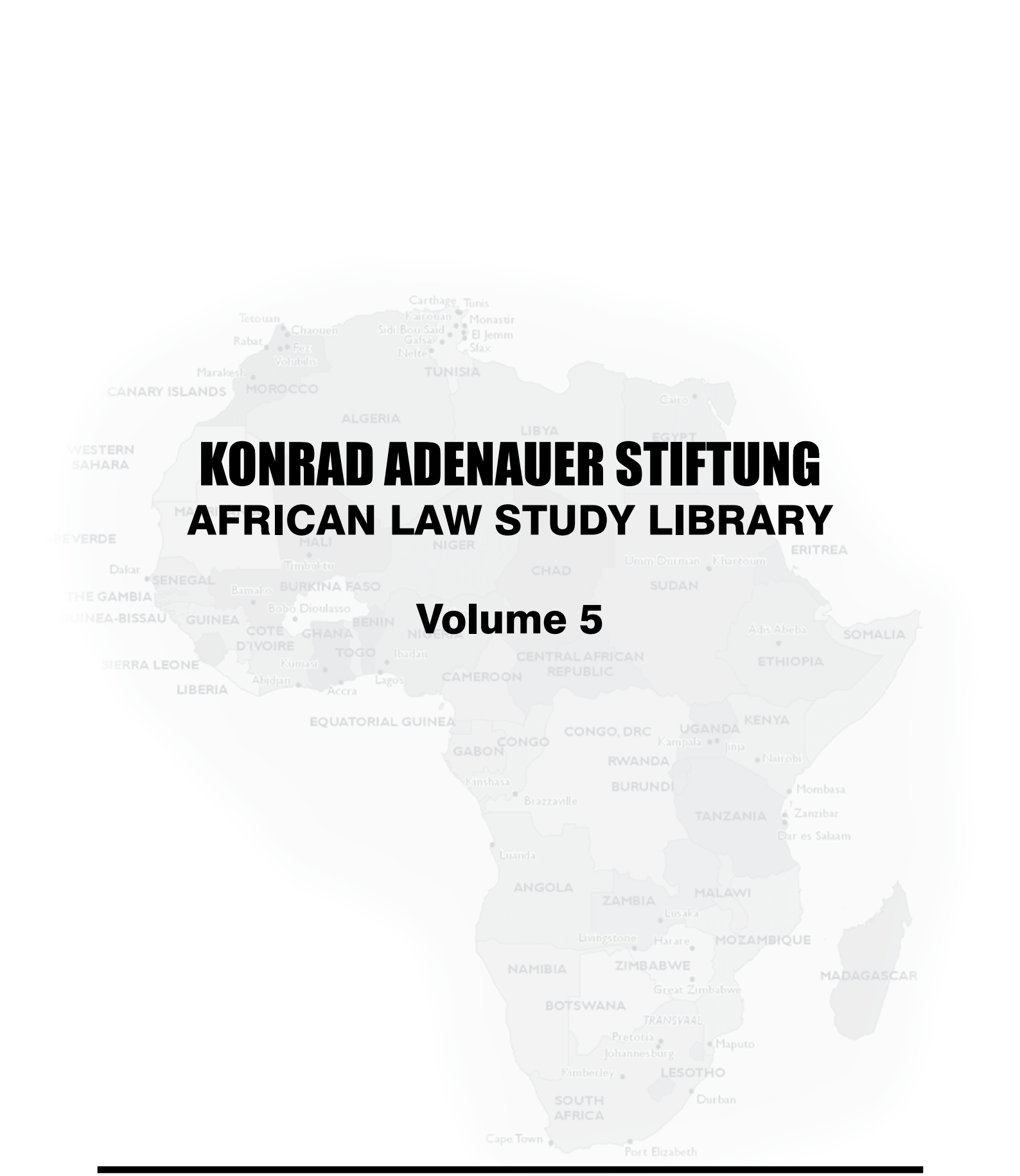

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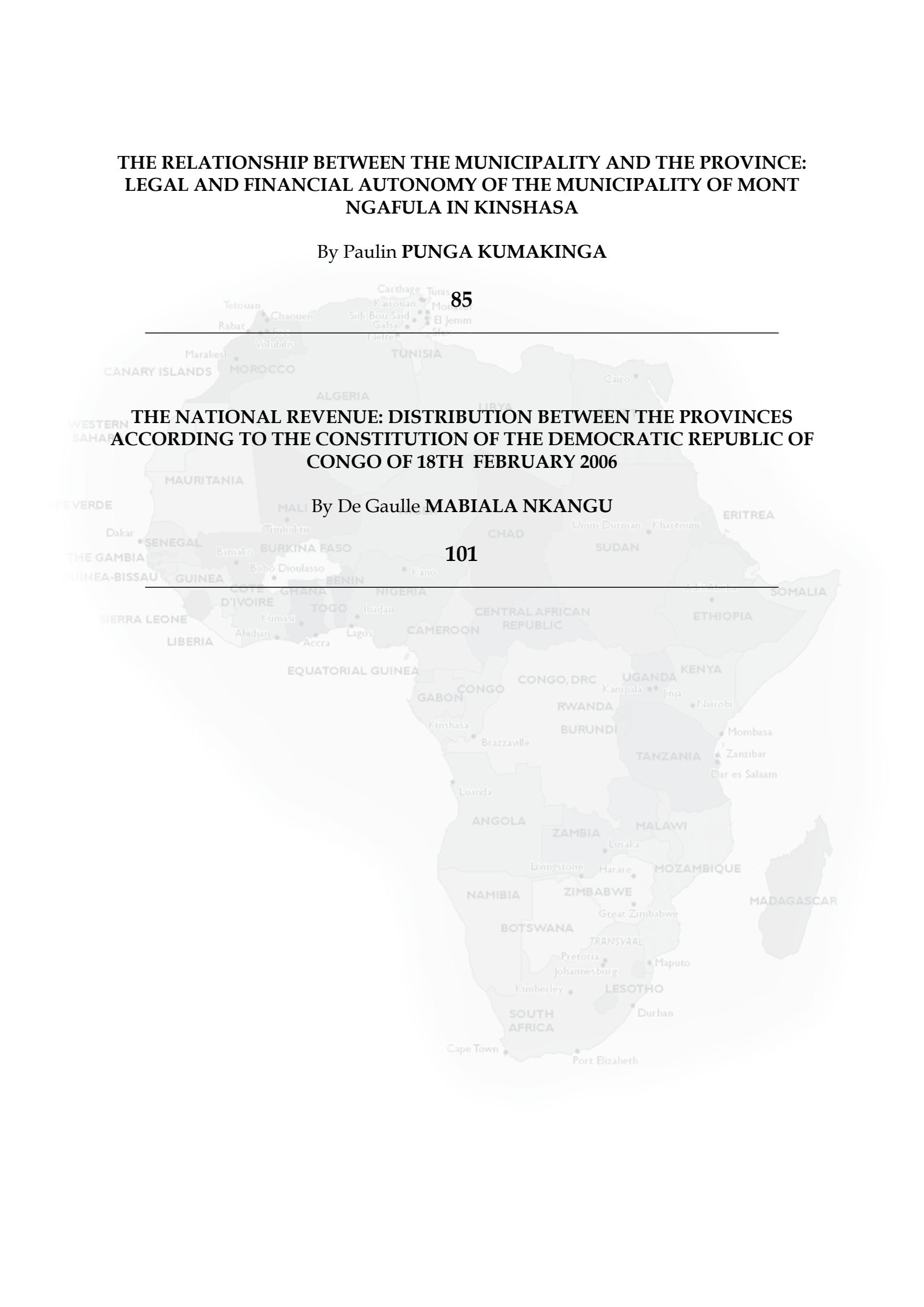

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VOLUME 5

FOREWORD

Pursuant to article 1 paragraph 1 of the Constitution of February 18, 2006, the Congolese constituent is the principle that" the Democratic Republic of Congo is, within its borders of June 30, 1960, a rule of law, independent, sovereign, united and indivisible, social, democratic and secular State „.

Unfortunately, this flame is sometimes choked by the Congolese intellectual who has difficulty acknowledging the authority of the law, trying instead to torpedo it by privileging the partisan interests. And, in this confusion, the jurists are often blamed and accused by public for using their esoteric knowledge to manipulate the texts of law according to their moods and interests. However, the rule of law is the one that refers to the law as the only and sole referent.

It is within this context that justified the organization of the seminar on the rule of law in the DRC for PHD students in law with a view to initiating them to questions related to the realization of the structures of the rule of law.

This volume of the African Law study Library is part of the documents produced and submitted by the participants in this seminar since 2008. It includes a series of the reflections produced by the team of the University of Kinshasa and focuses on the one hand on „regional integration" and on the other hand "the process of decentralization in the DRC „.

Integration certainly covers several areas, the most important being the political and economic integration, which are interrelated and mutually enriching. African countries have eventually realized this. Although the early years of the independence were dominated by the search for political integration through the OAU, since the end of the 1970s the continent has become more interested in the economic integration as material basis for political integration. Thus, three articles are dedicated to the position of the DRC in the different sub-regional economic integration zones, namely SADC, ECCAS and COMESA.

The issue of the judicial cooperation in criminal matters based on the ECCAS, COMESA and SADC treaties is thoroughly analyzed by Balingene Kahombo whose interest in the criminal matters aims at keeping the community spaces free from impunity for the criminals who would seek, due to territorial application of criminal law to hide behind national border barriers and behind the differences of the judicial systems of the different countries and their reluctance to cooperate between them, in order to escape territorial, personal or universal jurisdiction for their crimes.. Moreover, the author notes that the judicial cooperation in criminal matters consists of several aspects such as the harmonization of the substantive penal laws and mutual assistance in its major components, namely the extradition and police cooperation.

Joseph Cihunda Hengelela focuses on the integration of the Democratic Republic of Congo in the SADC and recalls that this country possesses the assets that allow it to take advantage of its integration in this zone, provided that the political leaders stimulate emulation of Congolese enterprising dynamism.

Similarly, Anne-Marie Nsaka Kabunda wonders how the DRC can accelerate its integration in the ECCAS and play its leading role in the sub-region.

Everything considered, the integration of the DRC in these different zones should make it possible to accelerate its economic development, which requires observance of the fundamental freedoms guaranteed both by the Cooperation treaties and by the national legislation. The same applies to the "rights-claims" recognized by the Constitution of February 18, 2006.

Yves-Junior Manzanza Lumingu reflects on the mechanisms of guaranteeing the right to strike in the Democratic Republic of Congo. He introduces strike across a across a diachronic approach, both clarifying its semantic scope, its history as well as its conditions of exercise in a context of collective labour relation,,or in that of the public service, prior to analyzing the different hypotheses supposed to contribute to securing this right in practice, as the responsibilities are distributed at several levels (the political and administrative authorities, the courts and tribunals and the professional organizations).

The last group of articles deal with the impact of the new structure of the State on the relationships between the municipality and the province/city with respect to the national revenue.

Paulin Punga Kumakinga examines the legal and financial autonomy of the municipality of Mont Ngafula vis-à-vis that of the City/Province of Kinshasa, and tries to explain the whole relationship that these two entities have or can have in their operations.

Finally, De Gaulle Mabiala Nkangu proceeds with an objective assessment of the implementation of decentralization in the Democratic Republic of Congo so as to ensure the compliance with the constitutional provisions thereto related, mainly those related to the distribution of the national revenue between the provinces.

PROF. DR. HARTMUT HAMANN **PROF. DR. JEAN-MICHEL KUMBU KI NGIMBI**

JUDICIAL COOPERATION IN CRIMINAL MATTERS BASED ON THE ECCAS, COMESA AND SADC TREATIES

By **BALINGENE KAHOMBO (*)**

INTRODUCTION

According to the official definition of Regional Economic Communities (RECs) by the African Union (AU)[1], the Economic Community of Central African States (ECCAS)[2], the Common Market of Eastern and Southern Africa (COMESA)[3] and the Southern Africa Development Community (SADC)[4], they all seem to be highly interested in the legal cooperation among member States in criminal matters.

The interest in criminal matters aims at keeping the community spaces free from impunity for the criminals who would seek, due to territorial application of criminal law[5], to hide behind national border barriers and behind the differences of the judicial systems of the different countries and their reluctance to cooperate between them, in order to escape territorial, personal or universal jurisdiction for their crimes. This is an issue that these communities have started looking at the end of the 20th century and at the beginning of the 21st century, with the adoption of the first international treaties governing the relationships between their Member States in this area.

In fact, judicial cooperation translates to the willingness of the State parties to collaborate by collectively taking advantage of their specific competences in order to achieve a common goal. It aims at reconciling the legislation and procedures of the different countries[6] as well

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1 See AU Assembly Decision. Dec.112 (VII) on the moratorium on the recognition of the Regional Economic Community, adopted by the Conference of the Union during its 7th ordinary session held in Banjul, Gambia, from 1st to 2nd July 2006. Under this Decision, the African Union has eight regional economic communities, namely: ECCAS, COMESA, SADC, EAC, IGAD, ECOWAS, the Community of Sahelian Saharian States (CEN-SAD) and the Union of the Arab Maghreb (UMA).

2 The treaty instituting ECCAS was adopted on 18 October 1983 in Libreville (Gabon), where its headquarters are located. It covers the central African region and comprises 10 member States: Angola, Burundi, Cameroon, Congo Brazzaville, Gabon, Equatorial Guinea, Central African Republic (CAR), DR Congo (DRC), Sao Tome and Principe as well as Chad.

3 The treaty instituting COMESA was concluded in Kampala (Uganda) on 5 November 1993. COMESA has its headquarters in Lusaka (Zambia) and covers two African regions: East and Southern Africa. It comprises 23 member countries: Angola, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Uganda, DRC, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tanzania, Zambia and Zimbabwe.

4 The treaty instituting SADC was adopted on 17 August 1992 in Windhoek (Namibia). SADC has its headquarters in Gaborone (Botswana) and covers Southern Africa. It regroups 15 member States: Angola, Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, DRC, Republic of South Africa (RSA), Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe.

5 Read HENZELIN (M.), *Le principe de l'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité (The Principle of Universality in International Criminal Law. Right and Obligation of States to Prosecute and Judge according to the Principle of Universality)*, Bruxelles, Bruylant, 2000, p.21. The author explains: «the prosecutions, trial and sentencing actually take place more than often and, safe in some exceptions, they occur within the borders of the State with affirmed jurisdiction».

6 NGAPA (T.), *La coopération judiciaire pénale dans la zone CEMAC (Penal Justice Cooperation in CEMAC Zone)*, Specialization diploma thesis on Community and Comparative Law, University of Dschang, Cameroon, 2008, in http://www.memoireonline.co, visited on 12 October 2009..

as their reciprocal commitment to implement them so as to guarantee that each of them can exercise its jurisdiction to investigate, prosecute, judge and enforce sentences, if need be, with the assistance of its partners so that no criminal can escape the severity of the law and justice. One can thus say that judicial cooperation in criminal matters includes several aspects: the harmonization of substantial penal legislations and the mutual judicial assistance in its major components, including extradition and police collaboration.

When considered within the ECCAS, COMESA and SADC framework, the issue of the judicial cooperation in criminal matters raises, in our opinion, two fundamental problems. First, it is the jurisdiction of these regional economic communities to deal with issues of such magnitude, whereas, merely by referring to the adjective e*conomic*, they rather seem to define themselves mainly by their economic suitability. If these questions cannot be considered as going beyond the constitutional framework of their respective jurisdictions due to the fact that they are international organizations according to article 2 of the Vienna Convention on the Law of Treaties[7] of 23rd May 1969 consequently governed by the principle of speciality[8] and implicit jurisdictions, as stated in the jurisprudence[9] of the International Court of Justice (ICJ), one can at least attempt to consider the relevance of the exercise of these powers. It is desirable to appreciate and comprehend the main reasons that led these communities to take interest in these eminently criminal issues.

This process presents a double interest. First of all, it should allow specifying the situation in which each of these three communities is empirically in terms of the efficient exercise of their respective penal jurisdictions. From the onset, it seems to us that it is not wise to think that all these communities exercise or have had to exercise these penal jurisdictions in the same way and with the same amplitude. There must inevitably be discrepancies among them since they cannot, as subjects of law, have the same priorities. Then, the other advantage is the consequence of what we have just said. It is the possibility of explaining the plausible reasons for these differences and to indicate the way the possible deficiencies of one of these communities are compensated in order to maintain within the community space, an environment where impunity is not accepted when crime has been committed by foreign citizens.

As for the second problem, it is related to how this judicial cooperation in criminal matters is technically organized. However, one cannot address this problem in all its dimensions since it appears to be extremely vast. It is notably related to the municipal criminal law, the international criminal law, human rights, as well as to the diplomatic law and practice.

Each of these dimensions can validly be part of a comprehensive study. Such is the case of the means of redress that are provided to the people who are subjected to the judicial cooperation between the member States of the communities, to the manner of settling disputes in case of one State's refusal to cooperate in accordance with the community legal instruments or the coordination of the cooperation mechanisms as defined by the communities along those linked to more representative organizations of the States, such as the International Organization of Criminal Intelligence (OIPC - Interpol). One neither knows whether the modes of cooperation that have been put in place are already in force between the State parties, nor do they know the level of their implementation in each of

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7 According to this article, international organization means «intergovernmental organization».

8 NGUYEN QUOC DIHN, PELLET (A.) and DAILLIER (P.), *Droit international public (Public International Law)*, Paris, LGDJ, 2002, p.602.

9 See CIJ, *Réparation des dommages subis au service des Nations unies (Repair of Damages occured under UN Service* , Advisory opinion of 11 April 1949.

the States. It is thus convenient to limit oneself to the consideration of the main aspects of the technical arrangements of this judicial cooperation in criminal cases, by following a comparative approach between the three selected communities. This concerns more precisely the standards underlying this cooperation, its types as well as the institutional channels through which it takes place.

Considering the above, it is better to structure this study in two parts:

I. The jurisdictions of the ECCAS, COMESA and SADC in the promotion of the judicial cooperation in criminal matters between the member States;
II. The technical organization of the judicial cooperation in criminal matters based on the ECCAS and SADC treaties.

I. THE JURISDICTIONS OF ECCAS, COMESA AND SADC IN THE PROMOTION OF JUDICIAL COOPERATION IN CRIMINAL MATTERS BETWEEN THEIR MEMBER STATES

An international organization, be it qualified as a regional economic community, is a creation of the States. The treaty on the basis of which it is instituted is of a bivalent nature[10]. It is both a multilateral convention governing the relationships between the organization and the member States and between the latter themselves, and the constitution of the organization, i.e. the legal act that determines its organization and operation.

It is in this constitutional aspect that the constitutive treaty determines the jurisdictions transferred by the member States to the organization and allocates them thereafter between its various main organs. It is the same for ECCAS, COMESA and SADC. But, considering their main objectives of economic integration, one must try to establish the political and legal basis of their additional jurisdiction in criminal matters, prior to considering the way each of the three communities actually exercises these rights for the promotion of judicial cooperation in criminal matters between their member states.

I.1. Political and Legal Basis of Penal Jurisdictions for the ECCAS, COMESA and SADC

Two reasons contribute to the legitimacy and legality of the penal jurisdictions of the ECCAS, COMESA and SADC. Their action in the area of penal cooperation between their member states justifies itself by their membership to the African integration system, which strongly advocates the eradication of impunity, and this through the conjunction to their advantage of the largest possible integration and cooperation jurisdictions within their constitutive treaties.

I.1.1. Common membership to the African integration system

Like all regional economic communities, ECCAS, COMESA and SADC are part of the «*African integration system*»[11]. They are presented as the pillars of continental integration[12], especially since they are the ones whose responsibility is to move the process forward before joining their forces for the concretization of real continental African economic community. It goes without saying that they are at the centre of the African integration system.

[10] DUPUY (P.-M.), *Droit international public (Public International Law)*, Paris, Dalloz, 1998, pp.138-139.
[11] Useful reading : NDESHYO RURIHOSE (O.), *Le système d'intégration africaine (The African Integration System)*,, Kinshasa, PUZ, 1984, 182p.
[12] UNECA, State of regional integration in Africa, Addis-Ababa, CEA, 2004, p.41.

The Constitutive Treaty of the African Union also places them under its normative dependency when it states in its article 3 (i), that one of the objectives of the Union is that of «*coordinating and harmonizing policies between the existing and future regional economic communities with a view to progressively achieve the objectives of the Union*». More specific is the Protocol on Peace and Security Council of the Union. It clearly states under its article 16 (b), that the ratio *legis* of coordination and harmonization policies of the regional economic communities, although solely in the area of peace and security. However, this is not far from the fight against impunity, which is part and parcel of the global peace approach, for the latter cannot be achieved when impunity prevails. In fact, the purpose of this coordination is for the activities of the regional economic communities to be «*in compliance with the objectives and principles of the Union*».

However, the Constitutive Treaty[13] of the Union underlines that the objective of integration can only be achieved if the conditions for a sustainable peace and security are met. Among these conditions are the observance of human rights and rulr of law, as well as the fight against impunity, which have been made as the operational principles for the Union. It follows that ECCAS, COMESA and SADC do not negate their rationale if they deal with issues of penal cooperation between their member States. On the contrary, they contribute at their level to the dynamics of the system.

All the more so, these three communities are integration organizations or, better still, they are unification organizations. This integration should be done according to the Bela Belassa's theoretical model[14] and should consist «*in unifying …the markets in such a way that they can be operated according to a number of common institutional rules allowing free movement of capital,, people and goods from the different member countries of the unified market…* »[15]. In these circumstances, the opening of borders entails the risk of seeing criminals move freely if criminal law remains confined within the national borders of each State. Promoting judicial cooperation in criminal matters is therefore the necessary logic for the planned free movement[16] within these communities. This is a requirement for the conciliation between peace, security and the integration objective. However, such jurisdictions are still to be sought for in the constitutive treaties of these communities.

I.1.2. Joining the integration and promotion competences of penal cooperation under the constitutive treaties of the communities

There is no contradiction but complementarity between an integration organization and a cooperation or coordination one. In other words, a unifying organization is necessarily also one for coordination[17] ; however, the contrary is not true. That is why, besides their integration powers, ECCAS, COMESA and SADC have jurisdiction for coordinating the relationships between their member States, including in the penal area.

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[13] See paragraph 9 of the Preamble.

[14] The author is the reference theorist who studied the model of economic integration in five classified stages: free trade area, customs union, common market, economic community, economic and political union. Free movement appears already as the component of integration during the common market stage. See BELA BALASSA, *Theory of economic integration*, Homewood Illinois, Richard Irwing, 1961.

[15] NTUMBA LUABA LUMU, «Quel modèle d'intégration pour l'Afrique ?» («Which Integration Model for Africa?»), *in Zaïre-Afrique*, Kinshasa, n°158, October 1981, p.476.

[16] It is planned for since none of the three communities under consideration has not yet managed to implement free movement from one to another member State. Borders are still closed in spite of the existence of some judicial community instruments which are advocating the contrary. To this effect, read COMMISSION DE L'UNION AFRICAINE, *Libre circulation des personnes, des biens, des services et des capitaux (*African Union Commission, *Free movement of Persons, Goods, Services and Capital)*, Report of the Department of Economics, April 2008, 49p.

[17] DIEZ DE VELASCO VALLEJO (M.), *Les organisations internationales (International Organizations)*, Paris, Economia, 2002, p.21.

In fact, the constitutive treaties of these regional economic communities confer to them the general powers in all the sectors of integration and cooperation. Article 3 of the Treaty instituting the ECCAS states precisely the objectives for which this Community has been created, including «*any other activities aimed at achieving the community objectives that members States can undertake jointly*». This provision is confirmed in article 68 of the Treaty, which extends the jurisdiction to harmonize member States » policies to «*all the areas where harmonization could be considered necessary or advisable for the effective and harmonious operation and development of the Community and for the implementation of the provisions of the current Treaty*». Articles 3(h) and 165 of the Treaty instituting COMESA acknowledge the same wide jurisdictions in the area of cooperation in a wording almost identical to that used in the ECCAS Treaty. However, it also states clearly that «*Member States commit themselves to cooperate in the area of prevention, investigation and suppression of customs offences*»[18].

As for SADC, it has been given such jurisdictions according to articles 21 and 22 of its constitutive Treaty. Article 21 commits members States to cooperate in all the relevant areas in order to promote development, regional integration and cooperation, whereas article 22 authorizes member States to sign, if need be, protocols of the constitutive Treaty in each of the areas of regional cooperation, and this in the framework of the Community. The Protocol related to legal issues, as adopted on 7th August 2000 in Windhoek (Namibia) has even institutionalized the promotion of cooperation in criminal matters[19], as is indicated in the objectives of the said Protocol stated in its article 2.

The Protocol puts in place a tripartite technical structure: the Council of Ministers of Justice, the Committee of Experts in legal matters and the Legal Sector Coordination Unit. It is incumbent upon the latter to, *inter alia*; facilitate the adoption of appropriate cooperation policies in criminal matters between SADC member States, to promote the harmonization of legislative and administrative standards in criminal matters, as well as the adoption of mutual assistance agreements in the same area.

At the level of operational principles, like the African Union, each community is based on the principle of observance of human rights and rule of law. Moreover, these principles are clearly stated in the additional texts mainly adopted by ECCAS and SAD in the area of peace and security. The Protocol related to Peace and Security Council of Central Africa (COPAX), as adopted on 24th February 2000 in Malabo (Equatorial Guinea), provides more and more that COPAX[20] «*ensures the strengthening of cooperation in the sectors of… the fight against transborder crimes, international terrorism,…illegal arms trafficking,…and all the other related elements* »[21].

As for the Protocol on Police, Defence and Security within SADC, as adopted in Blantyre (Malawi) on 14th August 2001, it creates an Organ in charge of Police, Defence and Security (OPDS) with the objectives of developing close collaboration between police forces and security services of State parties in order to fight crime along the borders[22]. The COPAX Protocol adds the creation of a Defence Committee composed particularly of Chiefs of Staff of member States' armed forces, their chiefs of police and experts from the Ministry of the

[18] Art. 66, §1, of the constitutive Treaty of COMESA.

[19] Let us note that this Protocol also applies in extra penal areas such as civil matters.

[20] Contrary to common belief, le COPAX is not an ECCAS body; it is a dialogue platform for peace and security that had been put in place within the community. It is composed of several bodies, which are: the Conference of Heads of State and Government, the Council of Ministers, the defiance and security Commission, the General Secretariat and any other body or authority that the Conference of heads of State and Government could create.

[21] See its article 6, a).

[22] See art.3, i) of this Protocol.

Internal of security[23], the mission of which is, *inter alia*, «*to examine the strategy for the fight against crime in all its forms*»[24] at the regional level. It periodically submits the evaluation report on the fight against organised crimes and on regional security cooperation[25] to the Council of Ministers or, if need be, to Summit of Heads of State.

In any case, it is the Summit of Heads of State and Government that is considered to be the supreme decision-making body in each of these communities. It is for it to translate the willingness of member States to harmonize their policies in the different areas of community jurisdiction into legal cooperation instruments. Nevertheless, one can wonder whether each community already has these legal cooperation instruments in criminal matters so that it can make a report on the extent of implementation of the jurisdictions that the constitutive treaties allow them in this area.

I.2. Exercising the Respective Jurisdictions of ECCAS, COMESA and SADC in the Area of the Promotion of the Penal Cooperation

There are two observations to be made at this point: on the one hand, only the ECCAS and SADC have allowed the conclusion within their framework of instruments of judicial cooperation in criminal matters between their member States; on the other hand, COMESA and ECCAS are lagging behind in this regard in relation to the SADC.

I.2.1. The judicial instruments of judicial cooperation in criminal matters adopted in the framework of SADC and ECCAS

Three important protocols have been concluded within the framework of SADC. These are:

a) The Anti Corruption Protocol, adopted on 14th August 2001 in Blantyre in Malawi: This protocol criminalizes clear acts of corruption and provides modalities for judicial cooperation in criminal matters so as to put to an end this practice. This was concluded before the adoption of the African Union Convention on the Prevention and the Fight Against Corruption of 11th July 2003 in Maputo (Mozambique), the vocation of which is to link SADC member States at the continental level[26] ;
b) The Extradition Protocol, adopted on 3rd October 2002 in Luanda in Angola. This is a general treaty of extradition between SADC member States ;
c) The Mutual Legal Assistance Protocol in Criminal Matters was adopted in Luanda, Angola, at the same time as that on extradition.

As for ECCAS, the only instrument we know of[27], which gives some provisions in relation to judicial cooperation in criminal matters, is the Multilateral Regional Cooperation Agreement on the Fight against Human Trafficking, particularly the trafficking of women and children in West and Central Africa[28]. As is indicated in its designation, this agreement was concluded under the aegis of ECCAS and ECOWAS. Like SADC, ECCAS has no protocol either on the fight against international terrorism, nor has it against mercenary terrorism, and even none

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[23] Art.13 of the COPAX Protocol.
[24] *Ibidem*.
[25] Another analysis may be made on the States' interaction in terms of their commitments under two judicial instruments in order to see whether these are complementary and where there are contradictions that could be corrected.
[26] However, it seems like there is a Convention on judicial cooperation and assistance between ECCAS member States, which was allegedly in Brazzaville (Republic of Congo) on 18 March 2006, following the meeting of Ministers of Foreign Affairs, Justice and Immigration of ECCAS member States. However, this Convention was nowhere to be found and we cannot therefore confirm its existence.
[27] This Agreement was adopted in Abuja, on 6 July 2006.
[28] See chapter VIII of the African charter on democracy, elections and governance, adopted on 30 January 2007 in Addis-Ababa, Ethiopia.

against anti-constitutional change of government, which is considered as an international crime by the African Union[29]. On the other hand, contrary to SADC, ECCAS has no protocol either on the fight against corruption, nor has it in relation to extradition among its member States. Like COMESA, it is undoubtedly lagging behind SADC. One would want to know the reasons for this delay.

I.2.2. The delay of ECCAS and COMESA in Comparison to SADC in the Promotion of Judicial Cooperation in Criminal Matters between their Member States

There are at least three main reasons why ECCAS productivity is slow in the promotion of judicial cooperation in criminal matters between its members.

The first reason is historical. In fact, ECCAS was created on 18th October 1983 by the members of the Customs and Economic Union of Central Africa (UDEAC)[30], which later became the Economic and Monetary Community of Central Africa (CEMAC) since the adoption of the Treaty of 16th March 1994, and the members of the Economic Community of Countries of the Great Lakes (CEPGL)[31], namely Burundi, Rwanda, the then Zaire[32] and Sao Tome and Principe. As for Angola, it had kept an observer role until 1999, when it became a full member[33]. It follows that five of the eleven ECCAS member States are not members of CEMAC. It also follows that, contrary to popular belief[34], both groups of countries did not share the interest in common integration in the framework of ECCAS, whereas Rwanda withdrew from the latter in 2006.

Moreover, the CEMAC member States preferred to develop their judicial cooperation approach in criminal matters in the framework of their own Community. This explains the paradox existing between the deficiency of cooperation instruments in criminal matters on the side of ECCAS, and the relatively too many analogue instruments concluded in the framework of CEMAC. Such is the case for the Extradition Agreement between CEMAC members States, or the Judicial Cooperation Agreement both adopted in Brazzaville (Republic of Congo) on 28th January 2004 between these States. Yet the Treaty instituting ECCAS came into force in 1985, whereas the one creating CEMAC only did so from 25th June 1999[35].

In short, the real cause of the ECCAS delay is therefore the lack of political will of the member States to cooperate efficiently as an institution. It is, in our opinion, the same political will that is lacking at COMESA.

Perhaps another reason for the delay is the long period of hibernation that ECCAS has experienced from 1992 to 1998, due especially to the effects of the crisis in the Great Lakes

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29 Created by the Treaty of Brazzaville on 8 December 1964.

30 Created by the Convention of Gisenyi (Rwanda) of 20 September 1976.

31 Currently democratic Republic of Congo.

32 MAVUNGU MVUMBI-di-NGOMA, *Les relations interafricaines (The Inter-African Relations)*, Paris, Centre des Hautes Etudes sur l'Afrique et l'Asie moderne, 1990, p.73.

33 Like in CABINET S.A.I., *Contraintes aux échanges commerciaux intra ECCAS (Constraints to Trade intra ECCAS)*, final report of the study, October 2006 p.14.

34 *Ibidem*.

35 *Idem*, p.15. See also GOMA (L.S.), *Allocution prononcée en qualité de Secrétaire général de la ECCAS à l'occasion de l'ouverture de la 11ème Conférence des Chefs d'Etat et de Gouvernement (Speech given as Secretary General of ECCAS to mark the Opening of the 11th Conference of Heads of State and Government)*, Brazzaville, 16 January 2004.

Region[36]. When it was re-launched after five years of paralysis, emphasis was placed on the adoption of additional instruments for the operations of the Community rather than on the definition of the rules of the game in relation to penal cooperation between the member States. This goes to explain the simultaneous adoption in 2000 of two important texts: the above-mentioned COPAX Protocol and the pact of mutual assistance between ECCAS member States.

A last reason is the putting in place of a specific organization with the specific mandate of promoting police cooperation between member States through the Central African Police Chiefs Committee (CCPAC), which was instituted by a resolution adopted during a meeting between the Chiefs of Police of Central Africa, held from 9 to 11 April 1997 in Brazzaville[37]. Its Constitution was adopted in Yaoundé during a meeting held from 12 to 19 June 2000. It has to be noted that this organization was created with the support of OIPC-Interpol. The same goes for the other Committee of Chiefs of Police, i.e. the West African Police Chiefs Committee (CCPAO), the East African Police Chiefs Cooperation Organization (EAPCCO) and the Southern African Police Chiefs Cooperation Organization (SARPCCO).

That is why their secretariats are ensured by sections within the sub-regional Offices of OIPC-Interpol: that of Yaoundé for CCPAC, the one in Abidjan for CCPAO, that of Nairobi for EAPCCO and the Office in Harare for SARPCCO. However well installed these organizations are in the different regions of Africa, they do not have the same impact on their member States. It is the CCPAC that appears to be more productive in terms of the conventions so far adopted. For instance, two major judicial instruments have been concluded: the Criminal Intelligence Cooperation Agreement between the Central African States on 29th April 1999 in Yaoundé, Cameroon, and the Convention on the Fight against Terrorism in Central Africa on 27th May 2004 in Libreville, Gabon. In addition, there is the Convention on the creation of a training centre specialized in criminal investigation in Central Africa, which was adopted in Malabo on 8th May 2003. All these agreements have been adopted by CEMAC[38] through normal channels[39] as conventions integrated in the judicial system of the Community.

Thus, one could say that whilst ECCAS was busy defining the additional judicial bases for its functioning, judicial cooperation in criminal matters among its member States was being defined somewhere else. Although ECCA member countries like Burundi and Angola do not take part in this CCPAC process, it remains true that all the agreements concluded to date are open to their membership[40]. That is why it is not advisable to refer to the conventions concluded under the aegis of CCPAC when talking about judicial cooperation in criminal matters, because they possibly concern all the member States of the Community. Therefore, it is normal to take this remark into account during the next review of the technical organization of this cooperation.

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36 See *www.interpol.int/public/region/africa/committees/CAPCC.asp* , visited on 6 October 2009.

37 This Community allowed CAPCC to join in as a specialist agency. Yet some States Police Chiefs are represented in CAPCC are not members of CEMAC, i.e. DRC and Sao Tome and Principe!

38 See Council of Ministers' Regulation n°4/CEMAC-069-CM-04 of 21 July 2000 on the adoption of the cooperation Agreement in criminal intelligence matters between central African member States; Council of Ministers' regulation n°08/05-UEAC-057-CM-13 of 2 February 2005 on the adoption of the antiterrorist Convention for central Africa; Council of Ministers' regulation n°07/05-UEAC-057-CM-13 of 5 February 2005 on the adoption of the Convention creating a Specialized Training Centre for criminal Investigation.

39 Even the paragraph on membership contained in the Agreement on cooperation in central Africa in matters related to criminal intelligence (article 22) can be criticized since it says that any OIPC-Interpol member that will express the need to become member can do so. It is clear that the universal vocation as is shown in this paragraph on openness to membership is antinomical to the spirit of the Agreement, which concerns a priori the States of central Africa.

40 Art.4, e) from the Protocol under consideration.

II. THE TECHNICAL ORGANIZATION OF THE JUDICIARY COOPERATION IN CRIMINAL MATTERS BASED ON ECCAS AND SADC TREATIES

It should be noted that the objective of this part of our study does not consist of scrutinizing interstate penal cooperation as is organized in the different relevant judicial instruments which we have talked about earlier. We would only like to draw the main lines and reserve the possibility of elaborating on them later on, during more specific reflections, analyzing in depth each institution per community. That is why we will limit ourselves to determining generally, and in turn, the types of this cooperation and its implementation modalities.

II.1. The Instituted Types of Judicial Cooperation in Criminal Matters at ECCAS and SADC

The fight against criminal impunity in the ECCAS and SADC spaces is carried out through two main methods: the relative harmonization of member States criminal legislations and mutual judiciary assistance between them in both extradition and regional police collaboration.

II.1.1. The Relative Harmonization of Member States Criminal Legislations

As indicated in the title of this paragraph, ECCAS and SADC do not organize the harmonization of their member States criminal legislations regarding any sorts of criminal offences. It is obviously a relative harmonization, restricted to some particularly serious acts pertaining to the concept of organized crime. Previous developments therefore allow us to identify three types of criminal acts: corruption prohibited by the 2001 SADC Protocol, terrorism criminalized by the 2004 CCPAC Convention andHuman Trafficking, in particular women and children trafficking, prohibited by the 2006 ECOWAS and ECCAS multilateral Agreement.

A. Corruption

The SADC Anti-corruption Protocol defines through enumeration the acts constituting corruption in its articles 3 and 6. Article 3 applies to anyone, nationals or foreigners, national civil servants or private persons, whereas Article 6 refers to acts of corruption in the right of an agent of a foreign State. There is no need explaining what each of these acts is about. In the contrary, what is important is to indicate which are the main commitments signed by the State parties under this Protocol.

It is first the obligation to take all the necessary actions, including judicial ones, to prevent any acts of corruption. What is very positive is that each State party committed itself to maintain and consolidate « *the systems of protection of individuals who, out of good faith, report acts of corruption* »[41] and « *the laws that punish people who make false and vicious representations against innocent people* »[42]. This last commitment risks leading to abuses, thus discouraging justice lovers to report corruption. The safety valve that consists in proving that such whistle blowing is malicious, i.e. it has been done with the intention to harm others, does not seem reassuring considering the lack of independence of the judiciary in many State parties, which can clear a real guilty person solely because they want the whistleblower to fall into the net. In this state of affairs, this commitment seems more and more insufficient to us.

[41] Cf. art.7 of the same Protocol.
[42] See art.5 of the same Protocol.

State parties should have been encouraged to establish a remuneration system for people who stand out because of their integrity.

Secondly, State parties have made the commitment to harmonize their national legislations by adopting « *legislative and other measures required to confer, in virtue of [their] national laws, the criminal nature to acts of corruption aimed at in article 3*»[43]. On this subject, one can wonder why acts of corruption concerning an agent of foreign State, as stated in the above-mentioned article 6 of the Anti-corruption Protocol, were excluded from the scope of the criminal measures thus advocated for! As a corollary, the State parties committed themselves to adopt measures that appeared necessary in order to allow, on the one hand, the confiscation of the products of offences recognized as such in the said Protocol, or goods the value of which corresponds to that of the products and, on the other hand, to track back, freeze or seize the products, goods and instruments for a possible confiscation.

Finally, concerning the power to prosecute[44], each State party committed itself to adopt all the necessary measures to establish its jurisdiction regarding the offences that it has established as such in virtue of the Protocol when:

a) The offence in question is committed on its territory, we could even add, whatever the nationality of its author;
b) The offence is committed abroad by one of its nationals (case of active personal jurisdiction), or by someone (offence committed abroad by a foreigner) who usually lives within its territory ; and
c) The presumed author of the offence is present within its territory and it does not extradite him/her to another country.

The implementation of these rules of jurisdiction is in place without prejudice to any criminal jurisdiction exercised by a State party in compliance with its national law and under reservation of the *non bis in idem* principle.

B. Terrorism

The necessity to develop an anti-terrorism policy in Africa results from constraints at a global scale especially in the context of the September 11, 2001 attack in the United States of America. It is for this reason that the adoption of the Anti-terrorist Convention in Central Africa was realized in 2004. In general, this Convention expressly makes acts of terrorism a criminal offence. In its article 2, it states clearly that what is meant by act of terrorism as follows:

a) any act or threat in violation of the criminal laws of the state party likely to endanger the life, the physical integrity, the freedom of an individual or group of individuals, that causes or can cause damage to private or public property, to the natural resources, to the environment or to the cultural heritage, and committed with the intention to:
    i) intimidate, provoke a situation of terror, force, exert pressure or bring any government, body, institution, population or group of the latter, to engage in any initiative or to abstain from it, adopt, relinquish any particular position or act according to certain principles ; or
    ii) disrupt the normal functioning of the public services, the delivery of

[43] We say «African Union Convention» although this Convention was adopted in the framework of the OAU. The African Union replaced the OAU and therefore inherited all the conventions. Let us also say that this African Union Convention has already been part of a protocol: the Protocol to the African Union Convention on the prevention and fight against terrorism, adopted in Addis-Ababa on 8th July 2004.

[44] Art.3, 5), of the said Convention.

essential services to the populations or to create a crisis situation among the populations; or

iii) create a general insurrection in a State party;

b) Any promotion, funding, contribution, order, assistance, incitation, encouragement, attempt, threat, conspiracy, organization or supply of equipment to any person with the intention to commit any act mentioned in paragraph a (i) to (iii).

According to the above-mentioned Convention, State parties committed themselves to:

a) prevent by all means the plotting, funding, commission of terrorist acts on their territory, or the establishment of organizations referred to as terrorist by the United Nations;
b) ban from their territories any form of propaganda or apology of crime in general and that of terrorism in particular, and any support to terrorist organizations as mentioned in the preceding paragraph; and
c) Apprehend and bring to their courts of competent jurisdiction the people who have committed or attempted to commit offences of a terrorist nature as defined above.

It appears from what has been stated above that the Anti-terrorist Convention in Central Africa has virtually recaptured the definition of terrorism as is in the African Union Convention on the Prevention and Fight against Terrorism of 14th July 1999[45]. Nevertheless, it seems less demanding on State parties than that of the African Union. Whilst the African Union Convention commits the States that have ratified it to «*review their national legislation and criminalize terrorist acts as defined in the present Convention, and penalize these acts according to their seriousness*»[46], the Antiterrorist Convention in Central Africa requires the State parties only to «*adapt, for the States that have not done so yet, the internal legislations in the current context on international criminality, taking into account the terrorist phenomenon of which the risks of potential spread are more and more present in Africa*»[47].

Thus, this provision leaves a lot to the judgment of the addressees on the acts to be outlawed through criminal law. Apparently, it is the State party that freely selects these acts, whilst the other acts can be fought against through different measures. This situation is regrettable, especially where the State in question has not complied with the African Union Convention. In this case, the differences in the legislations might be inevitable and are of a nature to jeopardize the fight against State parties' terrorism impunity. In our point of view, it therefore would have been better to purely and simply adopt or improve the wording as is in the Convention of the pan African continental organization, rather than water down the relevant provisions of that Convention.

C. Human Traficking, particularly women and children trafficking

Clarification should be given right from the beginning. Indeed, the concept of child means, according to the ECOWAS-CEEAC multilateral agreement,, any human being under 18 years of age.[48]. This Agreement somehow considers women and children as most affected victims of human trafficking. Article 1, a), of the above-mentioned Agreement clearly states that the expression «*human trafficking*» means «*the 'act of recruiting, transporting, transferring, accommodating, receiving people by means* ***of*** *threat or force or other sorts of constraint, by abduction,*

[45] His definition is in compliance with article 1 of the Convention on children rights of 20th November 1989.
[46] Read art.10, a), c) and i) of the ECOWAS-ECCAS Agreement.
[47] Both the Convention and its Protocol have been adopted in 2000.
[48] Art.11, e), of the ECOWAS-ECCAS Agreement.

fraud, deception, misuse of authority or exploitation of vulnerability, or by offering or accepting payments or benefits in order to obtain the consent of a person who has authority on another ***for*** *exploitation, signifying to the minimum, the exploitation of prostitution of another person or other forms of sexual exploitation, labour or forced employment, slavery or analogue practices, servitude or organs retrieval*».

It is against this offence that the contracting parties of this Agreement made the commitment to fight by, *inter alia*[49] :

a) taking the necessary measures to prevent and detect human trafficking, particularly that of women and children;
b) enacting a national law against human trafficking with specific provisions on the protection of the child victim, in accordance with the United Nations Convention against Organized Translational Crime and the Protocol aimed at preventing, crack down and punish human trafficking[50], particularly that of women and children; and
c) Criminalizing and repressing any action encouraging human trafficking.

Similarly, the State of origin, i.e. the country where a victim of human trafficking is from, or where s/he had permanent stay, has committed itself to prosecute and punish the traffickers and their accomplices[51]. The same goes for the State of destination, i.e. the country where the victim of human trafficking has been identified and rescued, and State of transit, i.e. the country through which the victim travels on his/her way to the final destination[52].

Finally, it is these three categories of offences that should have been covered by the mutual judicial assistance in criminal matters between the member States of ECCAS and SADC respectively. However, we know that other more inclusive and global treaties dealing with this matter, exist within these communities. It is therefore convenient to analyze the global consistency of this mutual judicial assistance in all its dimensions.

II.1.2. Mutual Judicial Assistance in Criminal Matters: Extradition and Regional Judicial and Police Collaboration

The mutual judicial assistance is designed as a component of judicial cooperation. It is defined as a set of acts that a judicial authority of a State (requesting State) would like the judicial authorities of another State (requested State) to accomplish with a view to a criminal trial[53]. In other words, these are «*mechanisms whereby the States receive and provide assistance in order to gather evidence through investigation for criminal prosecutions*»[54]. Classically, this mutual assistance was requested through rogatory commissions, but it henceforth encompasses all types of collaboration of the police forces of the different countries. It can also be said that mutual assistance is even extended to a further stage, that of the trial, for the process of criminal convictions.

Having said that, we now have to consider the regional judicial and police collaboration as well as another related institution, i.e. extradition.

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49 Read art.12, d), as well as art.13, c) of the same Agreement.
50 Both the Convention and its Protocol have been adopted in 2000.
51 Art.11, e), of the ECOWAS-ECCAS Agreement.
52 Read art.12, d), as well as art.13, c) of the same Agreement.
53 DELMAS-MARTY (M.), *Criminalité économique et atteinte à la dignité de la personne (Economic Crime and Offence against the Human Dignity)*, Paris, Edition de la Maison des sciences de l'homme, 1996, p.65, quoted by NGAPA (T.), *op.cit*
54 MACERA (B.-F.), «Procédure d'extradition et "actes détachables" en droit administratif français» ("Extradition Procedures and" Dissociable Acts " in French Administrative Law", *in Revue de droit africain*, n°7, July 1998, pp.244-245.

A. Extradition

Extradition is a procedure that has a diplomatic, administrative and judicial dimension[55], at the same time. It is the oldest form of international judicial cooperation[56]. In theory, it is defined as the act through which the Government of a State (requested State) agrees or disagrees to return a person to the country that has made the request (requesting State), generally on basis of a treaty so that that person can be tried[57], or sentenced there[58].

In the ECCAS and SADC framework, the extradition procedure is provided in the different treaties the objective of which is to prevent and repress the particularly serious offences that we have dealt with previously. To that list should be added the SADC Protocol on Extradition.

Indeed, extradition within the framework of ECCAS is provided for under the common obligations of the parties to the ECOWAS-ECCAS Multilateral Agreement, in article 10(j), which commits the latter to «*extradite at the request of the contracting parties the traffickers and their accomplices*» guilty of human trafficking. This provision is substantiated by article 14(n), regarding the mutual judicial assistance, in that it prescribes that the assistance that the State parties have committed to provide to each other includes to the minimum *inter alia*, «*the apprehension and detention of any person involved in an offence in order for them to be extradited*».

Unfortunately, no other condition of application of this procedure is stipulated in the Agreement. More so, the latter remains silent on the possibility of extraditing people with a view to their criminal sentencing. All this looks like potential conflicts that can emerge in the implementation of such comprehensive provisions. Is the requested State, for instance, obliged to extradite when it expresses confidence to have jurisdiction to prosecute? What would happen in case of aggregation of extradition requests from the contracting Parties? What about re-extradition? This is how this Agreement can prove inefficient if the extradition mechanism is not organized through a more precise new agreement between the ECCAS member States. The situation may thus become complicated if the State in question is party to no other relevant treaty that would commit it in respect of the requesting State.

Concerning the crime of terrorism, the 2004 CCPAC Convention is not enough. It certainly submits the implementation of extradition to the provisions contained in the CEMAC Convention on Extradition, or to all the other agreements to which both the requesting and requested States are parties[59]. As for the first submission, CEMAC non-member States are not concerned. One may then wonder if they can prescribe extradition according to whichever treaty, especially when one thinks that it might be difficult to prove the second submission. That is why, as was previously suggested, a general treaty on extradition is long overdue for all the Central African States or, better still, for the ECCAS members.

Furthermore, the Anti-terrorist Convention in Central Africa brought in an innovation by introducing a procedure close to extradition in the interstate relationships: the police to

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[55] POUTIERS (M.), «L'extradition des auteurs d'infractions internationales» ("The Extradition of Perpetrators of International Crimes", in ASCENSIO (H.), DECAUX (E.) et PELLET (A.), (s/d), *Droit international pénal (International Criminal Law)*, Paris, Editions A. PEDONE, 2000, p.933. The author says the extradition was traced back from the ancient Egypt, in Karnack, where the kadesh Peace Treaty, concluded in 1269 BC between pharaoh Ramses II and Hatussi III, prince of the Hittites, was found engraved in the wall.

[56] MACERA (B.-F.), *op.cit.*, p.243.

[57] This addition stems from NYABIRUNGU Mwene SONGA, *Traité de droit pénal général congolais (Treatise of Congolese Criminal Law)*, Kinshasa, Editions Droit et Société, 2007, p.136.

[58] See art.4, 4), of the CAPCC Convention of 2004.

[59] Art.4, 5), of the same Convention.

police surrender[60]. This procedure was already stated in the Cooperation Agreement on Criminal Intelligence between the Central African States, under article 12. This article allows it on at least two conditions:

a) the person to be surrendered must have the nationality of the requesting State ;
b) The surrender must be done with the permission of the competent judicial authorities of the requested State.

Article 4(5), of the CCPAC Convention of 2004 has confirmed beyond any question the two preceding conditions by providing that the police to police surrender must be done in accordance with the above-mentioned cooperation agreement on criminal intelligence. However, problems remain as to its coexistence with the extradition procedure, since the two treaties in question do not provide the manner in which the judicial authorities should allow the police to police surrender to go ahead. Philippe Keubou[61] is of the opinion that the requirement for the agreement of the competent judicial authorities of the requested State legitimizes a return to the extradition procedure, provided that this go-ahead should be given arbitrarily, without observance of human rights, including the right of defence.

In any case, although the modalities of its implementation is not clear, the procedure of the police to police surrender seems to be based on the search for expeditious judicial assistance between the contracting Parties, since extradition can be delayed by a long diplomatic or even administrative procedure. The two institutions are therefore not identical. The police to police surrender seems rather overriding ordinary rules of law. It is therefore incumbent to each State party to promulgate its implementation measures in its national law, as is generally done for extradition so as to render this exceptional procedure compatible with the requirements of the rights of defence.

Extradition is addressed in details within the framework of SADC, as opposed to that of ECCAS. The Anti-corruption Protocol does so in its article 9 and looks like a special legal material in relation to the Extradition Protocol. But this is not the case because the latter provides that: «*The provisions of any treaty or bilateral agreement governing extradition between two given State parties will be complementary to the provisions of this Protocol and will be interpreted and implemented in compliance with this Protocol. In case of contradiction, the provisions of this Protocol will prevail*»[62].

Moreover, article 9 the issue of which seems to subordinate the implementation of the extradition provisions for acts of corruption to the existence of another specific agreement on extradition between State parties where it stipulates that «*each of the offences to which the present article applies will be considered in any existing extradition treaty between or among State parties as part of offences likely to lead to extradition*».

In this sense, the SADC extradition Protocol constitutes an implementation of the Anti-corruption Protocol for the States that will have accepted it in their mutual relationships. However, if the agreement required in articles 9(2), does not exist between the requesting and requested States, the latter can consider the Anti-corruption Protocol as legal basis for extradition[63]. That is a choice that risks being detrimental to the fight against impunity in cases of corruption. Anyhow, it is good to see that the Protocol requires the requested State to prosecute the person suspected of corruption in case of refusal to extradite: this is the recognition of the «*aut dedere aut persequi*» principle.

60 Quoted by NGAPA (T.), *op.cit.*
61 Art. 9, 4), of the anticorruption Protocol.
62 See its art.3, 1).
63 Art.3, 3).

As for the SADC Protocol on Extradition, it applies to all sorts of criminal offences, on condition that they be liable to imprisonment or deprivation of liberty for at least one year, or to another harsher sentence[64], according to the law of both the requesting and requested States. It is a general extradition treaty following the conditions that are generally required in international law. However, it sets out some exceptions:

a) Extradition cannot be refused, for default of double jeopardy, when it is requested against a person who is prosecuted in the right of an offence related to taxation, customs duties or foreign exchange control[65];
b) Re-extradition toward a third State is forbidden[66].

Finally, this Protocol elaborates on the case of competing extradition requests in its article 11 and a simplified extradition procedure in its article 9. To be more precise, this article stipulate that: «*The requested State can, if its own laws permit it, grant extradition after receiving an application for provisional arrest, on condition that the person being prosecuted explicitly tells the competent authority that s/he agrees to be extradited*»[67]. This simplified procedure aims at accelerating the procedure just like the police to police surrender mechanism that has been established in Central Africa. Considering its formulation that is of a very general nature, it is therefore incumbent on each State party to specify in its national law the modalities for the implementation of this procedure.

B. The regional judicial and police collaboration

Whether it is during the investigation or the prosecution, procedural acts are subjected to the principle of territoriality[68], out of respect for the sovereignty of the other States. They have to be recognized within the national borders of each State. But if the offence has been committed abroad, or if the people who can help find the truth are on the territory of another State, it is essential to enjoy the collaboration of this State so as to try the case efficiently. It follows that the objective of judicial and police collaboration is for a requested State to provide assistance during the investigations, prosecutions or judicial procedures taking place in the requesting State, in criminal cases for instance. This assistance can be provided between police forces (police cooperation) or between judicial authorities (judicial collaboration), but it always is based on a text.

Concerning the ECCAS space or the SADC region, the States have generally committed themselves to provide one another with the greatest possible judicial assistance in criminal matters. It is the same regarding suppression of all the crimes we have already examined[69]. Moreover, two specific treaties on judicial and police collaboration have been concluded in this area. As a reminder, these treaties are the Cooperation Agreement between the Central African States on criminal matters and the SADC Protocol on mutual legal assistance in criminal matters.

As for the first treaty, it constitutes the basis for police collaboration in Central Africa in the following three scenarios:

a) The facts finding mission abroad[70] : the contracting Parties committed themselves to allow such missions on their respective territories on presentation of a request

[64] See art.16, 1).
[65] NYABIRUNGU Mwene SONGA, *op.cit.*, p.146.
[66] Cf. art.10 of the SADC anticorruption Protocol ; chapter 2 and 3 of the CAPCC Convention CAPCC of 2004 ; art.14 of the ECOWAS-ECCAS Agreement on the fight against human trafficking, especially that of women and children.
[67] See chapter II of the Convention under consideration.
[68] That is the purpose of chapter III of the same Convention.
[69] Cf. chapter IV of the same Convention.
[70] Art.2, 3), of the said Protocol.

to this end. Movement of police officers from a requesting State must be explicitly authorized by the requested State in advance. In case of a refusal, the latter must give the reasons for the refusal and notify the requesting State;

b) The exchange of information[71] on criminal investigations, i.e. information about the authors, co-authors and accomplices of general law offences, the objects anyhow related to an offence committed or attempted, evidence of that offence as well as the police apprehensions and investigations carried out by the respective services against citizens of other parties and people residing on their territories. The exchange may also be on aspects related to crime prevention, i.e. a border notification card for a protected, a wanted person, and a person under surveillance, a suspected vehicle, a hazardous or prohibited object. Finally, this exchange can be on police intelligence in general, such as tracing action messages for missing people or notices of suspension and authentication of driving licenses issued in another country of the region;

c) Transmission[72] of objects seized from a general law offence or related to such an offence, the articles found or belonging to a deceased foreign citizen and the police investigation reports regarding the citizens of a contracting party that might include official verification reports, minutes of interrogation of witnesses, search reports, reports of physical search or seizure, etc.

As for the second treaty, i.e. the SADC Protocol on mutual legal assistance in criminal matters, it is not applicable in all circumstances. It only applies to criminal cases that include investigations, prosecutions or legal procedures in relation to offences concerning transnational organized crime, corruption, taxation, customs duties and foreign exchange control[73]. Moreover, it will not apply for apprehension or detention of a person in order to proceed with his/her extradition, for the execution in the requested State of the penal judgments made in the requesting State, safe if that is allowed by the laws of the requested State, as well as for the detention of the persons so they can serve their sentences[74]. Moreover, in the cases provided under article 6, a request for assistance can be rejected by the requested State if, for instance, it thinks that the request that has been made is related to a political offence or an offence of a political nature. Is there anything else that can be done with this Protocol?

First of all, the assistance solicited under this Protocol includes the localization and identification of the persons, the search and seizure as well as the facilitation of the attendance of the witnesses according to article 2(5) of the Protocol. This provision is only indicative due to the principle underlined in paragraph 1 of the same article, i.e. that the States parties provide to one another the greatest mutual legal assistance possible. Then, the assistance must be granted without having to find out whether the act under investigation, prosecution or going through the judicial procedure in the requiring State constitutes an offence according to the laws of the required State. Eventually, the request for assistance must include a certain number of information regarding the required State[75],, in particular on the competent authority in the requiring State conducting the investigations, the prosecutions or the judicial procedures in relation to the request, on the nature of these investigations, prosecutions or judicial procedures, the report on the facts and a copy of the applicable law as well as on the nature and purpose of the requested assistance.

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71 Art.2, 7).
72 See art.5 of the same Protocol.
73 KIMBERLY PROST, *op.cit.*
74 *Ibidem*.
75 *Ibidem*.

Relatively speaking, since the forms of judicial cooperation in criminal matters have already been globally shown, we can now try and understand how ECCAS and SADC have envisaged the implementation of the different relevant judicial instruments.

II.2. The Implementation of the ECCAS and SADC Judicial Cooperation in Criminal Matters

Two major problems deserve to be addressed at this level. First of all, it is a question of trying to understand, in view of the realization of the cooperation in question, how the requesting State can communicate with the requested State. Then, there are grounds to indicate the conventional mechanisms that have been instituted in order to make sure that every State party observe the commitments and to settle interstate disputes in case these commitments are respected.

I.2.1. Means of Communication between the Requesting and Requested States

Whether cooperation is achieved in the framework of ECCAS or SADC, the requests for collaboration and the responses to them can go through three main channels: either the central authority, OIPC-Interpol, or through diplomatic channel. This is an alternative that is foreseen as in two SADC treaties, the Protocol on Extradition and the Protocol on mutual legal assistance in criminal matters, respectively under their articles 6 and 3. The SADC Anti-corruption Protocol also provides for the institution of the central authority under its article 12. The same goes for the ECOWAS-ECCAS Multilateral Agreement under its article 15. As for the Antiterrorist Convention in Central Africa, communication must take place in accordance with the Cooperation Agreement on Criminal Intelligence between the member States of Central Africa. This Agreement provides for special channels of communication, according to the purpose of the solicited cooperation.

With regard to the first channel of communication, it is indeed incumbent on every contracting party to be able to freely designate the channel that will serve as central Authority in order to ensure a good cooperation with the other parties. In other words, there must be as many central authorities as there are State parties to the considered treaty. Once designated, reciprocal notification should be made about these authorities through the ECCAS or SADC Secretary General, depending on the case. This designation in regard of judicial assistance signifies the institution of a body that will centralize all the requests for judicial assistance[76]. It is this body that will ensure the coordination and follow-up of the requests that have been received and those transmitted[77]...

The advantages of instituting such a body can be summarized as follows: "*First, it will reduce considerably the time of the transmission of the request since the central authority constitutes, within the foreign State, a direct entry point and the known as the addressee of the request for assistance. Moreover, the staff of this authority is a specialized staff and, more importantly, they have the necessary legal knowledge and can provide by fax, telephone or any other means vital information regarding the applicable legislation and the execution procedures within this State. If this central authority has the necessary resources, i.e. sufficient number of qualified personnel, and at least the power to influence the authorities in charge of responding to the request, it is more likely that the request for assistance*

[76] BOURDON (W.), «La coopération judiciaire interétatique» ("The Interstate Judicial Cooperation"), in ASCENSIO (H.), DECAUX (E.) et PELLET (A.), (s/d), *Droit international pénal (International Criminal Law)*, Paris, Editions A. PEDONE, 2000, pp.926-927.

[77] *Idem*.

will be executed in due time[78]. "

The second channel is that of OIPC-Interpol. The International Organization of Criminal Police (OIPC) with its International Commission of Criminal Police was founded in 1923 in Vienna, Austria[79]. It is in 1956 that its new Statutes and its new general Regulation were adopted and conferred to it a new name: the OIPC-Interpol[80]. This Organization has National Central Offices (BCN) in each of its member States designated by the latter in order to ensure a constant and active cooperation between them in matters regarding criminal intelligence. It is these National Central Offices that can be used as channels of communication between the State parties under judicial assistance as indicated above.

The last channel and probably the heaviest of all is the diplomatic channel, i.e. the channel of the Ministries of Foreign Affairs, including the diplomatic representations of the concerned member States abroad. It is necessary to specify that the SADC Protocol on Extradition somehow seems to go further by providing for the channel of the Ministers of Justice or any other channels chosen by the concerned State party concerned. It is therefore very liberal in this respect.

In a nutshell, these are the assumptions provided by the Cooperation Agreement concerning criminal intelligence between the States of Central Africa. The channels of communication that it provides vary according to the purpose of the requested assistance. If it is about a request for a mission abroad and the response, the Contracting Parties have to resort to the National Central Office established in the framework of Interpol[81]. If, on the other hand, it aims at exchanging information, communication can to take place by any means available[82]. In this case, every service recipient can require a written confirmation of an oral or telephone communication. Eventually, if the request for assistance is about seizures and transmission of objects, the aforesaid transmission will be made by post[83].

However, in case of emergency or when particular precautions must be taken given the nature of the purpose, the transmission can be made through another appropriate channel[84].

As can be noticed, ensuring communication between the concerned States is one thing, the willingness to cooperate is undoubtedly another. Therefore, how can it be ensured that each party respects its commitments?

II.2.2. Monitoring Observance of Member States Commitments to Judicial Cooperation in Criminal Matters within the Framework of ECCAS and SADC

Two monitoring procedures have been put in place for treaties that have been concluded: a diplomatic control and a litigation control.

Diplomatic control proves to be very restricted. Regarding SADC, diplomatic control is limited to the offence of corruption, whereas in Central Africa, the restriction only regards human trafficking, especially that of women and children.

78 Art.7, al.3, of this Agreement.
79 Art.17, al.1, of the same Agreement.
80 Art. 19, al.1, of the said Agreement.
81 Art.7, al.3, of this Agreement.
82 Art.17, al.1, of the same Agreement.
83 Art. 19, al.1, of the said Agreement.
84 *Ibidem*.

As for corruption, the SADC Anti-corruption Protocol prescribes two methods of diplomatic control for contracting Parties' observance of their commitments. The first one is notification. Through this act, the State party that enacts or has enacted a law in pursuance of articles 3, 6 or 7 of the said Protocol informs the Executive Secretary of the Community about it and the latter notifies the State parties[85] about this promulgation.

The other procedure established by the Protocol under its article 11, is the follow-up Committee**.** This Committee is officially entrusted with, *inter alia*, receiving reports from each State party about the progress made in its implementation, one year from the date of signing the Protocol. Thereafter, every State party must make a report to the follow-up Committee every two years. This Committee that receives reports from the State parties also reports regularly to the Council of Ministers of the Community about the progress made by each one of them in the implementation of the Anti-corruption Protocol. Unfortunately, this Protocol does not indicate the answer that the Council of Ministers could reserve for the failure States according to the opinion of the follow-up Committee. One can therefore not minimize the political scope of this control or notification, because the State will almost always be in a bad position vis-à-vis the other parties if presented as the bad example of the Community.

As for human trafficking, particular the trafficking of women and children, the ECOWAS-SADC Multilateral Agreement established under its article 21, a follow-up mechanism named the regional joint permanent Follow-up Committee (CRPCS). This Committee must have a joint Secretariat created within ECCAS and ECOWAS. *It will be initially composed of eight members four of whom coming from ECOWAS and another four from ECCAS, including civil society representatives, following a rotating system for a two year mandate, and then sixteen members of whom eight will succeed annually those whose mandate at the Committee has come to an end''*[86]. The Commission will establish its internal regulation for it to function well. Its mission[87] is to do the follow-up and assessment of the activities undertaken by the contracting Parties regarding the implementation of the Agreement. It publishes the yearly reports to this end and expresses its views and recommendations. It goes without saying that this publication can have some political influence like the one that can result from the control of the follow-up Committee in the case of SADC.

In the last analysis, it is time to deal with the control of litigation, i.e. the control that is exerted on the States parties in case of dispute resulting from the violation of the commitments. In this respect, all the treaties examined in relation to SADC include a standard clause. Indeed, any dispute emerging from their interpretation or implementation that cannot be solved amicably will be transferred to the Court of the Community.

As for ECCAS, article 32 of the ECOWAS-ECCAS Multilateral Agreement prescribes that "*Any dispute stemming from the implementation and interpretation of the present Agreement between two or several contracting Parties will be settled through diplomatic channels and amicably between the concerned contracting Parties''*. This diplomatic channel, and more precisely the negotiation one, is also the way that has been chosen for the settlement disputes emerging from the implementation and interpretation of the Convention on the Fight against Terrorism in Central Africa[88]. Similarly, it is regrettable that the Cooperation Agreement between the Central African States on Criminal Intelligence did not prescribe any mode of dispute settlement between the contracting Parties. Considering the very limited purpose of this survey, we cannot consider

[85] Art.15 of the said Protocol.
[86] Art.23 of the aforesaid Agreement.
[87] See art.22 of the same Agreement.
[88] Art.10, para.1

further the issue of dispute settlement, resolution of inter-States conflicts resulting from the refusal to provide the cooperation requested on account of judicial assistance in criminal matters. One can only hope that good faith will prevail over bad faith in the interest of justice and the fight against impunity in Southern and Central Africa.

CONCLUSION

Out of the three regional economic communities that we have just studied as regards the promotion of judicial cooperation in criminal matters between their members, SADC is undoubtedly the most advanced organization of all on the normative production point of view. The number of the treaties concluded under its aegis attests to this. However, the delay that ECCAS experiences is compensated by the legal instruments adopted in the framework of the Central African Police Chiefs Committee, whereas COMESA experiences is a normative deficiency so much so only its Constitutive Treaty could be identified as the only legal instrument on which is based the judicial cooperation in criminal matters between its member States[89]..

Furthermore, it is clear from the analysis that the cooperation mechanisms established in the framework of SADC and those defined in Central Africa are overlapping. In fact, one State can be party to all the mechanisms at the same time and therefore has the obligation to meet the commitments made on sometimes very similar legal issues. That is the case of the DRC. There is no problem for the DRC as long as it is not in a relationship with a country that is also tied by the same mechanisms. On the contrary, there might be, due to this overlap, a risk of conventional inflation, normative contradiction and possible conflicts between the requesting and requested States regarding judicial cooperation in criminal matters. That is why it is advisable to ensure coordination and cooperation mechanisms that are in place through the African Union, more precisely this should be done through a master agreement on judicial cooperation whose principles will be implemented by the protocols concluded in the framework of the regional economic communities.

On the other hand, there are marginal States like Burundi, which is a member of ECCAS, but not SADC. It does not take part either in the Central African Police Chiefs' Committee[90]. It is therefore disconnected from the other States and its territory risks becoming, if we are not careful, a dumping ground of the regional criminals, since they will have found a country where they could block any regional action to fight impunity because of the lack of Burundi's adequate involvement in the mechanisms of community cooperation.

Without prejudice of all these remarks, the survey highlights the idea of a real legal shield against impunity. On the one hand, we notice that there is a tendency to harmonize criminal legislations, but this harmonization is still limited to the crimes of terrorism, human trafficking, particularly that of women and children with regard to Central Africa, and to corruption in relation to the community space covered by SADC. On the other hand, mechanisms of judicial collaboration have been created, starting from the most classic like extradition, to the most innovative like the police to police surrender in Central Africa, as well as the simplified extradition within SADC.

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[89] This deficiency is so obvious that COMESA could not be considered in our analyses all along the second part of our survey.

[90] Angola is one of the members of ECCAS, but it does not participate in the Central African Police Chiefs' Committee.

All these mechanisms have been analyzed as they appear in the legal instruments defining them. It is the same with the arrangement of the channels of communication between the requesting and requested States, or that of the international monitoring modalities for the implementation of the legal instruments they feely agreed upon. A new survey could therefore be envisaged for the actual implementation of the commitments made by the States. It is this survey that could clearly establish whether the judicial cooperation in criminal matters based on ECCAS and SADC, or even COMESA treaties constitute a strong and efficient lever for the fight against impunity in the region.

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THE INTEGRATION OF THE DEMOCRATIC REPUBLIC OF CONGO IN SADC: TREATY, AREAS OF COOPERATION AND THE WAY FORWARD

By **Joseph CIHUNDA HENGELELA** (*)

INTRODUCTION

The Southern Africa Development Community (SADC) is one of the best integrated sub-regional organizations in Africa. Its performance is remarkable considering the fact that its relatively new compared to the other Regional Economic Communities (RECs). This progress is the consequence of the history of the sub-region and is particularly related to economic boom of the first African power that is South Africa. Today, we can be optimistic about the promising future of this community with the economy of Angola, which has moved up to occupy the position of second economic power on the continent. The concentration of two powers in the same sub-region and the involvement of the DRC in this part of Africa are likely to accelerate the development of the sub-region if only the concerned political actors know how to play their role.

DRC membership in this community raised a certain number of questions in the past, which continued to be asked during the recent SADC Assembly that was held in the DRC Clearly, from 2 to 8 September 2009, Kinshasa was the capital of the Southern African sub-region[91]. The preparation for the 29th Summit of the SADC, the mediatization that followed it, the transfer of the rotating presidency of the organization to President Joseph Kabila were the events that made people from all the social strata of the Congolese population talk about SADC as never before. The Summit was also an indication of how little a portion of the population of Congo knew about SADC, twelve years after their country became a member of this institution. These empiric and observable data raise fundamental questions and take us right to the centre of the objectives of this study.

The first question is about the concept of the international integration as is analyzed in the theory. The second question is about the crucial issue of the continental geographical position of the DRC and its multi-membership to different RECs. As for the third question, it is related to the motivation that led to its joining SADC where the majority of countries are Anglophone. These questions add to that of the compatibility of the DRC needs of integration with the objectives and principles of the Southern African organization. What is the role of the DRC in this community? Is it to borrow the formula of a federalist approach of the integration; is it a Pilot-State or a Braking-State? Is it a big power, an average or a small one? The list of questioning as to why the DRC has joined SADC is endless.

In Economics, the term integration refers to a « set of procedures through which two or more States create a common economic space. *It can take several forms: free trade area, customs union, common market, economic union, total economic integration* ». The economic concept of

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91 Ngapi R., « Avec la présidence de la SADC , la R.D. Congo renait sur la scène internationale » ("With the Chair of SADC, the DR Congo is reborn on the International Stage"), *Renaitre* (August-September 2009) n° 15-16, p. 8

integration seems to be close to the currently fashionable sense of the term, but with an extension to all the areas, i.e. political, social and cultural. Such an economic concept advises on questions of the bases of any integration if we want to adopt neo-functionalist theses[92]. Several authors have resorted to this concept to explain the process of transformation of States, which has gone from simple forms to those referred to as composite forms of which federalism[93] is the model type. Thus, the term integration implies that the organization is internal as well as external to the State.

In Africa, the integration process concerns both the whole continent and its five sub-regions[94]. Despite the problems posed by this system, it is still considered to be the solution to the many challenges of the third millennium in Africa. One of the challenges Africa must address is that of globalization, which compels the continent to prepare itself according to its requirements so that they do not appear to constitute a threat[95]. According to Mwayila Tshiyembe, globalization has the advantage of allowing « *mobility of the States or their region-based massification, with a view to creating either free trade areas (ALENA, MERCOSUR, ASEAN), or economic and political unions (EU).* According to him, « *This neo-regionalism is a quest for uniformity and fragmentation, mercantilism and political regulation of the world* ». This transformation process of the planet « *underscores school of thoughts the geographic, cultural and historical proximity of which is the principle, the co-responsibility or the shared sovereignty and the mode of action of the fight against the inequalities* »[96].

Sub-regional integration in Africa takes place essentially on the basis of geographic proximity. Seen from this angle, the geographic position of the DRC in the centre of Africa raises questions about its membership of African international organizations. Though the North and West African sub-regions are far from Congo-Kinshasa, the remaining two sub-regions of the continent (Southern, Eastern; except Central Africa) have ties with the DRC. Hence, the debate about the multiple membership of this country in sub-regional communities covering Central Africa, Eastern, or even Southern Africa.

I. DEBATE ABOUT THE INTEGRATION OF THE DRC IN SADC

Can we really speak about the debate on integration of the DRC in SADC? If there is any debate, it now belongs to the past and could only be referred to out of scientific curiosity. To get to the centre of that famous debate, we have to ask ourselves, to which geographic region the DRC belongs. Therefore, in which international organization should it participate? Considering the geographic situation of the DRC, which regional organization does it belong to? These are the few questions that summarize the debate raised a decade ago by the integration of the DRC in the Southern African Development Community. It is advisable

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92 Barrea J., *Théories des relations internationales (Theories of International Relations*, Ciao éditeur, Louvain-la-Neuve, 1978, p. 361.

93 Pactet P. and Mélin-Soucramanien F., *Droit constitutionnel (Constitutional Law), 25th edition*,, Paris, Sirey, 2006, pp. 41-56 ; Masclet J-C and Etien R. (dir.), *Droit public général*, Vanves, Editions Foucher, 2006, pp. 31-34.

94 Ndeshyo Rurihose, *Le système d'intégration africaine (The African Integration System)*, Kinshasa, PUZ, 1984, pp. 59-62 note that this system is both regional, i.e. it concerns the whole of Africa (AOU, AU and sub-regional. At this level, it appears through the existence of sub-regional international organizations located in North, West, Central and east Africa.

95 See Kumbu ki Ngimbi, *Législation en matière économique (Economic Legislation),* Kinshasa, (s.ed.), 2009, pp. 192-208 ; Ntumba –Luaba Lumu, « Quel modèle d'intégration pour l'Afrique ? » («Which Integration Model for Africa ? «), *Zaïre-Afrique* (1981) n°158, pp. 471-482 ; Nsaka Kabunda, *Problématique des zones d'intégration économique en Afrique face à la globalisation des marchés (Problematics of Economic Integration Zones in Africa faced with the Globalization of Markets)*, BA dissertation, Faculty of Law, University of Kinshasa, 2005.

96 Mwayila Tshiyembe, « L'Union africaine et la nouvelle gouvernance régionale » ('The African Union and the new Regional Governance'), in Bangoura D., *L'Union Africaine face aux enjeux de paix, de sécurité et de défense. Actes des conférences de l'OPSA les 18 juin, 13 novembre et 19 décembre 2002 (The African Union facing the Challenges of Peace, Security and Defense. Conference Proceedings of the OPSA on June 18, November 13 and December 19, 2002)*, Paris, L'Harmattan, p. 56.

to look for the geographic and historical factors that were an argument for its integration in SADC, in order to answer these questions.

I.1. Geographic factors that are arguments for the integration of the DRC in SADC

All the African geographic maps locate the DRC in Central Africa. And rightly so, the situation could not be any different when it is known that the Congolese territory is at the centre of the continent. This centrality of the DRC in Africa allowed it to participate in most sub-regional organizations of three sub-regions of the continent where it played a leading role at a certain time. Added to this concept of Central Africa is the one of the "median Africa" with a geopolitical connotation. In one of the issues of the magazine Hérodote published in 1997, Roland Pourtier takes us back to the origin of this concept. The delimitation of this space included all the countries of the basin of Congo and the Great Lakes Africa. [97].

Mwayila Tshiyembe[98] regroups in this space (median Africa) the countries that are ordinarily classified in Central, Eastern and Southern Africa and participating in the regional communities of their respective regions. In this median Africa, the DRC is always characterized by its centrality so much so one would think that all these regional divisions had only the DRC as centre of gravity. Pourtier indicates that the space of the median Africa ended up becoming a danger spot of the continent[99], where violence and atrocities of all kinds reached the highest point. It is also important to point out that this is a region that has plenty of the natural and mineral resources necessary for the development of the populations.

The position of the DRC on this median Africa map tends to make it a State that should federate all the other States around it and stimulate development according to a concentric circle going from the centre to the extremities of the continent. This is what Emery Patrice Lumumba's country has not managed to do so far. Instead of federating, the DRC is deferring instead. Hence, the imagination of this byword that could explain the scattering of the DRC resources in its policy as regards integration: "He who does not federate defers ".

After unsuccessful leadership attempts in Africa[100], the DRC collapsed from the crisis that incubating from within. The vacuum that resulted from the crisis did not go without consequences. The armed conflicts that have set the region ablaze and the difficulties in recovering and taking off again are also analyzed in relation to the absence of leadership or the struggle for this leadership. These analyses have only recognized what Joseph S. Nye, the American geopolitical expert, wrote, which reads: "*The lessons learned during these past periods indicate that the perspectives of instability will increase if the most powerful state does not show the way to the others*[101]." In this state of things, the DRC should look for the opportunities to reconstruct in order to work towards redeeming its natural leadership.

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[97] Pourtier R., *L'Afrique centrale et les régions transfrontalières : perspectives de reconstruction et d'intégration , (Central Africa and the Border Regions: Reconstruction and Integration Prospects)*, (f), OCDE, 2003, p. 13 reads as follows « before being removed from the colonial scene, the Germans had imported their own territorial representations by projecting on the African continent the concept with a geopolitical connotation of a median Europe *(Mitteleuropa)*. At the beginning of the 20th century, partisans *of colonial expansion were dreaming of a German Mittelafrika that would cross the whole continent from east to West, joining Cameroon…to Tanganyika*.

[98] Mwayila Tshiyembe, *Géopolitique de paix en Afrique médiane. Angola, Burundi, République Démocratique du Congo, République du Congo, Ouganda, Rwanda (Geopolitics of Peace in Middle Africa. Angola, Burundi, Democratic Republic of Congo, Republic of Congo, Uganda, Rwanda)*, Paris, L'Harmattan, 2003, p. 46.

[99] Pourtier R., *op. cit.*, p. 10.

[100] Useful reading : Ngoie Tshibambe G., *La République Démocratique du Congo dans les relations interafricaines. La trajectoire d'une impossible quête de puissance (The Democratic Republic of Congo in Inter-African Relations. The Trajectory of an Impossible Quest for Power)*, Lubumbashi, Laboratoire des sciences sociales appliquées, 2005, p. 130.

[101] S. Nye J., *Le leadership américain. Quand les règles du jeu changent (American Leadership. When the Game Rules change)*, Nancy, Presses Universitaires de Nancy, 1992, p. 212.

The offer from SADC was timely, which means that it was made during the rupture with the old order that had contributed to debase the image of the country. Becoming a member of SADC marks that rupture. Was DRC membership of SADC an opportunistic move? Is it really the ambition of an adventure-minded man? Far from being a strike of luck, it contributes to the dynamics of the history of the southern sub-region, a history in which the DRC played an important part until the dismantling of the apartheid regime of Pretoria. Pourtier rightly argue that" *The membership of Congo Kinshasa in SADC is justified by the importance of the economic exchanges with South Africa, which is currently the main outlet of the mine products from Katanga, purchaser of the electricity from Inga and big supplier of agricultural and industrial products*[102]". His argument is restrictive because it is only based on the economic aspect despite the fact that it is dominant, but insufficient.

The reasons that led the DRC to become member of SADC as well as of COMESA are at the same time geographical (as regards the COMESA), historical and economic. Pourtier adds that" *The configuration of the regroupings cannot be understood without reference to history (…). The re-compositions reflect the contemporary political dynamics. The current extensions correspond to the global tendency favouring big economic communities in the context of globalization*[103]" With regard more particularly to the DRC, the author writes that all "*the regroupings underline the centrality of the DRC "and" its triple membership of ECCAS, SADC and COMESA is in conformity with its links and respective openings to the North-West, the South and the East*[104]." It now remains to analyze the contribution of the DRC by its integration in the SADC and the advantages that it draws from it for its own development.

I.2. Political and historical that favoured the integration of the DRC in the SADC

It is important to look again at the legal basis of the regional integration policy in the DR Congo before studying the compatibility of this policy with the objectives of SADC. Apart from the geographical reasons referred to earlier, regional integration occupies an important place in the political speech of the Congolese authorities before expressing the political will in legal term and through constitutional enactments and legal texts. We used to refer to the speeches of Prime Minister P.E. Lumumba, more particularly his address at the Pan-African Conference of Leopoldville on 25th August 1960 to determine the origin of the DRC political will to work towards African unity.

Long after him and more especially with regard to the southern African region, President Mobutu played an important, though controversial, role in the development of the conflict both inside South Africa and in its relations with its neighbours from the Front line. It is pointed out that Marshal Mobutu did not like being absent from big diplomatic manoeuvres that were taking place in Southern Africa. He met President Botha to advocate in favour of the change in the condition of the Blacks and notably for the release of Nelson Mandela on the one hand and of the other, he supported several nationalistic liberation movements.

It is also necessary to recall that President Mobutu's policy in relation to the situation in Southern Africa was a dual facet policy. Full of the philosophy of the authenticity, Joseph Désiré Mobutu had to get himself involved for the cause of the Blacks in this part of the continent. After Botha, Mobutu continued his mediation efforts with his successor, Frederic de Clerk. In this interface of the relations between Zaire and the countries of Southern Africa,

[102] Pourtier R., *op. cit.*, p. 15.
[103] Ibidem.
[104] Ibidem.

Mobutu maintained commercial ties with South Africa in violation of the embargo imposed by both the UN and the OAU against the pre-1991 South Africa.

The influence of the South-African economy on the economies of African countries can be seen in the strengthening of the discreetly maintained commercial ties. South African aircrafts (SAA) landed in Zaire as well as in the southern, western and eastern regions of the continent. For South-African companies, the DRC is the Promised Land for business[105]. This cooperation between the DRC and RSA appears to be the bellwether of the DRC integration in SADC. In her analysis of the Congolese disaster, Collette Braeckman sometimes talks about the occasional slyness of the role the RSA in Africa. For her, the intervention in Congo of South Africa, as a new regional power, embodies the ultimate stage of the big journey towards the North of Africa. Braeckman says that during Mobutu's era, the boxes of South African companies were already full of plans to restore and exploit the capacities of hydroelectric production of the dam of Inga, projects of the projects of restoration of the railway linking Katanga to big South-African ports[106].

These commercial links with South Africa could only be developed with the political change in the whole sub-region. The end of apartheid, the transformation of the SADCC into SADC and the influence of the RSA in this organization have constituted the reasons facilitating the membership of other countries whose presence was deemed conducive to the accomplishment of the objective of the community. The integration of the DRC in SADC in 1997 formalized the commercial ties and the long standing relations between the DRC and the RSA, the development of which was delayed by apartheid[107].

At the legal level, article 217 of the Constitution of 18 February 2006 constitutes today the basis of any integration policy in the DRC: « *The Democratic Republic of Congo can conclude treaties or association or Community Agreements involving a partial relinquishment of sovereignty in order to promote African unity* ». This is the consecration of the duty of solidarity of Congo towards the other sister nations of Africa. The existence of a government ministry in charge of regional integration is a demonstration of the country's commitment in this matter. How can this solidarity be materialized within SADC? It is on this that the developments of this reflection will be devoted.

II. DR CONGO AND SADC OBJECTIVES

It would be advisable to give an overview of the the history of SADC prior to studying the objectives and the areas of cooperation in this development community. Indeed, SADC was created on 17th August 1992 in Windhoek (Namibia). It succeeded the Southern African Co-ordination Conference (SADCC) that originated from the negotiations of the Arusha conferences in 1979 and those of Lusaka in 1980. SADC is composed of the following countries: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia,

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[105] Hassan Ziady, « Afrique du Sud. Pretoria à l'assaut du continent » ("South Africa. Pretoria seeks to capture the Continent»), *Ecofinance*, n° 43, 2004, p. 53.

[106] Braeckman C., *Les nouveaux prédateurs. Politique des puissances en Afrique centrale (The New Predators. Politics of Power in Central Africa)*, Paris, Fayard, 2003, p. 58.

[107] Read Cihunda Hengelela J., *Sécurité régionale et règlement des conflits armés en Afrique. Contribution de la République Sud-Africaine post-apartheid (Regional Security and Settlement of Armed Conflicts in Africa. Contribution of the Post-Apartheid South Africa)*, M.A Thesis, Faculty of Law, University of Kinshasa, 2005, p. 60 ; Zyad Liman and al, « La nouvelle donne africaine » ("The New African Order"), *Jeune Afrique* n°1585, mai 1991, p. 79 ; Vunduawe te Pemako F., *A l'ombre du Léopard. Vérités sur le régime de Mobutu Sese Seko (In the Shadow of the Leopard. Truths about the Regime of Mobutu Sese Seko)*, Bruxelles, Editions Zaïre Libre, 2000 ; Mobutu J.D., *Dignité pour l'Afrique. Entretiens avec Jean-Louis Remilleux (Dignity for Africa. Interviews with Jean-Louis Remiller)*, Paris, Albin Michel, 1989.

Zimbabwe (members of SADCC from 17th August 1981), Namibia (completes the list of the SADC original members in 1992), South Africa (joined in 1994), DR Congo (1997), Seychelles (1998), Mauritius and Madagascar. The SADC headquarters is in Gaborone, Botswana. What are the objectives, principles and areas of cooperation of the DRC?

To answer this question, we must imperatively analyze the founding treaty of this international organization and the different protocols used as instruments for the implementation of this treaty.

II.1. Principles and objectives of the SADC

The objectives and principles of the SADC are set out in the SADC Constitutive Charter, which was adopted on 17 August 1992 under the title of 'treaty' and was reviewed in 2001. It results from the reading of article 4 of the treaty that the relationships between SADC members are governed by the following principles: sovereign equality between all the members; observance of human rights, democracy and rule of law; free movement of capitals, goods and people; and the peaceful conflicts resolution[108].

The above-enumerated principles aim at achieving the following objectives[109]:

- To promote sustainable and equitable economic growth and development with a view to reducing poverty, strengthening the level and quality of life of the peoples of the Region, supporting the socially underprivileged through integration,;
- To promote the common political values and systems, and other shared values transmitted through democratic, legitimate and efficient institutions;
- To strengthen, defend and maintain democracy, peace, security and stability;
- To promote the auto-centred development thanks to collective effort and interdependence between the member states;
- To ensure complementarity between the national and regional strategies and programmes;
- To promote and maximize the exploitation and the use of the resources of the Region;
- To ensure sustainable use of the natural resources and efficient protection of the environment;
- To strengthen and consolidate the historic, social and cultural affinities and the ties between the peoples of the Region;
- To fight HIV/AIDS or the other deadly diseases and infectious epidemics;
- To ensure that the eradication of poverty is prioritized in all the activities and programs of SADC;
- To guarantee gender mainstreaming in the process of the edification of the Community.

To achieve these objectives, SADC must:

- harmonize the policies and the plans of the member states in socioeconomic matters;
- encourage the peoples of the Region and their institutions to take some initiatives to develop economic, social and cultural ties through the Region and to participate fully in the implementation of SADC programmes and projects;
- create appropriation institutions mechanisms for the mobilization of the necessary resources for the implementation of the programmes and operations of SADC and its institutions;
- develop policies with a view to gradually eliminate the obstacles to the free movement

[108] Art. 4 (a-e) of the SADC Treaty, Windhoek 17 August 1992.
[109] Art. 5, of the SADC Treaty.

of capitals, manpower, goods and services, and of the peoples of the Region in general, and between the members of SADC in particular;
- promote the development of the human resources;
- promote the development, transfer and mastery of technology;
- improve management and economic performance through regional cooperation;
- promote the coordination and harmonization of international relations between the member countries;
- ensure mutual understanding, cooperation and mobilization of public and private flows of resources in the Region;
- Develop other activities that the member States can decide upon according to the objectives of this treaty.

The objectives of SADC are compatible with the expectations of the DRC, which would like to initiate its (re-) construction in order to eradicate the poverty of the population, which was in contrast with the immensity of the resources that the country has. The DRC must also translate into action its African vocation in this part of Africa. We can, from these objectives, determine the areas of cooperation between all the members of the development community of Southern Africa.

II.2. Areas of Cooperation within SADC

From the reading of the objectives and the commitments made by SADC in order to reach these objectives, it follows that the main areas of cooperation within SADC are those related to the economy, policy, security, environment, energy and those related to the natural, mineral, social and cultural resources. In short, these are activities that are likely to promote sustainable development for a region populated by about 250 millions inhabitants. In this study we opted to regroup the activities of SADC in four categories constituting the areas of cooperation for the member states. This classification, far from being perfect, seems to have an advantage in the perception of the activities of the development Community Southern Africa.

II.2.1. Cooperation in Economic and Technological Matters

The economic and technological sector seems to enjoy a particular interest considering the number of legal instruments adopted in this area. One would be tempted to criticize the SADC by saying that several African regional communities had put more emphasis on economic activities to the detriment of the other sectors such as peace and security[110]. This vision goes together with the approach of the neo-functionalist doctrine according to which the drive for any integration is constituted by the socio-economic elites[111].

We were pleased to gather the following sectors in this area of cooperation: electric energy, water, fisheries, forest, mining, trade, transport, and wildlife conservation, use of the natural resources, telecommunications and meteorology. All these sectors are covered by protocols. Trade has been identified as the intervention that has the biggest potential to address the biggest problem in Southern Africa, i.e. poverty. To do so, it became urgent to establish a Free Trade Area within SADC.

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[110] For example, ECOWAS has evolved towards the sub-regional security component by reducing its original gap with a non aggression agreement between its member States in 1978 and protocol of mutual assistance in 1981. This policy will get to a turning point in 1993 with the total amendment of the founding treaty in order to adapt it to contemporary realities. The creation of the Economic Community of West African States Monotoring Group (ECOMOG) was an illustration of this evolution. See Cihunda Hengelela J., *op. cit.*, p. 51 ; Nadia Tabiou, « L'intervention de l'ECOMOG au Liberia et en Sierra- Leone » ('The ECOMOG Intervention in Liberia and Sierra Leone'), in Madjid Benchikh (dir.), *Les organisations internationales et les conflits armés (International Organizations and Armed Conflicts)*, Paris, L'Harmattan, 2001, p. 267.

[111] Barrea J., *op. cit.*, p.361.

In this respect, the necessity to put in place a good infrastructure became a priority because the present road and railway networks do not serve efficiently the intra-regional trade. The DRC is very concerned by the deficit in infrastructure. It breaks the dynamics of the channels of communication that goes from Southern Africa and stops in Katanga without the possibility of reaching Central Africa. The presidential program known as the" Five building sites" was saluted because of its emphasis on putting in place communication infrastructure. However, there were some doubts as regards the implementation, especially towards the end of the first legislature of the third Republic. It nevertheless is to be recognized that some achievements were recorded as regards the national road n°1 joining Kinshasa to the City of Kikwit (more or less 500 Km).

The Free Trade Area essentially concerns the issue of the tariffs since it allows customs rebate of 85% on the marketed products. However, the Member states should tackle again the problem of non tariff barriers such as the restrictive conditions of entry at the border which were contrary to the spirit of the free trade area. The Free Trade Area was established through the SADC Trade Protocol the implementation of which started in the year 2000. To this date, 11 of the 15 Member states of SADC brought the protocol into force, which means that more than 170 million people in these countries will immediately benefit from the new economic distribution. Angola and the DRC have asked for some time before joining the FTA. For a successful implementation of the FTA, the Member states are supposed to harmonize their national trade policies with all the provisions of the Trade Protocol.

We should think about the time that it will take for the DRC to join the FTA. It is true that for the time being the DRC does not produce much that it can trade except for the raw materials that the multinational companies extract and process abroad. According to the surveys that have already been conducted in this area, the DRC does not apply any tariff reductions[112] The customs tariff of the DRC comprises five categories and five rates starting from 5 to 30% and are structured as follows:

	Products	**Tariffication in %**
1.	Raw materials	5
2.	Consumer Products	10
3.	Semi-protected Products	15
4.	Protected Products	20
5.	Luxury commodities	30

The reasons supporting the maintenance of the tariffication are justified by the significant contribution of tariff incomes to the State budget. These incomes are growing and cannot be reduced without adversely affecting the government five year programme. The following is the illustration of this growth:

	Years			
	2004	**2005**	**2006**	**2007**
Amounts in USD	966 037 906	1 132 159 047	1 684 001 586	1 785 352 993

[112] Cabinet SAI, *Contraintes aux échanges commerciaux intra CEPAC (Constraints to Trade intra CEPAC)* , (sv), ACP, 2006, p. 48.

From these customs incomes, the imports from South Africa, which is a SADC member, amount to 18. 5%[113] and this country is therefore the first importing country in DR Congo. The table below gives the details:

	Main sources of imports	**Estimates of 2004 in %**
1.	South Africa	18. 5
2.	Belgium	15. 6
3.	France	10. 9
4.	USA	6.2
5.	Germany	5.9
6.	Kenya	4. 9

In these conditions, the full participation of the DRC in the FTA is subjected to some prerequisites. It must among other things re-construct its production units (industries,…) that were destroyed by lootings and wars. How long is it going to take? If this situation continues to obtain, would the DRC become a braking State within SADC? Here is a challenge for the Congolese President who is currently chairing the Community.

Fisheries remain key in the economic sector that contributes significantly to the GDP of the member States of SADC. Its impact on food security and job creation is not negligible for the member States. It is justified by the presence in SADC of a considerable number of coastal States such as South Africa that is located at the crossroad of two oceans (Indian and Atlantic). The DRC has a coastline, a majestic river and a number of lakes. But the State has not yet developed a national fishing policy. It seems that fish die of old age in the different Congolese waters while the populations have no other options but consuming fish imported in conditions that sometimes leave a lot to be desired, menacing dangerously food security. One hopes that cooperation in this area with the SADC States could make it possible to create a fishing industry.

The same goes for agriculture. In this sector, the DRC beats the records in terms of assets: 24 millions of hectares of arable land (2nd potential in the world), a dense hydrographic network, and a varied and favourable climate for a varied agriculture. In spite of all these advantages, no agricultural policy has been implemented to make this country become the granary of Africa. It is scandalous that part of the Congolese population suffers from the malnutrition[114]. For SADC, the forest sector provides a large range of products and services necessary for the economies of the member States. In fact, forestry is considered as an important area for the Region and its management must be carried out according to the principles of the Regional Indicative Strategic Development Plan (RISDP) and the priority guidelines concerning food, agriculture and natural resources (Food, Agriculture and Natural Resources, FANR).

The forest and its different species of fauna constitute a potential in natural resources in the SADC region. As for the DRC, it has a large extent of the forest of Africa considered to be the second lung of the world after the one of the Amazon. The Congolese forests and savannas contain varied and rare species; others existing nowhere else but in the DRC (the Okapi for instance). Like with the other sectors, the forest resources do not contribute to the reduction

[113] http://www.izf.net/entreprises/pays-exe/pays-5 (visited on 1st February 2010)

[114] Kankwenda Mbaya, « Le Paradoxe de la Crise agricole au Zaïre » ("The Paradox of Agricultural Crisis in Zaire"), in Kankwenda Mbaya (dir.), *Le Zaïre. Vers quelles destinées ? (Zaire. Towards which destiny?*, Dakar, CODESRIA, 1992, p. 307.

of poverty. The sector is experiencing organized looting, especially during the years of war. It is in this area that a quick transfer of technology is required from South Africa so that the DRC will stop exporting forest products in their raw state. The energy sector (water and electricity) can be an advantage that allows the DRC to get the partners it needs for its development. All depends on the imaginative and negotiation capacity of the Congolese authorities.

II.2.2. Cooperation in the Political and Judicial Area

Cooperation in the political and judicial area is consecrated by article 3 of the SADC treaty[115] requiring the development of political values and common institutions. Principle 3 that imposes the obligation for SADC member States to observe human rights, democracy and the rule of law[116] can also be taken into account. Several protocols have been signed in this sector. These are the political protocol[117] on immunities, public affairs (administration), corruption[118] and the principles of electoral conduct in member States.

Dr Claude Kirongozi Ichalanga talks about the development of political cooperation in the SADC zone when he writes: "The protocol on Police, Defence and Security provides that SADC must promote the development of democratic institutions and practice on the territories of the member States, and encourage the respect for the universal human rights as provided by the African Union and United Nations Charter and Conventions[119]." The will is translated through the Strategic Indicative Plan Organ (SIPO) whose objective is to consolidate democracy in the Region[120].

Political cooperation within SADC increased in electoral matters with the adoption of the protocol determining the principles for democratic elections. These principles are" Principles for management, Monitoring and Observation of Elections in the SADC Region". These principles can be summarized as follows:

- The full participation of the citizens in the political process;
- The freedom of association;
- The organization of regular elections in accordance with the respective constitutions of the member states;
- The Political tolerance;
- The Equal opportunity for all political parties to have access to the Media;
- The Equal opportunity to exercise the right to vote and the right to be elected;
- The independence and impartiality of the institution in charge of organizing the elections;

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115 Art. 5, 3 of the SADC Treaty.

116 Art. 4, 3 of the treaty, idem.

117 Protocol on policy, defence and security within SADC, Blantyre (Malawi), 14 August 2001.

118 Anticorruption Protocol, Blantyre (Malawi) 14 October 2001.

119 Kirongozi Ichalanga C., « Le rôle de la SADC et de ses Etats membres dans le processus de démocratisation de la République Démocratique du Congo » ("The Role of SADC and its Member States in the Democratization Process of the Democratic Republic of Congo"), in Bakandeja wa Mpungu G., Mbata Betukumesu Mangu A. and Kienge-Kienge Intudi R. (dir.), *Participation et responsabilité des acteurs dans un contexte d'émergence démocratique en République Démocratique du Congo. Actes des Journées scientifiques de la Faculté de Droit de l'Université de Kinshasa 18-19 juin 2007 (Stakeholders'Participation and Responsibility in a Context of Emerging Democracy in the Democratic Republic of Congo. Proceedings of Scientific Sessions of the Faculty of Law, University of Kinshasa, 18-19 June 2007),* Kinshasa, PUK, 2007, p. 240.

120 Ibidem.

- The acceptance and respect, by the political parties, of the election results as issued by the competent national electoral authority as being free and fair in conformity with the national law.

The DRC received an important support from SADC as a community and its member States acting individually in the framework of bilateral cooperation for the organization of the 2006 elections. SADC involved itself deeply in the organization of the elections by dispatching to Congo teams to observe the electoral process. It is through SADC that the electoral Institute of Southern Africa (EISA) was invited to work with the Independent Electoral Commission. The intensity of the activities of the EISA contributed in the training of Congolese citizens in electoral matters. Let us recall that there is within SADC a structure that brings together all the electoral commissions of the region and whose mission is to share experiences and harmonize the policies in this area.

Some SADC member countries, namely Angola and South Africa, played a particular role in the process of democratization in the DRC. Angola, as member of the International Committee for the Management of the Transition (CIAT), contributed to mitigate tensions between the belligerents during the transition before contributing financially and materially to the electoral process. It is South Africa that played its role as a regional power as was expected of it. The survey on the action of the RSA in view of the stabilization of the political life in the DRC began in 1996.

It is here that Dr Kirongozi's opinion can be subjective as he only concentrates on the diplomatic ballet of President Laurent Désiré Kabila as initiator of the DRC integration process in the SADC. In 1996, President Mandela attempted unsuccessfully to find a solution between Kabila and Mobutu. In 1998, when the war broke out again, Thabo Mbeki, then Vice-president of Mandela, took care of the Congolese dossier from the Lusaka Agreement up until the Inter-Congolese Dialogue in Sun City. As member of the CIAT, RSA played a determining role in the transition of the DRC toward the Third Republic[121].

At the judicial level, SADC instituted a cooperation based notably on the Extradition Protocol and on the creation of the SADC Tribunal. The advantage of that this Tribunal offers to the citizens of the Region is the fact that they can request it to rule on a case involving them and any member State. Article 15 of the protocol stipulates: "*The tribunal has jurisdiction to receive any litigations between States as well as between any private person or body corporate and the States. No individual person or body corporate would sue a State unless all the possible means to settle the dispute have been exhausted and unless the case cannot be dealt with under a national jurisdiction…* ".

The DR Congo is part to this tribunal and therefore, a Congolese citizen can bring their case against the State before this jurisdiction after the decision incriminating them has acquired authority of *res judicata*; that means after using all the internal means of appeal. *The Campbell Case* is the first jurisprudence on this matter. It is about the complaint from white farmers expropriated by the State of Zimbabwe and who won the case before this tribunal, which made a determination condemning the government of Mugabe for the violations of the rights of these farmers. Such a tribunal offers some opportunities to the Congolese citizens

[121] Cihunda Hengelela J., *op. cit.*, pp. 81-83; Vunduawe te Pemako F., *op. cit.*, p. 415 ; Hassan Ziady, *art. cit.*, p. 54; N'gbanda Nzambo Ko Atumba H., *Ainsi sonne le glas ! Les derniers jours du Maréchal Mobutu (As the Bell tolls! The last Days of Marshal Mobutu)*, Paris, Editions GIDEPPE, 1998, pp. 224-229 ; Balanda Munkuin Leliel G., *Les accords de paix en République Démocratique du Congo (Peace Agreements in the Democratic Republic of Congo)*, Kinshasa, Cheche, 2003, p. 149 ; Matusila PA., Minani Bihuzo R. and Nlandu Mayamba T., *Regard sur le Dialogue Intercongolais de Sun City. Trois perspectives (A Glance at the Inter-Congolese Dialogue in Sun City. Three perspectives)*, Kinshasa, RODHECIC, 2002, p. 55-56.

who are often confronted to unique decisions made as a last resort especially when the case concerns the State or its employees.

II.2.3. Cooperation in the Peace and Security Sector

Besides the SADC treaty[122], the area of peace and security is organized by the Protocol on Police, Defence and Security within the SADC[123] to which it is desirable to add the Protocol on the Control of Firearms, Ammunitions and other related materials[124] and that on the Fight against Illicit Drug Trafficking. It is convenient, beyond these judicial provisions, to analyze the collective security system of the SADC, which had given rise to many controversial issues, especially during the intervention of the Angolan, Namibian and Zimbabwean armed forces.

The objectives pursued by SADC and which are contained in the Protocol consisting in protecting Southern Africa against instability through cooperation in matters related to defence and security, prevention, management and resolution of conflicts. This also about the protection of sustainable peace and security through operations aimed at restoring or keeping peace, building collective capacities and the establishment of a pact of mutual defence as well as the coordination of the participation of the member States in sub-regional, regional or international peace-keeping operations.

The first SADC collective defence adventure took place in 1998 in the DRC. As a matter of fact, it was at the end of the meeting of the Inter-States of Defence and Security Committee (ISDC), which is a structure of the OPDS, held in Harare on 18 August 1998 that SADC, through the ODPS, would send Angola, Namibia and Zimbabwe to intervene militarily in the DR Congo. This intervention gave rise to controversy, especially within the SADC member States, which split into two camps: the camp that favoured thee military solution and the other of partisans of the diplomatic approach[125].

Both approaches bore fruits in that the military intervention allowed stopping the spectacular progress of the armies of the aggressor countries and their allied Congolese rebels, thus protecting Laurent Désiré Kabila's power. Besides, the very active diplomacy resulted in the signing of the Lusaka Agreement, which is the basis of any further agreements and of the resolution establishing the MONUC. The refusal by RSA to intervene militarily in the DRC was criticized by the Congolese public who considered that attitude to be a disguised support to Rwandan and Ugandan subversive activities. However, the precarious position of the then democratic and pluralistic regime of Pretoria could justify this abstention.

Another criticism regarding that intervention is that it goes against the procedure consecrated under article 54[126] of the United Nations Charter according to which no coercive action

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122 Art. 4, 2 et 5 ; art. 5, 3 of the SADC Treaty, *op. cit.*

123 SADC Protocol on Policy, defence,….*op. cit.*

124 SADC Declaration on firearms, ammunitions and other related materials, 3 April 2001 is part of commitments made by member States, namely the Convention against transnational organized crime; the work undertaken by the preparatory Committee of the UN Conference of 2001 on illegal trade of small arms and any small caliber, the SADC/EU Joint Declaration on illegal traffic of small arms and small caliber of November2000, the Bamako Declaration of 1 December 2000 on a common position on the proliferation, circulation and illegal trafficking of small arms and small caliber weapons and the preparatory work done in the draft Declaration of the First continental meeting of experts held in Addis Ababa in May 2000.

125 Sundi Mbambi P., « La politique sécuritaire et de défense de la SADC et la crise congolaise » ("SADC Security and Defense Policy and the Congo Crisis"), *Congo-Afrique* n° 396, June-July-August 2005, p. 361.

126 Art. 54 of the UN Charter : The Security Council must, at all time, be informed about any action undertaken or envisaged according to regional agreements or by regional organizations for peace and international security keeping.

should be taken under the provisions of the regional agreements without informing the Security Council. Such a criticism did not seem substantiated since the action of SADC was a reaction to an armed aggression of a member State; hence the provisions of article 51[127] justified its implementation without any restriction.

SADC and ECOWAS have shown that they have the military capabilities that can be used to settle armed conflicts in the sub-region as well as across the African continent[128]. SADC also proved to be ready to still send troops to the DRC should the rebellion of the National Congress for People's Defence (Congrès National pour la Défense du Peuple, CNDP) of Laurent Nkunda continue with its offense against the Congolese national army in North Kivu. SADC has substantial military assets thanks to the presence of both South Africa[129] and Angola, which have extensive military experience and equipment in the continent.

It can be difficult to evaluate the contribution of the DRC in this military cooperation. In this area, the DRC seems to be the recipient of the assistance from the other members without consideration. This does not go without consequences. The military presence of some SADC member States has an adverse incidence in the exploitation of natural resources and the spread of diseases like HIV/AIDS[130]. In this perspective, we can once more deplore the behaviour of Angola towards the DRC. We know very well that Angola has contributed more in the training of the DRC military and police and that it knows the weaknesses of the Congolese defence policy. The Republic of Angola shares with the DRC a long borderline of 2. 600 Km[131] and constantly violates the principle of the intangibility of borders by occupying some Congolese territories.

II.2.4. Social and Cultural Cooperation

It seems convenient to draw from the strength of the social realities as well as through the legal materials that are supposed to govern them, a necessity of a socio-cultural cooperation for the Southern African region. From the preamble of the SADC treaty already, the Heads of State of Southern Africa expressed their willingness to put in place cooperation in the social and cultural area. This dimension of the cooperation aims at the full involvement of the peoples of the Region in the development and integration process. Article 5(h) of the

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[127] Art. 51 of the Charter: No provision of the present Charter derogates from the natural law of individual or collective self-defence in the case where a UN member is victim of an armed aggression until the Security Council takes the necessary measures to keep international peace and security. The measures taken by member States in the exercise of this legitimate right of self-defence are transmitted to the Security Council and do not affect the power and duty of the Council to act at all time in any way it deems necessary to keep or restore international peace and security, according to the present Charter.

[128] Read Mwesiga Baregu, « Economic and Military Security », in Mwesi Baregu and Landsberg Ch. (ed.), *From Cape to Congo. Southern Africa's Evolving Security Challenges*, London, Lynne Rienner Publishers, 2003, pp. 19-30; de Coning C., "Towards a Common Southern African Peacekeeping System", in Solomon H. (ed.), *Towards a Common Defense and Security Policy in the Southern African Development Community*, Pretoria, Africa Institute of South Africa, 2004, pp. 140-182.

[129] On the continental military supremacy of South Africa, read Edem Kodjo, *L'Occident : Du déclin au défi (The West: From Decline to Challenge)*, Paris, Stock, 1988, pp. 216-221.

[130] Clark J.F., « Museveni's Adventure in Congo War. Uganda's Vietnam?", in Clark J.F. (ed.), *The African Stakes of Congo War*, Kampala, Fountain edition, 2003, pp. 145-165; Turner T., "Angola's Role in the Congo War", in Clark J.F. (ed.), *op. cit*., pp. 75-92; Rupiya M.R., "A political and Military Review of Zimbabwe's Involvement in the Second Congo War", in Clark J.F. (ed.), *op. cit*., pp. 93-105; Landsberg C., "The Impossible Neutrality? South Africa's Policy in the Congo War", in Clark J.F. (ed.), *op. cit*., pp.169-183; Kabemba C., 2007, "South Africa in the RDC: renaissance or neo-imperialism?", in Sakhela Buhlungu, Daniel J. et al. (ed.), *State of the Nation. South Africa 2007*, Cape Town, HSRC Press, 2007, pp. 533-551.

[131] Ngoie Tshibambe G., *op.cit.*, p. 55; Nguya-Ndila Malengana C., *Frontières et voisinage en République Démocratique du Congo (Borders and Neighbourhood in the Democratic Republic of Congo)*, Kinshasa, CEDI, 2006, p. 253.

treaty confirms this willingness when it stipulates that the SADC member countries commit themselves to strengthen and consolidate the long standing affinities and the historic, social and cultural ties between the peoples of the Region. That is the basis and purpose of this social and cultural cooperation between the SADC States.

The social and cultural area regroups the sectors of gender, tourism, education and training, culture and sport, youth, health and movement of people and their settlement. All these sectors are covered by protocols. In this area, the DRC has enormous resources to offer for an efficient regional cooperation. From music to sport, from painting to literature, Congo-Kinshasa is renown across Africa. As for education, we can deplore a timid cooperation between the universities of the Region. However, we can point out that a great number of medical doctors from Congolese universities (Universities of Kinshasa and Lubumbashi) immigrate each year to work in some SADC States where the conditions of work appear favourable to them.

Besides the doctors, other young university graduates prefer to settle down in Southern Africa. Hence, the importance of the protocol on the movement and settlement of people in the community, which would result in the setting up of a common visa as is the case in West Africa. We are still far from this ideal when we look at the pictures of the Africans being burnt in South Africa back in 2008[132]. The Congolese were also victims of these violent acts. Currently, Angola has taken over from South Africa. This immediate neighbour of the RDC is busy expelling the Congolese living on its territory. These operations are denounced because they are accompanied with practices that violate international human rights conventions.

The attitude of the Angolan authorities does not seem understandable. The measures of expulsion of the Congolese from Angola could be justified by the "good" reasons of public order and are a matter for the sovereignty of the Angolan State. However, these measures seem to go against the nature of the historic ties that even the Conference of Berlin failed to break. All along the 2. 600 Km border between the DRC and Angola live peoples who belong to both States; for that border does not mean anything to them. Therefore, instituting measures likely to bring about mutual rejection and abuses is against nature and harmful to all the integration efforts. A Joint Angolan-DRC Commission made it possible to mitigate these social tensions in the two countries.

III. REFLECTIONS ON THE EFFECTIVE PARTICIPATION OF THE DRC IN SADC

The question that one raises about the participation of the DRC in SADC is whether or not the integration of this country in SADC can bring about the much sought-after development. If the answer is yes, on which condition shall that be? As for some European countries that developed themselves by integrating the EEC, there is no more doubt today that the solution to the problems of development of African States is found through community projects that are likely to compensate for the disparities in terms of resources and technological progress. The DRC therefore needs its partners for the consumption of its resources and for the import of the technology, mainly from South Africa, in this particular case.

In this respect, the DRC must meet some conditions in order to act fully in the Community and to take the advantage it needs. The first and most important thing is that the DRC should

[132] Sundi Mbambi P., « Comprendre la xénophobie en Afrique du Sud » ("Understanding Xenophobia in South Africa"), *Congo-Afrique* (October 2008) n° 428, p. 635.

begin with its internal integration before even thinking of benefiting from its membership in SADC. This national integration requires the DRC to strengthen its democratic process, eradicate the armed conflicts that are still taking place in a part of its territory, and get ready to assume leadership by fulfilling the requirements that this position imposes on it.

III.1. Reflection on the actions to be taken internally

In its internal component, the DRC recovery plan requires national integration and an increase in economic activities; a consolidation of the existing democratic assets and respect for the rule of law; a total pacification of the country and its return on the African international scene as a regional leader. This is exactly what Thomas Bango Bango thinks when he writes: "*Let's not lose sight of the fact that our dear homeland depends on its faculty to know how to position itself not only on the African scene in order to take maximum advantage of what the market trends are proposing but also to anticipate all the warlike action that could undermine the development acquirements.*"[133].

III.1.1. National Integration and increase in Iinternal Economic Activities

This internal or national integration implies that the DRC should put in place infrastructure of sub-regional interest in matters related to communication. If integration means primarily the free movement of goods, capitals and people, how can we move in a zone supposed to be integrated if there are no channels of communication between its different components? This exactly what Albertini is criticizing when he writes « *the lack of roads, railways, telecommunication networks, and water supply system (…), in one word the lack of infrastructure is one of the causes of disarticulation and under-development. These infrastructure, he added, are usually defined as basic implements and services without which the domestic industry cannot produce* »[134]. To correct this state of things, the DRC must create infrastructure that link the country to the already dense Southern African network.

III.1.2. Prerequisite for Democracy, Rule of Law, Good Governance and Observance of Human Rights

It is nowadays admitted that democracy, the institution of the rule of law and the observation of the requirements of good governance are ingredients that can stimulate development in Africa. The combination and implementation of these three values have brought about the improvement of peoples' social conditions in the countries that have committed themselves to respect these values. For the observance of human rights, there is no doubt whatsoever that one of the objectives of regional integration is the promotion and protection of human rights. Beyond all the theoretical discourses, the DRC must still make a lot of efforts towards democracy, good governance and observance of human rights. Since the elections of 2006 and the installation of the national institutions, the Congolese democratic process rhymes with the non observance of judicial materials, corruption and financial embezzlements, especially in the management of natural resources.

All these practices contrary to the requirements of democratic governance is a reminder of the former regime and makes a lot of observers say that we are living in a Mobutist DRC

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[133] Bango Bango Lingo Th., "Les elections en RD Congo au-delà des enjeux nationaux" ("The Elections in DR Congo beyond National Issues"), *Congo-Afrique* (September 2006) n° 407, pp. 271-279.

[134] Albertini JM., *Les mécanismes du sous-développement (The Underdevelopment Mechanisms)*, 3rd edition, Paris, Editions économies et humanisme, 1967, p. 216.

in the absence of Mobutu[135].. " Old habits" are still present in the conduct of public affairs, there is a deplorable personalization of power with decisions being made in informal circles though citing constitutional texts, politicization of the civil service, repression of political parties; institutional instability and chronic violence; dependence on international finance and interferences in the workings of the judiciary. All these problems should be eradicated so as to allow the emergence of a genuine democracy and not the staged democracy that we seem to experience.

III.1.3. Total Pacification of the National Territory

As for any development effort, the integration both at national as well as regional level cannot be achieved whilst there still are zones of conflicts and insecurity. War is incompatible with integration for the simple reason that it is destructive and brings about poverty. The Northeast and the East of the DRC still experience sporadic cases of instability due to the presence of the rebel forces. In the eastern Province where the rebels from the Lord Resistance Army kill, rape, loot and burn down entire villages in the zones that they occupy, we cannot speak of the yet necessary stability for this part of the national territory. The joint offensive (Uganda-South Sudan-DRC) of June 2008 did not manage to neutralize these negative forces. It is the same with the military operations led against the FDLR rebels in the East, in the two provinces of North and South Kivu.

The analysis of these military operations aimed at pacifying the whole country has exposed the inability and the disorganization of the Congolese defence system. The FARDC, the Congolese Armed Forces, are not able to defend the country and ensure peace for the peaceful citizens who only need stability to develop their activities. Faced with the persistence of armed conflicts in this region, one can wonder why the Congolese government does ask assistance from SADC. This assistance would have proven to be necessary since SADC was ready to send troops to the DRC, in spite of the presence of the UN mission which is so used to watching the population suffer without reacting, contrary to what is expected of them.

III.1.4. Search for a Responsible State Leadership and Return of the DRC on the International Scene

It is accepted that the delay experienced in the area of integration in Central Africa worsened because of the collapse of the DRC whose position in this region is strategic. Its overall recovery will allow it to play its leading role as the spearhead of development in this part of the continent. The role of leadership of the RDC cannot be limited to Central Africa. The DRC cannot contribute efficiently to the activities of SADC if it is not entrusted with a leading role. The leadership in question in this case will be a shared one with the RSA and Angola which have overtaken the DRC and are far ahead of it.

This position corroborates the opinion of Dzaka-Kikouta when he concluded his analysis as follows: "*Finally, at the geopolitical level, we continue to argue that the performance of the economic and political integration of ECCAS countries would eventually require the emergence of the DRC as a country capable of playing the role as a key influencer in the region. This implies a quantum leap toward modernity for the consolidation of its economic, military and political power, like Nigeria for West African countries (ECOWAS) and South Africa for Southern African countries (SADC)* [136].

[135] Wamba dia Wamba E., « Mobutisme après Mobutu : réflexions sur la situation actuelle en République Démocratique du Congo » ("Mobutism after Mobutu: Reflections on the Current Situation in the Democratic Republic of Congo"), *Politique Africaine* n° 72, December 1998, pp. 145-158.

[136] Dzaka-Kikouta Th., « Incidences de la guerre de la RDC sur les réseaux des échanges parallèles transfrontaliers en

The DRC has what it takes to play this role and to become a power acting as the engine for the three regional communities of which it is a member (SADC, ECCAS and COMESA).

III.2. Initiatives to be taken in Favour of the Sub-Regional Policy: Implementation of Integration Projects

It has been said several times that the DRC has much to give to the world and to Africa. However, the DR Congo looks so far like the recipient of good and bad donations from all over the world. The much spoken about opening of the DRC to the world is a traditional way used by the big western powers to express their will. In 1885 already, these big powers made this part of the continent an Independent State so as to ensure the exploitation of its natural resources. Since that era, the country has remained open to all the continents. As Professor Mbata puts it, « *Even during the time when the cold war was very stiff, the country maintained relations with capitalist and communist countries whilst being part of « Non-aligned » countries*[137]. But what has this cooperation brought to the country, if not looting and distress pricing of the natural and mineral resources of the country?

The opening of the country to Africa seems to be an « inalienable duty » due to the geostrategic position of the DRC in Africa. Indeed, it is usually said that the DRC has an African vocation. This vocation can be perceived as a specific call from nature and history requesting the DRC to play a part in the future of the continent. According to Professor André Mbata, the geographic position of the DRC in Africa « *confers to it a strategic posture that Frantz Fanon translated by the following expression: 'Africa has the shape of a revolver whose trigger is in Congo' »*[138]. Now we can so rightly wonder what the DRC has actually done for Africa.

In other words, what was and what can be the contribution of the DRC to the political and economic integration of the continent? Let us pursue this reflection together with Professor André Mbata to note that by opting for the African integration", *Congo must have and adopt a policy and attitude of solidarity towards that of the other countries of the continent. This involves developing a policy that promotes African unity and working towards that vision.*[139]." We can also say that since the DRC is experiencing several constraints and can therefore not open up to Africa, it is the duty of the latter to pull the DRC toward Africa. How can this be done?

We would like to point out the opportunity that there is to enhance Congolese energy potential for the development of Southern Africa. For a long time the State had kept the monopoly in the production and distribution of electricity and water. In fact, the presence of the State as the only shareholder of the national electricity company did not allow the latter to exploit the potential of one of the biggest dams in the world. The dam of Inga was deemed capable of supplying electricity to the whole of Africa, the Middle East and the South of western Europe, but it only does so to some towns of the country (5% of the Congolese population only) and to some SADC States (Angola, Zimbabwe, Zambia, Namibia, Botswana and RSA) and to Congo-Brazzaville. The surveys have already been conducted, the only remaining thing is to secure the funding that can put into production all the twenty-five phases of the hydroelectric power station.

Afrique centrale : un défi de la mafia internationale à l'intégration régionale ? («The Impact of the DRC War on Parallel cross-border Trade Networks in Central Africa: an International Mafia Challenge to the Regional Integration? "), in Sabakinu Kivilu (dir.), *Les conséquences de la guerre de la RDC en Afrique centrale (The Consequences of the DRC War in Central Africa)*, Kinshasa, PUK, 2002, pp. 220-221.

137 Mbata B Mangu A., *Education à la citoyenneté*, Kinshasa *(Citizenship Education)*, (s.ed.), 2009, p. 69.

138 Mbata B Mangu A., Education….op. cit., p. 68.

139 Ibidem.

The public authorities have just taken some initiatives inviting African partners to make materialize the dream of electrifying Africa with the power from the big dam of Inga that René Beeckmans praised as follows: *"November 24, 1972 will remain an important date in the economic history of the Republic of Zaire: it will be the day when the first dam of the complex hydroelectric station of Inga, which will one day become the biggest dam in the world, will be inaugurated…*[140]. ". Thirty-seven years later, Inga is yet to play this big role. Hence, the necessity of changing the methods of management. This explains why through the Law n°08/007 of July 7, 2008 on general provisions for the Privatization of the Public Corporations, the SNEL (the national electricity company) as well as the REGIDESO (the water supply company) became commercial companies and the private sector could therefore share in the capital.

It seems that an opportunity is offered to Southern African ministers of energy and to SADC to encourage private individuals and body corporate to share in the capitals of these two companies so as to increase their capacities to produce and distribute energy across the continent starting from the Southern sub-region. The same goes for the agricultural sector. There is a possibility that the Southern African farmers" without land" (South Africa and Zimbabwe) come to invest in the DR Congo which has a great deal of arable land and water to develop an intensive agriculture in order to make good the food deficit on the continent. The DRC can take advantage of its presidency of SADC to materialize this urgent policy.

CONCLUSION

SADC has initiated important projects that began with the launching of the FTA as an initial phase of the commercial integration trajectory, moving toward the establishment of a Customs Union in 2010, a Common Market by 2015 and a Monetary Union by 2016. A regional Central Bank and a common currency are planned for 2018. What can be the contribution of the DRC in this move of the SADC toward integration? This is what this survey is striving to demonstrate. The DRC possesses the assets that allow it to draw advantage from its integration into SADC. But all depends on the capacity of its political leaders to make the country profit from the advantages offered by the Southern African Development Community.

Considering the numerous challenges that the DRC has to meet before participating fully as a power within the SADC, we should be cautious and avoid too much optimisms about the chances of making a" quantum leap" so as to take part in the common Agenda of the SADC. The missions of the Congolese authorities complicated themselves with the rotating presidency of SADC for this period running from September 2009 to September 2010. Although the DRC is considered to be an important country in the realization of the objectives of this sub-regional organization, the will of Joseph Kabila whose motto for his term of office is "challenge to obtain concrete results", does not foretell anything about the determining role of the DRC in achieving the SADC objectives.

Forward-looking observers are wondering what one can really expect from this Congolese presidency when one knows that Joseph Kabila has not yet succeeded in getting positive results in the DRC since his election as President in 2006. Indeed, despite all the electoral promises and three years at the helm of the country, all the Congolese are yet to see a true change that is likely to move the country to a better future.

[140] Beeckmans R., « Inga, grandiose réalisation d'une utopie » ("Inga, Great Achievement of an Utopia"), *Zaïre Afrique* n°69, pp. 537-543.

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THE INTEGRATION OF THE DEMOCRATIC REPUBLIC OF CONGO IN ECCAS: TREATY, AREAS OF COOPERATION, FUTURE PROSPECTS, INNOVATIONS AND PECULIARITIES

By Anne Marie NSAKA KABUNDA (*)

INTRODUCTION

African countries in general and those in Central Africa in particular feel that they cannot effectively compete in the current globalized market on their own. Thus, these countries try to organize themselves in intergovernmental institutions (ECCAS, ECOWAS, CEMAC…) and outline strategies of collective action within the framework of NEPAD. Regarding the particular case of CEEAC, the prospect of economic integration however remains at the institutional level.

The DRC has just emerged from several years of multifaceted violence whose consequences on State governance has manifested themselves particularly by the systematic looting of natural resources. Known as one of the richest countries in terms of natural resources, the DRC is ranked among the world's poorest nations, which by itself constitutes a dilemma whose causes deserve to be analyzed.

Since the establishment of a new regime led by leaders democratically elected in 2006, the focus is on rebuilding of the state and the visibility on the international scene. The government has overhauled the states horses of battle. To build the state and initiate the walk towards economic development, the DRC, which in 2009 headed the Economic Community of Central African States (ECCAS) and still runs to date the South African Development Community (SADC), decided to welcome all foreign investors. CONGO (Ex-Zaire) has gone through the transformation of the Capital accumulated during the colonial occupation which had consequences on the path followed by the Congolese economy immediately after independence. Transformed into financial capital, the colonial capital in Congo has reproduced the role of commercial capital for Export-Import at the end of the 19th century, First World War and of past-colonial period and investing in the Congo Zaire was considered as a world market.

Integration assumes several forms, the most important being political and economic integration which mutually enrich each other. African countries have realized this because whereas the first years of independence were dominated by the need for political integration within the framework of the OAU, since the late 1970, there have been more efforts towards economical integration as the basis for political integration. The real turning point in the history of the OAU, Lagos Plan of Action had been conceived as a sort of anti-drift control of the African continent following the fragment and bitter failure of Structural Adjustment Programs devised by the major capitalist states through international financial institutions such as the World Bank and International Monetary Fund. [141]

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[141] Ndeshyo Rurihose, O., *L'Antidérive de l'Afrique en désarroi : le plan d'action de Lagos (The Drift Control of Africa in Disarray: the Lagos Plan of Action*, PUZ, Kinshasa, 1987, p.8)

African leaders finally agreed on the fact that the continental economic integration had to happen from the bottom and not from the top and that economic integration at different sub-regions had to serve as engines and base to the economic integration of the continent[142]. It is within this framework that the sub-regional economic blocs were created, a force that later contributed to the creation of an African economic community or a common African market. Africa having been divided into five sub-regions that is West Africa, Central Africa, Southern Africa, East Africa and North Africa, each of these regions was going to organize itself to realize its regional integration while setting foot on economic institutions in order to promote the integration. We have to admit that there was and still exists a proliferation of economic organizations, Central Africa having created several like the ECCAS, the UNDEAC, the CEMAC and the GLSC. These organizations had to group together all Central African States or some of them before opening up to all others. The main objectives were and still are the promotion of the economic development of the sub-region, the creation of a free trade area in the short term and long term, an economic and monetary union with the free movement of goods, persons and capital by the suppression of tariff barriers among others[143].

Each sub-regional institution had to rely on its own organs but their common and ultimate objective was and still remains the improvement of the living standard of the people through the elimination or at least the reduction of poverty in Central Africa in general and DRC in particular. Regarding the integration of the DRC in the ECCAS, its regrettable that despite the abundant human and natural wealth which overflows in this state, the DRC seems to keep on running in place and its initiative towards economic integration seems to be slower than that of other Central African Countries and compared to the aftermaths of independence, poverty among its population has only increased instead of reducing.

Which role must the DRC play in order to realize her integration in the ECCAS with regard to these objectives? How can the DRC accelerate her integration in the ECCAS?

What could justify the lethargy of the DRC to play her leading role in the sub-region? What are the innovations and future prospects for the DRC? How should the DRC play her role of leadership? What is the problem of integration of the DRC in the ECCAS?

To whose benefit is the integration of the DRC in the ECCAS? Is the integration of the DRC in ECCAS able to accelerate her economic development? How does the DRC in order to fulfill its obligations? Does the content of the treaty establishing ECCAS facilitate the economic development of its member states?

The work put forward will attempt to answer these questions on which the author intends to share his thoughts.

I. THE DRC AND THE REGIONAL INTEGRATION IN CENTRAL AFRICA.

Many authors and researchers have devoted themselves to the study of under-development problems in Africa. They have in fact proposed solutions towards the fight against poverty. Integration was considered like a source of wealth creation for the improvement of living conditions of the people. Others leaned precisely on the issue of economic integration in Central Africa and the problems that it has been encountering.

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[142] Ndeshyo Rurihose, O., *Le système d'intégration africaine (The System of African Integration)*, PUZ, Kinshasa, 1984, p.22

[143] Bakandeja wa Mpungu, G., *Le droit du commerce international : les peurs justifiées de l'Afrique face à la mondialisation des marchés (The International Trade Law: the Justified Fears of Africa in front of Markets Globalization)*, Afrique Editions, Kinshasa, 2001, 57

It follows that, despite the abundant resources in strategic mining in the majority of Central African countries and the DRC, low performance has been recorded in that region in particular since the 1990s, in the field of economic growth as well as a weakening of the state, an increase of risk, a weaker sub-regional economic integration in relation to West African countries (WAEMU, ECOWAS) and Southern Africa (SADC) of which the DRC is also a member[144]. Dietrich wrote that "*in Central Africa, the correlation between poverty, instability and diamonds give the belief that the region is overwhelmed by its wealth in diamond rather than being fortunate*"[145]. Indeed, with the exception of three countries (Cameroon, Gabon, Equatorial Guinea) reputed as stable since the 1990s, most of the ECCAS countries show an almost chronic political instability and the majority of these countries have experienced armed conflicts in form of rebellions or wars of aggression (Angola, DRC, Rwanda, Burundi, Congo, Chad, CAR)

Speaking of mechanisms of underdevelopment, Albertini notes a disarticulation of under-developed countries. This disarticulation was particularly caused by the lack of infrastructure. This author has had the merit of pointing out an obstacle that is not the least in the economic integration. His analysis is too general to focus on the economic integration of Central Africa which was not realized due to lack of basic infrastructure[146].

Good governance aims at establishing sustainable human development; the latter being perceived as a maximum opening of opportunities available to every citizen. He adds that political governance in DRC did not help to reduce poverty as it was characterized by anti-democratic practices. This realistic analysis which establishes a link between governance and development is incomplete because it does not specify the authoritarian regimes that didn't allow economic integration in Africa.

In an optimistic perspective, Professor Theophile Dzaka-Kikouta persists in affirming that economic and political integration of the ECCAS countries would mean the emergence in the long run of the DRC as a country that could play a key role in the region.

With six neighboring countries, the DRC is participating in several international organizations in which her contribution would be significant. Her disastrous situation is unfortunately the cause of inactivity of an organization such as the GLFC which has just been re-launched after several years. The study of the role of the DRC in the international organizations had the merit of highlighting its leadership in Central Africa. The DRC is not playing its leading role[147].

In an optimistic perspective, Professor Theophile Dzaka-Kikouta persists in affirming that economic and political integration of the ECCAS countries would mean the emergence in the long run of the DRC as a country capable of playing a key role in the region.

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144 Dzaka Kikouta,Th., « Entreprenariat d'insécurité et réseaux de contrebande de diamant et de coltan en Afrique Centrale des années 1990 à nos jours : une menace pour l'intégration sous-régionale? » («Insecurity Entrepreneurship and Diamonds and Coltan smuggling Network in Central Africa from the 1990s upto date: a Threat to the Sub-regional Integration? ") in Pidika Mukawa D et Tchouassi G, *Afrique Centrale : crises économiques et mécanismes de survie (Central Africa: Economic Crises and Coping Mechanisms)*, CODESRIA, Dakar,2005

145 Dietrich, C., « Monnaie forte : l'économie criminalisée des diamants dans la RDC et les pays voisins. Partenariat Afrique Canada » («Strong Currency: Criminalized Economy of diamonds in DRC and neighboring countries. Partnership Africa Canada), *www. partenariatafriquecanada.org,* 2002.

146 Albertini, JM., *Les mécanismes du sous-développement (The Underdevelopment Mechanisms)*, 3rd edition, Edition économie et humaine, Paris, 1967.

147 Cihunda Hengelela, J., *Sécurité régionale et règlement des conflits armés en Afrique. Contribution de la République Sud-africaine post-apartheid (Regional Security and Settlement of Armed Conflicts in Africa. Post-apartheid South Africa's Contribution)*, Unikin, Kinshasa, 2005.

Integration means nothing other than the coming together of all parties. Through integration one understands the incorporation of new elements to a system. It can take several forms of which the most important ones are the economic integration and political integration which enrich each other mutually[148]. As such, the integration constitutes a reasoned and deliberate act.

The degree of realization of economic integration depends on the organizational skills of the main agents of development. They are the ones who will define the terms of unification and pass them into concrete reality. They will as well choose adequate means that able to ensure fast progression towards real economic integration. The process of integration requires the organizational skills of economic agents and very often, the necessary measures for the progress of the integration take an opposite direction from that of market forces[149].

Gannage states that economic integration in underdeveloped countries is usually doomed to fail due to the competitive nature of these economies; resemblances as well as similarities in economies structures do not promote integration of economies. Timbergen defines integration particularly as an economic policy which shows an optimum of centralization[150]. It requires the bringing together of several units under one decision making authority.

I.1. Economic Integration

Regarding integration, everyone recognizes that economic integration means the bringing together of several national economic entities under a decision and policy making authority particularly desirable by under-developed countries of which the economic dimensions are often reduced[151].

Although it can be considered in many respects as one of the major themes of several economic theories like that of international economy, economic space or economic development, integration is derived from the classical theory of international trade. This theory of international trade is an apologist for the free trade regime considered as a means of overcoming constraints resulting from the availability of factors of production.

As far as the process to use is concerned, economic integration amounts to liberalization of trade and the realization of an international business entity in which abundant goods are exchanged against scarce goods under a regime of free trade[152]. Thus economic integration looks like the end of a process of trade liberalization, the absence of discrimination in the economic relations of different countries.

The traditional concept of economic integration has in fact led to a definitive definition that holds the elimination of obstacles to the trading and not production and refers explicitly to optimize benefits or profits in the traditional sense[153].

The liberal concept postulates that underdeveloped countries should be connected with the industrialized countries. The result of specialization in such cases is well known, the

148 Myrdal, G., *Une économie internationale (International Economy)*, PUF, Paris, 1958, p.11.
149 Ngom-Ngoudi., *La réussite de l'intégration économique en Afrique (The Success of Economic Integration in Africa)*, Economica, Paris, 1971, p.37.
150 Tinbergen, J., *International Economic Integration*, Amsterdam, 1954, p.95
151 Ngom-Ngoudi., *La réussite de l'intégration économique en Afrique (The Success of Economic Integration in Africa)*, Economica, Paris, 1971, p.36.
152 Norro, M., *Le rôle du temps dans l'intégration économique (The Role of Time in Economic Integration)*, Louvain, 1962, p.102
153 Nsaka Kabunda, A.M., *La problématique des zones d'intégration économique en Afrique face à la globalisation des marchés (The Problematic of Economic Integration Zones in Africa faced with Markets Globalization)*, Unikin, 2005, p.15

former supply industrial goods in return for export of their primary products. Moreover, the effect of domination undermines the development of these countries as far as the people are concerned while tending to ensure a standard of living comparable to that led by people of industrialized countries.

Economic integration can be regarded, at the same time, as an ideal or goal to be achieved and as a process leading to an end. Myrdal suggests that economic integration be the realization of the ideal freedom and equality of opportunity. It involves the loosening of social rigidities which limit the freedom of choice of individuals. To achieve this ideal, it is nevertheless necessary to be have attained a certain degree of industrialization. Such an ideal is never reached[154].

Integration is not just the establishment of relations geared to an end beyond the economic calculation of the traditional optimization. It equally presents a process aimed towards the goal to achieve the process by which the suggested ideal to the international community trends to be realized. At a more concrete level, the integration presents itself as of resources and human and material energies to facilitate an accelerated development in this case it implies that individuals agree to voluntarily organize their life together. The sharing of resources and energies seems to be the surest way to serve at the same time the national development objectives and consequently advance more quickly towards economic progress. Such sharing requires beforehand willingness of the main agents of development who must decide to congregate in areas to maintain stable, consistent, perfect relationships and make the greatest profit[155].the success of any economic integration postulates intervention of states and this itself resulting directly from the process of integration. In matters of integration as in several other areas there is a close relationship between the economy and politics.

I.2 Political Integration

Integration constitutes a meeting field of national economic policies of development. They clash, confront and reconcile the objectives of various national states in order to arrive at a political economic equilibrium to coordinate and transcend these political difficulties because they are the ones who decide the distribution of human and natural resources and the allocation of capital that is supposed to be shared. Integration is regarded from that moment on as a technique and in one word, politics.

It calls for coordination of economic policies conducted by different countries.

One of the basic objectives of the Organization of Unity (OAU) was the political integration of Africa. Nkrumah states that political integration would remain an empty word with economic independence. Political independence at the continental level postulated economic independence which progressively became one of the objectives of the OAU especially the second during the second decade of independence.

Economic integration and political integration cannot be dissociated from each other. Economic integration requires a certain level of political integration and vice-versa.

European integration, for example, would not be able to materialize without collective membership of European States in the ideals of democracy, the rule of law and respect for

[154] Myrdal, G., *op.cit*, p. 76

[155] Tomlison, I., quoted by Yunusa,Y., « *Globalization, ITC, and The New Imperialism : perspectives on Africa, in the Global Electronic village*, Africa Development, Vol.XXX, No 1 and 2, 2005, p.98-124.

human rights and without some level of political integration. Likewise, economic integration currently being sought by African countries must rely on existing efforts and these still underway for the achievement of a major political integration of the continent.

A successor could say natural discourse on structural adjustment and good governance, the discourse of global capitalism postulates complete opening of markets. So it is for democracy and human rights in Africa an in other developing countries despites the benefits it can bring to boast economic development, globalization also poses problems for the economic integration that are not always marked by it protagonist and their agents.

The question is however to know which form of integration precedes the other according to the economists, industrial and economic integration must precede political integration and a good political integration is based on economic integration[156]. African countries seem to have taken a different direction putting politics first the creation of OAU was the first manifestation of the desire of independent African countries to first of all look for political unity. For Nkrumah and other founding fathers, it was first independence integration includes politics first; the economic was necessarily going to follow. We wait to see until the late 1970s to finally see the OAU addressing more seriously the economic issues.

1.3 Economic Potentials of the DRC

The DRC, the pace-setter of Central Africa abounds several sustainable natural resources to promote economic integration in the ECCAS and the rest of the countries in sub-region. We can talk in a vindictive manner talk about forest, water, oil, human and mineral resources. Due to its exceptional wealth in minerals, gemstones and in energy resources is representative of the wealth of ECCAS, it's for this reason the DRC is "geological scandal"

1.3.1 Forest and Savannah in the DRC.

The forest environment forms a wide circle of less populated areas rich in biodiversity, wood reserves and cultivatable land and made the country a global forest reserve[157].

The savanna environment, open environment have in the contrary promoted the formation of political entities. The highlands of the Congo-Nile crest form the most sensitive of the country, victims of natural asset s of tropical mountains (healthy climate for cattle breeding, fertile volcanic soils).

These natural environments are rich in a diversity of flora and fauna that can develop a tourism industry in keeping with tourist attractions of other countries.

I.3.2 Water, Oil and Mineral Resources

The environment of the DRC is the mark of water. In the political issue of the 21st century, the question of water concerns all the countries in the sub-region and beyond, which led to the strengthening of regional cooperation.

Potential companies in DRC indicate that his country is full of large oil reserves. Gabon, Cameroon and Equatorial Guinea are classified among the oil producing countries in

[156] Amin Samir., *Les défis de la mondialisation (Globalization Challenges)*, Ed. La Découverte, Paris, 1996, p.54.

[157] Poutier, *L'Afrique centrale et les régions transfrontalières : perspectives de reconstruction et d'intégration (Central Africa and the Border Regions : Reconstruction and Integration Prospects)*, OCDE, 2003, p.

Africa. This combined wealth makes the Central African region to be self-sufficient in the consumption of black gold.

The DRC is regarded as a geological scandal in the world. It is counted among the countries of the planet containing ore with technology needs for its development the recent discovery colt an in the extreme eastern DRC confirms this assertion.

I.4 Population and State of Poverty in the DRC

Population of the DRC is a wealth that needs to be brought to light to re-launch its integration in the ECCAS. Despite wars that decimated much of the population, it can be argued that the country is recording a higher population growth rate per year.

As for the state of poverty, we will try to pick up incidences or factors from which one can detect the state of poverty in a country that limits its national integration. This includes in particular conditions of daily life, access to basic social services.

I.4.1 Unmet Basic Needs

Having enough to eat, adequate clothing, shelter and medical care are basic needs of existence. In DRC, results of the opinion poll on the perception of poverty by the catalogue population (SOPPOC) shows that 79% of the population are not satisfied by their shelter, 82% of the population reported not to be in a position to take care of their health issues, 84% of the people interviewed said they were struggling to dress decently[158].

I.4.2 Deterioration of Production factors.

Poverty is perceived as a situation of weak production, lack of buyers and lack of evacuation routes. It looks like a lack of employment, initiatives and long term vision because of the inexistence of companies capable of creating employment from the active population. Where they exist' they only employ a tiny part of the population of working age[159].

Poverty is also the lack of capital resulting from the inability to access credit to start a productive activity. It is clear from the participatory analysis that the lack of capital hinders human and economic development[160].

1.4.3 Low access to basic social services.

Inability to go see a doctor or seek treatment constitutes one of the most remarkable perceptions of poverty as indicated by a citizen of Equateur province in DRC. Results from the opinion poll carried out in DRC shows that 76%of the households are not satisfied with the education of their children and 82% with their healthcare.

Also, some households across the country only send one or two children to school, in most cases, boys. From a generic level, poverty in DRC is made worse by political, economic and

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158 *Document de la stratégie de croissance et de réduction de la pauvreté en RDC (Paper on Growth and Poverty Reduction Strategy in DRC),* Kinshasa, 2006, p.18

159 Idem

160 Ibidem, p.18-19

social factors[161].

State of poverty in DRC contrasts with the immense resources that this country is endowed with. This is concern to all political and economical factors of the different sectors of this country. What action should be taken to pull the country out of poverty so that it plays its leading role and succeed in its integration and that of the ECCAS?

To respond to these questions we will try to look for the causes of failure of this international organization of integration before proposing some ideas as a solution to the activities describing so far.

I.5. Problems of Economic Integration In The ECCAS

The Treaty establishing the Economic Community of Central African States (ECCAS) was signed in October 1983 at Libreville and came into force in December 1984. The sub region economic organization is found in the center of Africa and at the cross roads of exchanges on the continent, it has countless economic resources and is considered as the pillar of the African Economic Community (ECA) because of its favorable and outrageous economic situation but the official contacts between the ECA (AEC) took place in October 1999, this largely due to lack of activity of ECCAS during much years of the 90s and especially the lack of political stability and of cohesion policy for the Member states of the organization.

Several barriers prevented economic integration of Africa and that of ECCAS in particular. As for us, we will retain three main causes. It is the lack of political will, absence of sub-regional leadership and the persistence of armed conflicts in Central Africa.

I.5.1. Lack of Political Will

Given that international organization of economic integration are emanations of wills of State, their efficiency and effectiveness depend upon the degree of engagement in the implementation of treaties of integration by the signatories. Organizations of economic integration in Central Africa and host of ECCAS as well, have experienced many obstacles including obvious ones such as lack of financial resources necessary for their operation, violation of treaties by member states and withdrawal or refusal to participate in an international organization by a state whose absence would affect the activities of that organization.

Lack of political will of the member states in the ECCAS is also to blame for the nature of political regimes in place in these countries. There is no secret that monolithic and dictatorial regimes have not allowed economic integration. This explains the bad governance characterized by the dilapidation of funds for the maintenance of authoritarian power, frustration of the actors of economic integration by human rights violations[162].

It's the lack of will which makes the member States of the ECCAS not to be able to allocate necessary funds for the construction of infrastructures for public interest[163]. DRC is one

[161] Charentenay, P., *Le développement de l'homme et des peuples (The Development of Human Being and Peoples)*, Paris, Centurion, 1990, p.26

[162] Mukendi wa Meta, E., « *Regard sur la pauvreté et les stratégies pour son éradication* » («*Focus on Poverty and Strategies for its Eradication»)* in Afrique et développement, n° 17, FCK, 2003, p.53.

[163] Albertini, JM., *Les mécanismes de sous-développement (Underdevelopment Mechanisms), 3rd edition*, Paris, Edition Economie et Humanisme, 1967, p.216

of the countries that have difficulty paying their contributions to the organizations. Until proven otherwise, the DRC has not planned in its budget the modalities of payment of its contributions to the international organizations. The question is to know how the DRC pays its contributions and what are the mechanisms.

The existence of anti-democratic regimes and their corollaries have led to armed conflicts.

I.5.2. Persistent Armed Conflicts.

Among the barriers that are the basis of the malfunctioning of the international organization of economic integration in Central Africa represents a terrible scourge which is a major obstacle and that of armed conflicts which paralyzed a good number of African Sun-regions.

The Central African sub-region was plunged into mourning by the numerous armed conflicts which culminate with the first war in Africa which took place in DRC from 1996 to 2003. With the exception of Gabon, Cameroon, Sao Tome and Equatorial Guinea, all other countries in the region have experienced bloody conflicts whose consequences have been detrimental to the sub-regional economic integration.

It is within this context that professor Theophile Dzaka-Kikouta maintains that "the weakening of the nation state and the concomitant rise of mafia networks of large smuggling (the war in DRC having intensifies this trend) is a major obstacles to the revival of monetary and economic integration of Central African Countries." Then, politically, if we admit that the success of the process of the regional economic integration should in cooperate as well the political integration, it must be noted that the war of aggression imposed by three neighbors, two of which (Rwanda and Burundi) are members of the ECCAS, constitutes a serious threat that could lead to the balkanization of Central African countries[164].

I.5.3. Lack of Sub-Regional Leadership.

The question of state leadership in the relations between states is becoming a phenomenon that should be taken to account in the study of international organizations.

The layout of leadership in the international organizations is omnipresent as in the UN as well as in the EU. It is clear that Africa cannot run away from this phenomenon. Besides, we can note with satisfaction the influence, though in the process of Nigeria in West Africa especially in its action in the ECOMOG or the commitment of the RSA in the integration of Southern Africa, more precisely in the stabilization of the SADC. The two regions are the most integrated in the continent thanks to these sub-regional powers.

Central Africa is not subscribed to the phenomenon of State leadership. Indeed the inactivity of the DRC on the international scene has a negative impact on the integration of central of Central Africa. We can say that thanks to its mining, water, plant, hydraulic and its geographical position the DRC would be the decision for launching the development of Africa. Recurrent crisis caused by the long dictatorship and war have stripped the country

[164] Dzaka-Kikouta, Th., « *Incidences de la guerre de la RDC sur les réseaux des échanges parallèles transfrontaliers en Afrique Centrale : Un défi de la Mafia internationale à l'intégration régionale* ? » (*"The Impact of DRC War on Parallel cross-border Trade Networks in Central Africa: an International Mafia Challenge to the Regional Integration? "*) in Sabakinu Kivilu, *Les conséquences de la guerre de la RDC en Afrique Centrale (Consequences of DRC War in Central Africa)*, Kinshasa, PUK, 2002, p.220-221

of all its capabilities to establish itself as a rival power to the RSA or to Nigeria. This lack of participation of the Congo-Kinshasa in the Central African international organization has consequently the non-integration factor of the sub-region. How can we then revive the economic integration in the ECCAS?

II. THE DRC AND THE OBJECTIVES OF THE ECCAS.

The Economic Community of Central Africa States was created to promote economic development of the sub-region facilitate the movement of goods and services, and people. The primary purpose is to promote and to reinforce harmonious cooperation and a balanced development and self-sustaining in all areas of social and economic activity, particularly in the areas of industry, transport and communication, energy, agriculture, natural resources, trade, customs, financial and monetary questions, human resources, tourism, teaching, development, culture, science and technology and of movement of persons in order to achieve collective autonomy, raise the standard of living of the people , increase and maintain economic stability, strengthen the close relations between member states and contribute to the progress and development of the African Continent. But the political instability and the lack of political will among the member states led to the complete stopping of all activities and programs of cooperation and integration between 1993 and 1998.The community was shelved.

By the treaty establishing ECCAS, the high contracting parties were supposed to abide by the principles of international law governing relations between States, god neighborliness, non-interference in internal affairs, non- use of force for the settlement of disputes and respect for the rule of law in their mutual relations[165].

The member states of the ECCAS undertake to direct their efforts to reunite the favorable conditions to the development of the community and the attainment of its objectives as well as the harmonization of their policies for the concretization of these goals through the institutions of the community. They refrain from taking any unilateral measure that could jeopardize its realization.

Every member state agrees to take all measures in accordance with its constitutional procedures to ensure the adoption and dissemination of legislative texts necessary for the execution of the provisions of the treaty.

The DRC is faced with several scourges which prevents it from becoming integrated at the regional and sub-regional levels, political instability is manifested by the recurrence of coups and assassinations. They are mostly the cause of the rebel troops and a major factor of destabilization

II.1. Objectives of the ECCAS.

a) Promoting and strengthening harmonious cooperation and a balanced and self sustaining development in all areas of social and economic activity.
b) The elimination between member states of customs duties and other charges having equivalent effect to the importation of goods.
c) The abolition of quantitative restrictions and other trade barriers;
d) The establishment and maintenance of a common external customs tariff.
e) The establishment of a trade policy

[165] Article 4 of the ECCAS Treaty

f) The gradual removal of obstacles to free movement of persons, goods , services, capital and right of establishment
g) The harmonization of national policies in order to promote community activities particularly in the areas of industry, transport and communication, energy, agriculture, natural resources, trade, money and finances, human resources. Tourism, teaching and the culture of sciences and technology.
h) The creation of a fund for cooperation and development.
i) The rapid development of members' landlocked states, islands, semi-deserts and belonging to the category of least developed countries.
j) Other activities aimed at achieving community objectives that the member states will undertake together[166].

In addition to these objectives, promotion of peace, security and stability was included in 1999.

The DRC being member of ECCAS is committing herself to direct her efforts to reunite the favorable conditions to the development of the community and the realization of its objectives as well as the harmonization of its policy for the concentration of such objectives through the institution of the community. They refrain from talking any unilateral measure that could jeopardize its realization[167].

II.2 Areas of Cooperation

The treaty establishing the ECCAS provides several areas of cooperation, some being more important and useful for the DRC.
We will try to name all the areas of cooperation provided by the ECCAS for all the member countries which are:

- Cooperation in monetary, financial and payments.
- Cooperation in the field of agriculture and food.
- Cooperation in the field of industry.
- Cooperation in the field in of infrastructure and equipments, transport and communication.
- Cooperation in the field of science and technology.
- Cooperation in the field of energy and natural resources.
- Cooperation in the field of human resources and social affairs.
- Cooperation in the field of education, training and culture.
- Cooperation in the field of tourism.

It seems that the DRC embraces all international organizations of regional integration, so it will be necessary to know which areas of cooperation that may be of interest to it and be useful for its economic development and the well being of it s people.

ECCAS actions in the field of integration has not produced concrete results so far for various reasons (conflicts, institutional shortcomings, weak commitment of states).Thus, from 1993 to 1998 the darkest period of its existence, the situation of the ECCAS was characterized by: ineffectiveness of its headquarter, paralysis of the community institutions, the virtual lack of contributions from states and the cessation of payments, withdrawal of Rwanda…

[166] Article 4 of the ECCAS Treaty
[167] Articles 27-66 of the ECCAS Treaty

ECCAS has been designated a pillar of the African economic community in gestation. But due to hibernation in which it sunk from 1992, official contacts with the ECA ceased and resumed only in October 1992. Its within this month of October 1999 that the ECCAS signed the protocol on the relations between the CEA and the Regional economic Communities (REC)[168].

Activities were received at the conference in matabo in June 1999 with a growing emphasis on research and the prevention of conflicts[169].

Indeed, under the Standing Advisory Committee of United Nations for security issues in Central Africa, the ministries of foreign affairs, defense and internal security come together at Yaoundé from 26 to 30 October 1998 evoked issues of cooperation in matters of peace and security . Given the persistence of crises and conflicts in Central Africa, they had an opportunity to recommend the creation of a higher Council for the promotion of peace, Prevention, management and settlement of political crises and armed conflicts in the sub-region, by a summit of Heads of State and Government.

ECCAS intends to also strengthen its activities in the prevention of conflicts by reactivating the records of anti-drugs and the fight against trafficking of small arms and light weapons in Central Africa.

In matters of economic integration, the activities of the ECCAS, have not given to this day significant results and seems to concentrate in the short term mainly on preparatory studies.

- A study of the control of free movement of certain categories of persons (state civil servants, economic agents, religious etc)
- A study for the establishment of an autonomous financing mechanism.
- A study "on the establishment of a regime of trade liberalization within the ECCAS", the model of the trade regime of the CEMAC.
- A study on the establishment of structural funds and compensation.
- A study on the interconnection of electronic networking of the eleven member countries of ECCAS including the DRC.

However the time of Central Africa is now. Peace, stability and regional integration present them as conditionality.

III. PROSPECTS, INNOVATIONS AND PECULARITIES

We will try at this point to raise some prospects, to find out if the are new things and finally draw some peculiarities.

III.1 Prospects

After having formulated a diagnosis that the rest is not exhaustive it's the duty of any researcher to propose solutions that can meet the challenge of non-integration of the DRC. Under the task, what needs to be accomplished to accelerate integration of the DRC in the ECCAS, we retained mainly the infrastructures, democratization, eradication of armed conflicts and the search for state leadership responsible at the sub-region.

[168] Articles 37-66 of the ECCAS Treaty
[169] Idem

III.1.1 Building of Infrastructure.

If the integration involves primarily the movement of goods, capital, persons and how does one move in an area where there is almost no channels of communication between its various components? The lack of infrastructure is one of the first causes of underdevelopment. That's precisely what Albertini maintains when he says "lack of roads, railway lines, telecommunication networks supply of water (…), in a word infrastructure is one of the causes of disarticulation and underdevelopment. These facilities, he adds are the same….. defined as the equipments and basic services without which productive sectors cannot operate[170]. In the same sense, experts for the initiative for Central Africa concur when they state that "international air transport represents an interesting indicator of the level of the regional and sub- regional integration. Central Africa highlights the weaknesses of aerial routes between the capitals of the sub-region[171].

It takes the creation of sub-regional infrastructure to address to the state of affairs. Reference is made to roads and railways linking all countries of the ECCAS. For coastal countries like the Congo-Brazzaville, DRC, Cameroon or countries with the border river, can be transformed into a real transitional path used for sub-regional integration. It's the case of River Congo which unites the two Congo and Central Africa thanks to Oubangi the creation of maritime partnership of regional interest becomes a necessity.

III.1.2. Pre-conditions of Democracy- the Rule of Law, Governance and Respect for Human Rights.

Without trying to define these concepts that are part of a new song of development, democracy, rule of law and good governance are regarded as prerequisites or in gradients capable of stimulating the development of Africa[172]. These three values put into practise elsewhere have been the basis of improvement of social conditions of people.

For respect of human rights there is no doubt because economic integration of the DRC in the ECCAS needs human resources for its realization. These men and women that are needed should enjoy sustained attention with their right to freedom, education, and health to life so as to be able to make their contribution to building the integration.

The member countries of the ECCAS should still provide a lot of effort in the field of democracy, good governance and respect for human rights. The democracies of the member countries of the ECCAS facades, corruption, financial malpractice particularly in the management of natural resources and the rule of law ….

It is the bitter fact that Professor Andre Mbata establishes when he enumerates the characteristics of governance in forty years of independence in Africa. He maintains that within the political level[173], there is:

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[170] Albertini, JM., *op.cit*, 1967, p.217

[171] Initiative Afrique Centrale (Central Africa Initiative), p.48

[172] Mbata B. Mangu, A., *Education à la citoyenneté, Manuel d'Enseignement (Education for Citizenship, Teaching Manual)*, 1st Edition, Kinshasa, 2009, p. 22 and 23, 28 to 32.

[173] Mbata B. Mangu, A., «*Suprématie de la constitution, indépendance du pouvoir judiciaire et gouvernance démocratique en République Démocratique du Congo» («The Constitution Supremacy, Independence of Judiciary and Democratic Governance in the Democratic Republic of Congo»)*, in Bakandeja wa Mpungu G., Mbata B.Mngu A., and Kienge Kienge Intuidi R., *Participation et responsabilité des acteurs politiques dans un contexte d'émergence démocratique en RDC*, Actes des journées scientifiques de la Faculté de Droit du 18-19 juin (*Stakeholders'Participation and Responsibility in an Emerging Democracy Context in the Democratic Republic of Congo. Scientific Sessions Proceedings of Faculty of Law, University of Kinshasa, 18-19*

- A personalization of power, leaving the center of decision in the informal circles and whose manifestations are the manipulation of constitutional texts the politics of the politics of public service, repression of political parties.
- An institutional instability and chronic violence.
- Confusion between the executive and the judiciary.
- A domination and subjugation of the public administration.

All these anti-values should disappear to leave space for democracy, rule of law and good governance in central Africa.

III.1.3. Creating Peace in the Armed conflicts Zones

Just like all other efforts in development, economic integration is not compatible with war. War is considered as the mother of all poverty[174], political instability and permanent insecurity. Armed groups and rebel grouping are also detrimental to integration. Central Africa is sick prone to armed conflicts. Efforts should be put together so as to set up a security system for this Sub-region with the help of SADC or ECOMOG and all this within the framework of ECOWAS.

III.1.4. Search for a responsible public leadership: The return of the DRC in the African international scene.

It is now recognized that the problems of Central Africa have exacerloated because of the collapse of the DRC position in this strategic area. Its overall recovery allows it top play its leadership role serving as the engine of development of sub-region.

On that subject, we can give advantages to the assets of the DRC to lead Central Africa:

- The immensity of the territory which represents almost the half of Central Africa. This territory has a lot of raw materials for the development of all the countries of the region.
- The water reserve the courses constitute, lakes, rivers and the big Congo River is a wealth of XXIst c especially century especially for its hydroelectric potential, source of energy for the development of industries.
- Human resources: the DRC is inhabited by a population on that represents the double population accumulated from all the member state of the ECCAS. This resource is the first wealth, thanks to its dynamic with which it's necessary to count for economic integration[175].

III.1.5. Re-launching of the activities of the ECCAS.

In 1998, the ECCAS was able to hold in Libreville a summit of heads of state and governments who gave a new impetus to the process of cooperation and integration in Central Africa. The new impetus was confirmed by the second summit organized in June 1999 at Malabu, and was marked by the adoption of a recovery program and revitalization of the ECCAS centered on some priority actions including development.

June 2007), Unikin, 2007, p. 397.

174 Nsaka Kabunda, A., *Intégration économique et lutte contre la pauvreté : défis et perspectives (Economic Integration and Fight against Poverty: Challenges and Prospects)*, Conférence sous-régionale pour l'Afrique Centrale 27-28 janvier 2007,(Sub-Regional Conference for Central Africa 27-28 January 2007) Douala, 2007, p.14.

175 *Article 4, paragraphs a, b, c, d and f of the ECCAS Treaty*

Moreover, in addition to its traditional missions in the world of integration and regional cooperation, the ECCAS is currently in charge of promotion of peace, security and stability in Central Africa as well as to provide support to member states in electoral processes. It is also designated as the focal point NEPAD for the region and provides secretariat of the Regional Monitoring coordination of NEPAD in Africa. (RCNEPAD/ AC).

Budget of 10 million French frames was approved by the council for that purpose and instructed the Secretariat of the following activities.

- Obtain the support of ECA (UN) to evaluate the operational activities of the secretariat and the contributions due from members.
- Hold a special meeting of the cabinet as soon as possible to evaluate the recommendations of the ECA (UN);

The council had equally asked the countries of the region to find lasting solutions to peace and political problems.

III.2 Innovations

We note the political will of the Congolese leaders to bring back the DRC on the international scene. Concerning its integration in the ECCAS, there are no new elements; instead it seeks to find solution to a certain number of problems it knows, like the obligation of its contribution to the ECCAS and other organizations. The problem is not well understood in the country even though it is anticipated in the budge the contributions column to the international organization; we see that money anticipated for the contribution of 10 is spent for other purposes. This is not encouraging.

III.3 Pecularities

What we see in particular for the DRC is that, this country is located in the center (heart) of Africa and is surrounded by 9 neighboring countries, It is torn from every side because of its potentials, its human resources, it belongs o several integration organizations even in the Southern Africa to which it doesn't belong geographically.

CONCLUSION

Despite the presence of its strengths, the DRC must remove some obstacles to be able to play its role in the ECCAS, they include:

- The DRC must first integrate itself economically.
- Consolidation of democratic achievements, the rule of law, respect for human rights.
- Pacification and maximum securing of the country.
- Social recovery, improvement of the conditions of the people.

This is our opportunity to acknowledge the correctness of the perception of problems in the ECCAS by Professor Theophile Dzaka Kikouta[176] when he concludes in these terms, "Finally in geographical terms, we continue to argue that the performance of political and economic integration of the ECCAS countries would require the emergence of the DRC as a country capable of playing the regional locomotive role." This requires a qualifying leap towards modernity for the consolidation of its economic power, military and political in

[176] Dzaka Kikouta, *op.cit*, 2002, p. 36

keeping with Nigeria for Western Countries (ECOWAS) and South Africa for the Southern Countries.

Only a successful economic integration will improve the fight against poverty achieve the desired economic development. Such economic integration and the integration of the DRC are possible only if the members refuse to get themselves in the process of globalization "wild" and "blind" to only tolerate globalization "with a human face" which certainly helps the market but also takes into account the social needs of the Central African people.

However, opposite to the will of the people and determination of enlightened intellectuals displayed by the political vision of a new class of leaders committed to working for the renaissance of Africa, it does not seem necessary to yield to Afro-pessimism conveyed by the enemies of Africa an which unfortunately dominates the political and intellectual talk on our continent.

We must also consider the heavy colonial and neo-colonial heritage still affecting the DRC and the enormous political, economic and cultural chains which it endeavors to liberate itself from independence and which has left very deep wounds. Faced with the impasse of the development, no credible alternative is possible which excludes economic integration. The sky's the limit and the prospects are good in spite of environmental realities. In the field of economic development like that of economic integration, we must also consider the importance and the role of time as Michel Norro[177] would advice.

It is on this optimistic note that we conclude our work.

[177] Norro, M., *op.cit*., p. 52

MECHANISMS TO GUARANTEE THE RIGHT TO STRIKE IN THE DEMOCRATIC REPUBLIC OF CONGO: KEY STAKEHOLDERS AND THEIR RESPECTIVE ROLES

By: Yves-Junior MANZANZA LUMINGU (*)

INTRODUCTION

Since the appearance of man on earth, he has always aspired to guarantee his well-being; which often times has led working hard to earn a living. But the right to life will be merely an illusion if it was not accompanied by other prerogatives established by various international, regional and national legal instruments.

These prerogatives are generally referred to as 'human rights" while some national legislation refer to them as "basic rights", "Rights and freedoms of citizens", "public freedoms". But regardless of the qualifications they can receive from state legislation, these rights are the ones that define and establish , in legal terms, the freedom of an individual, that he exercises alone or in a group[178].

We note that the legal protection of human rights has developed since the United Nations Charter requires states to promote and encourage respect for human rights and basic freedoms, although the obligation is more moral than legal. As a result of this Charter, the General Assembly of the United Nations adopted on 10th December 1948 the Universal Declaration of Human Rights (UDHR), which led to formulation of other instruments focusing on human rights such as the International Covenant on Economic, Social and Cultural, Rights of 16th December 1966.

This Covenant provides for the right to work in addition to others such as the right to fair and favorable working conditions, right to form and to join trade unions, the right to strike, right to social security and social self-assurance, right to adequate standard of living, right to education, right to participate in cultural activities, the right to benefit from scientific progress etc.

However, despite the expressed willingness to promote basic humans rights which every citizen must enjoy, some sluggishness persists, causing untimely violations of all these achievements. Hence the urgent need to advocate for effective measures, especially concerning stakeholders to see the applicability of some of these rights-claims, primarily the right to strike proclaimed by the Congolese constitution.

This thesis is designed to address the various mechanisms put in place by the Congolese legislation to guarantee the right to strike.

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178 Refer to KANDOLO ON'UFUKU wa KANDOLO, *De l'exercice des droits et libertés individuels et collectifs comme garantie d'une bonne gouvernance en Afrique noire : Cas de la République démocratique du Congo (De l'indépendance à nos jours) [Rule of Law and Individuals and Groups Freedoms as Good Governance Guarantee in Sub-Saharan Africa: Case of the Democratic Republic of Congo (From Independence upto Date)]*, Thesis, AUF, 2004-2005

I. THE RIGHT TO STRIKE AND THE RIGHTS-CLAIMS.

From the onset, it should be noted that the term "rights-claims" finds its roots in the economic, social and cultural rights "which emerged after the political and civil rights to counter the social injustices brought about by industrial revolution[179]".

Indeed, realizing that traditional or classical freedoms made little sense to those who didn't have material resources at their disposal, new rights were then claimed demanding from the government positive action towards their achievement, from where the expression "rights- claims" stuck to almost all the right which constitutes the second generation of human rights.

The new rights do not intend to replace the traditional freedoms but to complete them in the sense that they added and allow them to materialize. However, they introduce a series of changes in the way of thinking about human rights.

Indeed, Danielle Lochak writes "*human rights had been set forth, originally, from a universalist and individualistic perspective. Therefore, the new rights no longer just apply to an isolated individual but also the individual in a group they no longer aim at an abstract man, but actual people seized in their singularity; they don't postulate any more eternal and immutable human nature, but claim in contrary to consider …individual needs in accordance with the established social context*"[180].

Thus human rights amounted, in a liberal view, to a sphere of autonomy left to the individual, aimed at counterbalancing the power they claimed against above all, the state. The rights-claims to the contrary require an active intervention by the state to be implemented.

Finally, while the traditional freedoms are guaranteed by the mechanisms enshrined within the legal system, the satisfaction of rights-claims is based primarily on the mobilization of material resources and the establishment of public services (schools, hospitals, social security etc)

Note however that some of the rights recognized in the social sphere such as the right to strike, trade union rights are not right-claims: they are implemented by the same procedures as the "classical" freedoms[181]. Indeed, strike is not claimed but exercised in order to claim a right.

Consequently, although within the economic and social rights, strike will be analyzed here, not as a right-claim but as a freedom to be implemented to trigger the claims of an occupational category in order to guarantee certain rights in danger.

To seize better the impact of the right to strike, it's important to look back from the origin of the Labor Law of which it's closely bound. Admittedly, the labor law itself in its modern draft is traceable to the social evolution of the 14th Century in Europe when the workers were placed in difficult or unacceptable working conditions. This condition created an awakening of consciousness on the leaders of workers and pushed them to organize themselves and to demand an improvement of the working conditions. They arrived at labour laws aimed primarily at protecting them over and beyond the simple concern for the protection of

[179] Voy. Rusen ERGEC, *Introduction au droit public. Les droits et libertés (Introduction toPpublic Law. Rights and Freedoms)*, Bruxelles, Kluwer, 1994, p. 36 and Danièle LOCHAK, *Les droits de l'homme (Human Rights)*, Paris, Edition La Découverte, 2002, p. 41

[180] Danièle LOCHAK, *Op. cit.*, pp. 44-45

[181] Ibidem

workers, to which recognises and regulates collective rights. It must be recognized that the evolution of the labor law was marked by anti-colonialist ideas as well as by the action of International Organization including the ILO.

I.1 Prolegomenes

Understanding of the right to strike mainly by analysis of the concept strike as well as its history. Furthermore, the route of the semantic scope of strike will enable certainly distinguish other movements that are similar.

I.1.1 Concept

The concept of strike postulates its definition, its characteristics as well as its different forms as imagined by the society overtime.

A. Definition.

Strike is traditionally defined as a collective and concerted cessation of work by the staff of one or several companies in order to achieve the demands of professional nature.

It's in this sense that it's also understood as downing of tools by the employees for the defense of common interests or still as an essential instrument to fight for the workers[182].

Further, strike may designate a collective movement, an initiative taken by all or some employees of a company generally intended to compel the employer to the negotiation of working conditions and remuneration[183]. Thus, the French trade unions find, besides demonstrations and petition a means to defend social benefits such as retirement benefits, social security or public education system as well as to get salary increments and the improvement of working conditions[184]. Nevertheless, it should be noted that the strike is likely to cause a serious reversal with mass effect and paralyze the national economic life. Consequently it requires an effective regulation highlighting particular characteristics.

B. Characteristics.

Examination of the above stated definition highlights the specific characteristics of the strike, which involves.

- Existence of a labor dispute: the collective stoppage of work or the participation to this collective stoppage of work can only take place only during a labor dispute[185].
- Stoppage of work: it constitutes a specific element. The stoppage of work must be completed even if the partial strikes, minority or categorical are lawful.
- Concerted action[186]: an employee can only claim to exercise his right to strike on condition that the stoppage of work that he is observing is together with his peers[187].

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[182] Comp. CAVALERIE, *Notions fondamentales de droit (Fundamentals of Law)*, Paris, Ed. Faucher, 1995, p. 345 ; FLICHY, H., *Droit du travail (Labour Law)*, 7th Edition., Paris, Editions Belfond, 1991, p. 249

[183] www.dictionnaire-juridique.com/definition/greve.php

[184] http:/fr.wikipedia.org/wiki/Grève, 12 September 2009.

[185] Art. 315, paragraph 1 of Law No. 015/2002 of 16 October 2002 establishing the Labour Code.

[186] It refers to several participants, but it does not refer to a question of majority since a minority can legitimately go on strike. Indeed, no legal provision passes the exercise of the strike through a referendum among the workers.

[187] BEYA SIKU, « Démocratie en droit du travail » ("Democracy in Labor Law"), in *Participation et responsabilité des acteurs dans un contexte d'émergence démocratique en République Démocratique du Congo. Actes des journées scientifiques de la Faculté de Droit de l'Université de Kinshasa (*18-19 juin 2007) (*Stakeholders'Participation and Responsibility in an Emerging Democracy*

The strike should be carried out by at least two employees. If the stoppage of work can be limited by the fraction of staff (a workshop, a category of staff…) even minority, stoppage of work by a single employee is not a strike unless his action responds to a national policy or is the only employee in the company[188]. It's the reason why some authors talk about an individual right exercised collectively[189].

- Professional claims: strike is meant to defend professional claims focusing for instance on the remuneration (salary increment, restoration of premium,)' working conditions (ventilation of premises, transport), timing or duration of work, terms of employment (economic dismissals). Company strategy (new commercial policy). The claims must be presented to the employer (by the strikers or trade union) before starting the movement.

C. Forms of Strike.

Strike can be spontaneous and brutal, without a precise aim organized and directed towards a specific result restricted to a company or a branch or a region but various forms of strike were invented in the course of history.

Among these different forms are: surprise strike,….go slow, work-to-rule, illegal strike, general strike, hunger strike, sympathy strike, sit-down strike, political strike etc. each one of them takes on a specific consent and accordingly can be legal or illegal.

I.1.2 Historical Account

Strike itself has evolved differently from one country to another but we will limit our analysis on the situation in France[190] from which the DRC inherited most of the rules through Belgium, its former colony.

The origin of the term is in practice under the old regime under which workers in Paris, stopping work gathered in the "Strike Square"[191]. Such stoppage not being authorized , they suffered consequences (imprisoned at Bashile or sent to the army galley) indeed , strike was for a long time prohibited in France[192], consequences of the abolition of co operations and contracting of the labor law and within the first half of the 19th century, the monarchial that suppressed strikers and often imprisoned the strikers.

The right strike started to be recognized (with restrictions) since Emilie Olivier's law of 25 May 1864, before being proclaimed in the Constitution of 1946. Finally, the Constitution of the Fifth Republic didn't provide the right to strike but the Constitutional Council in its decision No. 79-105 of "of 25 July created the concept "block of constitutionality" in order to confer a constitutional valve to the preamble of the Constitution of 1946[193] and therefore the

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Context in the Democratic Republic of Congo. Proceedings of Scientific Sessions of Faculty of Law, University of Kinshasa, 18-19 June 2007), Kinshasa, Presses de l'Université de Kinshasa, 2007, 307-317.

188 FLICHY, H., *Op. cit.*, p. 250 ; HESS-FALLON, B. et SIMON, A.M., *Droit du travail (Labour Law)*, 16th Ed., Paris, Dalloz, 2004, p. 262 ; RAY, J.E., *Droit du travail. Droit vivant (Labour Law. Living Right)*, 9th Ed.., Paris, Les Editions Liaisons, 2000, p. 408 ; PELLET, R. et SKZRYERBAK, A., *Leçons de droit social et de droit de la santé (Lessons of Social Law and Health Law)*, 2nd Ed., Paris, Sirey, 2008, pp. 113-114.

189 MARLIAC, C., *L'essentiel des droits politiques, économiques et sociaux (Essentials of Political, Economical and Social Laws)*, Paris, Gualino editor, 2003, p. 126 ; RAY, J.E., *Op. cit.*, p. 408

190 Cfr http:/fr.wikipedia.org/wiki/Grève, 12 September 2009.

191 MARLIAC, C., *Op. cit.*, p. 125

192 PANSIER, F.J., *Droit du travail. Relations individuelles et collectives (Labour Law. Individual and Collective Relationships)*, 3rd ed., Paris, Editions du Juris-Classeur, 2003, p. 150

193 PELLET, R. and SKZRYERBAK, A., *Op. cit.*, p. 109 ; Comp. MAZYAMBO Makengo Kisala, A., « Introduction aux droits

right to strike enshrined in it.

Concerning the civil servants, the right was affirmed and specified in 1950 by a decision of the state council, l'arret Dehaene of 7 July 1950[194].

In the light of the previous developments, it is recalled that strike is since the 19th century a collective action consisting of a concerted stoppage of work by the employee of a company, an economic sector an occupational category or by extension of any other productive person often organized by trade unions. This action is meant to support the claims of the employees by putting pressure on the superiors or the employer (the manager or the boss) through the loss of production that stoppage of work leads to.

The legal status of the actions of strike varies from country to country it could be outright ban (particularly in dictatorships) to the regulatory framework or legislative. In countries where strike is legal, it generally prohibited within certain professions like the military, professional firefighters or the police.

I.2 Exercising the Right to Strike in the DRC.

The Democratic Republic of Congo being faithful to its international commitments particularly in the context of the International Labor Organization protects the right to strike as one of the basic rights established in its Constitution of the 18th February 2006.

The recognition of the right to strike is justified also because of the adhesion of the Congolese State to the International Covenant on Economic, Social and cultural Rights of 16th December 1966. Indeed, states that are part of the covenant have to ensure the right to strike exercised in accordance with the laws of each country[195].

This is the place to define its legal basis in the DRC and the collective labor relations in the Public Service.

I.2.1 Backgound

In the current state of Congolese law, strike is a basic right having a Constitutional backing. Indeed, through Article 39 of the Constitution of the 18th February 2006, the Constituent Congolese Assembly recognizes and guarantees the right to strike which is exercised under conditions laid down by law and may prohibit or restrict the exercise in the fields of national defense and security or any public service of vital interest in the nation. Its consecration was obtained after a bitter struggle, particularly under the colonial regime but also in the field of collective labor relations.

I.2.2 Strike in the Collective Labor Relations

The concept and history of the right to strike points out that this right has for a long time been confined essentially to people subject to the scope of labor legislation.

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de l'homme : théorie générale, instruments, mécanismes de protection » («Introduction to Human Rights: General Theory, Instruments, Protection Mechanisms «), in *Mandats, rôles et fonctions des pouvoirs constitués dans le nouveau système politique de la République démocratique du Congo (Mandates, Roles and Functions of Established Powers in the new Political System of the Democratic Republic of Congo)*, Kinshasa, 2007, pp. 226-279

194 Voy . especially JAVILLIER, J.C., *Droit du travail (Labour Law)*, 5th ed., Paris, L.G.D.J., 1996, p. 25 ; VERDIER, J.M., *Droit du travail (Labour Law)*, 9th ed., Paris, Dalloz, 1993, p. 361 ; PELLET, R. and SKZRYERBAK, A., *Op. cit.*, p. 110

195 Art. 8, paragraph 1 litera d) of the International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

But its exercise may be justified in a context of labor disputes, without prejudice to the conditions required for its legality.

A. Context: Labor Disputes.

Under articles 303 of the Act on Labor Code, " a collective labor dispute is any conflict occurring between one or more employees on one hand, and a certain number of members of their staff on the other, on working conditions since it is likely to jeopardize the smooth running of the business or social peace."

The conflict may be about a certan object of the dispute and about the parties that oppose it. The dispute is in fact about rights or common interests to a group of workers (e.g. wage rates, hours of work, transport, social benefits, etc). Consequently, protests by a group of workers having no direct relation with the work cannot generate a labor dispute.

Moreover, the dispute must involve a group of employees (it can be restricted to a category of employees or a company, a profession, a town). In employers view, the conflict remains collective even if it opposes a group of employees by a single employer. In simple terms, it's about "confrontation" between the social partners.

To sort out such conflicts, P. Durand advices that parties must at all cost avoid resorting to the strike or to the lock-out which are preceded by force which in social context is equivalent to a war[196].

B. Terms of Legality.

Collective cessation of work or participation to this collective cessation of work may take place only on the occasion of a labor dispute and once the means of settlement of the conflict, conventional or legal have been exhausted[197].

To put it clearly, workers desire to launch a strike must first exhaust all the means of settlement within their reach and in case of failure, give a notice to their employer.

a. Failure of peaceful settlement of conflicts.

Peaceful settlement of conflicts is subjected to a procedure determined for that purpose by the parties in the collective agreement of the company or one that is applicable to it. It's about a conventional procedure[198].

The law does not; however require the parties to the dispute to try before everything to settle their differences themselves. The procedures are not mandatory since the parties can use them or not. Solutions coming from the parties would have merit to be faster and would not start other legal proceedings for the settlement of labor disputes, thus avoiding "imposed" external solutions. Indeed, the commonly

[196] DURAND, P., *Contribution à la théorie de l'extension des conventions collectives : les effets de l'arrêté d'extension (Contribution to the Theory of Collective Agreement Extension: The Effects of Extension Order),* Paris, 1956, p. 24, quoted by LUWENYEMA LULE, *Précis de droit du travail zaïrois (Zairean Labour Law Handbook),* Kinshasa, Ed. Lule, 1989, p. 474

[197] Art. 315 al. 1 of the Congolese Labour Code

[198] This procedure is justified by the interpretation of Article 279 of the Labour Code which, in its paragraph 2, sixth paragraph indicates that the mandatory must contain a collective agreement, including "The conciliation and arbitration to be observed for the settlement of industrial disputes between employers and employees bound by the Convention".

perceived idea is that "the parties know the problems better and the measures to take. This step would be again not only of time but also money.

In the absence of the conventional procedure, the dispute is settled in accordance with the legal procedure[199] or if necessary by a competent labour tribunal without prejudice to the right to strike or to lock-out.

b. Beginning of the strike.

When they are not settled by the methods described above, collective disputes often lead to strike (or to a lock-out). For this happen, workers planning to go strike must notify the employer and a notice of six working days from the day of the notification including a copy forwarded to the labor inspector. The parties have a period of 10 days to go to court. Once started, the strike is in fact of force that consists of a cessation of work of which the effectiveness depends on the ability of the parties.

Let's take as an example the strike in November 2009 by workers of the Lebanese traders and Indo-Pakistan who were demanding the payment of their salaries at the daily rate of the American dollar. To recall, their employers were applying to their remuneration the rate of 560 Congolese francs to 1 American dollar while the market rate was estimated at 890 Congolese francs.

All the steps taken by the workers representative to engage the employers on the table of negotiations proved fruitless. What is worse, recommendations made by the supervisory authority inviting employers to pay wages at the correct rates and in accordance with the guaranteed minimum wage[200] were ignored by the latter who retorted; "your government to pay you at that rate or find another job"[201]

c. Effects of strike.

Let's distinguish the effects depending on whether it's about strikers or non strikers. With regard to the strikers, it should be noted that the cessation of work to defend professional demands is a right of any employee as long as it is exercised in normal conditions, cannot justify neither action nor dismissal[202].

The strike does not break a contract unless in the case of a serious offense by the employee[203]; there is rather the suspension of the execution of the employment contract.

Regarding the non strikers, in principle a strike by part of the staff has no effect on the employment contracts of those who didn't strike but who were unable to work. Also, the employer remains because of their wages except in the case of absolute necessity[204].

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[199] Art. 306-315 Labour Code. This legal process has two stages: the *reconciliation* that is provided by the Labour Inspector and the *mediation* conducted by an ad hoc committee.

[200] In DRC, Guaranteed Minimum Wage (SMIG) is fixed by decree No. 08/40 of April 30, 2008.

[201] Evidence of a striker collected by a local television, Kinshasa, November 12, 2009.

[202] WANTIEZ, C., *Introduction au droit social (Introduction to Social Law)*, 5th ed., Paris, Bruxelles, De Boeck et Larcier sa, 1999, p. 69

[203] In this case, the strike has to be called off because it is suspensive in regard to the employment contract. The legislature prohibits the termination of the contract during its suspension (cf. art. 57 and 60 of the Labour Code).

[204] Voy. aussi DUQUESNE, F., *Labour Law*, 2nd ed., Paris, Gualino editor, 2003, p. 247

Finally, strike can also have an effect on the third party. Because the business manager may be found in the impossibility of fulfilling his obligations to such parties. He could also escape liability by invoking the major contractual force and requires special circumstances.

- Some generality, otherwise the employer could enforce the order by another company not affected by the strike.
- Unpredictability, or else the employer had time to organize him.

We can also note that, by its expansive nature[205]. The labor law has a strong influence on other branches of private law and public law including administrative law where we saw the introduction of unionism and the strike.

I.2.3 Strike In Public Service.

Restricted by the origin of collective labor relations, strike is currently exercised so much by the private companies than by the public service officers. Although the right to strike does not recognize some officials, like the magistrates or the military in France[206], the prohibition is not necessarily followed. Hence, the interest of the analysis of the paradoxical aspect or not of the strike against the principle of continuity of public services.

A. The right to strike against the principle of continuity of public service[207].

From the onset, it is clear that the concepts "strike" and "continuity" in the context of public service contradict.

Theoretically, they are even contradictory for the reason that strike evokes the idea of a stop, a temporary collective cessation of work and therefore temporarily dysfunction of the public services; while continuity refers to continuous operation, continuous public service without restrictions other than those authorized by the law or the statutory[208] . MIGNARD is also wondering how one could very well ensure the continuity of public services without restricting the right to strike as such[209].

It therefore emerges from this contrast the difficulty to integrate the idea of strike in the functioning of public service as a right to be exercised by officers of that service. Indeed, in labor law, worker's strike is aimed at pressuring the employer about a profession dispute and is aimed at obtaining better working conditions and this, because its acting in a contractual relationship between the two parties; on the other hand , in the public service

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[205] Voy. KUMBU ki Ngimbi, *Droit du travail. Manuel d'enseignement (Labour Law. Textbook)*, Kinshasa, 2009 ; MUKADI BONYI, *Labour Law*, Bruxelles, CRDS, 2008.

[206] http:/fr.wikipedia.org/wiki/Grève, 12 September 2009

[207] The continuity principle means that the Authority shall take all measures, more generally, to ensure the continued operation of public service, without any interruption from incidents. In other words, an institution with a mission of public service must operate in an uninterrupted manner to ensure the constant interest created by its activity, which as per the purpose of the establishment, is administrative, social and cultural, or scientific and technical. Useful reading: CHAPUS, R., *Droit administratif général (General Administrative Law)*, tome I, 13th ed., Paris, Montchrestien, 1999 ; KABANGE NTABALA, C., *Grands services publics de l'Etat et entreprises publiques en droit congolais (State Public Services and Public Enterprises in Congolese law)*, Kinshasa, P.U.C., 1998 ; VUNDUAWE te PEMAKO, F., *Traité de droit administratif (A Treatise of Administrative Law,)*, Kinshasa, Afrique éditions, Bruxelles, De Boeck et Larcier, 2007.

[208] Voy. VUNDUAWE te PEMAKO, F., *Op. cit*., p. 562

[209] MIGNARD, P., *Droit de grève et service public (Right to Strike and Public Service)*, quoted by MITONGO KALONJI, *Op. cit.* ; Comp. PELLET, R. and SKZRYERBAK, A., *Op. cit*., pp. 119-129

law, the latter does not rely on a contractual basis, but rather on the purely regulatory[210], so it turns out that its difficult to evoke the strike in a public service as means of securing an amendment of the regulations or statute.

In practical terms, on the other hand, it is acknowledged that "strike" and "continuity" can be reconciled and exist together in the operation of public service. Indeed, through a possibility recognized only by a fraction of a public service –those related to the later by an employment contract – to exercise exhaustively and scrupulously the strike, there is no doubt by the fact that it is acknowledged that a relaxation is brought to the vigor of the continuity, a fundamental principle and pledge for the general interest in public service to deal with the demands and the most invincible prerogatives of the staff in the service, thus leading to the regulations and restriction to the strike a constitutional right, a constitutional law: the rational of minimum service in public is in practice[211].

Indeed, the organization of a minimum service in case of a strike within the public service responds to many necessities, including securing of general interest that can be apprehended as a set of human necessity of the community whose satisfaction nevertheless determines the fulfillment of destinies. Perceived in this manner, the general interest should be developed. Maintained and secured, so as to avoid it, at least in the slightest moderation possible[212].

For example, some European countries including Spain, United Kingdom, Germany and Italy have adopted fairly restricting laws on the matter[213].

But how does the Congolese legislature reconcile the complaints of professional interest s of workers whose strike is one of the means of expression, with the general interests of which the principle of continuity is the most sensitive guarantee in all public services.

B. The state of the matter in Congolese law.

In the present state Congolese law, it is Ministerial No. 3/69 of 25 January 1968 concerning the obligations of the employer and the worker, parties in a labor dispute, completed and amended by the Ministerial Decree No.12/cab/min/tps/113/2005 of 26 October 2005 setting out the rights and obligations of parties during the suspension of an employment contract, which specifies and establishes the system of the right to strike in any institution or service, public or private of general or public interest.

It can immediately be noted that the Constitution of February 18, 2006 which , in its article 39 the first paragraph, recognizes and guarantees the right to strike , also specified in the second paragraph of the same article that this right is exercised under conditions laid down by law that may prohibit or limit the exercise in the fields of national defense and security or for any activity or public service of vital interest to the nation.

Indeed, until today, no law has been made to regulate the right to strike in all public services on that subject, its important to note that law No. 81-003 of July 17, 1981 protecting the general status of staff and officers in the state public service does not prohibit the right to strike to such personnel and agents, or at least not determine the manner of exercise. In

[210] DUVERGER, M., *Eléments de droit public (Elements of Public Law),* 2nd ed., Paris, P.U.F., 1992, p. 365
[211] MITONGO KALONJI, *Op. cit*
[212] Idem.
[213] http:/fr.wikipedia.org/wiki/Grève, 12 September 2009.

addition, law No.08-009 of July 07,2008 supports general provisions applicable to laying public institutions which sets a general framework. It provides in its article 30 paragraph 2 that the status of staff of the public institution determines, in particular, the discipline of staff.

This being the case, says Trésor- Gauthier MITONGO KALONJI , the Board of directors, a body legally empowered to determine, on a proposal from the Executive management , the framework and the status of staff of the public entity, may insert in the chapter of discipline status, certain prescriptions related to ban or limitation of the right to strike.

Certainly, it must be said that the DRC is often the theater of a series of strikers that have become a true national sport in both public companies and state-owned financial institutions as well as in the areas of justice, education and of health. The study of mechanisms of protecting the right to strike becomes indispensable.

II MECHANISMS OF PROTECTING THE RIGHT TO STRIKE IN DRC

The mechanisms of protecting the rights recognized by the constitution differ from the specificity of a right to another. But talking about the right to strike one wonders what would be the responsibility of political authorities, that of judicial power and that of professional organizations.

II.1 Intervention of Political Authorities.

We can quickly note that the principle debtor of rights claims, including that of strike remains the Congolese government that must ensure the enjoyment to the population concerned. But how do political authorities take them? Do they not promote barriers to the right instead of protecting it?

II.1.1 Stakeholders

Responsibilities can be shared between the Head of State, the Executive and the National Assembly.

A. The President of the Republic.

The president of the Republic, as the protector of the nation, has the primary responsibility of protecting the fundamental rights recognized by the constitution. Indeed, he is responsible for ensuring compliance with this fundamental text, as required by the Congolese Constituent Assembly[214].

Thus, the right to strike being recognized and protected by the same constitution, the president of the republic is called upon to strive to make sure that restrictions are only applied in the cases provided by the legal texts which are promulgated by him[215] and those regulations for which he has also the power concurrently with the Prime Minister([216]).

B. The Executive.

The mechanisms of guaranteeing the right to strike resulting from the executive can be apprehended by the intervention of either the Prime Minister or the Minister of labor

[214] Art. 69 para. 2 of DRC Constitution of February 18, 2006.
[215] Art. 79 para. 2 of the quoted above Constitution.
[216] Art. 79 para. 3 and 4 of quoted above Constitution.

and Social Welfare, or even ministers whose sectors have been affected by the strike. Indeed, the Prime Minister who has been given power by the constitution to execute laws and regulatory power subject to the prerogatives vested in the president (art.92, (1)) has a big responsibility in respect to the right to strike. But his effort should in principle include the prevention of this social discomfort. So we often see at work , especially when it comes to claims arising from state employees: it's the case of meetings with the Inter-state companies that challenged the decrees on measures of application of laws on the reform of these companies[217] and more recently, the memorandum of understanding signed with the National Union of Doctors (NUD).

As for the minister of labor, his role regarding the protection of right to strike is not to demonstrate any more given that he has the burden of managing this department and to apply by way of judgment , the various measures of execution. He is also the one who operates upstream in the settlement of labor laws either by the labor inspectorate which he supervises or mediation by the commission instituted by him under section 309 paragraph 3 of the labor code, before a strike is launched.

Indeed, it should be remembered that workers who are planning a strike must notify the employer through a notice of six days from the day of notification and a copy of the notification must be sent to the labor inspector.

Finally some ministers may as well respond to the "rights-claims" when their departments are affected by a social discomfort justifying the use of a strike by the agents. We can cite in particular Ministers having in their duties the portfolio the finance, the budget, the transport, the posts, telephone and communications etc.

C. The National Assembly.

The involvement of the National Assembly in safeguarding the right to strike is crucial; the legislative power being exercised by the parliament who's Assembly constitutes a chamber[218].

Thus, insofar as it is called upon to pass laws, including the one to establish the conditions under the right to strike is exercised, the national assembly remains an institution supposed to protect this law, at least in terms of texts. This law is, unfortunately, violated by the same people who are supposed to protect it.

Ii.1.2 Obstacles to the right to strike emanating from the Politico-Administrative Authorities.

We note here the political pressures, corruption and even the differences. Indeed, it's not rare to note the traffic of influence exercised by the political authorities and the strikers particularly when it involves state public service officials or public companies staff.

Furthermore, on the occasion of a labor dispute, some practices are alleged to labor inspectors called upon to intervene in the settlement procedure of these conflicts. Certainly, with their

[217] Joachim Diana GISUPA, « *L'Intersyndicale des entreprises publiques est désormais impliquée dans la réforme des entreprises* » *("The Public Enterprises Central Labour Body is now involved in the reform of enterprises")*, in *http://www.afrique.kongotimes.info/news/201/ARTICLE/11149/2009-06-01.html*

[218] Art. 100, para. 1 and 2 of DRC Constitution of February 18, 2006.

wages of misery, labor inspector would very easily get into corruption[219]. Would also lead for example, disregarding the legality of the strike observed by a group of employees on the ground that the notice period was not respected. Finally, the indifference of political authorities is likely to make the right to strike lose its character demands. These are the demands of nurses and other health personnel in public hospitals on one hand and that of the teachers on the other. to speak only of this second hypothesis, more than a Congolese were scandalized when a high political personality, speaking about the teachers strike in September 2007, stated that it has always been so at each new school year[220].

II.2 The Action of the Judiciary.

Safeguarding the right to strike by the judiciary can occur through the intervention of a competent court in the settlement of labor disputes , conflicts which also constitute the launching of the strike.

II.2.1 A Competent Court.

Lets point out that the conflict between the workers and employer are within the jurisdiction of labor courts that should be glancing through the context of establishment in Congolese law before specifying the rules governing their organization and jurisdiction and the procedure applicable.

A. History of Labor Courts.

Like the Congolese law in general, the law on labor courts has evolved.

a. Under the colonial regime.

We notice that the colonial legislature did not establish specific courts for labor disputes. Thus, lack of special provisions to govern the affairs of the work, they were subjected to the ordinary courts, following the ordinary rules of civil procedure and that , in accordance with the Decree of 30 July 1888 on Congolese Civil Code Book III, of May 8, 1958 on the organization and jurisdiction of law , of March 7, 1960 promulgating the code of civil procedure and that one of February 1st 1961, on the contract of special services.

b. Under the regime of Decree-law no. 67/310 of August 1967.

The labor code of August 9, 1967 is an important step in that, it has brought together into a coherent, whole, once scattered laws and creates institutions previously not recognized as labor courts.

It was five months after the promulgation of labor code that the legislature, in the execution of articles 205 and 212 of this text, created special courts for Labor disputes by Decree-Law NO.68/036 of January 1968. After the creation of these courts, the same legislature enacted the same Decree-Law No. 68/100 of 29 March 1968 on the organization of labor courts and on the proceedings and remedies in these courts.

[219] MASIALA MUANDA, J., *De la réglementation du travail des enfants en République Démocratique du Congo (Regulation of Child Labor in the Democratic Republic of Congo*, Kinshasa, edited by the author, 2005, p. 43

[220] This is to say that we are already familiar with their strike, and therefore, they will eventually call it off.

Unfortunately, considering the inability of the state to create more labor courts because of lack of judges specialized in labor law; it was judged rational to integrate these courts in the ordinary courts, under the special form of chambers of labor Affairs

However, the lack of sufficient financial resources to operate these special chambers of labor affairs, the Decree- law of No. 78/005 of 29 March 1978 was abolished through its section 147 and 148 provided that local individual labor disputes within the jurisdiction of the former chambers of labor affairs would henceforth bear before the ordinary courts of the workplace.

Finally, considering that only the professionals are directly aware of the problems of their profession and its laws, several resolutions relating to the regulation of work recommended the re-establishment of the chambers of labor affairs within different jurisdictions of the country. It's through this wish that the legislature of 2002 reacted by re-introduction, not the special chambers but autonomous labor courts.

c. The establishment of Labor Courts.

In accordance with what is stated in Article 316 of the Law No. 015/2002 of October 16, 2002 carrying the labor Code, it created in DRC, the Labor Courts whose organization and functioning are fixed by Law No. 016/2002 of October 16, 2002.

B. Organisation and Juridiction of Labour Courts.

Article 3 of the law No. 016/2002 of October 16, 2002 on establishment, organization and functioning of Labor courts provides that "the labor court is composed of a president, judges and associate judges"; the president and the judges are appointed by the minister of justice among the judges of High Court while the associate judges are appointed by the minister of Labor and Social Welfare on basis of list proposed by the professional organizations of employers and workers.

The jurisdiction of these courts extend to the settlement of individual disputes arising between the employee and his employer in or in an occasion of the employment contract , collective agreements or the laws and regulations and the social welfare as well as disputes as defined in article 303 of the Labor Code[221].

From the standpoint of jurisdiction, jurisdiction is that of place of work unless otherwise agreed internationally. Nevertheless, when by force or an act of on employer, the worker finds himself summoned to the headquarters of the company; the labor court of this place becomes competent[222].

C. Procedure.

Under article 26(1) of the law No. 016/2002 of October 16, 2002 on establishment and functioning of Labor courts, the referral to the Labor court is exclusively through written or verbal application of the applicant or his counsel or the Labor Inspector with a special power.

[221] Art. 15 and 16 of Law No. 016/2002 of 16 October 2002 on the establishment, organization and functioning of labor courts

[222] Art. 17 of Law No. 016-2002 of 16 October 2002 quoted above

This text revived old discussions on the referral to the court, given that some litigants use the traditional writ of summons and that in both cases, the judge considers to hear the facts of the case.

But the light of arguments advance by each other, we believe that as a special law, although applicable monetarily by a court of law. Written or verbal communication is henceforth the only mode of referral in matters of work[223].

Ii.2.2 Obstacles Caused to the Rght to Strike by Judicial Settlement

As paradoxical as this statement may seem, the jurisdiction of labor courts in the settlement of labor disputes opens a gap likely to torpedo the right to strike which, however remains a constitutional right.

Indeed, the Congolese legislature states that referral to the court has a suspense effect on the strike[224]. Nevertheless, given that the procedure is often long 'so long as the case shall be pending in court, the right to strike will be suspended much to the detriment of workers.

Professor Kumbi Ki Ngimbi also notes that if the referral to the court suspends the strike, the effect of this state of affairs is the maintaining of the *status quo*. For the workers, this state can only be the work. They are therefore forced to return to work without finding solution to their grievances, it also says that sections 305 of the law No.015 and 28 of the law No.016 begin, by their letter and spirit, the right to strike recognized in the Constitution. One can also imagine that only the employer who has interest will go to court[225].

We can finally note that effective mechanism of ensuring the right to strike remains the action of professional organizations.

II.3. The Contribution of Professional Organisations.

The professional organizations as they are constituted in order to protect the professional interests of their members should be an effective mechanism to guarantee the right to strike as the Congolese Constitution secures to all citizens.

But before understanding their impact on the ground, looking through some trade unions, its worth to recall, while passing their genesis.

II.3.1 History of Trade Unions.

History teaches us that real unionism cannot result from external pressures on the people concerned. It has to result from a unique need to a profession, that of defense of collective interest of a profession particularly working conditions, salaries, social security etc.

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[223] Voy. KALALA Muena Mpala, *Juridictions de droit commun siégeant en matière du travail : composition, compétence et saisine irrégulières (General Courts sitting in Labour issues: composition, ability and improper referral),* Kinshasa, Ed. Nata, 2008 ; KABUMBU M'BINGA-BANTU, « La saisine du tribunal du travail au premier degré pendant la période transitoire » («The Referral of Labour Court in the First Degree during the Transitional Period»), in *Les Analyses Juridiques*, n° 7, Lubumbashi, 2005, pp. 4-19 and KANGULUMBA MBAMBI, V., « Encore à propos de la saisine du tribunal de travail en droit congolais : assignation ou requête. Note d'observation sur l'arrêt RTA 1160, CA Kinshasa/Matete («More about the referral of Labour Court in Congolese Law: Summon or Petition. Observation on the Judgment RTA 1160, CA Kinshasa / Matete), in *Revue du droit africain*, n° 33/05, January 2005, pp. 80-92

[224] Art. 28, para. 3 of Law No. 016-2002 of 16 October 2002 on the establishment, organization and functioning of labor courts

[225] KUMBU ki Ngimbi, « Du code du travail de 1967 à celui de 2002 : avancée, stagnation ou recul du droit du travail congolais ? » («From the Labour Code of 1967 to that of 2002: Progress, Stagnation or Decline in Congolese Labor Law? «), in *Congo-Afrique,* n° 386, XLIVth year, June – July - August 2004, pp. 335-353

It's in this sense that VERDIER mentions that unionism of workers is of protest nature, manifested as a reaction against the employer[226]. Nevertheless, some obstacles are worth noting before launching of a trade union action in the Democratic Republic of Congo.

A. Obstacles of Traditional Nature[227].

Taken from the traditional setting (the clan) and attracted by the wages in major centers, the workers still tend to transpose in terms of wage his tribal conception of existence.

When he accepts to enter into an employment contract with an employer, he does so with the society in mind: the employer becomes to him a clan leader of special nature, who cannot be able not to assume the role of a protector, benefactor and father.

But unionism is by definition, an instrument of combat of claim. Unfortunately, still pursued by the specter of clan solidarity, the Congolese worker does not ask for much, the concept of unionism being unknown or even strange to him, because of the organization of the traditional society. What he wished is to present grievances directly to manager and not through a group that is opposed to the interests of the employer regarded as *pater familias* ([228]).

On the whole, the unions would have been born and developed in Africa in general and in the DRC in particular, following the establishment of commercial agricultural and industrial companies by the settlers, with as corollaries the various uprising demonstrated here and there by blacks. This makes it necessary to analyze.

B. The context of trade movements

Various demonstrations recorded in his colony are to be considered as precursory signs of a union movement. Basically the indigenous workers, although exploited, did not feel the need to come together to demand better working conditions.

Indeed, educated in the spirit of clan and family solidarity, they join, after work, their families or clans where a certain socio-economic balance is naturally found. In sum, it's the Europeans who introduced and developed unionism in the DRC, then the Belgian Congo.

a. Birth of Association of Employees and Agents of the Colony (AEAC).

Following the deterioration of the Social and Economic situation of the colony due to the participatory efforts of the Belgian Congo at the 1st World War, the European staff launched a strike in 1919 demanding the improvement of working conditions.

Taking advantage of law concerning the establishment and functioning of professional associations, the civil servant and the white officers in administration created on the 18th January, 1920 at Boma their own association aimed at defending and promoting their professional interests, namely the Association of Employees and Agents of the Colony, (AEAC).

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[226] VERDIER, J.M., *Les syndicats (LabourUnions)*, Paris, Dalloz, 1966, p. 9

[227] Useful reading : LUWENYEMA LULE, *Précis de droit du travail zaïrois (Zairean Labor Law Handbook)*, Kinshasa, Ed. Lule, 1989, pp. 487-537 ; BEYA SIKU, « Démocratie en droit du travail » («Democracy in Labor Law»), in *Actes des journées scientifiques de la Faculté de Droit de l'Université de Kinshasa,* 18-19 juin 2007 (*Proceedings of Scientific Sessions of the Faculty of Law, University of Kinshasa, 18-19 June 2007),* Kinshasa, Presses de l'Université de Kinshasa, 2007, 307-317

[228] BEYA SIKU, *Op. cit.*

The association was recognized by the Decree of March 23, 1921, but to deal exclusively with professional interests. However, their right to strike was prohibited and they could not stop work without prior authorization.

But not being concerned by this prohibition, the white staff working in private sector companies launched a series of strikes (1941-1942) to claim the right to pension. On 27th June, 1944, the colonial Government took a Decree recognizing the whites the right to strike provided that the coalitions result to cessation of work only after exhausting a conciliation procedure.

b. Control of Indigenous Workers.

Article 2 of the Decree of 23 March, 1921 forbade the natives and other officers of color to join professional associations; the colonial government considered that it was still early to allow the blacks to join in he protest movements, on the ground that they had not achieved the required union maturity.

For this reason, a series of actions were carried out by the black workers: strike of 1941 at Katanga, strike of 1945 at Matadi and at Leopoldville, etc. also, General Governor Ryckmans, in agreement with the minister of Colonies tool an emergency Legislative order No. 82/AIMO of the 17th May 1946 giving to the blacks the right to form professional associations.
From that time, the black trade union movement expanded rapidly[229]. In general, it was particularly the Christian unions from Belgium who tried to promote native trade unionism.

c. Elimination of discrimination Between Whites and Blacks.

It's the Decree of the 25th January 1957 which granted freedom of association to all workers, without distinction of race, working in public or private sector. The new Law, an initiative of Mr. BUISSERET (the then minister for colonies) had the undeniable merit of removing the barrier of color from the Congolese union regime. Blacks and whites could then join side by side within the same unions.

d. Development of professional organizations.

Several unions were formed at the end of the years 1950 and after independence before their unification into a single union namely, the National Union of Workers of Congo (NUWC), whose constituent congress was held from 21s to 23rd June 1947; this association is today named Federation of Companies of Congo.

Freedom of association is currently recognized and protected by the Congolese Constitution[230]. It's the legislature who, in accordance with the 2nd paragraph of this constitutional provision, fixes the modalities of the exercise while granting to the workers and employers the right to come together in professional organizations with the objective of studying, defending and developing their professional interests as well as moral, economic and social progression of their members[231].

[229] See Ordinance No. 128/AIMO of May 10, 1946, supplemented by the ordinances of 20 January 1948, 13 October 1948 and 22 October 1949

[230] Art. 38, para. 1 of the Constitution of the Democratic Republic of Congo of 18 February 2006

[231] Art. 230 of Law No. 015/2002 of 16 October 2002 establishing the Labour Code.

II.3.2 Some Trade Union Organisations

Unable to study in detail the actions undertaken by all the trade union organizations in the DRC, we will limit ourselves to those that have been conspicuous by their intervention in a more or less permanent way in the last three years.

A. Inter-Union of Public Companies.

With strikes being more frequent in DRC it will be ambitious to go through contours of all the strikes that have paralyzed the public service companies in the states portfolio. How many times have we not seen the Place Golgotha[232] being besieged by agents of the state against their "employer".

With this argument, we will narrow down to the strike call launched by the inter-union public companies at the end of the month of May 2009[233] as well as the strike by the officers of the National Insurance Company (NIC) on one hand and those of the National Transportation Agency (NTA) on the other. Regarding the call to strike launched by the inter-union of public services, everything started with the reform policy of public companies that was not well received, calling it a wild reform.

In fact, she suspected the government making an uncontrolled privatization, as another version of Zairianization and felt marginalized in this process, fearing to loose jobs and gained social benefits.

Therefore, when the Prime Minister, speaking in the context of the enforcement of Laws No. 007, 008, 009 and 010 of 7 July 2008, took a series of decrees; the Inter-union of public companies leaped to defense. The inter-union requested the Prime Minister to postpone those decrees, failing which it would call for a strike that, according to its terms, would paralyze all public enterprises.

The call for the strike was lifted only after the union representatives had obtained assurances from the Prime Minister regarding the Inter-union's involvement in different levels of discussions on public enterprise reform. This involvement should also be effective at the Steering Committee of the public enterprises reform (COPIREP) where its participation, as observer, will allow it to assert workers' rights and benefits with the aim of safeguarding employment. The unions will also have a dual representation in the business steering committee as provided by law and regulations, reassured the Prime Minister.

Concerning the strike observed by the National Insurance Company staff, it was essentially based on claims about their premiums and the respect of acquired rights, whose benefits would have not been well assured by the managing director Hermann MBONYO. Therefore, his departure was the sine qua non requirement before initiating any dialogue with the Government. Hence, the Minister, in charge of the docket, had to suspend the contested MD from his duties and assured dialogue with the strikers who agreed to return to work after putting forth their claims.

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[232] Golgotha Square is similar to the 'Grève' (strike) Square in Paris from which the French word "Grève" gets its name, but the only difference is that in the Congolese context, it is a gathering point where state employees expressing their discontent on a given professional issue

[233] Joachim Diana GISUPA, « *L'Intersyndicale des entreprises publiques est désormais impliquée dans la réforme des entreprises* » *("The Inter-Union of public enterprises is now involved in the reform of enterprises')*, in http://www.afrique.kongotimes.info/news/201/ARTICLE/11149/2009-06-01.html

Finally, let us remember that for more than five weeks of the first half of 2009, ONATRA strike has paralyzed public services, thereby causing huge loss of revenue, particularly for financial Boards such as Customs and Excise Office (OFIDA) whose principal operations are carried out at the borders (in the case of Ports of Boma and Matadi). The demands focused on improving the treatment of workers (wage revision taking into account the indicators of market prices and allocation of performance awards) as well as the departure of the Management Committee headed by Claude PECUNE, judged incapable of meeting the workers' demands.

B. The National Union of Magistrates (SYNAMAG)

The National Union of Magistrates (SYNAMAG), resorted sometimes to strikes as a way of presenting its members' demands or expressing their discontent with the regulator.

The action that interests us here is the call for the strike that came after the President of the Republic signed the February 9, 2008 ordinances on judicial organization in the DRC. As per these ordinances, the judges and prosecutors have been appointed and others put into retirement because they had attained the age of 65 years or they had completed a 35-year career of continuous service. SYNAMAG was requesting the Head of State to revoke his orders[234].

The same call was made after the *tsunami* that struck the bench in July 2009 even if the industrial action has been weakened by lack cohesion. The issue at hand was the policy framework known as' *Zero tolerance* "initiated by the Head of state.

***C.* The main professional organizations in the education sector**

Education (especially at the primary, secondary and vocational levels) remains one of the sectors that are hit hard by the strike each year, in a way that minds are always prepared to experience this serial at the beginning of each academic year. Thus, the smooth start of 2009 academic year was merely an exception confirming the rule; things were not that easy a year before.

Indeed, teachers in Catholic schools and public schools of the Democratic Republic of Congo had largely boycotted the new academic year across the country to demand pay increase. The call for a strike to denounce the government's "*indifference*" to teachers' salary demands, was "*widely followed*" throughout the country, as reported by the Agence France Presse (AFP), the Secretary General of the Teachers' Union of Congo (SYECO) and the National Union of Teachers in Catholic sponsored schools (SYNECAT).

The SYECO and SYNECAT's demands included a wage increase in accordance with an agreement concluded in February 2004 with the government (Mbudi agreement), wage harmonization at national level and regularization of individual contractors' status. Teachers demanded also withdrawal of parents' financial contribution, initiated in 1994 to address the state deficit in teachers' salaries.

[234] BAKAMA BOPE, E., « Nomination des hauts magistrats en violation de la constitution » ("Appointment of Senior Judges in Violation of the Constitution"), in http://www.congoone.net/Allstory.php?Id=1087, 27 February 2008 ; KUMBU ki Ngimbi, *L'indépendance du pouvoir judiciaire remise en question (The Independence of the Judiciary is questioned), (unpublished)* ; http://www.congoindependant.com/article.php?articleid=3331.

For four years, the public sector teachers' unions have been boycotting the beginning of the academic year for the same reasons. The teaching resumed after four weeks of strike[235] in 2007.

On another note, let us not forget the actions taken by the National Union of Higher education institutions, university and scientific research lectures (SYNESURS)[236]. However, the Association of Professors of the University of Kinshasa (APUKIN) deserves special attention due to its involvement in the struggle to promote the rights of its members.

D. The main unions in health sector

Health sector is not immune to strike, although it was granted a special provision due to the sensitive nature of the services it is required to provide to the public. Moreover, the doctors' actions have to be distinguished from those initiated by other healthcare professionals.

a. The National Union of Doctors (SYNAMED)

It is rare to spend a full year in Kinshasa without witnessing a showdown between the "*White Coats*" of public hospitals and the Government. That is what happened with the radical and unlimited strike of August 2008[237]; the latest being the September 2009 strike, which registered more than one victim in medical training institutions in Kinshasa, to mention but a few.

Congolese Physicians' claims include: the new salary scale ([238]), the payment of six-month arrears of risk premiums and unpaid wages to the strikers for the year 2008, the mechanization of new units and, more importantly, the recognition a specific status.

A Memorandum of Understanding was signed between the National Union of Doctors (SYNAMED) and the Prime Minister on Sunday, September 12, 2009, in response to the claims of doctors who, in turn, promised to call off the strike the next day.

*b. The unions of healthcare professional***s**

The demands of healthcare professionals working in the public sector are presented by the National Union of executives and officers of the health sector (SYNCASS), the SYNAPETAS and the trade union Solidarity of the nurses in Congo (SOLSICO).

One of the actions of these unions is the strike launched since October 2008 and which would lead to threats of radicalization[239]. As a reminder, the health personnel demand the standardization of the risk premium. Unfortunately, contrary to the

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[235] Refer to Gabon Eco, « RDC : les enseignants boycottent la rentrée scolaire » ("DRC: Teachers boycott the Beginning of the Academic Year"), in http://communisme.wordpress.com, *2 September 2008*.

[236] MILOR, MILOR, « Menace de grève des centres de recherche de l'ESURS » ("Strike Threat of ESURS Research Centers"), in *http : //www.digitalcongo.net/article/50589,* 26 March 2008.

[237] Read « La grève des médecins reconduite en RDC » ("The Doctors' Renewed Strike in DRC"), in http://www.continentalnews.fr/actualite/sante,(11 Sept. 2009).

[238] In 2008, a Congolese doctor had a monthly salary of 119,000 Congolese francs (216 USD), risk allowance inclusive, AFP informs, « La grève des médecins du secteur public en RDC est bien suivie » ("The Successful Strike by Public Sector Doctors in the DRC ", in http://afp.google.com/article, 19 August 2008.

[239] Radiookapi.net, « Le personnel de santé menace de radicaliser sa grève » ("Healthcare Professionals threaten to radicalize their Strike ", 15 August 2009

doctors' claims which do not drag to draw the government's attention, other healthcare professionals' demands are struggling to find their way into the government agenda: *double standard policy*!

II.3.3. The ills that plague the Congolese unionism

None is our claim to proceed to an inventory of the Congolese union system; however, in this paper, we are going to discuss the evils that have attracted the most our attention, namely the inconsistency in orders and corruption among the trade union movements' facilitators.

A. Inorganic disintegration[240]

The system of disintegration that Paul Burdeau denounces consists of lack of cohesion among members of a professional organization. Indeed, the author argues « isn't it true that a strike without cohesion is an unreasonable and senseless act since the first word, strike, obviously presupposes the second, cohesion, harmony?

Isn't it evident that the boss would resist best if several of his workers, by continuing to work, demonstrate by their example that the existing working conditions can be acceptable?" [241]

To be convinced, it would be sufficient to look at the inconsistencies in how strikes are called and called off particularly by unions in the health and teaching sector (teachers in primary, secondary schools and training colleges) – especially the Congo Teachers Union (SYCO) and the National Association for Teachers in Catholic Schools(SYNECAT) - and by those in the health sector.

Looking at the case of trade unions in the health (public sector) only, let's remember the saga witnessed in Kinshasa in October 2008. Indeed, in a declaration made on Wednesday 22nd October during a general meeting at the headquarters of the Congo Nurses Union (SOLSICO) in Kinshasa, the Nurses' Trade Union called for the suspension of the strike on humanitarian grounds and on the basis of significant steps made in the negotiations with the government.[242]

From the day after this appeal to the end of the nurses' strike in Kinshasa, nurses in major hospitals did not return to work arguing that it was a unilateral call by the trade unionists without prior consultation from members[243].

The same saga resurfaced during the strike declared on Wednesday 27th May 2009 by Medical professionals (Syncass, Synapetas)[244] Regarding this strike, Mr. Patrice Samukungu, introduced as the Secretary General of the Nurses' Union had declared the same day on Radio Okapi that the nurses were not bothered by the three day work stoppage declared by the medical professionals union indicated above.

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[240] This expression is borrowed from Paul Burdeau, *Le contrat de travail. Le rôle des syndicats professionnels (The Employment Contract. The Role of Trade Unions)*, Paris, Félix Alcan, 1902.

[241] BURDEAU, P., *Op. cit.*, p. 34

[242] Radiookapi.net, « Le syndicat des infirmiers appelle à la suspension de la grève ("Nurses' union calls for the suspension of the strike), 22 October 2008

[243] Radiookapi.net, « Les infirmiers boudent l'appel à lever la grève » ("Nurses shun the call to call off the Strike", 23 October 2008 ; « la grève du personnel de la santé n'est ni levée ni suspendue » (The Health Personnel's Strike is neither called off nor suspended", 27 October 2008.

[244] Radiookapi.net, « Les professionnels de santé en grève Medical practitioners on strike », 27 mai 2009 27th May 2009 ; « Grève des professionnels de la santé, la Solsico désavoue son secrétaire général » (Health professionals' strike : Solsico disowns its secretary general), 29 May 2009.

But that intervention was dismissed by the wave of the hand by the Chairperson of the crisis committee of the nurses union SOLCICO where M. Samakungu is a former secretary general, disowned by nurses since December 2008 for taking unilateral decisions without consultation with the union base.

B. Corruption

A study by the nongovernmental organization ***Transparency International*** carried out in the Democratic Republic of Congo in 2007 lists an assortment of practices based on corruption.

It particularly refers to documentary and physical fraud, humiliating extortions and harassment, misappropriation of public servants and army officials' salaries, sexual corruption, under table dealings, parents' contributions, diversion of external aid, mounting up of illegal road blocks, transport, motivation and compensation, corruption in the judiciary corruption, unpredictable price increases of company products, etc.[245]

To evoke the detrimental effects of this rot in professional organizations, it helps to remember that the inconsistency in the instructions given by the leaders of some trade unions as observed above would result from corruption which they embrace to the detriment of professional interests of those who they are meant to represent.

Indeed, having an inclination towards his personal well being, man is often tempted to sacrifice the common good for the satisfaction of his own needs. Thus, put in an embarrassing situation where the company boss bribes them so that they can call off the strike, the union representatives would be tempted to accept such offers, promising in return to use their wealth of imagination to convince the striking workers to return to work.

Ivorian artist Alpha Blondy would say that with their miserable salaries, they did what they could. No, the miserable salary would by no means justify the breach of trust over the demands of a whole group of workers, demands that seek to improve remuneration and bring about other social gains.

CONCLUSION

In the framework of research work in which Konrad Adenauer Foundation, through its Rule of Law Programme in sub Saharan Africa, brings together doctoral students in law from different Congolese universities, we focused our attention on the right to strike as an extension of the rights at the work place**,** the two being prerogatives that the Congolese constitution guarantees to all the citizens.

Indeed, the Constitutional state as « a judicial order in which the respect for rights is truly guaranteed to its subjects, the principal preoccupation being protecting them from arbitrary tendencies"[246], it presents itself as one where the organization and the systems obey the principle of the preeminence of law, which must guarantee the public freedoms, fundamental human and citizen rights and the equality of all before the law.

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[245] Freddy Kilubi, « La corruption en RDC a atteint son paroxysme ("Corruption in the DRC reached its Climax), http://fr.allafrica.com/stories/200801141423.html?page=5, 14 January 2008..

[246] KALINDYE BYANJIRA, D., *Civisme, développement et droits de l'homme : condition d'instauration d'un Etat de droit en République Démocratique du Congo (Civics, Development and Human Rights: Conditions for establishing the Rule of Law in the Democratic Republic of Congo)*, Kinshasa, IADHD, 2003, p. 75

As such, certain privileges are guaranteed to the population. It's particularly about the right to work which comprises an obligation which compels the state to provide jobs to its citizens as long as they are not incapacitated.

But this right to work wouldn't be complete if the constitution had no provisions for judicial mechanisms allowing the workers to present their professional grievances.

The most important mechanism to date remains the right to strike. Thus, having presented as a claimed right through a diachronic approach, clarifying at the same time its semantic range its background as well as the conditions of its application in a collective work relationships context or public service, we have looked through the different hypothesis thought to compete against the practical guarantee of the right.

The supervisory responsibility for this right was assigned at different levels. At the political level, apart from the President of the Republic, the Prime Minister as the head of Government as well as certain Ministers among whom should be the minister under whose jurisdiction the work falls were presented as supervisors who would have to, in accordance with the powers granted to them by the constitution of the Republic ensure the right to strike is respected.

Besides, courts and tribunals as they are charged with the responsibility of articulating the law and appreciating in certain cases the legality of a strike are institutions which must not be exempted from that obligation to guarantee the right to strike exercised in conformity to legal and statutory provisions.

Finally, actions of professional organizations seem to constitute real pillars in safeguarding the right to strike, given that workers are the main claimants to it, even if one can deplore certain practices which could weaken them.

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THE RELATIONSHIP BETWEEN THE MUNICIPALITY AND THE PROVINCE: LEGAL AND FINANCIAL AUTONOMY OF THE MUNICIPALITY OF MONT NGAFULA IN KINSHASA

By Paulin Punga Kumakinga (*)

INTRODUCTION

The study of the relationship between the ward and the province brings out the issue of regional decentralization. In the democratic Republic of Congo, this question of decentralization has, since 1982 become one of the most discussed in the political arena as well as in the scientific world. Several studies[247] have been devoted to this without managing to exhaust its substance or relevance.

Contrary to earlier constitutions, the constitution of 18th February 2006 created basic entities which it decentralized politically and administratively. From that point of view the province is a product of political decentralization while the municipality is as a result of administrative decentralization.

This study has the objective of defining all the reports that these two entities work with or can work with in their operation. In the said reports, it will be particularly a question of underlining the important issue of their autonomy desired with a lot of concern not only by

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247 Useful reading : VUNDUAWE Te PEMAKO, "La décentralisation des responsabilités au Zaïre .Pourquoi et comment ?" ("The Decentralization of Responsibilities in Zaire. Why and How?"),*Zaïre-Afrique,* n°165 and 166(1982) ; BULU BOBINA BOGILA, « La formation et la décentralisation territoriale : regard sur un aspect du développement rural au Zaïre « (Formation and Territorial Decentralization: A look at an aspect of Rural Development in Zaire»), *Zaïre-Afrique, n° 187(1984) ; BIRANGAMOYA M.,* «Décentralisation et Développement Au Zaïre» («Decentralization and Development in Zaire»), *Zaïre-Afrique*, n° 181 (1984) ; ISANGO IDI WANZILA, « La Décentralisation administrative pour le développement : quelques écueils à éviter» (Administrative Decentralization for Development: Some Pitfalls to avoid «), *Zaïre-Afrique*, n° 222 (1988) ; IKILI TABU et OTEMIKONGO MANDEFU, « La Décentralisation administrative et les finances publiques zaïroises (cas de la région du Haut-Zaïre) « [«Administrative Decentralization and Zairean Public Finance (A case of the region of Haut-Zaire)»], *Zaïre-Afrique*, n° 242 (1990) ; EPEE GAMBWA et OTEMIKONGO MANDEFU, « Entités territoriales décentralisées et financement public du développement local au Zaïre» («Decentralized Territorial Entities and Public Financing of Local Development in Zaire»), *Zaïre-Afrique*, n° 266 (1992) ; ALOKO GBODU OMBENG, « Décentralisation et fédéralisme, mythes et réalités» («Decentralization and Federalism, Myths and Realities»), *Zaïre-Afrique*, n° 284 (1994) ; WEMO DJUNGA, J.M, « La décentralisation du contrôle budgétaire est-elle indispensable à la décentralisation administrative et territoriale ainsi qu'au fédéralisme ? Qu'en est-il en République Démocratique du Congo ? « («Is the Decentralization of Budgetary Control essential to Administrative and Territorial Decentralization and Federalism? What is the Case in the Democratic Republic of Congo?»), *Mouvements et enjeux sociaux (Social Movements and Issues)*, n° 17, May - June 2004 ; MWAMBA MUMBUNDA, P., « Décentralisation en République Démocratique du Congo : un pouvoir et une administration lointains» (Decentralization in the Democratic Republic of Congo: Remote Power and Administration»), *Mouvements et enjeux sociaux ((Movements and Social Issues)*, n° 23, November-December 2004 ; MOMINDO, F., «Décentralisation et démocratisation en République Démocratique du Congo» («Decentralization and Democratization in the Democratic Republic of Congo»), ULK, n°1, april 2005 ; MABI MULUMBA, E., Pour une bonne gouvernance des entités administratives décentralisées (EAD) « [(For Good Governance of Decentralized Administrative Entities (DAE) «], *Congo-Afrique*, n° 402-403, February - March 2006 ; VUNDUAWE te PEMAKO, F., «La dynamique de la décentralisation territoriale en République Démocratique du Congo» («The Dynamics of Territorial Decentralization in the Democratic Republic of Congo»), *Congo-Afrique*, n° 432, February 2009 and 433, March 2009 ; MABI MULUMBA, E., « Décentralisation et problématique de la fiscalité» («Decentralization and Taxation Issues»), *Congo-Afrique*, n° 432, March 2009, etc.

the constitution but also by the law.[248]

However, it's important at this level of analysis to make two important clarifications without which the following part of our study will not be clear. First, we must note that in the relationship that links the municipality and the province, two laws and consequently two legal regimes, having expected that law number 08/016 outlining the composition, organization and operation of decentralized territorial entities urban, municipal and local elections having not been organized on a national territory scale.

It was from then provided for by the order in Council number 81 of 2nd July 1998 outlining territorial and administrative organization of the Democratic Republic of Congo[249]. On the other hand law number 08/012 of 31st July 2008 outlining fundamental principles related to the free administration of provinces is in application and the institutions it serves are in operation also.

Then, we wished to carry out this study in line with the relationship between the municipality and the province in the context of Kinshasa where the town has the status of a province. Thus, this article looks at the reports of judicial and financial autonomy between the city (province) of Kinshasa and one of its 24 municipalities, mainly Mont-Ngafula municipality.

Two major pronunciations are going to guide our study. The first will center on the legal qualification (status) of the province and the municipality while the second on relationship between the same entities.

I. THE LEGAL STATUS OF THE PROVINCE AND THE MUNICIPALITY

I.1. The Province, a political entity according to law no. 08/012 of 31st July 2008

In the spirit of the Constitution of 18th February 2006, the province no longer has the status it used to have since 1982, the year of the launching of the process of decentralization in Zaire, now Democratic Republic of Congo.

The province from then became a political entity, for it now had institutions and political power directly recognized by the constitution. Technically, when a constitution recognizes political powers in a territorial entity other than the state, such an entity is the subject of political decentralization; it is from that point of view qualified as a regionalized entity.

I.1.1. Regionalization or Constitutional regionalism

In the language of publicist jurists, regionalization, constitutional regionalism or political regionalism, or even political decentralization are expressions used indistinctively, for

[248] Article 3 of the Constitution, *Journal Officiel de la République Démocratique du Congo*, 47th year, Especial edition, 18 February 2006, article 2 of the law n° 08/ 012 on core principles for the free administration of provinces, *JORDC*, 49th year, Especial edition, 31 July 2008 and article 5 of law n° 08/016 on the composition, organization and functioning of the decentralized territorial entities (DTE) and their relationships with State and provinces, *JORDC*, 49th year, Especial edition, 10 October 2008 provide that the province and DTE enjoy free administration and autonomy to manage their human, economic, financial and technical resources.

[249] Speaking of actual administrative authorities, Article 126 of Law No. 08/016 quoted above provides that, pending the organization of urban, municipal and local elections by the Independent National Electoral Commission established by the constitution, the authorities of the decentralized territorial entities currently in post are managed in accordance with Decree-Law No. 082 of July 2, 1998 on the status of the authorities responsible for administering the territorial constituencies.

they are synonymous hence interchangeable. According to the Universal dictionary[250], regionalism is a political or administrative system tending to ensure autonomy in the regions to a certain extent. In order to clarify and simplify issues, writes Vunduawe te Pamako[251], political regionalism is a mode of organization and unitary state management decentralised politically at the provincial level and administratively at a lower scale of local regional entities.

If constitutional regionalism is decentralization of political organs, it isn't any less true that a difference between the two subsists. Indeed, constitutional regionalism is distinguished from decentralization at two levels:

- The source of law governing regionalism is the constitution (art. 195-206) while decentralization is from law.
- In the framework of powers, the regionalized entities hold powers in the political, financial and administrative domains.
  The existence of provincial political institutions, parliament and the provincial government (article 195 of the constitution) is a real sign of that political autonomy while the decentralized territorial entities only have limited powers in the administrative and financial domain; they are put under supervisory control[252].

Having specified the legal qualification of the province, we need now to define the province and to discuss its organs.

I.1.2. Definition and organs of the province

According to Congolese law[253], the province is a political and administrative component of the territory of the Republic. It is a legal personality. It enjoys autonomy in the management of its technical, financial, economic and human resources. It exercises, through its political institutions the authority devolved to it by the constitution.

This definition contains several facets which need explanation. Indeed, the province is a political component, as we have clearly explained above. Equally, the province is an administrative component and entity in the sense that it is part of the administrative organization of the country. Likewise, its executive authorities benefit from a hybrid status of political-administrative authorities. These authorities manage a political entity and a regionalized administration at the same time.

The province is a legal personality like the state or the decentralized territorial entities. The legal personality authorizes the province to exercise certain capacities enjoyed by individuals, notably the capacity to be entitled to rights and obligations, the capacity to have and dispose its heritage and the capacity to appear in court as a defendant or complainant**.**

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250 Dictionnaire universel (Universal Dictionary),, Paris, Hachette, 1996, p. 1012.

251 VUNDUAWE Te PEMAKO, F., " Réflexion sur le régionalisme politique ou la nouvelle décentralisation territoriale dans la constitution du 18 février 2006 : conditions du développement des bases de l'Etat" (Reflections on Regionalism Policy or the New Territorial Decentralization in the Constitution of February 18, 2006: Developing Basic Conditions of the State "), *Revue de la faculté de droit (Journal of the Faculty of Law)*, n° 5 (Droit et développement) (Law and Development), Kinshasa, éditions de l'Université protestante au Congo, 2007, p. 183.

252 KAMUKUNY MUKINAYI, A. et CIHUNDA HENGELELA, J., " Régionalisation, décentralisation et naissance effective de vingt-cinq nouvelles provinces en République Démocratique du Congo : défis et perspectives de prévention des conflits » ("Regionalization, Decentralization and Effective Creation of twenty-five new Provinces in the Democratic Republic of Congo : Challenges and Prospects for Conflict Prevention"), *Congo-Afrique*, n° 434, April 2009, p.301..

253 Article 2 paragraphs 1, 2, 3 and 4 of Law No. 08/012 of July 31, 2008, *op.cit*.

The legal personality in itself accords or recognizes autonomy of management in a provincial entity which is therefore capable of disposing of its resources that constitute its heritage.

Through its political institutions which are the Provincial Assembly and the provincial government, the province[254] exercises powers devolved to it and recognized by the constitution[255].

These provincial institutions are precisely the organs through which the province makes independent management decisions regarding its entity; allocating its resources within the province as freely as possible, be they human, financial economic or technical.

A. The Provincial Assembly

We must clarify right away that this study does not seek to elucidate how the province relates with the central authority, but how the province relates with the regional decentralized entity, the municipality.

The relationship between the province and the municipality are directly distinguishable in Kinshasa, the capital of the Republic, whose province status is recognized by the constitution. Indeed, Kinshasa as a province is subdivided into municipalities and these are directly liked up with provincial institutions unlike municipalities in other towns in the country. Between the province and municipalities in towns other than Kinshasa there are town hall institutions.

Having clarified this, it appears that our study is devoted to analyzing relationships between the Mont-Ngafula municipality and the province of Kinshasa. And what is said about the province is *mutatis mutandis*, for Kinshasa city[256].

To return to the nature of provincial organs, it's important to note that the provincial assembly is the deliberative organ, better still the custodian of the legislative authority of the province as well as of the control of the provincial government and of the entire local and provincial public services[257].

In terms of the law articulating fundamental principles related to the free administration of provinces, the provincial assembly is the deliberative organ of the province. It deliberates in the domain of powers reserved to the province and controls the provincial government as well as the provincial and local public services.

It legislates through edict. Its members are called provincial representatives. They are elected through direct or secret universal suffrage or co-opted for a five year term renewable within conditions dictated by electoral law. The number of provincial representatives co-opted cannot exceed a tenth of members forming the provincial assembly[258].

Studying this provision gives us the true legal nature of this institution, the provincial Assembly. Indeed, as a legislative organ, the provincial Assembly deliberates in the domain

[254] Article 195 of the Constitution, *op.cit*.
[255] Articles 203 and 204
[256] Article 3.
[257] VUNDUAWE Te PEMAKO, F., *Traité de droit administratif (Treatise of Administrative Law)*, Bruxelles, éd. Larcier-Afrique éditions, 2007, p.497.
[258] Article 7 of Law No. 08/012 of July 31, 2008, *op.cit*.

of powers reserved for the province. However, a provincial Assembly can legislate, by way of edict, on issues regarding exclusive power of the central government in case of authority obtained from parliament (national Assembly or senate) to that effect[259].

In concrete terms, if the provincial Assembly observes that the interests of the province are threatened by the absence of national regulation on one of the exclusive areas of the central government[260], it will solicit legislative capacitation from the national parliament, only if the latter is not able to intervene immediately through the law. The duration of such authorization is determined by the capacitation law enacted to that effect by the national parliament.

As a deliberative organ of the province, the provincial assembly takes legislative actions technically called (in that case) provincial edicts.

On the other hand, as control organ, notably on the activities of the provincial government, the provincial Assembly holds the power to pass a motion of censure against the entire provincial government or a no confidence motion against its member[261]. In the latter case, the actions (censure motion or no confidence motion) are not legislative acts but acts of parliament.

The provincial Assembly works closely with the provincial executive organ to which it furnishes with standards likely to help in the daily management of the province.

B. The provincial Government.

From a constitutional creation like the provincial Assembly, provincial executive authority is exercised by the provincial Government[262]. The provincial government is the executive organ of the province[263]. It is composed of a governor, a deputy governor and provincial ministers.

The governor and the deputy governor are elected for a five year term renewable only once by the provincial representatives within or outside the provincial assembly. They are established by a decree of the President of the Republic[264].

As for the provincial ministries, they are appointed by the Governor from within or outside the provincial Assembly. The composition of the provincial government takes into account provincial and women representation[265].

As central executive authorities, authorities that pilot the provincial government benefit from double status, that of political-administrative authorities.

Indeed, as a political authority, the Governor of the province is the head of the provincial executive arm. He represents the province in judicial matters and to third parties. He appoints provincial ministers, relieves them of their responsibilities and, where the case

[259] VUNDUAWE Te PEMAKO, F., *op.cit*., p. 497.
[260] Article 202 of the Constitution
[261] Article 41 de la loi n° 08/012, *op.cit*.
[262] MBAYA NGANG KUMABUENGA, *Droit constitutionnel et tradicentrisme des institutions politiques du Zaïre 1960-1997 (Constitutional Law and Tradicentrisme of Zaire's Political Institutions 1960-1997)*, Kinshasa, ed. ergo sum, 1997, p. 97.
[263] Article 22 of Law No. 08/012 of July 31, 2008 *op.cit*.
[264] Article 23 paragraph 2.
[265] Article 23 paragraph 4.

demands, revokes their appointment[266]. As an administrative authority, the governor of the province is in charge of public administration in the province. On these grounds, all national and provincial public services in the province are placed under his authority[267].

The fact that the governor of the province is also the State representative in the province can, in our opinion, threaten the autonomy which he enjoys with the central authority. A position of commissioner or government representative could have been established, as in Italy and Spain, to manage the administration of the state in the province. The constitution would have had to imagine other more democratic mechanisms to prevent possible loss of control by the governor which justified the fear.

We must finally note that as a provincial administrative authority, the governor of the province acts through provincial orders deliberated in the ministers' council. Such an order is countersigned by the provincial minister in charge of its execution[268]. The Governor of the province promulgates the edicts of the provincial assembly.

As for the provincial minister, he is responsible for his ministerial department. He applies, to put it this way, the programme of the provincial government in his ministry under the Coordination and authority of the Governor of the province. And as an administrative authority, the provincial minister exercises the statutory power in his sector by way of orders of the provincial minister[269].

As one may realize, the province has its own political and administrative organs able to come up with independent management of their entity. We shall revisit this point.
We mentioned above that the province and the decentralized territorial entity enjoys free administration and autonomy in the management of resources. The municipality as a decentralized legal entity also has autonomous organs.

I.2. The Municipality, an administrative entity according to the Government decree no. 081 of 2nd July 1998 and law no. 08/016 of 10th October 2008.

The Constitution of 18th February 2006[270] granted to the province and to the decentralized territorial entities (ETD) a legal personality, and recognized their liberty to manage their affairs.

However, the constitution itself didn't care to distribute powers between the province and the decentralized regional entities as it did between the central government and the province. Instead, the constitution left that responsibility to the law.

Thus, when the law creates and organizes outside the centre other centres of interest, other levels of responsibilities and decision, administrative decentralization is achieved.

I.2.1. The administrative decentralization.

According to Vunduawe Te Pemako[271], decentralization is the administrative organization system in which there is a creation by the law or in accordance with the law, outside the

[266] Article 28 para.1, 2 et 3.
[267] Article 28 paragraph 4.
[268] Article 28 paragraph 6 of Law No. 08/012 of July 31, 2008, *op.cit*
[269] Article 29.
[270] Article 3.
[271] VUNDUAWE Te PEMAKO, F., *Traité de droit administratif (Treatise of Administrative Law) …, op.cit., p. 411.*

centre, other levels of responsibility and decision making. It consists of entrusting decision making powers to organs other than the simple agents of central government.

The municipality as a legal entity and as a subject of administrative decentralization has local affairs recognized by law. By local affairs, the law on decentralization refers to powers it accords to the decentralized organs or to the decentralized entities in order to differentiate them from specific provincial and even state powers.
The real decentralization foresees not just local affairs but also local organs chosen freely by the citizens of the entity.

I.2.2. The organs of the municipality

In the framework of decentralization, the existence of proper decision making organs coming from elections or not, is therefore essential[272]. Nevertheless, election constitutes par excellence the technique which ensures the independence of the organs charged with the management of local affairs[273].

What is the municipality and what organs has the law equipped it with?
By municipality, the law refers to:

- the entire territory masterpiece
- every subdivision of the town or every agglomeration having a population of less than 20000 inhabitants to which a decree of the prime minister will have conferred the municipality status[274]

As we have so well clarified, it is the government Decree no. 081 of 2nd July 1998 that currently governs the municipality. According to article 104 of the said Decree, the municipality is a decentralized administrative entity with legal personality. The municipality is a subdivision of the town. It is subdivided into districts and/or incorporated groupings.

Mont-Ngafula municipality perfectly matches the conditions enlisted by the two laws. Indeed bordering Makala, Selembao, Lemba and Kisenso municipalities to the north, Kasangalu area (Bas-Congo Province) to the south; N'Djili, Kimbanseke and N'Sele municipalities to the East, Ngaliema municipality and the Republic of Congo to the west, Mont-Ngafula municipality has an area of 358, 90 Km2 with a population estimated at 263,708 inhabitants[275] Its main districts are Maman Yemo, Masanga-Mbila, Kimbondo, Kindele, Ngansele, Maman Mobutu, Matadi Mayo, Matadi Kibala, Kimwenza and N'Djili Kilambu, etc.

Concerning organs considered to be in charge of the municipality, the government Decree no. 081 of 2nd July 1998[276] made provisions for the burgomaster and the municipal consultative council. But it's known that the municipal consultative councils were never established.

Consequently, only the burgomaster and the deputy burgomaster manage the municipality in Kinshasa city (province). The current bourgomaster of Mont-Ngafula, Mr Olivier Saya

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[272] *Ibid., p. 412.*

[273] KABANGE NTABALA, C., *Droit administratif*, Tome III : *Genèse et évolution de l'organisation territoriale politique et administrative en République Démocratique du Congo, de l'EIC à nos jours et perspectives d'avenir (Administrative Law, Volume III: Genesis and Evolution of the Political and Administrative Territorial Organization in the Democratic Republic of Congo, From EIC to the Present and Prospects)*, Kinshasa, Université de Kinshasa, 2001, p. 24.

[274] Article 46 paragraph 1 of Law No. 08/016 of 7 October 2008, *op.cit*.

[275] Cfr. MASUDI BITUMBA, *Rapport de stage effectué à la Maison Communale de Mont-Ngafula du 06 Avril au 13 Mai 2009 (Internship Report in the Municipality of Mont-Ngafula from 06 April to 13 May 2009)*, Kinshasa, 2009, p.4.

[276] Article 105 of Decree No. 081 *JORDC*, 39th year, especial edition of 2 July 1998.

Mandja has been the head of the municipality for two year now. In concrete terms, since September 2008, Mont-Ngafula municipality is structured as follows:

1° The bourgomaster and the deputy bourgomaster, two administrative authorities appointed on 24th September 2008 by order no. 08/057 stipulating appointment of burgomasters and assistant burgomasters of Kinshasa city.

2° The town clerk, who is in fact the municipal secretary and replaces the two officers in case of impediment. He coordinates all the services (administrative, technical, specialized and humanitarian) in the municipality.

Such is the administrative structure of Mont-Ngafula municipality in Kinshasa. However, before talking about the administrative structure put in place by law number 08/016 which will fully and concretely take effect after the municipal, urban and local elections there is need to ask ourselves the question of the independence of current organs of the municipality vis-à-vis those of provincial authority.

The current municipal burgomaster enjoys, in our opinion, limited autonomy, because he relies heavily on the city (province). Not only does his authority proceed from nomination, he can be suspended at any time by the governor of Kinshasa or be dismissed based on grievances charged against him by the city officials.

He therefore lacks enough room for maneuver in view of the instructions coming from the city authority. Recently, five municipal burgomasters of municipalities in Kinshasa were suspended by the city (province) authority because of not having properly implemented their instructions.

What will become of the municipal council and the executive college which will be established after the municipal elections?

A. The municipal Council

The municipal council is the deliberative organ of the municipality. Its members are called municipal councilors. They are elected in conditions dictated by electoral law[277].

While Parliament and the provincial Assembly hold legislative power, the deliberative organ of the municipality only holds statutory power.
The municipal council governs by decisions which are largely administration and policy regulations on numerous areas mandated to it by law[278] and which are all for the interests of the municipality. The municipal council decisions are not legislative acts like provincial laws and edicts; they are administrative acts taken by a deliberative organ.

B. The executive college of the municipality

A decision making and implementation organ of the Municipal council, the executive council is composed of the Burgomaster, the Deputy Burgomaster and two other members called "municipal Aldermen"[279]

[277] Article 48 of Law No. 08/016 of 7 October 2008 *op.cit*
[278] Article 50.
[279] Article 55.

The Burgomaster is the authority of the municipality. He is the head of the municipal executive college of the municipality. In that capacity:

1° He makes sure that administration under his jurisdiction is properly functional.
2° He is an officer of the judicial police
3° He can act as the registrar of the municipality
4° He is the chief financial officer in charge of the municipality budget
5° He represents the municipality in judicial matters and vis-à-vis third parties
6 ° He enforces (and ensures enforcement of) laws, edicts, and national regulations as well as municipal and urban decisions and regulations
7° He ensures that public order under his jurisdiction is maintained[280].

Administrative authority like the municipal council, the Burgomaster acts through municipal decree after deliberations of the executive college[281].

Before analyzing the different ties that can link up the province and the municipality we believe it's necessary to review their different organs which equally constitute one of the aspects of their autonomy.

II. THE RELATIONSHIP BETWEEN THE PROVINCE AND THE MUNICIPALITY

In the relationships that link up the province with the municipality, we'll lay our emphasis on the autonomy of each of these entities vis-à-vis the other. However, we can discuss a bit more the common traits of the two entities.

Indeed, the constitution recognized and accorded a legal personality decision making organs and local affairs to the regionalized entity, the province and to the decentralized entity, the municipality, through the principle of free administration and free management of resources whether economic, financial or technical.

II.1. The Principle of Free Administration

II.1.1. Judicial and organic autonomy

Both the province and the municipality have each its own organs basically formed by members elected by their respective citizens. The organic autonomy implies that none of these entities can influence the other in the choice of its leaders. Each is equipped with organs in conformity with electoral law.

The provincial representatives are elected by direct universal suffrage that is by all the citizens of the province who have satisfied the conditions stipulated by electoral law. A tenth of the provincial representatives are appointed by cooption.

The governor and the deputy governor of the province are themselves also elected by indirect universal suffrage by provincial representatives.

[280] Article 60 of Law No. 08/016 of 7 October 2008, *op.cit*
[281] Article 62.

On the other hand, the municipal councilors are elected in a direct universal suffrage by the citizens of the municipality. These municipal councilors in turn elect the burgomaster and the deputy burgomaster.

As one can see, none of these entities (province or municipality) interferes with the other in the choice or designation of the organs.

It's the election organized in the province and municipality that founds the organic autonomy of these respective entities.

The organic autonomy enjoyed by the organs of the province on one hand and those of the municipality on the other, reverberates through their power to make decisions. Indeed, members of the provincial assembly just like those of the municipal council decide independently on the issues relevant to their respective powers. The former have legislative powers while the latter a regulatory power.

Articles 203 and 204 of the constitution, as well as 35 and 36 of the law on the fundamental principles related to the free administration of provinces lists areas which emanate from decision making capacity of the provincial assembly.

On the other hand, the areas listed in article 50 of the law on composition, organization and functioning of the decentralized territorial entities and their relationship with the state and the provinces are within the judicial powers of the municipal council.

At the judicial level, statutory power and contractual liberty enjoyed by members of the municipal council establish and justify the legal autonomy of the municipality vis- a vis that of the province which can't, unless by legal exception, interfere with its area of jurisdiction.

But, as we have indicated above, what concerns the municipality will be implemented when the municipal councilors and the burgomasters will have been elected. For, currently, there are no municipal councilors, and the burgomasters who manage the municipalities were appointed by a presidential order, which naturally has an impact on their autonomy as we have pointed out above.

II.1.2. Financial autonomy

The principle of free administration is closely related to that of the free management of resources whether economic, human, financial or technical.

In the law preamble on the composition, organization and functioning of decentralized territorial entities (ETD), the law affirms that it's the principle of financial autonomy which allows a decentralized territorial entity to have a proper budget, distinct from that of the central government or of the province

It's clearly stated here that the state budget is distinct from that of the province and from that of the decentralized territorial entity (ETD). The municipality therefore has a budget which is different from that of the province. A budget is always understood as revenue and expenditure. But since the indispensable part of the budget is revenue, we are going to be particularly inclined to it in this study of financial autonomy.

According to Vunduawe Te Pemako [282], financial autonomy supposes, indeed, not only the theoretical possibility of having a property and managing it, but also the real possibility for the decentralized entity to procure resources and to choose how to use them.

What are the different resources that the province and the municipality freely and distinctly mobilize in order to allocate their respective budgets?

The resources transferred to the province include taxes, duties, provincial and local duties as well as share revenue.[283] Levies which were assigned to the province are the tax on the land area, developed or not, actual taxes on vehicles, taxes on rental revenue.

On the other hand, taxes and provincial duties comprises notably taxes for the common good, specific taxes for each province and the administrative revenue channeled back to the generating activities whose decision falls under the jurisdiction of the province[284].

The taxes in question here are for the common good between the provinces and the ETDs and include the special tax from traffic, annual tax for the issue of trading licenses, various taxes on consumption of beer, alcohol and spirits as well as tax on mining leases and concessions, tax on the sale of precious material for craftwork production and all other taxes put in place by the central government and being rechanneled totally or in part to the provinces in accordance with the law.[285]

So far, the efficient application of local fiscal administration faces serious as the laws for its successful application are yet to be voted. Evariste Mabi Mulumba[286] lists these laws as follows:

- The fixation with sharing of taxes for the common good between the provinces and the ETDs and between decentralized territorial entities through the legislation that establishes them.
- The principles governing the collection of special taxes by the law fixing the catalogue of local revenue.
- The new organic law on public finances (the new financial law) adapted to decentralization.
- The law relating to the creation of the national equalization fund.

Despite that the law has allocated to the province resources capable of guaranteeing its financial autonomy. On the other hand, the municipality, like all the ETDs, equally has its own resources (fiscal and administrative revenue)[287] capable of affirming its financial autonomy vis-a-vis the province and other ETDs

It is important to note that the municipality can, outside its own resources, mobilize other resources proceeding from national revenue, from the national equalization fund and exceptional resources.[288]

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[282] VUNDUAWE Te PEMAKO, F., *Traité de droit administratif (Treatise of Administrative Law)…, op.cit., p 413.*

[283] Article 48 of Law No. 08/012 of July 31, 2008, *op.cit*.

[284] Refer to Article 49 of Law No. 08/012 of July 2008, *op.cit*.

[285] Article 50 of Law No. 08/012 of July 31, 2008, *op.cit.*

[286] MABI MULUMBA, E., "Décentralisation et problématique de la fiscalité " ("Decentralization and Taxation Issues), *Congo-Afrique*, n° 432, février 2009, p. 131.

[287] The resources of a decentralized territorial entity comprise personal minimum tax, participation income, local taxes and duties.

[288] Articles 118 and 119 of the Las No. 08/016 of 7 October 2008, *op.cit*.

All these different revenues allow the municipality to have an independent budget which is transmitted as revenue and expenses to the provincial governor for integration into the provincial budget. This constitutes a notable progress in the process of putting in place local democracy, and we strongly wish to see all these legal provisions applied.

But for now, the municipality (notably that of Mont Ngafula) functions in a different manner on financial matters. The municipality resources are constituted from the administrative revenue, from licenses and sometimes from retrocession of some revenue by the City (province) of Kinshasa. Indeed, the municipality accounts are formed from remuneratory taxes and from the single on the establishment of a business or industry tax (CEMAC duties).[289]

The important thing that one might want to know is what the municipality does for the people with the income it gets. The evident response is that it puts it under expenses.

However, one can admit that the expenses are not directed to visible development projects in the municipality.

So far, the municipality has not yet been very active or very visible in the development of its people. For example, in order to curb erosion and install public lighting in the municipality, the municipality simply refers to the city or to the central government, or even to non-governmental organizations or international development partners. May be the municipality will soon be first preoccupied by the development of its people when its autonomy will be efficient.

On the issue of autonomy, one must not forget that it doesn't mean independence. This is why a provincial control system on activities of the decentralized territorial entities was provided for by the law.

II.2. Provincial Control Mechanisms for the Municipality

As stipulated in article 93 of the law on composition, organization and functioning of the decentralized regional entities and their relationship with the State and the provinces the Mayor, the burgomaster, the administrative chief and the traditional chief are executive local officials and represent the State (sic) and the province in their respective jurisdictions.

As representatives of the State and the Province, these local authorities oversee the proper functioning of the State and provincial services in their entities and ensure the proper functioning of their respective administrations[290]. This responsibility cannot be assumed without right to do so from the central government and in our specific case, from the province.

However, what is the nature of the control that the province exercises over the municipal authority and up to what point does such control stretch?

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[289] Mont Ngafula Municipality, *Rapport annuel d'activités. Exercice 2008 (Annual Report of Activities. Year 2008)*, Kinshasa, (s.ed.), 2009, p.40. During this year, for example, the town had revenues of approximately **43,616,485 CF** derived primarily from selling liquor license, municipal market stalls tax, succession certificate tax, taxes on vital records, parcels Plots registration tax, single fee for the establishment of business and industry, legal and procedure fees; almond and forfeitures; certificate physical fitness fees; fee for the maintenance of captured stray animals; veterinary inspection fee, tax on bicycles and carts; Tree cutting fees, canoes Tax; patent; maps selling to planters and farmers as well as the retrocession (p.41.)

[290] Refer to Article 93 para.2 of Law No. 08/016, *op.cit.*

II.2.1. The nature and extent of the control of the province on the municipality

The province and the municipality are two distinct public entities. The control to be exercised by the former on the activities of the latter can only be supervisory. This is clearly affirmed by the law itself[291] , and that supervision is only allowed on the acts of the supervised authority and not the latter. _

In fact, the supervision of the organs consists of nomination, suspension and revocation. Yet, all these sanctions are not normally granted for the municipal executive authorities who are appointed through election. In a context of a constitutional State, an act of suspension of elected authority can at most only be envisaged following a judicial decision condemning it. But in principal, in that hypothesis is the voluntary resignation of the accused that is required.

On the other hand the supervision of the acts of the burgomaster is exercised by a pre-examination and a post-examination. The acts enumerated limitedly in article 97 of law no. 08/016 are the only ones subjected to pre-controls, meaning the acts get prior authorization for the provincial authority before their adoption. In concrete terms, acts subjected to prior controls are submitted to the governor before deliberation or execution. He will then have twenty days to give his opinion. At the end that period, the proposed act is deliberated on or executed[292].

If the governor gives a negative opinion on the bill submitted to him for assessment, that negative decision can be subject of administrative or jurisdictional recourse[293]. The refusal to give his opinion can also provoke an appeal before a competent judge if and only he hasn't addressed the issue 30 days from the day the proposed draft was submitted to him.

It's important to note that the management of the acts is practically done in three phases notably before, during and after the controlled authority gets the act. As far as the acts listed in article 97 are concerned, when the Bourgomaster hands over the project to the provincial governor, he waits for authorization from him. But when it refers to other acts on which prior control is exercised, the Bourgomaster can make a decision before seeking the opinion of the governor. In that hypothetical situation, the law reserves to the latter the power to annul the act applied in this manner if it contradicts the law that governs its formation.

The provincial governor also has power to oppose a statement by the burgomaster or even, in cases of extreme necessity to substitute it with his decision. As one may realize, the powers to annul and to substitute can seriously undermine the autonomy enjoyed by municipal executive authorities. They are used in cases of extreme necessity.

The fact that the burgomasters currently in office can be suspended or revoked any time, the supervision to which they are subjected is at the same time supervision of the organs and the acts and in conformity to the provisions of articles 216 and 207 of decree no. 081 of 2nd July 1998.

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[291] Under Article 95 of Law on the composition, structure and functioning of DTE ... the provincial governor, in the conditions prescribed in this Act, has authority over the actions of the decentralized territorial entities (DTE)..

[292] Article 98 of Law No. 08/016 …, *op.cit.*.

[293] Refer to article 99

The Implications of the Supervision of the Municipal Acts

The fundamental question that presents itself is the following: Does the supervisory control established by the law of 7th October 2008 on the local executive authority acts take away the authority enjoyed by those authorities? In other words, is the autonomy incompatible with supervisory powers? Supervisory control is a mechanism exercised in accordance with the law and always seeks to protect the general interest. Never is supervisory control established to satisfy the feelings and whims of the supervising authority.

For our purposes, the municipality, like all decentralized territorial entities, enjoys autonomy accorded to it by the constitution and the law. That autonomy implies that it has power to freely make decisions on areas under its jurisdiction without the interference of the province as far as that decision is concerned. The deliberative organ has areas in which it takes regulates administration and policy.

In cases where the supervisory structure is established, it does not implicate the power of initiative which the local executive authorities in general and municipalities in particular hold. The autonomy of local authority is also manifest in the attribution of a fiscal domain to the benefit of decentralized territorial entities, which allows them to mobilize financial resources susceptible to financing their activities. But once more the current municipal authorities will have to be patient before they realize an efficient application of their autonomy.

CONCLUSION

The relationship between the Municipality and the province have no infringement at all to their respective autonomy. Each of these territorial entities maintains its autonomy which comes from the constitutional principle of free administration[294]. This autonomy is organic, legal, economic and financial at the same

The municipality is managed by authorities elected locally and who have real decision making powers within their mandate. It also ensures the allocation of local taxes providing the means of development without necessarily having to step into the decision making process.

The authority given to the province is a safeguard against possible drift and abuse of municipal powers.

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[294] Article 3 of the Constitution, *op.cit*.

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THE NATIONAL REVENUE: DISTRIBUTION BETWEEN THE PROVINCES ACCORDING TO THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF CONGO OF 18TH FEBRUARY 2006

By **De Gaulle MABIALA NKANGU (*)**

INTRODUCTION

On 30th June 1960, when Democratic Republic of Congo attained independence from Belgium most sectors of the national economy anticipated fast growth given that the country boasted immense resources allowing her to foresee a promising future: in 1959, Belgian Congo was the largest producer of cobalt to the tune of 5.996 tonnes, that is 39% of total production worldwide; the largest producer of industrial diamonds at 66% of total production in the world and fifth globally in the production of copper averaging 282.094 tonnes representing 9% of world production [295].

The same year, the country returned a clear record in the production of cotton: 179.660 tonnes of cotton - seeds, that is 59.280 tonnes of cotton - fibers, out of which 52.790 tonnes were exported. During the same period, Congo was one of the largest producers of cotton in Africa after Egypt and AOF (French West Africa) and the second largest producer of palm oil in the whole of Africa (after Nigeria), with 400.000 tonnes… ! Moreover, the exports of agricultural produce represented more than 45% of total exports[296].

Forty nine years later, as a major shock, the Democratic Republic of Congo with her vast resources went into destruction and was consequently forgotten.

Given these facts, the question that comes to mind is how and why a country with incredible natural resources could be counted among the under developed countries?

In reality, the Congolese people are never unanimous in answering these twin questions sometimes attributing the situation to fate, other times to malicious intent by the political class of yester years going back to the dawn of the pre-colonial period beginning with the discovery of the source of the River Congo by Diego Câo in 1482 and also the participation of David Livingston and Henry Morton Stanley regarding the birth of the Belgian colony in 1885 through the intervention of King Léopold II until the hosting of the Berlin Conference which took place between November 1884 and February 1885 and thereafter, the accession of the Democratic Republic of Congo to independence.

Again and taking everything into consideration, through history, one finds out that the Democratic Republic of Congo has lived through a back and forth evolution given that the first

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295 VAN MEERHAEGE, M, *Caractéristiques de l'économie (Characteristics of the Economy)*, in Académie Royale des Sciences (Royal Academy of Sciences),, Tome I, Bruxelles, 1962, pp. 467- 482.

296 Information collected by Professor TOLLENS, E, *De economische toestand van Belgisch Congo en va Ruanda-Urundi in 1959 (The Economic Situation of the Belgian Congo and Ruanda-Urundi in 1959)*, African Affairs Department / Directorate of Economic Studies, quoted by De FAILLY, D, *L'économie de la République Démocratique du Congo en phase de post – conflit (The Economy of the Democratic Republic of Congo in Post – conflict Phase), In* la République Démocratique du Congo (The Democratic Republic of Congo), Konrad Adenauer Foundation Publicaions, Kinshasa, 2006, p.137.

five years following independence were quite tumultuous with politico-military conflicts, mutinies, the exodus of the Belgians, secession attempts, the military intervention by UN, numerous governments and counter-governments, constitutional conflicts, uprising of the peasants, students, epics of the mercenaries and numerous interventions by foreigners[297].

This scenario of events quickly created a climate which could not favour institutional stability culminating in the stripping of power from Joseph Kasa Vubu in November 1965 by Joseph Désiré Mobutu who took over and exercised power until his removal from office on 17th May 1997 by the AFDL (Democratic Alliance for the Liberation of Congo) forces which installed Laurent Désiré Kabila in power until his assassination on 16th January 2001[298].

So, the country moved from the colonial Charter of 1908 to the law of 1960 before changing and adopting according to circumstances, between the so-called Luluabourg Constitution of 1st April 1964, the one enacted on 24th June 1967[299] followed not only by the Law n°001 of 2nd April 1993 on the transitional harmonised Constitutional Act, the government decree of 17th May 1997 but also the transitional Constitutional of 4th April 2003 and recently the Constitution of 18th February 2006 after adopted through a referendum and which installed a semi-presidential system based on a unitary State with provisions for strong devolution.

Strictly speaking, it is about the option of a constitutional regionalism[300] which according to Pierre Bon is «an intermediary form between a unitary State and a federal State which combines unity of state and the autonomy of its components[301] ».

Furthermore, in a unitary State, there is only one centre of power. However, the option of devolution[302] clearly implies the sharing of power, responsibilities and resources among several actors taking into account local, provincial and national realities for, as best observed by Professor LACHAUME, « devolution does not draw a line in form of a boundary that should not be crossed, but defines a 'zone' containing several possible solutions which are in agreement with the Constitution[303] ».

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297 HANF, T, *Un pays destiné au pillage ? Essai de situer la crise congolaise (A country destined to plunder? Attempt to put the Congolese Crisis into Context)*, Konrad Adenauer Foundation Publications, Kinshasa, 2006, p. 11.

298 See MABIALA MANTUBA Ngoma, *La longue transition politique en République Démocratique du Congo (The Long Political Transition in the Democratic Republic of Congo)*, Konrad Adenauer Foundation Publications, Kinshasa, 2006, p. 32.

299 De Quirini, P, *Une Constitution pour quoi faire* ? (A Constitution, what for ?), CEPAS, Kinshasa, 1990, pp. 45-52.

300 It is a process of development of state power, which aims at politically and constitutionally decentralizing provinces. The provinces, in a unitary state, become political and administrative components equipped with legal personality and institutional and financial autonomy. Read PHILIPPE, X, « La répartition des compétences entre l'Etat central, l'Etat provincial et les municipalités : structures politiques ou administratives ? » («The Division of Powers between the Central Government, the Provincial State and Municipalities: Political or Administrative Structures?), in *Revue française de l'Administration publique (French Journal of Public Administration)*, n° 85, January - March1998, pp. 15-34..

301 BON, P, *L'Etat autonomique, forme nouvelle ou transitoire en Europe (The Autonomic State, a new or Transitional Form in Europe)*, Economica, Paris, 1994, p. 60.

302 Decentralization means "make a movement contrary to centralization." This is a second approach, which assumes that a prior centralization that should be countered. Politically, "Decentralization" is democratization, it consists of involving people to the discussion and management of public affairs at a level that touches them directly. At legal and administrative level, "decentralization" is to transform repercussion centers, which were regions and basic entities, to centers of initiative, leadership, decision-making and responsibility. Read VUNDUAWE te PEMAKO, F, *La dynamique de la décentralisation territoriale en RD Congo (The Dynamics of Territorial Decentralization in DR Congo)*, In Actes des Journées Sociales du CEPAS (Proceedings of CEPAS Social Sessions), Congo-Afrique, XLVIIIth year, February 2009, n° 432, Kinshasa, 2009p. 108.

303 LACHAUME, JF, *Décentralisation ou libre administration ? Rapport introductif du colloque de Bordeaux sur les vingt ans de la décentralisation (Decentralization or Free Administration? Introductory Report of the Bordeaux Symposium on the twenty years of Decentralization)*, quoted by DJOLI, J, *Les entités territoriales déconcentrées : contrepoids ou contrefort de la décentralisation congolaise (Devolved Territorial Entities : Counterweight or Spur of the Congolese Decentralization)*, In Actes des Journées Sociales du CEPAS ((Proceedings of CEPAS Social Sessions), Congo-Afrique, XLVIIIth year, Februay 2009, n° 432, Kinshasa, p. 138.

This considerably justifies the parallelism to be established between what is done and is happening in the Democratic Republic of Congo and what should have been done towards decentralization especially because everyone agrees that « if not well understood, decentralization can bring along the threat of a breakup of the country through the awakening of the secessionist fervor which is lying dormant in the subconscious of those nostalgic for secession as proven by the decrees of the mayor of Lubumbashi which were, quite fortunately, nullified by the relevant authorities[304] ».

To achieve this, our approach begins with an objective analysis of the implementation of decentralization in the Democratic Republic of Congo in a way that ensures adherence to the related constitutional provisions mainly relating to the sharing of the national revenue among the provinces by examining the modalities of this sharing and the constraints which can possibly arise from the current judicial structure of the country whose transformation throughout history has for long been the subject of debates informed by a number of reasons obviously based on universally accepted principles.

1. EVOLUTION OF DEBATES ON THE STRUCTURE OF THE STATE IN THE DEMOCRATIC REPUBLIC OF CONGO.

The organization and the functioning of a judicial system or of institutions of any nature does not happen by chance but as a result of a multi-facetted mix of social, economic, and political factors which oppose or support each other at a given time within the context of the realities of any country[305].

For the Democratic Republic of Congo, according to a partial study on the administrative organization since the first division of the Independent state of Congo in 1888, more than 500 decrees, laws, orders and edicts have been enacted in view of modifying the structure and whose transformation was analyzed in six major phases, that is from 1888 to 1910, from 1910 to 1929, from 1929 to 1940, from 1940 to 1960 and from 1960 to the present[306].

The reason being that it is not the first attempt by the constitution to determine the judicial set-up for the Democratic Republic of Congo yet if during the colonial period (1908-1960), the debate on the correct structure began with the Royal Decree of 28th July 1914 which favored a centralized system.

But following the First World War, the colonial authorities through the Royal Decree of 29th June 1933, undertook an administrative reorganization with the aim of strengthening the central government and therefore weakening provincial governments. Suddenly, through this Royal Decree, there was the passage from a relatively decentralized Unitarianism to a strongly centralized Unitarianism.

This situation lasted until the 1st July 1947, the date on which a certain administrative decentralization was put in place through the delegation of executive powers to provincial

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304 KENGO wa DONDO, L, *Réforme de la territoriale et respect de l'unité nationale (Reform of the Territorial and the Respect of National Unity)*, Palais du peuple, Kinshasa, September 2008, p. 4

305 KABANGE NTABALA, Cl, *Le réaménagement de l'Etat, la décentralisation et l'émergence démocratique en République Démocratique du Congo (The Redevelopment of the State, Decentralization and the Emergence of Democracy in the Democratic Republic of Congo)*, In Actes des Journées Scientifiques de la Faculté de Droit de l'Université de Kinshasa (Proceedings of Scientific Sessions of the Faculty of Law, University of Kinshasa), *Publications produced with the support of the Mission of the United Nations in Congo, PUK, 18-19 June 2007*, p. 50.

306 De Saint MOULIN, L, *Histoire de l'organisation administrative du Zaïre (History of the Administrative Organization of Zaire)*, Extract from the journal Zaire-Africa, Kinshasa, 2000, p. 304 quoted by KABANGE NTABALA, Cl, *op.cit*, p. 50.

governors. This decentralization was extended through the Royal Decree of 13th February 1957 hence strengthening the autonomy of governors notably by making a provision for provincial budgets[307].

Accordingly, Jean STENGERS was made to observe that « the only difficulty concerning institutions, during the January 1960 political round table talks was the sharing of powers between the central and the provincial governments ».

From 1960 to 1965 (under the 1st Republic), the idea of federalism was at the centre of political consultations beginning with the 25th January to 16th February 1960 Léopoldville Round Table talks during which the idea of a Unitary State was rejected in favor of a Federal State. Thereafter, it was during the Antananarivo conference held from 8th to 12th March 1961 that the sovereignty of de facto States created through secession was recognized by proposing confederalism.

However, the draft constitution prepared in Luluabourg from 10th January to 11th April 1964 and subjected to the constitutional referendum organized from 25th June to 10th July 1964 opted for a federalism by declaring in its Article 5 : « autonomous provinces enjoy national legal status whereas international legal status is only reserved for the Republic[308] ».

Following the military coup d'état by President Mobutu on 24th November 1965 (under the 2nd Republic), the country had a centralized Unitarianism from 1965 to 1981 and then, from 1982, there were attempts at decentralization, following the government decree n° 82-006 of 25th February 1982 on territorial decentralization (territorial and political organization and administration of the Republic)[309], political decentralization and administration of the country. In other words, the country opted for a Unitary State[310] with a presidential system[311], a unicameral parliament[312] and a bipartisanship[313] which never saw the light of day. Instead, a pyramid-shaped, autocratic, monolithic, personalized and dictatorial power structure was installed through the combination of hard power (use of force) and soft power (use of utilitarian consensus)[314]. Following the removal of the latter on the 17th May 1997 by the AFDL forces, the country reverted to a unitary centralized and totalitarian State[315] and then later it was stated in substance in the transitional Constitution: « the Democratic

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307 Useful reading MABIALA MANTUBA NGOMA, *Le fédéralisme dans l'histoire politique du Zaïre, pour une démocratie fédéraliste au Zaïre ? (Federalism in thePolitical History of Zaire, for a Federalist Democracy in Zaire?)* , IFEP, Kinshasa, 1992, pp. 26 and ff..

308 MABIALA MANTUBA NGOMA, *Fédéralisme ou unitarisme en République Démocratique du Congo ?, (Unitarianism or Federalism in the Democratic Republic of Congo?),* In Konrad Adenauer Foundation Publications, Kinshasa, 2004, p.32.

309 Territorial Decentralization is the system of administrative organization in which there is creation by law or by the legislator, of other levels of responsibility and decision out of the center of power. It is to devolve decision-making powers to other bodies than to mere agents of central power. Read VUNDUAWE te PEMAKO, F, *op.cit*, p. 106.

310 A unitary State is the one that has only one pulse center in all its attributes and functions of a single proprietor who is the legal entity of the state. See also VINCENT, J, et GUILLIEN, R, *Lexique des termes juridiques (Glossary of legal terms)*, Dalloz, Paris, 1970, p. 154.

311 This is the system of balanced cooperation of powers, where the Government and the parliament have common areas and means of mutual action; the parliament could jeopardize the political responsibility of Government. See also VINCENT, J, and GUILLIEN, R, *op.cit*, p. 296..

312 Parliament organizational system consisting of the establishment of a unicameral chamber. VINCENT, J, and GUILLIEN, R, *op.cit*, p. 232.

313 Party system in which only two parties with majority vocation more or less regularly alternate power; the winning party forming the Government, the looser constituting the opposition. This alternation in power requires the agreement between both parties on fundamentals of the regime. See VINCENT, J, and GUILLIEN, R, *op.cit*, p. 44.

314 MABIALA MANTUBA NGOMA, *op.cit*, p. 33.

315 De SAINT MOULIN, L, *Les enjeux et les défis du découpage administratif (The Issues and Challenges of Administrative Civision)*, In Actes des Journées Sociales du CEPAS, (Proceedings of CEPAS Social Sessions), Congo-Afrique, XLVIIIth year, February 2009, n° 432, Kinshasa, p. 102.

Republic of Congo is a decentralized Unitary State[316] ». This clearly remained pious hope given that the system was still unitary and very centralized throughout the years and was retained in the current Constitution of 18th February 2006.

2. THE REASONS FOR THE ADOPTION AND THE RETENTION OF THE DECENTRALIZED UNITARY STATE FORM OF GOVERNMENT UNDER THE 3RD REPUBLIC.

Decentralization is a complex and lengthy process which does not correspond to any model whereas it takes its roots from the political and administrative history itself dependent on a country's geography.

Regarding the Democratic Republic of Congo, the decision to adopt and to maintain a decentralized unitary State has time and again been motivated by different reasons. The main reasons are:

- The immense territorial surface area with its 2.345.000 km²,
- Cultural and ethnic diversity,
- The complexity of its geographical regions,
- The wealth of its human and natural resources,
- The failure of the unitary system, the real desire to change and especially to develop grassroots units to take charge of their future[317].

3. FUNDAMENTAL PRINCIPLES OF THE FUNCTIONING OF DECENTRALIZATION

Thus, the constitution of 18th February 2006 tried a compromise between two inclinations and established a hybrid system. Decentralization was, from then cast in stone on the pediment of this fundamental charter with the aim of, on one hand, consolidating the national unity messed up by the successive wars and, on the other hand, creating centers for stimulation for development at the grassroots[318].

By implication it's indeed noteworthy that the harmonious functioning of decentralization involves observation of several fundamental principles especially- free administration and in the management[319] of provinces and decentralized territorial entities[320] in the clear

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316 Art 5 of the Constitution of the Democratic Republic of Congo of April 4, 2003..

317 Read MULAMBU MVULUYA, *Les conflits interethniques : quelles voies de solution ? (The Ethnic Conflict: What Possible Solutions?)* In Fédéralisme, ethnicité et intégration régionale au Congo/Zaïre (Federalism, Ethnicity and regional integration in Congo / Zaire), Publications of the Institute of Political Studies and Training, Kinshasa, 1997, p. 36.

318 DJOLI Eseng'EKELI, J, *Les entités territoriales déconcentrées : contrepoids ou contrefort de la décentralisation congolaise (Decentralized territorial entities: counterweight or spur of the decentralization Congolese)*, In Actes des Journées Sociales du CEPAS, Congo-Afrique, XLVIIIth year, February 2009, n° 432, Kinshasa, pp. 139-140

319 The attribution of legal personality is a normal consequence of decentralization, since it draws the logical conclusion of the recognition of a "center of legally protected interests". Consecutively, the financial autonomy example is not only the theoretical possibility of having a heritage and to manage, but the practical ability of the decentralized organization to obtain resources and choose their jobs. See also MABIALA MANTUBA NGOMA, P, *Les fondements de la décentralisation (The basis of decentralization), In* Le processus de décentralisation en République Démocratique du Congo (The decentralization process in the Democratic Republic of Congo), Konrad Adenauer Foundation Publications, Kinshasa, 2009, p. 15. Read also KUMBU ki NGIMBI, JM, *Le cadre légal de la décentralisation en République Démocratique du Congo (The legal framework for decentralization in the Democratic Republic of Congo), In Le processus de décentralisation en République Démocratique du Congo (The decentralization process in the Democratic Republic of Congo)*, Konrad Adenauer Foundation Publications, Kinshasa, 2009, p. 58.

320 Useful reading articles 3 and 123 of the Constitution of 18 February 2006 which suggest the institutionalization of

perspective of encouraging good governance,

The Democratic Republic of Congo is a country permanently searching for a lasting State legal system for the republic. And, as stated above, since its existence as a state, this country is tossed from a federal system to the unitary model.

Understood as devolved administration where there is impartial and transparent management of public affairs (…) that the spirits of responsibility among citizens in taking charge of the problems in their environment[321].

That clearly means that the success of all decentralization is pegged on the transfer of authority and human, economic, financial and technical resources that the State (central government) must carry out "in good faith" toward the provinces and the decentralized territorial entities in conformity with the constitution which determines *expressis verbis* the powers of the latter which are exclusive or competing[322] with those of the province, which constitutes a substantial guarantee to their autonomy[323] in the framework of political decentralization.

Beyond that, the central government will have to provide to each province[324] a portion of the revenue generated by the various services rendered by the state throughout the national territory.

This perception brings about, in plain language, a double preoccupation whose ultimate goal would be inclined to bringing out what the state (central government) relies on in order to meet its public expenses as well as determining the manner through which the said revenue have to be distributed between the provinces

4. STATE'S (CENTRAL GOVERNMENT) SOURCES OF FINANCING

It's important to note that decentralization is not a denial from the Central Government, but the application of a political, social and fiscal pact between the governors and the governed[325].

Moreover, to decentralize is just one dimension of the problem, after decentralization, one has to coordinate the activities to which relative independence was given. (…) Self administration is given to a local authority, which uses it to fight for irredentism, at least in order to boycott government directives. To an extent that it becomes a vicious circle."

In order to do this, the state, as a legal entity, is composed of people who live in a territory under the authority of a government which embodies public authority. Taken as a moral personality, the State can neither consume nor spend. Rather, it's the public servant, the State's service provider, who spends the money that the State gives and what he gets form

political regionalism at two levels of exercise of state power: the central government and provinces within which move decentralized territorial entities that are the city, community, industry and the leadership and other administrative districts. Read for this purpose prescribed in Article 2 of Law No. 08/012 of 31 July 2008 on basic principles on the free administration of the provinces

321 MABIALA MANTUBA NGOMA, *Fédéralisme, ethnicité et intégration régionale au Congo/Zaïre (Federalism, Ethnicity and regional integration in Congo / Zaire)*, *op.cit*, pp. 69-70.

322 See articles 202, 203, 204 of the Constitution of February 18, 2006.

323 Autonomy is not independence, if independence determines the relations between sovereign entities, autonomy determines the relationship between decentralized and central government or between federal entities and federal power

324 The DRC has 25 provinces and the city (province) of Kinshasa, bringing to a total of 26 provinces.

325 DJOLI Eseng'EKELI, J, *op.cit*, p. 138.

other individuals[326].

In *casu specie*, the Congolese central government draws public policy resources not only from its administrative, legal and national revenue from taxes, equity and excise duty collection but also revenue from taxes levied on big companies, oil companies and other taxes at place of production[327]

This refers to the different resources regarded as national that the Constitution and law no. 08/012 of 31st July 2008 distinguishes from the revenue generated by the provinces[328] which basically constitute only duties, taxes, provincial and local levies as well as revenue from shareholding[329].

Similarly, some ask a question for information purposes - what is the criteria for the distribution of the said resources to the provinces.

5. CRITERIA FOR THE DISTRIBUTION OF RESOURCES TO THE PROVINCES

The democratic Republic of Congo is a state where territorial area is estimated at 2,345,000 Km^2. comprising of, in conformity with the constitution of 18 February 2006, 11 provinces[330] subdivided into diverse decentralized territorial entities (cities, territories, municipalities, and administrative areas under the jurisdiction of an administrative chief, areas under a traditional chief, groupings…..)[331]

As it is, and in the perspective of the reformation of the centralized state following the virtues of decentralization of which one of the aims is to promote local development by making provinces the hub of economic development, the concerns still have to do with modalities through which the central government organizes the distribution of "national revenue" to the provinces.

5.1. Modalities of Distribution of the said Revenue

In order to make the application of law effective, the Congolese constitution has explicitly articulated on one hand that retention at source[332] is the only mechanism through which each province can retain its 40% and on the other hand, it's the Central Bank of Congo which in strict adherence to law, ensures an automatic deposit of a sum equivalent to 40% of the

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[326] Every modern state through resource revenue so-called "definitive resources and extraordinary". The definitive resource truly mean permanent income which the state uses all times to cover expenses incurred without him they create burdens on future generations. They are charged by the state or local government in the hands of taxpayers, individuals or entities. These tax revenues (taxes) and nontax consist of Crown resources, administrative fees and special levies on one hand. Whilst the other hand there is the extraordinary resources that form the cash resources and external borrowings

[327] Art 55 of Law No. 08/012 of 31 July 2008 laying down basic principles for the free administration of the provinces.

[328] Articles 171 of the Constitution of 18 February 2006 and 43 of Law No. 08/012 of July 31, 2008.

[329] Read art 48 of Law No. 08/012 of 31 July 2008 on basic principles on the free administration of the provinces

[330] The division of the country into 26 provinces will be effective until 36 months after the political institutions from the elections will be installed. For now, the Democratic Republic of Congo has only 11 provinces

[331] Art 4 of Law No. 08/012 of 31 July 2008 quoted above.

[332] Refer to Art 171 of the Constitution of February 18, 2006 and s. 54 of Act 08/012 of 31 July 2008 laying down basic principles for the free administration of the provinces. Read about KUMBU ki NGIMBI, JM, *Le cadre légal de la décentralisation en République Démocratique du Congo (The legal framework for decentralization in the Democratic Republic of Congo), op.cit, p. 82.* The withholding tax is a technique for collecting the tax on income, which consists in requiring the debtor to make a taxable amount on it a levy that will pay the tax as an advance payment tax which will owe the creditor. Read and VINCENT, J, and GUILLIEN, R, *op.cit*, p. 309.

national revenue in the provincial account and 60% in the Treasury[333].

As one can see, the portion of national revenue that has to be allocated to the provinces is set at 40%[334] of the total sum of money collected by each of the provinces for the Treasury. However faced with the inequality of economic potential across the provinces, there is no doubt at all that some provinces risk being disadvantaged compared to others. In other words, provinces with lower capacities to mobilize financial revenue can't expect much from the central government and indirectly cannot hope to develop in the near future of course due to the emphasis on "mobilization capacity and the capacity to contribute" in each province[335].

The depiction of the level of revenue mobilization per province below is a sufficiently clear illustration.

5.2. Level of Resource Mobilization Per Province

- Kinshasa province : 55%
- Katanga province : 23%
- Bas-Congo province : 20%
- Eastern Province : 0,08%
- North Kivu Province: 0,75%
- West Kasaï province : 0,44%
- South Kivu province: 0,39%
- East Kasaï province : 0,13%
- Maniema province : 0,06%
- Bandundu province: 0,06%
- Equateur province: 0,06%.

A close examination of the depiction above shows that only three provinces namely Kinshasa city, Bas-Congo and Katanga contribute noticeably to the treasury hence in accordance with the constitutional mechanism of the retention at the source they are the only ones which would benefit from sufficient resources for normal operations; which, if the opinion of more than one independent Congolese analysts are anything to go by, exposes the shadow of an unhealthy climate among the provinces in the near future because of "*the better gaps of inequality of financial shares*" ; *money being the sinews as they say.*

Certainly, regarding resources, the province can result to internal borrowing to finance its investments, to contract and guarantee external loans one hand and, on the other hand, benefit from grants and donations as well as from resources from the National Equalization Fund[336]. However, even then, considering that the equalization fund will hardly be financed

[333] Useful Reading: articles 3, 171, 175 para 2, 202-204 of the Constitution of February 18, 2006. See also articles 104, 108-114, 115-116, 117, 118 to 119 of the Organic Law No. 08/016 of 7 October 2008 on the composition, organization and functioning of decentralized territorial entities and their relationship with the State and Provinces

[334] Art 175 para.2 of the Constitution of 18 February 2006 and 54 of Law No. 08/012 of 31 July 2008 on basic principles on the free administration of provinces.

[335] Press briefing by the Prime Minister Muzito on RTVS1/Congolese private Channel in connection with the organization of the governors' conference, Democratic Republic of Congo, Kinshasa, August 4, 2009.

336 The mission of Equalization National Fund is to finance projects and public investment programs in order to

by an annual state budget contribution not exceeding 10% of national fiscal revenue, there is no doubt that it will never be sufficient to ensure the development of all the provinces or reduce the yawning gap in the level of development in the provinces.

Moreover, consider, up to June 2008, the part in % of the Large Enterprises Headquarters, Oil companies in all the Tax collection centers of Government Tax Authority were estimated in the following manner:

Centre	2004	2005	2006	2007	June 2008
- Big Enterprises Headquarters	70,81	62	63,9	62,37	55,00
- Oil companies	19,78	25	21,6	19,43	20,10
- Other centers	9,41	13	14,5	18,20	24,90
	100	**100**	**100**	**100**	**100**

Source: Calculations done from the data available from Government Tax Authority

Nevertheless, it is notable on one hand that revenues collected by the Government Revenue Authority are dominated by revenue from the Large Enterprises and the Oil companies both totaling 85.5% in 2006, 81.8% in 2007 and 75.10% in June 2008 while on the other hand the large enterprises are concentrated in Katanga, in the Kinshasa city/province and in Bas-Congo and that all the oil companies are exclusively based in Bas-Congo.

Moreover, concerning the resources to be transferred, it was deducted that the revenue from Tax and Excise duty office and from the Large Enterprises Headquarters were distributed according to the demographic weight on one hand and that on the other hand the revenue from the Government Tax Authority (outside Large Enterprises Headquarter) were distributed among the provinces according to the mobilization capacity of each province[337].

As one may observe, two delicate realities are emphasized namely, the constraints borne by the central government regarding the application of the virtues of decentralization and the issue of the survival of retrocession.

6. THE CONSTRAINTS OF THE CENTRAL GOVERNMENT OF THE DEMOCRATIC REPUBLIC OF CONGO.

Decentralization is a process that is never static and is continually influenced by the structural or economic phenomena related to growth or drafting of the state. Thus, when the central government grows (in the time of war for example), the trend of centralization is almost

ensure national solidarity and correct the development imbalance between provinces and between the decentralized territorial entities. See article 181 of the Constitution of 18 February 2006 and 57 of Law No. 08/012 of July 31, 2008.

337 MABI MULUMBA, E, *Décentralisation et problématique de la fiscalité (Decentralization and the taxation problematics)*, In Actes des Journées Sociales du CEPAS (Proceedings of CEPAS Social Sessions), Congo-Afrique, XLVIIIth year, February 2009, n° 432, Kinshasa, pp. 132-134.

irresistible. Conversely, when the size or the resources of the central government reduce, decentralization tends to happen.

Like it or not, the Democratic Republic of Congo is, by its generic political character, faced with a real problem of governability of a very wide area thus opting for the latter, we have seen it before through the Constitution of the 18 February 2006 promulgated at the conclusion of a referendum being understood that decentralization which is a way of managing public services resulting from the transfer of allocation from the state to the institutions (territorial or not) legally separate from it and enjoying, under an organic law, a certain autonomy[338] revealing itself, in all conditions as an appropriate response to the Democratic Republic of Congo in order to stimulate the impulse of development and support at the grass-root.

It, unfortunately, turns out any evidence that inequality of provinces in economic potentials is evident such that the disparity in the level of development of the provinces is striking. Due to "the imperatives of equity, and of the protection of the balance of public finances", the central Government of the Republic of Congo whose players demonstrate lack of political will among other alternatives but to act in violation of constitutional provisions advocating withholding tax which shapes to the horizon the tendentious problematic of the survival of retrocession.

7. PROBLEMATIC OF THE SURVIVAL OF RETROCESSION

Decentralization is not just a sum of reforms. It is primarily a state of mind, a willingness to go forward in the deepening of democracy[339] certainly, but application to the letter of decentralization in the Democratic Republic of Congo inspires so much fear that the central government would simply and purely propose "the abandonment of the mechanism of withholding tax in favor of Retrocession"[340].

Although it may cost something, however, it is not surprising that such a shift in the position of the Congolese central government is strengthened or supported through the note from the World Bank. Tax decentralization[341] which by pulling its alarm bell about the constitutional provision relating to the 40% relinquishment to be transferred to the provinces, indicated that the application to the letter of this inherent principle to the constitution presents serious risks in as much as:

- It may exacerbate already existing imbalances and leave many poor provinces with insufficient resources even to pay the salaries.
- It is opposed to one of the most important principles of tax decentralization which says "the Resources follow the functions"
- It may consider the necessity of a programmed transfer of functions in the future as the institutions shall be established at both provincial and local levels. In particular, the fiduciary Capacity at those two levels will have to be strengthened before thinking of any significant increase of the levels of transfer.

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338 TOENGAHO LOKUNDO, F, *Partis politiques et décentralisation territoriale en République Démocratique du Congo, cas de la province orientale avant et après l'ajustement politique de 1990 (Political Parties and Territorial Decentralization in the Democratic Republic of Congo, case of the Eastern Province before and after Adjustment Policy in 1990)*, PhD thesis in SPA, Kisangani, 2003, p. 73

339 TOENGAHO LOKUNDO, F, *op.cit*, p. 348

340 See. 4 August 2009 Press briefing by Prime Minister Muzitu on RTVS1 during the Governors'Conference.

341 WORLD BANQUE, *Document n° 42612-ZR, La République Démocratique du Congo, Décentralisation en République Démocratique du Congo : Note sur la décentralisation fiscale (The Democratic Republic of Congo, Decentralization in the Democratic Republic of Congo: Note on fiscal decentralization)*, January 2008, p. 8.

It's therefore, from this fact, that such a system is unfair: the base not being distributed in the Territory in a homogeneous manner, the more the province is "poor" in potential revenues – so Poor in absolute, the lesser the retrocession it will receive.

Clearly, as was so well written by Professor Felix VUNDUAWE te Pemako, the lack of Adequate correction mechanism, the sharing system as provided by the constitution may aggravate the disparities between provinces (horizontal imbalance).

Thus, everything considered, the appeal to relinquishment of withholding at the source is the inequality of the provinces in economic potentials even when it's known that, under any general considerations, each province can face it particularly by sanitizing the local Investment climate, by boosting local production so as to create opportunities for import and export of goods and services.

The last round will have an advantage of correcting itself a bit, the disparities between provinces in allowing each one of them by applying of the "theory of location of consumption or production of goods" to benefit from revenues generated in another province. Thus, by applying the "theory of location o consumption or production of goods" every province producing some resources will benefit from redistribution to its output.

Consequently such a system turns out to be unbalanced; the revenue not being shared equally in the territory; the poorer a province is in revenue potential (therefore absolute poor) the less retrocession it receives[342]. Clearly, as Professor Felix Vunduawe te Pemako wrote, in the absence of an adequate corrective mechanism, the sharing system as envisaged by the Constitution risks aggravating the disparities among the provinces. (Horizontal imbalance)

And hence, everything put into consideration, resulting to retrocession in the place of retention at source comes from inequality among the provinces regarding the economic potential even though we know that, all factors remaining constant, each province can deal with the situation notably by reorganizing *the local investment climate by locally stimulating production in a way that creates opportunities for importation and exportation of goods and services*.

This last aspect will have the advantage of correcting, if even slightly, the disparities among provinces while allowing each of them, through the application of the ***"theory of place of consumption or production of goods"*** to benefit from revenue thus generated from another province. This way, through the application of the **« theory of place of production or consumption of goods"**, each resource producing province will be able to benefit from the consequent reward for its production.

A similar corrective mechanism reputed as not anti-constitutional is encouraging as long as, in order to arrive at an equitable distribution, it starts from the 40% which the exporting province must enjoy and convert it first to 100%. After deduction of an amount equivalent to 5% in favor of Tax and Excise Duty Board (OFIDA), the rest, that is 95% will also have to be converted to 100% in such a way that in the distribution, 40% goes back to the exporting country, 40% to the province producing the goods and 20% will be deposited in the national Consolidated Fund.

[342] VUNDUAWE te PEMAKO, F, *La dynamique de la décentralisation territoriale en RD Congo (Territorial decentralization dynamism in DR Congo) (2), In Actes des Journées Sociales du CEPAS (Proceedings of CEPAS Social Sessions), Congo-Afrique*, XLVIIIth year, March 2009, n° 433, Kinshasa, p. 177.

With this failure, we can consider that with the increase of the number of provinces to 26 in accordance with articles 2 and 226 of the constitution of 18th February 2006, the disparities are set to be worse in order to justify resulting to retrocession instead of the principle of *retention at the source*. From then, to the question of knowing if *the difficulties presented above can justify the violation of constitutional provisions? The response* is naturally negative.

Indeed, "exemplum date" has been proclaimed for ages. This maxim had to be presided over in a way that keeps the Congolese political leaders going. But, alas! The example for the Democratic Republic of Congo demonstrates desolation: The constitution is violated each day like a betting game.

However, the simple fact that the constitutional principle of retention at source may be violated to the benefit of the partisan interests of the type displayed in the Conference of Governors, even though no one is ignorant of the fact that they (the governors) have no obligation or restraint, is a peculiarity that empties all meaning from the constitution which declares that "*The Democratic Republic of Congo is a "Constitutional State"*[343]*:* that is a legal State where the rule of law is applied in all its distinction, (…) where the executive power, the administration and justice are subjected to the respect of the law voted by Parliament, which, as an expression of the general will of the people, is indisputable[344].

In the same way that the principle of retention at the source was ratified by the constitution without prior research, in the same way, Congolese authorities must be responsible for the effective application of the constitution whose adoption, it must be remembered, is as a result of a popular referendum.

CONCLUSION

The Democratic Republic of Congo, as part of African states opted for decentralization in its new constitution of 18th February 2006 in order to ensure development at the grass roots. That is a painful experience as much as it is frightening in its implementation due to its virtues, the disparity of the level of development in the provinces, caused by the inequality of economic potentials.

Certainly, law no. 08/012 of 31st July 2008 bearing the fundamental principles notably on the free administration of the provinces was voted and promulgated in the perspective of establishing the new politico-administrative architecture, but we need to appreciate the fact that the mobilization and availability of financial resources is complicated in all ways mainly due to lack of transparency in the management of public affairs on one hand, and *financial in civism* on the other which characterizes the Congolese people, over and above the lack of political will among the current leaders which has to be stimulated on the way to a real democracy and development.

[343] Article 1 of the Constitution of 18 February 2006..

[344] Read KUMBU ki NGIMBI, JM, *Bonne gouvernance comme condition de réalisation d'un développement participatif en République Démocratique du Congo (Good governance as a condition for achieving participatory development in the Democratic Republic of Congo),* In Actes des Journées Scientifiques de la Faculté de Droit de l'Université de Kinshasa (Proceedings of Scientific Sessions of the Faculty of Law, University of Kinshasa), *Publications produced with the support of the Mission of the United Nations in Congo, PUK, 18-19 June 2007*, p. 279.

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