reimbursed all the expenses incurred by the family, after which he was accepted back by the family.<sup>99</sup>

After analyzing the two situations and many others, we came to realize that the chief handled a lot of cases related to witchcraft, therefore helping to reestablish trust and reconciliation in the community.

<sup>99</sup> Testimonies of MPUMA Gaspard, a court clerk in the KAPONDA village, MULEMENA MUKONTA, a judge and LUKANA MUSHIKA, representative of the chief of KAPONDA





### **Evidence in Witchcraft Cases**

In fulfilling its obligations of analyzing litigation or disputes in cases related to witchcraft, the customary court turns to the help of witnesses as well as the confessions of the accused person.

By helping to resolve disputes related to witchcraft, the courts were managing to reconcile families whose members were almost enemies, thus eliminating the prospect of the community carrying out vengeance against the sorcerer as he was obliged to pay compensation for damages caused by his actions.

Evidence in matters pertaining to witchcraft is actually sought with the authorization of the customary court to the two concerned parties to consult three soothsayers and report back their findings to the court for further directions.

In case one of the three soothsayers consulted has an opinion differing from the other two, the court can bring in a fourth soothsayer in order to make an informed decision.

The evidence helps to establish the guilty party and come up with a way of holding the culprit pay reparations for their actions. The decision to consult the three soothsayers is taken by the customary chiefs as part of their efforts to render the best possible judgment in any given case.

The Congolese penal code book II, in its articles 57 and 59, stipulates the following: “an offense of superstitious nature is committed when someone is subjected to a bad physical ordeal (poisoning, torching, etc.) whether this person has confessed or not in seeking to establish whether this person is responsible or not for the offense he/she is accused of (death, disease and accident).”<sup>100</sup>

But in customary law, this manner of attributing guilt is accepted by all the parties and remains an effective means of dealing with cases, especially matters pertaining to witchcraft, the customary authority, which respects the human person, handles the situation.

Regarding means of gathering evidence, the customary court takes into account certain methods recognized under the written law. Notably, there is confession, which can stem from evidence adduced from divination, or the person himself in front of the court, testimony, when the person for example turns to a lightning launcher to settle a conflict of concession. The lightning launcher can be a well known person within the locality, and the initiated persons are well capable of distinguishing lightning related to physical phenomenon and lightning originating from witchcraft, the solicited person could be allowed to testify, etc.

Under customary law, we witness condemnations where by the condemned persons are required to pay fines to the courts and compensation to their victims. Therefore, we witness peace being reestablished, public order being restored and social life continuing as usual within the community.

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<sup>100</sup> Article 57 and 59 of the Congolese penal code book II





### **The Written Law versus Witchcraft**

The written law is defined as a set of regulations established to govern order and peace, enacted by a competent authority and prescribing sanctions.<sup>101</sup>

The written law, or more precisely the Congolese penal code, does not recognize witchcraft as an offense, but specifically in its article 78, punishes the accusation of witchcraft, thus the act of accusing someone of witchcraft constitutes an offense, when this person, in the wake of this accusation, becomes victim of an act that is punishable under law.

The accusation of witchcraft constitutes an offense in case the following takes place:

- A person is accused without any basis;
- This accusation is solely based on superstitious beliefs;
- This accusation leads people to commit an offense against the accused person

With regard to the written law, the difficult part is gathering evidence in matters pertaining to witchcraft, because after analyzing the constitutive elements in an offense, a problem arises with regard to establishing the responsibility of the accused person, the responsibility is much easier in making the accusation of witchcraft than proving witchcraft itself.\_

Shedding light on the subject matter, DUVIEUSART L. says that “the belief in witchcraft as a means of protecting oneself can not be proved conclusively through science; it’s a question of belief and free opinion. It is indeed impossible to prove that the lightning that killed Mr. X or the enraged dog that bite him or even the cancer eating away at him was sent by his maternal uncle, even if the said uncle admits this to be the case.”<sup>102</sup>

The challenge is to know why the written law does not punish witchcraft, even though its existence is well known to the Congolese legislator, who is well aware of the existence of this phenomenon within the Congolese society but does not seek to prevent people from believing in it.

This can be explained by the fact that the written law treats the phenomenon of witchcraft as superstitious owing to the Judeo-Christian principles which constitute the very basis of the written law.

The evangelization of Congo has led the Congolese to forget their culture and totally embrace the Western civilization.

### **Conflict between the Written Law and Customary Law on Witchcraft**

While addressing the issue of witchcraft, Antoine SOHIER notes: “a regulation becomes part of the customary law when it can be enforced by the authority or when an individual can turn to it to force a third party to respect his rights; in brief, when it can be applied by the local authority on request and without consultation. A rule is accepted as part of the local law when it is enforceable in public or private justice or better still when failure to uphold it can lead to conflict in a social grouping.

We have looked at the question of legal dualism, which is characterized by the coexistence of both written and customary laws in the Democratic Republic of Congo. Regarding

<sup>101</sup> LIEDE CHRVAN, element of the Zairian civil law, CRP, Kinshasa, 1990 p7

<sup>102</sup> DUVIEUSART LEOPOLD, case study of witchcraft in rural Zaire, (24 February online 1999), [www.lingithub.elsevier.com](http://www.lingithub.elsevier.com): (April, 21 2008).





the issue of witchcraft, the customary court is mandated to handle matters related to witchcraft. We have demonstrated how the issue of witchcraft was being handled by the customary court to resolve conflict related to witchcraft, and as such public order in customary issues was restored. Even today, these same courts are continuing to find solutions to these kinds of conflicts in the same manner.

The difficult part here is when we refer to the written law where witchcraft is not recognized as an offense. All the phenomena that we have highlighted as being social facts are not captured in the written law or according to the provisions of this law, gathering evidence is difficult, as it is seen as a mysterious phenomenon.

In a situation where there is conflict between the law and the custom, the written law takes precedence.

Therefore, all disputes pertaining to witchcraft which are recognized and handled by the customary courts are reviewed at the level of appeal by the courts of peace. The judgments handed down by the peace courts are normally in favor of people condemned by the customary courts. Here we see conflict between the written and the customary law, something that requires the intervention of the legislature in order to resolve a number of problems that are bedeviling our communities.

## **Conclusion**

Our reflections on witchcraft is aimed at showing that the Congolese society is suffering from certain social realities that are not captured in written laws, despite the fact that these are true realities and well known to Congolese legislators. The legislators know these facts and their consequences and as such they have to be resolved in order to restore social peace in our areas where we are increasingly seeing the emergence of disputes related to witchcraft.

After independence, the challenges of putting in place a modern African law in general and Congolese in particular was necessary for the unification of the written and the customary law, since the ignorance of the traditional law has not been able to overcome or ruin customary justice which is now coming to the fore and creating major social problems.

We have looked at phenomena such as londola, majende, kapopo, tenta, lightning, bizaba, the sacrificing of a member of the family by another one seeking riches, job promotion, etc.

Given that we are living in an environment which requires a particular attention, there is need to know the causes of the problems affecting our African society in order to come up with long-lasting solutions instead of burying these realities under a heap of silence.

There is no society that operates without laws, laws are required to govern the society, and as such society can not live without laws, it is the society that creates laws, any society must grow, exist and evolve. The law must also evolve in tandem with the society, which means there is a necessity to amend the law, to adapt it to the realities of the society and make it responsive to the needs of the community.

We have talked of the fundamental basis of the written law which can be traced back to the Judeo-Christian spirit that we inherited from the colonizers, who emphasized on evangelization and even the concept of God itself.







Through the use of dualism, the colonizer who was confronted with the same scenario managed to come up with a way of dealing with the situation and realizing his goal of leading the native to embrace the European civilization.

In our opinion, when evaluating the issue of witchcraft, we do not see backwardness. Without scientific baggage, crazy, villager, believable or surreal, we believe that this phenomenon that is present in our midst requires us to talk about it in order to come up with a solution at the level of intellectuals. In addition, our written laws needs to be amended on the issue of witchcraft, of course, taking into account the solutions of advanced by the customary law which continues to help resolve various disputes in our rural areas and even in areas surrounding major towns. We also need to make efforts to facilitate the creation of a section or chamber in the level of high authority courts to handle all disputes related to the issue of witchcraft.

The recognition of soothsayers by the ministry of culture and arts, who according to some people are even capable of healing certain diseases, leads us to support the notion that we can not affirm something and contradict it at the same time.



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