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Volume 9

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Konrad Adenauer Stiftung

Published By:
Rule of Law Program for Sub-Saharan Africa

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P.O. Box 66471-00800
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Tel.: 030/269 96-0
Fax: 030/269 96-3217
www.kas.de

ISBN: 978-9966-021-05-2

Typeset & Printing by:-
LINO TYPESETTERS (K) LTD
P.O. Box 44876-00100 GPO
Email: info@linotype.co.ke
Nairobi-Kenya

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VOLUME 9

FOREWORD

The work published in this ninth volume of the "KAS African Law Study Library" is on the "rule of law in the Democratic Republic of Congo." In the context of this publication, the rule of law is understood to mean that all citizens, rulers and the ruled are subject to the law which is adjudicated upon by an independent and impartial judicial authority.

Four scientific contributions were made by members of the Faculty of Law, Catholic University of Bukavu. They address different themes, but converge on the same issue of the rule of law. Two of them focus on the effectiveness on one hand i.e. the right to education in the DRC in terms of international and national legal instruments and on the other hand, the legal and financial autonomy of Communes vis-à-vis the Provinces. The other two deal with the issue of repression of sexual violence in eastern Democratic Republic of Congo and taxation under the new Congolese Forest Code (DRC) respectively.

The topics and the research findings were discussed at legal seminars organized by the Faculty of Law, with the participation of representatives of Konrad Adenauer Stiftung and the German Embassy, whom we sincerely thank.

The reflections scrutinize the implementation of the legal provisions against the realities faced by Congolese citizens in the areas mentioned above. Researchers formulate, as a result of the analysis, some suggestions about it.

This publication is the result of collaboration between the Konrad Adenauer Stiftung and the Catholic University of Bukavu, through its Faculty of Law.

We hope that this collaboration will continue to strengthen research focused on African realities, and to encourage young researchers in this academic exercise.

The views expressed in this work are those of the authors.

Jean Claude Mubalama **Hartmut Hamann** **Murhega Mashanda**

THE PROBLEM OF REPRESSION OF SEXUAL VIOLENCE IN EASTERN DEMOCRATIC REPUBLIC OF CONGO

By **Nathalie VUMILIA NAKABANDA***

INTRODUCTION

Since its independence, on June 30 1960 to date, the Democratic Republic of Congo (DRC) has experienced many endless wars.

The recent so-called wars of liberation were not without consequences to the civilian population (killings, looting, murders, massacres and mass displacement of population, sexual violence against women and girls and sometimes men ...). Sexual violence is used by different perpetrators as a weapon of war through which the population is either punished for allegedly collaborating with the enemy, or for being part of the enemy community.

Tens of thousands of women and girls of all ages are victims of sexual violence whose perpetrators either civilians or members of armed groups or the Armed Forces of DRC (FARDC) go unpunished and continue to perpetrate these vile acts, despite the efforts provided by Congolese military courts in the prosecution of sexual violence as a crime against humanity or war crimes as appropriate.

Regardless of the multiplicity of international instruments of protection of human rights which the DRC is a party such as the Universal Declaration of Human Rights and all of its covenants, the Geneva Conventions, especially Convention IV of 12 August 1949 on the Protection of Civilian Persons in Time of War, the International Convention on the Elimination of All Forms of Discrimination against Women, the International Convention against Torture and Other Cruel Treatment or Punishment, the Convention on the Rights of the Child, the UN Convention on the Elimination of Violence against Women, the Protocol to the African Charter on Human and Peoples Rights on women's rights, the Rome Statute establishing the ICC, sexual violence and the many cases of human rights violations persist ...
The Constitution of the DRC of 2006[1] confirms the superiority of international treaties and agreements that are regularly domesticated into national laws albeit their application is not always effective under the Congolese justice system. However, these are tools that urge a positive obligation to protect Congolese civilians, and in this case, the victims or better the target of sexual violence and take all steps within its power to end this situation which destroys Congolese society in general and women in particular.

In the African culture, women are seen as the guardians of life through their children. Sexual abuse inflicted on her leads to an excruciating break in this chain of life, the suffering destroys the social fabric. The man who is physically strong and dares to defend the woman against the armed man often witnesses her killing and raping, and he is sometimes himself killed by the perpetrators. The atrocities that accompany this sexual violence (in public, often in front of the community members...) are such that the woman is at the mercy of her executioners.

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[1] Art. 215 of the Constitution of DRC

Faced with these barbaric acts, the international community has not remained silent, it responded through various statements such as the Resolution 1888 of the Security Council of 30 September 2009 in which it affirms its commitment to ending sexual violence against women in countries affected by conflict.

Current statistics are far from reflecting the reality of sexual violence against Congolese women especially since some victims prefer to keep quiet for fear of reprisals, social rejection, shame, humiliation... Other cases of sexual violence are settled amicably through marriage of the victim with his executioner or pay a certain sum of money as compensation fixed through customary mechanisms for the family of the victim if the perpetrator has been identified.

By way of illustration, in 2009, Panzi hospital recorded 3376 female victims of sexual violence compared to 3335 in 2008, of which the majority comes from Bunyakiri, Kaniola, Kalehe and the Ruzizi[2] plain. The United Nations Fund for Population Activities (UNFPA), UN agency which coordinates the work on sexual violence in Congo, said that in the single province of North Kivu in the east, 4820 new cases were identified out of 15 996 new cases registered in 2008 on the entire territory. According to the Minister of Gender, Family and Children, more than one million women and girls have been victims of sexual violence in Congo[3].

In Ituri, militia claiming to fight to defend their own ethnic group, attacked indiscriminately civilian populations, women in particular were considered spoils of war and sexually abused. Cooperazione Internazionale, which administers a program for survivors of sexual violence, has identified more than 6,000 rape victims in accessible areas of Irumu, Mambasa, Mahagi and Aru territory between April 2006 and June 2007. Thousands of other victims were identified between December 2006 and June 2007 in the Djugu territory that was previously not accessible due to security conditions. Hospital of Doctors Without Borders (DWB) in Bunia treated nearly 2,000 victims of rape in 2006[4].

Despite the lack of empirical data, it is clear that the various national and international actors agree on the general and systematic sexual violence suffered by women in eastern DRC, the impunity that promotes continuity of violation of Congolese criminal law and international humanitarian criminal law.

In the foregoing, it is important to examine the extent of sexual violence in DRC. And in the case of repression, what should be done to improve the situation to achieve a fair and impartial justice?

Sexual violence is a common feature of protracted armed conflict in the Democratic Republic of Congo. In areas affected by armed conflict, the Armed Forces of the Democratic Republic of Congo (AFDRD), the National Congolese Police (NCP), armed groups and, increasingly, civilians continue to abuse women sexually.

The situation is particularly grave in the east, where non-state armed groups, including foreign militia, commit sexual atrocities in order to completely destroy women, physically and psychologically, which affects the whole society. These cases go unpunished; the perpetrators are still at large. Gang rape has become common and that happens often in the presence of family members who are unable to protect women against these atrocities, with the number of victims of these barbaric acts on the rise.
DRC has to deal with multiple cases of sexual violence and to address the shortcomings

[2] Saleh Malunga, responsible for statistics in the health institution quoted by Radio Maendeleo of Bukavu, January 18, 2010

[3] Telephone interview with Human Rights Watch with Marie-Ange Lukiana, Minister for Gender, Family and Child, June 9, 2009 included in the report by Human Rights Watch | July 2009 *"the violent soldiers, commanders turned a blind eye, sexual violence and military reform in the Democratic Republic of Congo* ", p.14.

[4] Report of the Special Reporter, Yakin Ertürk, on violence against women, its causes and consequences, Mission in the Democratic Republic of Congo, pp.9-11.

that were in its penal code of 1940 which suppressed the offense of rape and indecent assault[5] (sections 167 and 168), adopted the law on sexual violence in 2006, it incorporates the rules of international humanitarian law relating to sexual offenses where the protection of vulnerable people is highlighted.

The Congolese constitution of 2006[6] requires the Congolese government to stop all forms of violence even sexual against women. Having said that, Congolese courts with the mandate to interpret the law and apply the various laws face several challenges, human, logistical, financial ... that hinders their effectiveness. The people on the other hand, have lost confidence in the Congolese justice system and use alternative methods of dispute settlement and other customary practices in resolving cases of sexual violence.

In this context of fear, war and insecurity, only a special international court would be a way out for various obstacles and will ensure that victims and perpetrators a fair, impartial and restorative justice, likely to affect even the foreign perpetrators (members of the Democratic Liberation Forces of Rwanda (DLFR) and their various factions) who would have perpetrated sexual violence.

The capacity of national courts may be considered to overcome the difficulties and obstacles for both national and international courts in the event of a less expensive and uneven justice. Our discussion will focus on two points constituting two chapters; we will present our discussion in two chapters. We will first highlight the overview of sexual violence and possible solutions considered, a proposal for mechanisms that can help stop sexual violence and to make a fair and impartial justice without any political influence and to be close to the victims and our preference will be a special court that would consider these cases to successful conclusions rather than an international court in the true sense of the term.

Sexual violence in eastern DRC has been widely highlighted by international organizations as well as national and international non-governmental. The various documents and reports, we have to collect the doctrine of national and international legal instruments on the prevention of sexual violence experienced by women in this part of the country and the fight against impunity, an essential tool to establish effective protection of human rights in general and women's rights in particular. A reflection on the repression of sexual violence and other related crimes committed from 1996 to the present and the satisfactory repair of damage to various forms attached to these atrocities suffered by the people of the East is proving to be important.

CHAPTER 1: THE STATE OF SEXUAL VIOLENCE IN EASTERN DEMOCRATIC REPUBLIC OF CONGO.

The Democratic Republic of Congo has an estimated population of over 70 million and consists of 11 provinces including North and South Kivu and Ituri, fields of endless wars, which are the basis of violence of all forms against civilians. The eastern DRC is now considered as the hotbed, the rear base of many armed groups and several wars have been happening from 1996 to date.

[5] *Section 170 as amended by Decree of 27 June 1960 and the Decree-Law No. 78/015 of 04 July 1978* provides: "is punishable by a prison term of five to twenty years, who commits rape, using violence or serious threats, either by cunning or by abusing a person by impairing his faculties, or any other accidental cause, would have lost his senses or was denied by some artifice. "

[6] Articles 14 paragraphs 3 and 15 provide respectively: "Governments shall take measures to fight against all forms of violence towards women in public life and private life" and "public authorities shall ensure the elimination of sexual violence. Without prejudice to international treaties, any sexual abuse of any person, with intent to destabilize, to break up a family and to eliminate an entire people is made a crime against humanity punishable by law. "

1st Section: FORMS OF SEXUAL VIOLENCE IN EASTERN DRC.

Paragraph 1: Status of Women and their role in procreation.

In traditional society, and in some urban areas, women, as mother and wife, aim to feed their family, to do housework and other jobs related to the survival of the latter. While undertaking these chores (fields, fishing, fetching water...), the woman is required to make several trips on foot and in insecure environments which exposes her to the attacks of armed men. The woman, being fruitful par excellence, is under mystique participation, as the essential link to fertilize the land and represents fertility.

She is well connected with the earth and entrusted all that is directly related to fertility, essential attribute of her sex. The link between female fertility and the fertility of the land and the use of the first one, for better fertility of nature creates symbiotic relationship between the two. This mission gives her special powers as guardian of tradition and culture[7].

The nuclear family is the foundation of any traditional society but it is not the ultimate end to the extent that human life has meaning only within the community, clan, society; the "Muntu" is stronger than his brother's side, this leads to Africa saw every event happy or unhappy with her community. Thus, the sexual violence suffered by women in the East seeks to remove the link from family, to undermine the whole line and offspring.

Paragraph 2: Forms of sexual violence in eastern DRC

The scale, bestiality and the repetition of criminal inhumane acts suffered incredibly by women of eastern DRC should not go unpunished. They come in various forms and in the words of Dr. Denis Mukwege of the Panzi Hospital who treated thousands of women raped, every armed group entered its stamp on violence against women[8].

Her body becomes the battlefield comes to different authors: bands or armed groups, FARDC, who have lost all sense of humanity. These sexual torture in many forms, among others the agony of sharpened bamboo is inserted into the woman's body from the vulva, the death comes after a relatively short period of time, but the victim endures suffering terrible acts of inspection body for the inner thighs and breasts of women, forced incest in public, the act of shooting in the woman's vagina after raping her, gang rape ...[9] Testimonies were atrocious collected from women raped and tortured on the atrocity of the torture and agony suffered as much in South Kivu in the North Kivu and Ituri.

The diversity of forms of sexual violence carried out on Congolese women led the Congolese Parliament to adopt the 2006 law on sexual violence in the various cases that might arise. For example, Article 170[10] which defines rape targeting different forms of this offense. Besides the rape, said law provides for other offenses that are indecent (articles171 and 171bis), the excitement of minors to debauchery (Articles 172 to 174a), the pimp and pimping (Article 174b), forced prostitution (article174c) sexual harassment (article174d), sexual slavery

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7 Innocent BIRUKA, *protection of women and children in armed conflicts in Africa*, Harmattan, France, 2006, p.92

8 You tube, Doctor. Denis Mukwege talks of women raped in the Kivus, accessed on June 30, 2010.

9 Ibidem, p.83

10 *Article 170*: "will have committed rape or using violence or serious threats or coercion against a person, directly or through a third party or by surprise, by psychological pressure or on the occasion of a coercive environment, or abusing a person who, by reason of infirmity, by the alteration of his faculties or by any other accidental cause has lost the use of his senses or was denied by some artifice: a) every person, regardless of age, who has introduced his sexual organ even superficially in that of a woman or b) any woman, whatever her age who has compelled a man to introduce even superficially his sexual organ into hers, c) any home that has penetrated even superficially the anus, mouth or other body orifice of a woman or a man with a sexual organ, by any other part of the body or any object d) Any person who introduces, even superficially, or any other body part or any object into the vagina; e) Any person who forced a man or woman to enter, even superficially including her/his anus, mouth or other orifice of her body with a sexual organ, any other body part or any object ... "

(article174e), forced marriage (article174f), female genital mutilation (Article 174g), zoophile (Section 174h), the deliberate transmission of incurable sexually transmitted infections (Article 174i), the trafficking and exploitation of children for sexual purposes (Article 174j), forced pregnancy (Article 174k), enforced sterilization (section 174L), the pornography of children (Article 174m) and child prostitution (Article 174n), this law has attempted to meet the prescribed sections 7 and 8 of the Statute of the International Criminal Court.

This barbaric practice emphasizes the determination of the perpetrators of any sort to conquer living space and install their own people and plunder the wealth of these populations[11].

2nd Section: PERPETRATORS OF SEXUAL VIOLENCE IN EAST DRC.

Paragraph 1: The members of armed groups

Rape is a crime that has existed in the Congolese criminal court since 1940 and which was, in most cases committed by civilians and where the general and systematic existed. From the endless wars that the country knows particularly the East, sexual violence is widespread, sometimes systematic, constituting a weapon of war by all sides to terrorize civilians deliberately, exercise control over them or punish them for a supposed collaboration with the enemy.

Armed groups have also abducted women and girls for use as sex slaves. Many crimes which were committed constitute crimes of war or crimes against humanity. Women said, it was "because of their bodies" that they were at war.

From the foregoing, the alleged perpetrators of sexual violence are in the majority of men cases in uniform or belonging to various armed groups (FDLR, CNDP, Maï-maï, FNL, CNDD, etc.) or in the FARDC.

Paragraph 2: Civilians as perpetrators of sexual violence

Although civilians (sometimes demobilized) are less likely as the perpetrators of sexual violence and are involved in this dirty work directly or indirectly, some of which might even be guilty of the offense of conspiracy, which appeared for the first time in Nuremberg (Article 6 in fine) and Tokyo (Article 5 in fine)[12].

3rd Section: VICTIMS AND CONSEQUENCES OF SEXUAL VIOLENCE IN EASTERN DRC.

Many wars in the eastern DRC have claimed several lives which include women, girls, old women and some men sometimes. The age of the victim or his physical condition is not taken into account by the rapist, who has no other plans rather than for them to suffer, torture, punish and kill people, he is not looking for sexual pleasure but on the contrary has full willingness to commit rape to destroy the civilian population, it is a deliberate act (rape of children under five years).

Paragraph 1: The victims (male or female).

In African society, the woman plays a key role as mother and wife. She is a source of social harmony ("KALUNGA MULALA" which means in the mashi dialect, units community, family),

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[11] Jean-Martin MBEMBA, *The other memoire of the crime against humanity,* African Presences, Paris, 1990, p.151

[12] *Articles 5 and 6 at the end:* "Leaders, managers, organizers, instigators and accomplices were involved in the development or execution of a common plan or conspiracy to commit any crimes listed defined above (a crime against peace, a war crime, a crime against the Geneva Conventions or a crime against humanity) are responsible for all acts performed by any person in execution of this plan.

prosperity ("NABINTU" dialect concept which means abundance) and honorary family and community through which she is identified by her behavior, her being. Raping a woman is like attacking the whole family (in both senses of the nuclear and extended family), the entire community in which they live and likewise these institutions are weakened by the enemy.

Some victims (women or men) are, as a result of sexual violence, carriers of sexually transmitted infections or HIV-AIDS, traumatic gynecologic fistula, others come with unwanted pregnancies, sexual mutilation of the device genital or remain trapped in the forest where they are carried and used as sex slaves, or else they find death from torture. Sometimes women can suffer the consequences repeatedly.

Paragraph 2: Consequences of Sexual Violence.

A. The direct victim

The woman is publicly stripped, flogged and mutilated so that she no longer dares to denounce or protest especially as equal as the man who responds in self-defense, is killed and thus serves as an example to any who would try to front the executioners. This is just the beginning of the ordeal. The woman, raped, and this is where the paradox in African society and Congolese, in particular, women, victims of sexual violence (often committed in public to humiliate him) is rejected by the same community that claims to defend and considers her, therefore, unworthy and unclean.

Many women lose their marriage (the influence of custom is too strong, they cannot sue for divorce, although the law allows them, they resign themselves to the dictates of custom, "OMUKAZI ARHAJA AHA NGOMBE, ARHAJA LUBANJA "which means that women cannot sit in the Court of palaver, or go to trial.

The consequences of sexual violence are also psychological and raped woman is traumatized, it is difficult for her to resume a normal life without being haunted by the horror of the situation faced and is destabilized both psychologically and physically in a society where she is now an engine of social and economic life of the family (the executioners also attack women and girls while they are occupied with the tasks typically required to ensure the survival of their families: field work , looking for firewood, walking from the market, from school, etc..) constant fear destroys their lives and their being.

B. Family and community

Sexual violence is often performed after a military assault on one or more villages at which the attackers destroy, loot, burn, kill, rape and carry as many women as property in the forest or their camps, forcing the population to forced displacement, leaving their entire fortune, a situation that further weakens the state's socio-economic status. These are the cases of Songo Mboyo in Equator, in Ituri, Baraka and Kalehe in South Kivu where reprisal attacks have been instigated by the military on the civilian population and in which several women have been victims of sexual violence and other humiliating and degrading forms of treatment.

"In the area of sexual violence, no humiliation can match the fact that a man knows that his wife, sister, mother, grandmother or daughter was raped. Violent combatants inflicted sexual torture in order to destroy their victims and dehumanize men in the community who cannot defend them. An anthropological reality is that humiliation; terror and violence inflicted by the rapist not only aim to degrade women, but also stripped them of their humanity in the community where they belong. This is a symbol of unity that must be destroyed to defeat a strategic target. "[13]

[13] Human Rights Watch, we "kill you if you cry": sexual violence in the Sierra Leone conflict, 2003

Sexual violence become a conspicuous manifestation of force for man through weapon and a weakness for the community, unable to defend its members against women and to force him to either walk with him, not always to force them to join the ideology of their movement but to undermine the morality of the population by causing him to adopt an attitude of defeat or leave everything.

Chapter 2: PLACE AND ROLE OF CONGOLESE COURTS IN THE REPRESSION OF SEXUAL VIOLENCE.

The complexity of the conflict requires an impartial and independent court to ensure effective prosecution, efficient and able to repair the damage suffered by the wife of the eastern DRC, "cradle" of sexual violence in the world. The DRC, in the preamble of its constitution of 2006 cited above, has set major principles including the following: avoidance of conflicts; establishment of rule of law, ensuring of good governance and fight against impunity.

The judiciary, guaranteeing individual freedoms and fundamental rights of citizens[14] is exercised by the courts and criminal courts and military prosecutors. The Congolese justice system is in operation, dualistic. In addition to the written law jurisdictions, there are the traditional courts that affect many in the settlement that some families use to avoid the ordinary courts in which they have lost confidence.

Responsibility for the punishment of international crimes and violations of human rights lies in this matter for the national courts as provided for the principle of complementarities and subsidiary based precisely on the operation of the International Criminal Court in its dealings with the national courts.

1st Section: The role of criminal courts in the prosecution of sexual violence.

According to some authors, "as part of a State, the sovereignty of the latter within its borders, even if it is eventually limited by its international obligations or the rules it has set its itself in its constitution, gives his organs a command, an emporium, imposed on all those residing in its territory: the state is the only entity that has the power to command and power to be obeyed. The State can create jurisdictions; regulate the composition and operation, to impose its jurisdiction on litigants, and under its power to compel, to organize a system of enforcement of judgments which shall, if necessary, seek assistance from the police. "[15]

The courts have the duty to state the law and restore social stability that has been disturbed by the antisocial behavior of the individual or group, perpetrator, accomplice. Sexual violence is a new form of crime that requires that the judiciary is equipped with thorough knowledge of the modern crime. Indeed, the state has an obligation to protect civilians at all times and everywhere, and paragraph 3 of Article 2 of the International Covenant on Civil and Political Rights requires State parties, must not only ensure effective protection of the rights, but must also ensure that individuals have accessible and effective remedies to enforce those rights.

These remedies must be tailored as appropriate to take into account the special vulnerability of certain categories of people such as children and women. The DRC has the primary mission of repression of sexual violence through the appropriate judicial mechanisms to review complaints of violations of domestic and international laws. The courts and prosecutors should ensure the mission to state the law and look for violations of these various texts. Thus, sexual violence, as international crimes in the DRC, within the competence of military

[14] *Article 150 paragraph 1 of the Constitution of the DRC in 2006, p.52*

[15] John Vincent and aliis, Judiciary. *Judicial organization, justice people*, 6th ed., Dalloz, Paris, 2001, p.263.

courts since the Law No. 024/2002 of 18 November 2002 on the Military Criminal Code[16].

This has benefited from the financial and logistical support of the United Nations Development Program, the United Nations Mission for the stabilization of the Congo and Lawyers without Borders. Some decisions made:

- Case RMP No.279/GMZ/WAB/05, RP. 086/05 of the mutiny in Mbandaka;
- Case RMP No.24/PEN / 05, RP. 018/2006 on crimes in Ituri;
- Case RMP No.154/PEN/SHOF/05, RP. 084/2005 in Songo Mboyo
- Case RP No.043, RMP No.1337/MTL/11 said order in Baraka;
- Case RP No. 038, / RMP No. 1280/MTL/09 said order in Kalehe.

Given the extent of sexual violence in DRC as pertains to crimes against humanity, the progress made still remains insignificant, insufficient as there is need to develop holistic approach mechanisms to fight the vice. There are still substantial grounds to be covered in order to protect the women and the community at large against these forms of sexual violence and work towards realization of these rights and peace that have been disturbed by these barbaric, heinous and despicable acts.

The organization of the civil courts is governed by the Ordinance-Law No. 82/020 of 31 March 1982 establishing the Code of Organization and Jurisdiction. In every province of the country, there is a Court of Appeal and High Courts. There are equally some magistrates' courts in several parts of the country. The Supreme Court, appellate court, should have been structured into three divisions as prescribed in the constitution of 2006[17]. The court of appeal is located in Kinshasa and is inaccessible to the majority of the Congolese people in general, and those in the East in particular, due to financial constraints.

Sexual violence are crimes that fall within the jurisdiction of the District Court which has jurisdiction to try offenses punishable by death and those whose sentences exceed five years of penal servitude or forced labor. The Congolese justice system has the second hearing, the primary role of courts of appeal even in cases of sexual violence. The litigant if not satisfied by the two levels of jurisdiction can go to the Supreme Court when it becomes operational.

Section 2: The obstacles faced by the criminal and military courts

Criminal and military courts experience difficulties that impede the due administration of justice, they can be linked to the institution (failure of the courts and their distance, slowness of justice, lack of access to justice ...), the victim (custom, humiliation and shame, the unknown perpetrators of sexual violence ...), the work environment (destruction of existing infrastructure, insufficient number of judges and other court personnel ...).

Paragraph 1: Obstacles related to the Institution

1. *Failure of the courts and distance from existing one:* In most provinces of the DRC, the courts are so far to reach justice. This farness constitutes to a justifiable cause of disinterest and discouragement of the people to the courts, to bring a legal action that would cost a lot of physical energy and high financial costs.

   In South Kivu, for example, there are two High Courts and one Court of Appeal for a Province of 64,851 km² divided into eight provinces[18]. The province of North Kivu, in

[16] See Article 161 to 175.

[17] *Article 149 first paragraph:* "... It is vested in the courts, which are the Constitutional Court, the Court of Cassation and the Council of State ..."

[18] Report of the provincial division of the interior of South Kivu, in 2007, quoted on fr.wikipedia.org / wiki / South Kivu, accessed on June 30, 2010 at 16:38.

turn, consists of five areas, which has only one High Court[19] located in Goma and the people of the territories have to travel long distances to reach justice, another disincentive to the population and magistrates' courts are virtually nonexistent.

2. *Slow justice:* Slowness is found in the proceedings, and especially the appearance of repeated discounts. These facts do not encourage the defendant to appear in court and the withdrawal to the custom is accentuated. Law No. 06/019 of 20 July 2006 amending and supplementing Decree of 6 August 1959 on Congolese Criminal Procedure Code (adapted to sexual violence) in Article 7 a month or less limited to the preliminary investigation from the referral of the judiciary and up to three months for training and the delivery.

   Duration limitations do not take into account distance and financial constraints for the litigant and the institution itself and this has led to illusory notions and hindrance to the proper administration of justice. This limitation of time is only theoretical in the current context of the DRC where thousands of territories are landlocked and others do lack road infrastructure that can enable easy mobility of the affected population.

3. *Inaccessibility of justice*: The saying "no one is supposed to ignore the law" is an illusion. Access to the law and relevant legislation is almost as difficult for professionals in the justice system as is for litigants. Ignorance of legal texts contributes to impunity and structural malfunctions. It creates legal uncertainty, non-compliance to the ratified instruments by the DRC, inequality before the law and the alienation of people from the justice. The police and majority of the populations including sometimes some legal professionals do not have easy access to legislation or simply ignore their existence.

   The complainant has no control over the legal instruments and the operation of justice since they cannot afford to pay a lawyer to plead his cause. This inability to afford legal services has led to improper legal representation and has injured the concerned parties. Here, non-governmental organizations play a vital role through the activities they perform in legal assistance and dissemination of national and international legal texts from litigants and legal professionals, the state has failed in its mission.

Paragraph 2: Barriers affecting victims of sexual violence:

1. *Custom*: Custom is defined as a set of practices that have become binding in a wider social group by repeated acts of peaceful public during a relatively long time. The essential elements of the custom are consistency, repetition and binding[20] and are an instrument of incalculable value in the regions of eastern DRC. The population of these regions is used to resolve its disputes and arrangements out of court, even if sexual violence in the name of preserving the family honor. Thus, some victims when the perpetrator is known, are given in marriage or while the offender, in accordance with custom, pay dowry value (estimated either in kind or cash) if the victim is not proposed for a marriage.

2. *Humiliation and shame:* Sexual violence practiced today is an atrocity and a nameless shame. The woman is raped, mutilated, tortured sexually and / or physically at times in public before her own family, her children, her husband and to her powerless community which is supposed to protect her. She lives in a perpetual shame of not knowing how to achieve her dignity and femininity. She prefers to be walled in her secret rather than expose her shame, the family and the entire community by filing a lawsuit, ignoring her right to camera hearing yet enshrined in the Law[21]. The humiliation she suffers haunts and leads her to resign in silence, no longer trust the Congolese justice to restore the dignity of woman for she believes and trusts that no trial can restore her femininity and dignity.

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[19] www.globalrights.org/site/DocServer/SOS_WebFinal_Ch3P1.pdf?docID ..., accessed on July 10, 2010 at 16:38.

[20] Rene ROBAYE, *Understanding the law*, working life, Brussels, 1997, p.137.

[21] *Article 74 (bis) paragraph 2:* "To this title, the closed meeting is delivered at the request of the victim or the prosecution.»

3. *The unknown perpetrator of sexual violence*: Sexual violence in eastern DRC is often, as we have already mentioned, the resultant of village attacks by militias or the fighting in some villages where military Loyalists (FARDC) clash with militias or armed groups. Women and girls are raped or taken into the forest to serve as sex slaves; few of them survive these atrocities.

   It is difficult for survivors to identify the perpetrator or perpetrators when they were brought into the forest to serve as sexual slaves or while in case of a gang rape on attacks against villages during the night. Bringing an action against unknown, often dead-end action would only increase the punishment, humiliation and shame. Congolese justice in the current era does not have the means that may enable the woman to prosecute offenders since quite often the members of the armed groups do hide in inaccessible environments.

4. *Difficult to establish prove*: Section 17 of the 2006 Constitution provides that everyone charged with a crime is presumed innocent until proved guilty by a competent judicial organ. This constitutional provision provides for the presumption of innocence which establishes the obligation of the prosecution and / or civil plaintiff to prove all the elements of the offense and those who can initiate responsibility on the accused.

   A task that is difficult for the victim and sometimes for the Crown to the extent that sexual violence may not have been followed by abuse and mutilation without medical certificate attesting to the existence of sexual violence, sometimes, too long a time pass before the commission charged with executing the offense responds and it comes difficult to find evidence.

   The few women who are victims of sexual violence do testify and most of them are in contact with the NGOs of human rights and women in particular. A large majority of these women remain within the scope of the threats or their executioners or their families holed up in their communities and as such, there would be a real lack of access to evidence.

5. *Poverty and financial dependency*: Access to justice is not always without financial costs. Most victims of sexual violence are villagers who do not have sufficient funds to meet the costs of fee or pay a lawyer.

6. *The place and role of women in society*: The woman has an important place in the regions of eastern DRC by the virtue of being a mother, wife, daughter and guardian of tradition. By and with the woman, the man manages to perpetuate life, the offspring. It is essential for the survival of her family for several years, the woman maintains the survival of her family by her various economic activities, agricultural activities, household chores.

   Her continued presence is essential for the smooth running of the household; sexual violence makes it hard for her to fulfill her saving role of the family and the perpetrators who inflict so much suffering to women tend to destroy the survival of an entire community. A trial court would result in a lack of women given the obstacles we faced in access to justice, really difficult things to accept in societies where women are the "hub of the family," difficult for her and for society as a whole.

7. *Law*: Law No. 87/010 of 1 August 1987 Family Code provides in Article 448 that the woman must obtain her husband's permission to sue[22]. This incapacity of women limits the action of the latter in the pursuit before the courts of sexual abuse whereby she suffers with the exception of the case of a sexual assault. This prohibition to sue without permission is always linked to the role of women in society and its financial dependence.

[22] *Article 448*: "The woman must obtain permission from her husband for all legal transactions in which she undertakes to perform a benefit due in person"

It is difficult, if not impossible to imagine a woman (educated or not) in this country where the commitment to respect for traditional values, especially in family relationships, initiate legal action without the consent of the spouse. As that says, if you do not know your right, it will be violated or disregarded without your knowledge even when a law provides for the possibility of a referral made by the woman without requiring authorization. One that would seize the jurisdiction would not be losing much more than the decree of August 6, 1959 on the Code of Criminal Procedure, Articles 53-55 of the referral to the court permits.

Section 3: Ineffective ordinary criminal courts to punish sexual violence.

The jurisdiction of national courts must be the rule in the repression of sexual violence, in particular, and violations of human rights in general, since a national court has the confidence of litigants who find themselves through the people who come up with it.

Article 1 of the Congolese penal code, the first book and dedicated non-retroactivity of laws. The principle of criminal law is perhaps the most important principle of criminal law, because it is the "cardinal rule, the cornerstone of the criminal law" can only be a criminal conviction on the facts defined and sanctioned by the legislature at the time the accused committed the act, and only can be applied to them in the penalties enacted by the legislature, "*nullum crimen, nulla poena sine lege*."[23]

Similarly, the Constitution of the DRC in 2006 reinforces the requirement of legality in criminal dedicated to Article 17 paragraph 2 that: "No person shall be prosecuted, arrested, detained or convicted in accordance with the law and the manner it prescribes. "

This means that any behavior that occurred before the 2006 law criminalizing all sexual violence and returning to his description cannot be prosecuted on that basis. Let us note that the Ordinance Law No. 78-015 of July 4, 1978 as amended by Decree of 27 June 1960 on the Congolese penal code related offenses of rape and indecent assault under sections 167,168,169 and 170. Impunity for such acts was not possible due to the application by the Congolese courts of its provisions for the suppression of acts of rape and indecent assault.

However, in view of the seriousness of the facts and circumstances surrounding sexual violence as war crimes or crimes against humanity do not fall into the category of crimes within the jurisdiction of ordinary criminal courts. Congolese law has reserved exclusive jurisdiction to military courts by the law cited above.

Prosecution under ordinary criminal law is frustrating for the victims, as the severity (systematic and widespread nature) is not made clear, the light on the origin, the causes, consequences and responsibility of senior criminals are likely to be difficult and therefore the ensuing penalty will not be proportional to the offense.

In addition to these cases, the requirement under section 24 of the Penal Code first book cited above, which determines the maximum period after which it will be impossible to consider any legal action[24], is another obstacle to the proper administration of justice. This legal provision would be an obstacle to prosecution of all sexual violence after 2006 and for which there was no prosecution. Finally, the definition is repeated in the 2006 law on sexual violence is ambiguous with respect to that proposed by the Rome Statute that contains one that is more accurate.

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[23] NYABIRNGU Mwene SONGA, *Treaty of Congolese general criminal law*, 2nd ed., Ed. African university, Kinshasa, 2007, p. 50.

[24] *Article 24*: "public action resulting from a violation will be required:
1. After one year of age, if the offense is punishable only by a fine, or if the maximum of the applicable court servitude is not exceeding one year;
2. After one year of age, if the maximum of the applicable court servitude is not exceeding five years;
3. After one year of age, if the offense can result in more than five years in prison or the death penalty. "

Notwithstanding certain assumptions that the judge in sexual violence has been to apply the Rome Statute in particular in cases RMP279/GMZ/WAB/05, RP.086/05 of the mutiny in Mbandaka, RP.018/2006, RMP No. 242/PEN/05 on crimes in Ituri and the RMP 154/PEN/SHOF/05, RP084/2005 in Songo Mboyo, the monism with primacy of international law is not always operated by the Congolese judges.

Constant interference by the executive and the legislature notwithstanding the prohibition from Article 151 of the 2006 Constitution to give order, to decide disputes, the obstruction of justice, to oppose the execution of a court to rule on jurisdictional disputes, to modify a court order or to oppose its execution, the lack of independence affects the exercise of judicial power and hinders the mandate to deliver justice the right impartially.

Section 4: Analysis of judicial decisions by military courts in sexual violence.

Some members of the FARDC and the Congolese National Police (CNP) are not free of acts of sexual violence in eastern DRC. The Congo has a military justice trying, ever so slightly, to fight against sexual violence by members of the FARDC and the CNP. Through the joint action with the Rwandan and Ugandan armies, it should be noted that some foreign troops found themselves in the DRC and are charged as much as the FARDC of sexual violence.

Several unfavorable factors in the fight against impunity of which we can mention the limits of military justice as civil justice in their mission to state the law, the separation of powers and effective non-interference by the executive in action of the judiciary are still felt while preventing or slowing momentum of Justice to seize VIPs when perpetrators, accomplices or co-perpetrators, and the name of peace, the alleged perpetrators of sexual violence are pardoned (confer the Peace Agreement between the Government of the DRC and the CNDP of March 23, 2009).

The military court has jurisdiction over crimes of a military nature, of any kind committed by the military[25] and war crimes as it is clear from Article 80[26] of Law No. 023/2002 of 18 November 2002 on the military judicial Code. These provisions, we deduce that the military courts may experience sexual violence currently in the eastern DRC because of its expertise in addition to war crimes but also crimes of all kinds. Let us point out however that the provisions that punish war crimes, genocide and against humanity, contrary to the Rome Statute are full of contradictions and gaps that can easily tarnish the decision of the court of irregularities.

Military courts have had to implement in the repression of sexual violence to the Rome Statute, this result of inaccuracies contained in the Military Criminal Code, which establishes war crimes and crimes against humanity which include sex violence. They have applied the Rome Statute even under the assumption of the principle that the law is the sweetest that is applicable to the accused and in this case, international law protects better than the national law provides for the capital punishment for crimes against humanity rather than the international imprisonment.

1. *Case RMP No.279/GMZ/WAB/05, RP. No. 086/05 of the mutiny in Mbandaka.*

In the city of Mbandaka in Equator, the military's Camp BOKALA, of 3 to 4 July 2005 made a mutiny, after which 46 women were raped. The court accepted the crime against humanity committed in the context of a widespread or systematic attack against the civilian population

[25] *Article 76*: "The military courts have jurisdiction in the territory of the Republic of service offenses punishable under the provisions of the Military court code. They know also offenses of any nature committed by military and punished in accordance with the ordinary court code. They are competent to interpret the administrative acts, regulations or individual and to assess the legality when this examination, the solution depends on the criminal trial before them. "

[26] *Article 80*: "The military courts have jurisdiction to take cognizance of offenses committed, since the outbreak of hostilities, by nationals or by agents serving the interests of directors or enemies, in the territory of the Republic or all areas of war operation.

of Mbandaka and rape which was selected during a crime against humanity on the part of some defendants as ETIKE LIKUNDA, MOLEKA MOMBUZA, MANZIGO LIGBAMI…

2. *Case RMP 242/PEN/05, RP. No. 018/2006 on crimes in Ituri*

The District of Ituri, in western Province, is the prey of unprecedented violence that has resulted since December 24, 2006 among other consequences of sexual violence against women have been encouraged by the hostilities conducted by Captain Blaise BONGI MASSABA, commander of the troops operating attacks against pockets of resistance of armed militias in Ituri in the Irumu, Community leadership-of-Walendu Bindi. The Garrison Court condemned Mr. BONGI of war crime punishable under article 8 of the Rome Statute.

3. *Case RMP 154/PEN/SHOF/05, RP084/2005 in SONGO MBOYO.*

Songo Mboyo, local territory of BONGANDANGA, District of MONGALA in Equator, was the scene of clashes between soldiers of the 9th Infantry Battalion of the Movement for the Liberation of Congo, dated 21 to 22 December 2003 and from which 31 women were raped, 80% are infected with sexually transmitted infections and one died. The defendants VONGA WA VONGA, BOKILA LOLEMI, MAMBE SOYO, KOMBE MOMBELE, MAHOMBO MAGBUTU, MOTUTA ALONDO, YANGBANDA DUMBA and MOMBAYA NKOY are convicted of rape as crimes against humanity.

4. *Case RP No. 043, No. RMP 1337/MTL/11 lawful of BARAKA*

From 1 to January 2, 2011, crime against humanity was committed (in the territory of Fizi in South Kivu province) with rape as part of a widespread or systematic attack launched against the civilian population and informed of the attack: an expedition against the people targeted by the military Baraka under the command of KIBIBI MUTUARE.

Women found hiding in their homes or were compelled to sex even in the presence of family members and close access from strength to these places by assailants armed with their individual weapons AK. 55 women were raped and whose age varies between 19 and 60. On the occasion of the attack, gang rapes in the presence of family members were made. Crime against humanity was chosen dependent from SIDOBIZIMUNGU and others, from KIBIBI MUTUARE...

5. *Case RP No. 038, RMP No. 1280/MTL/09 lawful of Kalehe.*

Mr. BALUMISA MANASSE and others are convicted of crimes against humanity by committed rape under the crackle of bullets and attack of homes of civilians in KATASOMWA in Kalehe territory in South Kivu province of 26 to 29 September 2009; directly cooperated with the commission of mass rapes of several women, including 16 reported in the presence of their family members including children.

It follows from these decisions that the condition relating to the policy of a State or organization requires that the attack was organized in a regular pattern. Such a policy can be implemented by groups of people running a specific territory or any organization capable of committing a widespread or systematic attack against a civilian population. This policy does not need to be stated formally. This condition is fulfilled by a planned attack, led or organized acts of isolated or spontaneous violence. This behavior was observed by the perpetrators of sexual violence and other related crimes discussed in these various decisions.

On the other hand, the quality of the military leader has been questioned by reference to the law of the International Tribunal for Rwanda (Chamber, the first instance, the Prosecutor against KAYISHEMA and RUZINDANA, Judgment of May 21, 1999, § 210) and of Article 7.3 of the ICTY, which determines the case may be liable for it in these terms: as a military

commander, exercising command and effective control over his forces (or subordinates) know or because circumstances have known that the forces were committing or about to commit one or more crimes listed in Articles 6-8 of the Rome Statute, not having taken the necessary and reasonable measures within his or her power to prevent or repress their commission or alleged crimes to refer to competent authorities for investigation or prosecution.

The Congolese military courts, in the process of repression of sexual violence have recourse to international law and the Rome Statute to justify their decisions and to punish those guilty of crimes under this Statute. We encourage the practice of these institutions and believe that there is still much to do in the repression of sexual violence.

However, military justice coldly applies the principle of "irrelevance of official capacity" it is based on the concept of "armed men" not to identify them from their attachment body, or the one of "uncontrolled military" to avoid reaching their supervisors should engage their liability for acts committed by their subordinates that they did not know or have control or against the actions which they had no prevention and have taken no precautions.

Yet international law has taken a forward look on the implementation of the supervisor's responsibility in these words: "with regard to the authority of the accused, the Chamber considers that it should be" considered strong evidence to establish that the mere presence of that person is an intentional act of participation, punishable under Article 7.1 of the Statute "(§ 65). In this case, Zlatko Aleksovski, "by attending to these abuses without fighting them, despite their systematic and authority he held the perpetrators [...] could only be aware that this approval implied would be interpreted as a sign of support and encouragement by the perpetrators of these abuses, contributing substantially to the commission of such acts "(§ 87)[27]. In response, it is better to use an international court to punish effectively violence against women in eastern DRC, an institution that would be able to achieve the "big fish" and to put pressure on political authorities of the country to deliver to the court.

CHAPTER 3: WHICH JURISDICTION FOR THE REPRESSION OF SEXUAL VIOLENCE IN DRC?

Immanuel Kant, in the 18th century, proposed the establishment of a public law which would be responsible for resolving conflicts between states "as a trial"[28], He predicted the fight against impunity in the international community and General Assembly of the United Nations has dedicated this idea through the creation in 1998 of the International Criminal Court (ICC).

The first attempts at international justice dating back to 1918 with the signing of the Versailles Treaty which provided for the impeachment of former Emperor William II of Germany for grave offense against international morality and the sanctity of treaties[29], it will not be held,

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[27] Jean Claude MUBALAMA ZIBONA, *Sexual and gender based violence, in synthesis of seminars organized by Women for Women (in Goma, Beni and Butembo), Bukavu*, p. 35, unpublished.

[28] Jacques FIEERENS, *International Humanitarian Criminal law* syllabuses, Faculties Universitaires Notre Dame de Namur, Masters Degree in Human Rights, 2009-2010, p.20, unpublished.

[29] *Article 227*: "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties.
A Tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defense. It will consist of five judges, appointed by each of the five following powers, namely: the United States of America, Britain, France, Italy and Japan.
The Tribunal will judge designs inspired by the highest principles of politics among nations with a view to ensuring compliance with the solemn obligations and international commitments and international morality. It will need to determine the sentence it considers to be applied.
The Allied and Associated Powers ask the Government of the Netherlands for a request asking him to deliver the former emperor in their hands for trial."

Great Britain having never extradited. The League of Nations will set up the Permanent Court of International Justice which had the task of judging disputes between States; it will remain ineffective and will be replaced by the International Court of Justice in 1945.

It took the establishment by the victors of World War II International Military Tribunal at Nuremberg and Tokyo for a first attempt to sanction and to define crimes against peace, war crimes and crimes against Humanity.

1st Section: The position of jurisdiction for the DRC.

In times of war, human rights are violated and respect for women and children and other vulnerable civilians are almost nonexistent, even if compliance is imperative.[30] The Second Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts provides fundamental guarantees in relation to humane treatment in Article 4.

The current situation in the DRC in cases of sexual violence should call the Congolese authorities and international since the magnitude of these acts and their impunity must be stopped at all costs and the court is the perfect way to end or be remedied. The judicial model of the DRC national jurisdiction seems to be the winners and judicial practices hardly guarantee impartial justice and fair in times of conflict, war situation that continues in the east, the use of amnesty, etc...

The different legal regimes that have succeeded in the DRC failed in the mission to provide the judicial system and the means necessary for its operation and which led to a shipwreck full of justice.

The existing buildings are completely dilapidated despite efforts by the Belgian Technical Cooperation through its proposed restoration of justice in Eastern Congo (REJUSCO) the judicial map digitized nonexistent equipment ridiculous, training clearly insufficient to all categories of staff, dissemination of law and law, provided the quality and legitimacy of judgments, non or very partial. The rot has resulted into corruption of each of the functions and at all levels. Justice is not delivered, it is purchased and the population living below the poverty line has lost all confidence in these institutions.

In view of the obstacles listed above which run up against the national courts (common law and military) and international ones, we found in the second chapter, it is imperative to consider a special international tribunal for the DRC that will fight against the perpetuation of these acts and punish the perpetrators who may be persons with the power, does not allow national courts to get their hands on them or take any legal action.

In the history of international justice, there have been and are still have ad hoc international tribunals, created to punish international crimes. The Security Council of the United Nations, under Chapter VII on the action with respect to threats against peace, breaches of peace and acts of aggression, creates organs as it deems necessary to exercise its functions (Article 29) as is the case of ad hoc tribunals (the Ex-Yugoslavia and Rwanda).

These *ad hoc* tribunals allow the international community to end the widespread and flagrant violations of humanitarian law and effectively redress these acts by prosecuting alleged perpetrators of grave breaches of international humanitarian law. These are established for a geographic area for a specific mission and a definite duration. Note that the offense of rape, which is about the DRC and South Kivu, in particular, as we noted in the previous chapter, was introduced and sanctioned for the first time in the Statute of International

[30] Jean-Martin MBEMBA, *The other memoire of the crime against humanity,* Africain Presence, Paris, 1990, p.12

Tribunal for the Former Yugoslavia and Rwanda as a crime against humanity[31].

The *ad hoc* court has several advantages compared to the national courts including the primacy of the latter, the presumption of impartiality and neutrality, as a subsidiary body, the independence, impartiality, the cooperation of member states UN asked to apply the measures taken with the institution in the fight against impunity and the cessation of international crimes.

It is notable however that this jurisdiction is subject to ad hoc criticism particularly slow in processing cases, the disproportion between the expected results and financial implementation, the fact that the victims do not assert their rights, etc.. In the event of crimes committed in the DRC, such jurisdiction to the above challenges would additionally fight to inadequate funding, it requires large financial resources not available to the DRC, the lack of access by victims in that court…

Section 2: The International Criminal Court (ICC)

The UN General Assembly established an International Criminal Court, a permanent body of the United Nations with the mandate to try individuals suspected perpetrators of serious crimes of international concern namely the Crime of Genocide, crimes against humanity, war crimes and the crime of aggression (Article 5 paragraph 1 of the ICC Statute). Sexual violence is precisely defined in this statute as a crime against humanity[32] and war crimes (in an international armed conflict or who does not have an international character)[33].

Article 8, paragraph e of subsection 2 of the Statute of the ICC (available in the event of armed conflict between and hold on the territory of a State, the authorities of the state government and organized armed groups or organized armed groups of them) is applicable to the armed conflict situation that is lived in the eastern DRC and is an international legal provisions on which sexual violence may be based as a war crime even more they are committed on a large scale, given the increasing number of victims and because of the lack of definition of the crime of aggression.

See also the following case law: *The Prosecutor* c. Jean-Paul AKAYESU, Trial Chamber I, September 2, 1998, Judgment, *The Prosecutor c. Zejnil Delalic et al.*, IT-96-21, Trial Chamber II, Judgment, 16 November 1998, *The Prosecutor c. Goran Jelisic,* IT-95-10, Trial Chamber I, Judgment, 14 December 1999, *The Prosecutor c. Dario Kordic and Mario Cerkez*, IT-95-14 / 2, Trial Chamber III, Judgment, 26 February 2001.

The DRC ratified the Statute of the ICC since April 11, 2002 and is the first country to have submitted a dossier of international criminal law against Uganda, hand over its nationals for trial (Thomas LUBANGA, Germain KATANGA).

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[31] Cfr. the matter of Prosecutor C. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23 and IT-96-23/1, Trial Chamber II, Judgement, 22 February 2001, the Crime of Genocide; Prosecutor c. Jean-Paul Akayesu, Trial Chamber I, Judgement September 2, 1998) and war crimes, Prosecutor c. Furundzija, IT-95-17/1, Trial Chamber II, Judgement, 10 December 1998).

[32] *Article 7 first paragraph g:* "For purposes of this Statute, 'crime against humanity of any of the following acts when committed as part of a widespread or systematic attack against any civilian population, informed of the attack: rape, sexual slavery, enforced prostitution, enforced sterilization or any other form of sexual violence of comparable gravity

[33] Article 8b xxii: "Other serious violations of laws and customs applicable in international armed conflict within the established framework of international law, namely, any of the following acts: rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2, subparagraph f (for forced pregnancy means the unlawful confinement of a woman forcibly made pregnant, with the intention of affecting the ethnic composition of a population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy), enforced sterilization or any other form of sexual violence constituting an offense serious to the Geneva Conventions";
Article 8 e vi "Other serious violations of laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: rape, the sexual slavery, enforced prostitution, forced pregnancy, as defined in Article 7, paragraph 2, paragraph f, enforced sterilization or any other form of sexual violence also constituting a serious violation of Article 3commun to the four Geneva Conventions."

But we note that despite the commitment of the DRC to implement the Rome Statute establishing the ICC, that court has jurisdiction in the DRC for crimes committed after its entry into force in accordance with Article 11 paragraph 1 which states: "the Court has jurisdiction only over crimes committed within its jurisdiction after the entry into force of this Statute" and devotes impunity for sexual violence before it. Crimes that are committed in the DRC are many depending on the time of their commission: the crimes of history, the crimes committed during the second Republic of which the massacre of students in Lubumbashi and Kinshasa Christians on February 16, 1991.

Similarly, it is important to mention the crimes of international humanitarian law that have characterized the wars of 1996 to July 1, 2002; all these crimes outside the jurisdiction of the ICC, the massacres of KASIKA, of MAKOBOLA, of KISANGANI massacres officers during the wars in KAVUMU so-called liberation.

Other barriers such as personal jurisdiction: indeed, the Court has jurisdiction only with respect to a national of a State party to the statute. The major risk is to see the alleged perpetrators to evade international justice by taking refuge in a state not party to the Rome Statute. This could be the case, for example, the alleged perpetrators of Rwandan nationality who would be prosecuted for crimes of sexual violence in DRC and return to their countries of origin, which is not party to the Rome Statute.

Territorial and temporal jurisdiction: Article 11 paragraph 2 of the Statute establishes the principle of non-retroactivity of crimes prior to its entry into force for the State and its nationals, which is a consecration of impunity within the International sphere. In principle, the Court's jurisdiction should be universal, however the application of the statute to only those States which have ratified the limited territorial scope.

To work around this last obstacle, an application of Article 56 of the Statute is necessary in that it establishes the full cooperation of States Parties with the court in the investigation and prosecution of crimes within its jurisdiction. Hence the importance for the DRC and its neighboring states involved in Congolese armed conflicts to cooperate with the court in the punishment of perpetrators of sexual violence.

The Court is not a significant part in the prosecution of crimes committed in the DRC, however, punishment of crimes committed before the entry into force of this is an illusion, while in the fight against impunity, no crime cannot remain unpunished in order to promote the establishment of the rule of law in the DRC which puts man at the center of its concerns. Following the lack of jurisdiction in court to punish crimes of sexual violence as others committed before its entry into force, its distance from the place of the crime making sometimes tricky rules of evidence and the lack of enforcement mechanisms of the sentence with only the cooperation of States Parties to enable the implementation of its decisions, another solution is possible. The law of the ICC is still in development given the fact that no final decision has been made by the Court until today, which is why we do not refer to it in this study.

Section 4: The special international court

The Security Council of the United Nations has had to set up special courts or mixed (Special Court for Sierra Leone, Lebanon and the Extraordinary Chambers in Cambodia) through which justice is administered in the State (except for Lebanon) where the affected population is based and have easy access if not at least possible judicial institutions that can enable them to pick up their rights.

The situation of sexual violence in eastern DRC requires a mixed international tribunal that will enforce the same right that the Congolese international criminal and humanitarian

rights in the suppression of such acts and will be a tool that will restore the confidence of the population affected and thirsty for justice impartially and fairly. For this, a court, like that of Sierra Leone is beneficial for the situation of violations of human rights in the DRC in general and the Eastern Congo in particular.

Thus, the following prerequisites must be observed by the Congolese authorities and the United Nations through its Security Council to deal with multiple cases of crimes against humanity, war crimes and genocide committed in this country since 1993 to the present and to circumvent the jurisdiction of the Court for crimes prior to its entry into force for the DRC:

Paragraph 1: Agreement conception between the DRC and the Security Council of the United Nations.

The Special Reporters for the DRC, Mrs. YAKIN ERTÜRK, Mr. TINTIGA FREDERIC PACERE and Mr. LEANDRO DESPOUY have, respectively, in their reports, blasted sexual violence being committed in eastern Congo. The Report of the Mapping for the most serious violations of human rights and international humanitarian law committed between March 1993 and June 2003 in the territory of the Democratic Republic of Congo said that: "committed on a large scale, for over ten years of conflict and allegedly by armed groups in DRC and elsewhere, violations that may reach the threshold of international crimes are potentially so numerous that no functioning judicial system in the best of his ability could treat as many case. Serious crimes and their perpetrators are tens of thousands of their victims by hundreds of thousands. In such cases, it is important to establish a priority for prosecution and to focus on "those who bear the greatest responsibility."

Yet the pursuit of "those most responsible" requires an independent judiciary, able to withstand the political and other, which is certainly not the case today for the Congolese justice system, whose independence remains seriously compromised and abused. In itself, the apparent widespread and systematic nature of crimes is also a challenge. Such crimes require complex investigations that can be done without significant human and material resources.

In some cases, specific expertise, both surveys that the judiciary may be required. However, the lack of resources available to the Congolese courts is making them unable to carry out their mandate for international crimes. Strengthening and rehabilitation of the domestic judicial system are also essential. Given these facts, the report concludes that a judicial mechanism consisting of mixed international and national staff - would be most appropriate to bring justice to victims of serious violations.

Whether international or national, operating procedures and the exact form of such jurisdiction should be decided and a detailed consultation with stakeholders, including victims, including their participation in the process, to give the mechanism adopted credibility and legitimacy. Moreover, prior to deploying resources and international actors, careful planning is required and an accurate assessment of physical and human capacity available within the national judicial system is necessary. "

The international community has not remained indifferent to the atrocities suffered by civilians in the DRC and animated by the desire to respect the Geneva Convention of 12 August 1949 on the Protection of Civilian Persons in Time of War, she and the belligerents felt challenged and affirmed the need to establish appropriate mechanisms for the protection of human rights in the conflict. These include the following:

- Resolution 1341 (2001) of 22 February 2001 of the Security Council, in particular, paragraph 14, specifically said that the occupying forces should be held accountable for violations of human rights committed in the territory under their control;
- Resolution 1304 (2000) of 16 June 2000 of the Security Council, in particular paragraphs

13, 14 and 15, the Security Council specifies that it «believes that the Rwandan and Ugandan governments should make reparations for casualties and property damage they have inflicted on the civilian population of Kisangani [...] «;

- Resolution 1234 (1999) of 9 April 1999 Security Council, paragraph 6 and 7. It is stated that the Security Council condemns all massacres on Congolese territory and demand that those responsible are brought to justice, an international investigation into all cases of this type, including the massacres in the Province of South Kivu and other atrocities. Many other texts discussed in this same direction to the example of the peace agreement in Syrte on April 18, 1999, Resolution No. 2002/14 of 19 April 2002, the cease-fire in Lusaka in 1999;
- The ratification of the Rome Statute establishing the International Criminal Court which criminalizes all acts defined as war crimes, crimes against humanity, genocide and crimes of aggression by the Congolese government, March 30 2002;
- The adoption by consensus in Sun City, by the plenary of inter-Congolese dialogue, resolutions of the Commission for Peace and Reconciliation, numbers 20/DIC/APRIL/2002 and 21/DIC/APRIL/2002. The first is creation of «a National Truth and Reconciliation Commission» responsible for establishing the truth and promote peace, justice, forgiveness and national reconciliation. The second, meanwhile, is application for the transitional government to the Security Council to establish as the former Yugoslavia, Rwanda, Sierra Leone, an international criminal tribunal for the Democratic Republic of Congo[34].

The Security Council of the United Nations, in view of these alarming reports could implement Chapter VII to create a special tribunal for the DRC in accordance with the Congolese government has already shown its willingness to cooperate with international justice through the agreement on judicial cooperation between the DRC and the Office of the Prosecutor of the ICC's October 6, 2004 and the transfer of some Congolese prosecuted for international crimes in The Hague. But this agreement does that only on the issues of judicial cooperation without reference to legal and institutional reforms in compliance with the Congolese positive law with the Rome Statute.

The Independent Expert on the situation of human rights in DRC supports the establishment of a mixed jurisdiction in the Sierra Leone model, recognizes the challenges in creating an ad hoc tribunal for the DRC, recommends that "vision to reduce the cost of a special tribunal, some provisions could be considered:

- It could sit in the country, rather than the center to limit the costs of the transfer of defendants and witnesses.
- The host country (DRC) could provide premises and defray some costs, so at least half the judges and three-quarters of the judicial personnel would be citizens of the DRC, the boards of office lawyers could be of the host[35]. "This proposal does not guarantee the independence of the judiciary and could even gangrene of the new instrument, however, should be free of political interference in order to make fair and impartial decisions implementing the principles of international guarantees for fair trials.

Paragraph 2. Composition of the special tribunal for the DRC

The model can guide the Sierra Leone Security Council and the Congolese government in the composition of the special tribunal. This court should be composed by a majority of foreign staff to avoid any suspicion of bias and limitations faced by the Congolese national courts.

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[34] Augustus MAMPUYA KANUNK'A-TSHIABO, *International Justice*: which court for the DRC?,

[35] See Report of the Independent Expert on the situation of human rights in DRC (A/HRC/7/25) by. 35.

Argue with the authors of Mapping Report that, given the lack of commitment by the Congolese authorities towards the strengthening of justice, how ridiculous given the judicial system to combat impunity, the admission and tolerance of multiple interference of political authorities military-court cases that spend their lack of independence, the inadequacy of military justice, which alone has jurisdiction to address the many international crimes often committed by security forces, judicial practice insignificant and fails, the non-compliance international principles relating to juvenile justice and the inadequacy of the judicial system in cases of sexual violence, it must be concluded that the capacity of the Congolese justice to end impunity for international crimes are clearly inadequate.

The DRC may, like the Sierra Leonean court, provide for the composition of the majority of foreign judges and their appointment by the UN Secretary-General in consultation with the Congolese government, and this, in order to overcome the shortcomings of the national courts.

The foreign personnel should play a role in decisions of the court and in the investigation phase to ensure the impartiality, independence and the manifestation of the humanitarian nature of massive violations of human rights, humanity as a victim too.

Paragraph 3: Financing of the special tribunal for the DRC

It is true that international jurisdiction requires a lot of those financial means to enable it to meet these expenses and be autonomous and independent of state influence. Article 4 of the Sierra Leone and the UN above indicates that the expenses of the tribunal will be funded by voluntary contributions from the international community and research by the Secretary General of the funds for its operation.

In the search for good governance and the establishment of rule of law relied on by the DRC, a financial commitment on her part is necessary to turn the machine of justice, fair, impartial, independent and equal: this is essential and mandatory for the Congolese government has signed international obligations to punish the perpetrators of the most serious crimes of international humanitarian law.

Note, however, that voluntary contributions can cause disability to the proper functioning of the court to the extent that contributions are not released at the right time for this, a compulsory contribution would be an alternative to the proper administration of international justice. A firm commitment and determination from the Congolese government to end the abuses suffered by her people, as reflected in its "zero tolerance" should characterize it through concrete steps including release of funds to finance timely mixed international tribunal for the DRC.

The judicial system from the DRC has suffered for a long time, due to a lack of resources. Between 2004 and 2009 the government allocated an average of 0, 6% of the national justice system, while most countries spend 2-6%. Much more are needed to attempt to resolve the serious problems persisting and restoring the rule of law[36].

Paragraph 4: Jurisdictions of the special tribunal for the DRC

Jurisdiction is the power of a court to be competent in a subject and can be physical, personal or territorial.

- *Material Jurisdiction*

Sexual violence committed in eastern DRC and which continue to be perpetuated on women is one of the main subjects on which the court should be a priority, it will know more in all

[36] International Amnesty, Memorandum to the Government of the DRC, in February 2011, p.12

other offenses arising from the various armed conflicts. Serious crimes defined as serious violations of international humanitarian law affecting peace, security and well being of humanity, will be subject to that jurisdiction. These are crimes against humanity, war and genocide falling within the definition of the Rome Statute as provided in sections 5, 6, 7 and 8 of the above mentioned Mapping Report under mutatis mutandis on constant violations in the DRC.

• *Personal Jurisdiction*

Given the scale of international crimes committed, impartiality and independence of the judiciary is essential because a large number of senior armed groups warring parties allegedly involved in various violations of human rights and international humanitarian law. Section 25 of the Rome Statute[37] is applicable to the jurisdiction of that Joint court for the DRC.

Let us note that to enable the court to reach all those involved in violations of human rights in the DRC, their official capacity, the amnesty and pardon shall not affect their lawsuit.

• *Territorial Jurisdiction*

The special tribunal for the DRC may act over the whole of the Republic with the activities of particular importance in the eastern provinces, "cradle" of sexual violence. It may meet away from its seat if necessary and given across the country and the need to go and bring justice closer to litigants.

• *Concurrent jurisdiction*

In line with Article 8 of the Statute of the Special Court of Sierra Leone, this court has concurrent jurisdiction with national courts, but with priority over the latter in all stages of the procedure. This implies that national courts must defer to the court if it so requests when they are aware of crimes within its jurisdiction.

• *Governing Law*

This court will apply the national and international laws for the various crimes committed in the DRC. The law of national courts and international law enforcement of international crimes are of great interest. International instruments relating to human rights and international humanitarian law will be applicable provided that the DRC has ratified.

Section 5: Specialized chambers within the Congolese courts.

It is true that the establishment of specialized divisions within the Congolese courts is a less expensive and can be achieved in a shorter period than that of the joint special court. This option seems to be better appreciated by the Congolese government in which it advocates the participation of international judges in numbers lower than national.

[37] The authors, that the crime was committed individual, jointly with another person or through another person, that other person is not criminally responsible; The person who orders, solicits or induces the commission of a crime under the statute, when it occurs or attempted commission of this crime; about complicity, the person, to facilitate the commission of such crime, assists, assistance or other assistance to the commission or attempted commission of this crime, including providing the means for its commission, which otherwise contributes to the commission or attempted such a crime by a group of persons acting in concert. This contribution shall be intentional and, as appropriate: the aim of furthering the criminal activity or criminal purpose of the group, if such activity or purpose involves the commission of a crime within the jurisdiction of the court or be made with full knowledge of the group's intention to commit the crime; the case of genocide, the person who directly and publicly incites others to commit (the incentive is therefore meant that the crime of genocide), the person trying to commit a crime under the statute by actions, not by their materiality, are put into execution but the crime does not occur because of circumstances beyond his control (and offense failed attempt). However, a person who abandons the effort to commit the crime or otherwise prevents the completion be punishable under the Statute for the attempt if that person completely and voluntarily gave up the criminal purpose.

These chambers are subject to a prior bill, similar to the widely internationalized criminal court. The success of these courts, as proposed by Amnesty International in its memorandum to the Congolese government in February 2011 will depend in particular on several key elements, namely:

- Chambers must be competent to try all crimes under international law and such crimes must be defined in accordance with international standards.
- Chambers must be competent to try all the defendants, including members of armed forces. The constitutional and legislative provisions which provide that only the military courts have jurisdiction over crimes committed by members of the Armed Forces shall be discontinued;
- Chambers must be competent to investigate and pursue the principle of command responsibility, which must be defined in the draft law as applying to senior civilian and military leaders;
- Chambers must be part of a long-term initiative aimed at rebuilding the national justice system. It also offers compliance with 10 core principles of their right to say with complete independence and impartiality;
- The internationalized criminal tribunals must be part of a broader initiative at the national level to do justice to all victims of crimes under international law
- The internationalized criminal tribunals must be independent and impartial;
- The mandate of internationalized criminal tribunals should not be overly restrictive;
- The internationalized criminal tribunals must investigate and prosecute crimes as defined by international law;
- Internationalized criminal courts must apply the principles of criminal responsibility under international law;
- Internationalized criminal courts must not apply the death penalty or other cruel, inhuman or degrading treatment;
- Internationalized criminal courts must respect the right to a fair trial
- Internationalized criminal courts must protect the rights of witnesses;
- Internationalized criminal courts should allow victims to participate in criminal proceedings and shall be responsible for granting complete and effective repairs to victims of crime whose perpetrators have been sentenced;
- The internationalized criminal tribunals must be adequately funded by government with the help of the international community.

Specialized chambers which will be build in the DRC will help improve the Congolese justice system, the contribution of the expertise of foreign judges and the decisions of these institutions will be critical in altering the Congolese jurisdiction. That is to say a word about the organization and the jurisdiction of these Chambers:

Paragraph 1: Creation and organization of the Chambers.

A specialized chamber of first instance will be created within the Courts of Appeal of Kinshasa/Matete, Lubumbashi, Bukavu and Kisangani. the resort of that comes this way: (a) the Court of Appeal of Kinshasa/Matete includes the city-province of Kinshasa, the provinces of Bandundu, Bas-Congo and Equator (b) the Court of Appeal of Lubumbashi includes the provinces of Katanga, Kasai Occidental and Kasai Oriental (c) the Court of Appeal in Bukavu includes the provinces of South Kivu, North Kivu and Maniema (d) the

Court of Appeal in Kisangani includes the Eastern Province and the Province of Equator[38]. A court of appeal is instituted in the Courts of Appeal of Kinshasa/Gombe, Goma and Kananga. Their activities are:

(A) of the Court of Appeal in Kinshasa/Gombe includes the city-province of Kinshasa, Bandundu Province, the province of Bas-Congo and the Province of Equator;

(B) of the Court of Appeal Goma includes the provinces of North Kivu, South Kivu, Maniema and western Province;

(C) of the Court of Appeal Kananga includes the provinces of middle Kasaï, western Kasaï and Katanga.[39]

Let us note that this bill does not bring justice closer to litigants as the court today are far from people and they only reinforce the situation and therefore difficult for litigants, sometimes living in environments landlocked usually poor to have easy access to the court. It would be possible to circumvent this problem by allocating sufficient resources available to these jurisdictions to better victims support to trial. Also, given the precarious conditions of detention and the lack of support for prisoners by the Congolese state, it will be difficult for family members to care for their brothers in prison.

Paragraph 2: Governing law

The bill provides for the implementation of international instruments concerning human rights and international humanitarian law duly ratified by the DRC and the code of organization and jurisdiction. It reaffirms the constitutional principle of the rule of international law on Congolese law. The procedure prescribed by law is the one on Congolese ordinary rights.

Paragraph 3: Jurisdictions

These Chambers have jurisdiction for international crimes committed in the DRC since 1990 and its life is 10 years from the entry into force of the law creating them. That said, it will be a significant advance in the repression of breaches and the fight against impunity given their skills expand to foreigners guilty of offenses falling within its jurisdiction.

Paragraph 4: Essential cooperation to the effectiveness of specialized Chambers

The Government of the Republic shall determine with the United Nations, governments and other organizations and bilateral and multilateral partners in the sub-region, region and the international community a specific framework for cooperation to ensure the enforceability and effectiveness of decisions specialized divisions, including the effectiveness of their enforcement through an effective and credible prison system.

The agreements in this context are automatically conventional sources of standards for specialized chambers. They reinforce the hybrid nature of these courts in legitimizing and consolidating its international dimension and ensuring their independence and effectiveness[40]. What is a laudable thing to effective law enforcement and can be for the eradication of violence against women and probable effectiveness of the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War.

However, unlike in Cambodia, specialized chambers were established to punish atrocities committed by the Red Khmers. These were no longer in power and had no influence on the

[38] Article 1 of the preliminary draft law on specialized chambers
[39] Article 2 of the preliminary draft law on specialized chambers
[40] Article 59, Article 1 of the preliminary draft law on specialized chambers

proper administration of justice; there was no interference by the executive in the mandate to interpret the law. The situation in Cambodia is distinct from the Congo where justice is silenced, the independence of the judiciary is hypothetical, and some perpetrators have powers affecting the normal course of justice, bias, breach of the procedural safeguards, and so on. They are all facts that cannot afford a proper functioning of the judiciary which is plagued by various ailments in the previous analysis presented in this study.

The Mapping Report above shows the challenges that may be exposed by the presented specialized chambers here below and we believe it is based around these obstacles by establishing a special tribunal mixed with several advantages for the proper administration of justice.

In addition to those already mentioned in the preceding lines, we can add:

- The lack of credibility of the national judiciary in the eyes of the Congolese people is likely to affect such Chambers. They should be able to overcome this handicap in that the presence of international players in sufficient numbers and in key positions within the mechanism should reassure victims and bring greater transparency in its operation;
- The chronic lack of capacity of the Congolese judicial system could jeopardize the new mechanism. As has been repeatedly observed in the previous section, the judicial system in the DRC is affected by a lack of significant structural, financial and operational, human resources and general capacity to allow all players in the justice system to perform their duties properly and free from financial worries. Constant and significant support from the international community is essential to the success of such a mechanism, both in its inception rather than that of its operation;
- It would be more difficult to obtain the cooperation of third States with those jurisdictions which have no general obligation to cooperate with them and probably more qualified to work as for an international system independent Congolese justice[41]. The political will to act is hypothetical in some cases.

Section 7: Role of NGOs in the repression of sexual violence and other crimes committed in eastern DRC

Non-governmental organizations (NGOs) have an important role in the process of assisting the victims of sexual violence. Article 15 paragraph 2 of the ICC[42] Statute provides that the Prosecutor may use the information from NGOs in support of its action. Currently the eastern DRC, both national and international NGOs have data on sexual violence that can be used by the special court to track down the perpetrators.

In an environment where the practice has a strong influence on women, the NGOs with which many of the women would be assigned, constitute an indispensable source for the court to circumvent the customary taboo tends to force to silence the female victim of sex violence. They can also contribute to the proper administration of justice, in addition to assisting and accompanying the victims, funding for the court and participation in the development of prison places, etc…

[41] Report of the Mapping for the most serious violations of human rights and international humanitarian law committed between March 1993 and June 2003 on the territory of the Democratic Republic of Congo, August 2010, p.485.

[42] *Article 15 paragraph 2:* "The Prosecutor shall analyze the seriousness of the information received. To this end, he may seek additional information from States, organs of the United Nations, to non-governmental organization, or other reliable sources that it deems appropriate, and collect Expenditure written or oral seat of the Court. "

CONCLUSION

Many women of all ages, the little girl of five years to the grandmother of eighty years, are victims of sexual violence in eastern DRC where endless armed conflicts rein since 1996. The alleged perpetrators of these heinous acts towards women are armed men which include some members of militias and armed groups and some members of the FARDC and the PNC, remain largely unpunished. They continue to commit with impunity such sexual violence especially in villages where women must attend to activities that require them travel long distances exposing themselves to the executioners which is also the case in the villages ravaged by war.

Congolese civil and military courts are trying to suppress some alleged perpetrators of sexual violence without having the opportunity to reach the perpetrators holding the high office or responsibility, justice has become national citizens of the lower ranks. A study on the prevention of sexual violence by an independent and impartial judiciary in which the public can have confidence to expect any sustained damage was an opportunity for us to reflect on the way to fight against impunity and for the protection of human rights in general, women and children in particular.

Congolese law, aware of the extent and severity of the barbarity with which women and some men suffer the sexual atrocities in eastern DRC, and with the involvement of national and international NGOs, has provided national courts law No. 06/018 of 20 July 2006 amending and supplementing the Decree of 30 January 1940 on the Congolese Penal Code and No. 06/019 of 20 July 2006 amending and supplementing Decree of 6 August 1959 on Congolese Criminal Procedure Code.

These laws are so important and essential for the suppression of sexual violence which is not sufficient to face barriers that Congolese courts are facing, as we have tried to show throughout the development of our thinking. We have proposed the establishment by the Security Council of the United Nations of a special tribunal for the DRC would consider in addition to sexual violence, and other war crimes against humanity committed in DRC and the East in particular. However to enable the judiciary to sue in peace, the following prerequisites are essential:

- As long as the gown gives way to the Kalachnikov, it is unrealistic to think of a fair and impartial justice, a cessation of hostilities is essential to ensure safety to any person acting for the prosecution of crimes committed in the DRC in regard to the civilian population in violation of international and humanitarian law;
- The regional and international collaboration and quick-hitting between the DRC, the Security Council and other states in the Great Lakes Region and the African Union;
- Staff training on the national judicial procedures of sexual violence ;
- The education of the male population above the rights of women and children;
- Identify, through a university research customs and laws that weaken women and facilitate the violation made to them particularly those married to provide the Congolese Parliament enabling them matter much to protect the rights of vulnerable persons like some women and children and so on.
- Training of judicial personnel and court officers, security actors and infrastructure equipment. : Sexual Violence committed in Eastern DRC come out of the ordinary other offenses. Additional training is needed to empower the various actors in the particularity of the past, war crimes and crimes against humanity, the safety of victims such as Article 74 (bis) in paragraph 1 on specification[43]...

[43] *Article 74 (bis) the first paragraph:* "The public prosecutor or the judge hearing an sexual violence takes the necessary steps to safeguard the security, welfare and physical being, dignity and respect for privacy or anyone involved. "

Treatment of sexual offenses requires a technical, material, financial and logistical support to ensure proper administration of justice. Rehabilitation of existing infrastructure and equipment would allow the judiciary (judicial police in the jurisdiction) to carry out their mission to satisfy the people and regain the confidence of victims.

In the fight against sexual violence, the community in which the victims live is required to accompany these to enable them to live more humanely the consequences of such violence, even for children who can rise to such acts, the family law protecting it and to equality whether born within or outside marriage under Articles 593 and 594.

Universal jurisdiction should play at this level given the fact that the States whose nationals are involved in violations of human rights in the DRC cannot extradite them given the fact that the DRC does not offer many guarantees of a fair trial.

Responsibility to do justice in cases of violations of human rights and international humanitarian law lies with the DRC. Given all the asphyxiation of the Congolese justice, the Congolese state, like Sierra Leone and other countries, out of armed conflict, will sell part of its national sovereignty in favor of the outbreak of truth and transitional justice to contribute to the establishment of rule of law.

Deficiencies that plague public administration are not saving the Congolese justice system. The safety of players involved in the repression of sexual violence, victims, lawyers, judges, witnesses ... is essential in the process of fight against impunity. As long as armed conflicts continue and that the protection of civilians is not assured, sexual violence will endure and repression will be difficult if not impossible. Without peace and rule of law, it is difficult to imagine an effective punishment when the victim will be reinstated in his rights and where the rights of the defense will be respected.

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LEGAL AND FINANCIAL AUTONOMY OF COMMUNES VIS-A-VIS THE PROVINCES: CASE OF RELATIONS BETWEEN THE DISTRICT OF KADUTU AND BAGIRA WITH THE PROVINCE OF SOUTH KIVU

By **Justin MASTAKI NAMEGABE***

INTRODUCTION

Empowerment of Communes is not a new phenomenon in the Democratic Republic of Congo. The first experience dates back to colonial times. Thus, the Decree of 26 March 1957 on urban areas had created the Communes of the Congo in decentralized entities. They had therefore been granted legal personality. However, it was not until the decree of 13 October 1959 on the organization of Cities and Communes that saw the Blacks ascend to the post of Mayor and conduct the first and decentralized entities created by the colonial authority.

When DRC became independent in 1960, the first Republic was inaugurated. Decentralization will remain the method of managing territorial entities that are part of the Communes. With the advent of the second Republic, November 24, 1965, the new authorities from the military coup remains at the peak of decentralization. In a speech to both chambers of the legislature meeting in Congress, December 24, 1966, President Mobutu announced the desire to break with the past[44]. During that year, the new Head of State announced a series of key measures including reducing the number of provinces from 21 to 12 and 12 to 8, the politicization of the Provincial Governors who become a career of civil servants; removing as Vice-Governor, the transformation of legislatures into mere advisory boards and the removal of the Provincial Executive.

Through the Legislative Order of 20 January 1968, the Communes lost their legal status to become mere administrative communes. In general, the second Republic was characterized on the administrative level, by excessive centralization, with the notable exception of the period from 1982. Indeed, the second Republic is judged to be fit, under the pressure of events related to the war in Shaba[45], to reintroduce decentralization. Thus, from 1982 until 1996, the Communes were considered decentralized entities that operated in reality as mere administrative units without legal personality. The personalization of Communes and Provinces of the country other than the City of Kinshasa ended with the advent to power of Laurent Kabila. This regression, at least in legal terms, is established by Legislative Decree No. 081 of 02 July 1998 on the territorial and administrative organization of the Democratic Republic of Congo. This text provides that only the municipalities of the City-Province of Kinshasa are provided with legal personality. The Municipalities of the other Provinces of the country again become mere administrative units lacking legal capacity. Note, however, that even the municipalities of Kinshasa and customized operating in reality, like their counterparts in the interior, as mere administrative communes is not personalized. To illustrate, instead of providing local councils with a deliberative, it was established in the Communes, advisory boards that were relevant only to give advisory opinions which are, in essence, is not binding.

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44 IMBAMBO-LA-NGANYA, *Notes of Administrative Law*, 3rd year graduate, Faculty of Law, U.C.B, 2003-2004, Unpublished.

45 Shaba means the present Province of Katanga. The rebels called "Ex-Katangan" there had been fighting the Mobutu regime in a war that has seen two episodes called "Shaba Shaba 1 and 2." This war began in 1977 and ended in 1978. Plan of the dictator Mobutu managed to win thanks to the Franco-Moroccan military intervention.

It was not until the enactment of the Organic Law No. 08/016 of 07 October 2008 on the composition, organization and operation of decentralized territorial entities and their relationships with the State and the Province to see the extent of decentralization of all Communes of the country. This law follows the Constitution of 18 February 2006 which establishes the decentralization as a way of managing some territorial entities. It provides the legal and financial autonomy in the Communes. Specifically, this law defines the competences of the Communes and the financial resources allocated to them.

At the City of Bukavu, three communes are involved in the legal and financial autonomy. These are the municipalities of Bagira of Kadutu and Ibanda. This study does, however, will focus on the Communes of Kadutu and Bagira. The choice of these two communes is dictated by the need to compare a rich Commune (Kadutu) Commune with the lowest (Bagira). This approach will examine the various issues that may induce or not a successful legal and financial autonomy in both the Communes.

It was reported that the leaders of the Communes are subject to the pressures and receive orders from higher authorities including the Provincial Governor and the Mayor of the City of Bukavu. However, the proportion of these pressures and levels differ in intensity depending on whether the municipality of Kadutu or that of Bagira. In addition, these authorities and certain public service officials are disrespectful of the skills of local authorities. Moreover, these recent show immobility characterized by the lack of initiative in areas of local interest. From the perspective of financial independence, the two communes suffer from a severe lack of resources. The few recipes that receive these communes do not allow them to fill the enormous needs of local interest. Financial autonomy enshrined in the Constitution and reaffirmed by the Organic Law had raised great hopes for the improvement of communal public finances. This autonomy is in fact resulted in the withholding of 40% of the revenues of a national character which are made especially by the Communes. Until then, this deduction is not applied. The central government, instead of making such effective restraint, has implemented a palliative measure: the handover. This consists of the central government, initially, to receive all the income of a national character conducted in the provinces and, secondly, to restore a portion fixed at each of the provinces. These, in turn, are called upon to surrender a portion including the Communes in them. According to the report of the League of Congolese fight against corruption (LICOCO)[46], with the exception of Katanga, the other provinces of the country does not lend to Municipalities and other entities on the amount of money that the central government allocates the revenues to national character. The LICOCO noted that the money ends up in the pockets of Governors of the provinces, and that lastly not be denounced or repudiated, corrupt the provincial MPs. Among these provinces, the LICOCO note is that of South Kivu. Thus, the Communes of Kadutu and Bagira, deprived of this important source of income, are forced to be content with their meager income from fees on local products.

In view of the foregoing, the following questions need to be asked to guide this study:
What should be made to the municipal authorities of Bagira and Kadutu fully exercise their skills and freely granted under legislation on decentralization?

What is the obstacle to the emergence of an effective financial autonomy for the municipalities of Bagira and Kadutu?

To the first question, we hypothesize that compliance by the authorities of the higher level, namely the Provincial Governor and the Mayor of the City, the decentralization law,

[46] The report to which it refers was published in 2009. He was devoted to how the governors of provinces used the annual rebates which are operated by the central government in lieu of withholding 40% of the revenue source to national character. In this report, the LICOCO revealed that all Congolese provinces, with the notable exception of Katanga is monopolized their money lent by the central government and that in complicity with the provincial assemblies. Thus, the Commons and others received nothing since 2007, since the handover was systematically taken out by the governors of provinces that connected provincial deputies.

would allow the Communes of Bagira and Kadutu to exercise their full powers in complete freedom. Meanwhile, the Congolese state should organize elections, to allow the Communes particularly mentioned above to have elected bodies that would be accountable only to local people.

As to the second question, we believe that the non-application of the withholding of 40% at the source of national revenue generated by the Communes of Bagira and Kadutu undermines the financial independence of these entities.

The present study was to analyze legal texts devoted decentralization in the DRC and giving, therefore, the legal and financial autonomy to all communes of the land. Then we will see how the legal and financial autonomy is implemented in the municipalities of Kadutu and Bagira after the entry into force of the Organic Law on the composition, organization and operation of decentralized territorial entities and their relationships with the state and the provinces. Clearly, it will be to compare the legal provisions recognizing the legal and financial autonomy to all the Communes of the DRC with the reality observed in the Communes of Kadutu and Bagira.

Our approach is to analyze the legal texts on decentralization in order to identify the merits and limitations. We also conduct interviews with the municipal authorities of Kadutu and Bagira to try to see how they value their relationships with provincial and urban areas.
This study focuses on three areas:

The first is devoted to the analysis of the legal framework governing the legal and financial autonomy of Communes in the DRC. This line touches briefly on transitional legislation, but focuses more on the legislation of the Third Republic which established the legal and financial autonomy of Communes. The second axis is trying to understand how the legal and financial autonomy is implemented in the municipalities of Kadutu and Bagira. The last line attempts to provide some suggestions for a successful legal and financial autonomy in the municipalities of Kadutu and Bagira.

I. THE LEGAL FRAMEWORK ADMINISTERING FINANCIAL AND LEGAL AUTONOMY OF COMMUNES IN DRC

As highlighted earlier, the legal and financial autonomy of Communes is in line with the decentralization which was adopted by the Constitution of 18 February 2006 as a way of managing some territorial entities. However, regarding the status of the authorities of decentralized territorial entities, the latter will be governed by Decree Law No. 082 of July 2, 1998 on the status of the authorities responsible for administering the territorial divisions of the organization to municipal elections. These allow the Communes to be equipped with elected bodies. Also, will there be an importance to first consider the legislation previously in force in the status of particular municipal authorities, before analyzing the relevant legal texts for decentralization.

1. TRANSITIONAL LEGISLATION: THE DECREE-LAW NO. 082 OF 02 JULY 1998 STATUS OF AUTHORITIES OF ADMINISTRATION TERRITORIAL DIVISION

We will meet in the first place, the transitional nature of this legislation, before it's release, and second, the general economy.

A. Transitional nature

The legislature has given the transitional nature to decree-law as follows: "Pending the organization of urban elections, municipal and local governments by the Independent

Electoral Commission established by the Constitution, the authorities in decentralized territorial entities are currently employed, managed in accordance with the provisions of Legislative Decree No. 082 of July 2, 1998 on the status of the authorities responsible for the administration of territorial constituencies"[47].

Note that the temporary nature only concerns the status of authorities to manage the decentralized territorial entities. It is therefore not precluded from exercising these authorities have the powers vested in them under the organic law including composition, organization and operation of ETD. The provisions relating to the Status of Mayors, which are contained in the organic law will be applicable only after the holding of municipal elections.

B. The General Economy

It appears from the Legislative Decree No. 082 of July 2, 1998 on the status of the authorities responsible for administering the territorial divisions[48] that local authorities are appointed by the President of the Republic on the proposal of Minister of Internal Affairs, that these authorities are called preferably from among the officials and employees of the Ministry of Internal Affairs, the appointing authority for appointment may, on its own initiative or at the request of the interested party, terminate the current mandate, the Minister of Internal Affairs may by reasoned order, suspend any authority for the administration of territorial constituencies for compromise or breach of the duties of his office, the Provincial Governor shall submit annually to the Minister of Internal Affairs report an assessment of activities including Mayors and their deputies.

From the above it follows that non-municipal election including the fact that the statute that governed the municipal authorities during the centralization of authority applies to ETD including those of the Communes. This poses a serious problem in that municipal authorities can freely administer their organizations. They may indeed be reluctant to take initiatives that would conflict with the higher powers which conflict might mean either the suspension or revocation.

In addition, through Decree-Law supra, it takes the legal basis relied upon by the current President of the Republic the appointment and functions within their municipal authorities, namely the mayors and their deputies, in a decentralized system. Thus in 2009, President Joseph Kabila revoked the Mayors of three municipalities that make up the City of Bukavu (Communes of Kadutu, Bagira and Ibanda). He then appointed new Mayors and deputy head of the said Communes. This situation is similar; however, that Jean-Pierre Olivier of Sardan[49], referring to the context of decentralization in Africa, considered a trend in democratic context reproduction of part of the political culture of post-colonial authoritarian regimes.

It is now necessary to analyze the legislation giving legal and financial autonomy under the Third Republic.

2. THE LEGISLATION UNDER THE THIRD REPUBLIC

This is about the law in general which states that the law shall be examined in turns, the Constitution of 18 February 2006 and the Organic Law No. 08/016 of 07 October 2008 on the composition, organization and operation of decentralized territorial entities and their relationships with the state and provinces.

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[47] Organic Law No. 08/016 of 07 October 2008 on the composition, structure and functioning of ETD and their relations with the State and the Provinces, art.126

[48] Read the Legislative Decree No. 082 of July 2, 1998 on the status of the authorities responsible for administering territorial constituencies, art.3, 6,7 and 14.

[49] Jean-Pierre Olivier de Sardan, *Some thoughts on decentralization as a research topic*, http://apad.revues.org/document547. HTML? format = print, p.3.

A. The Constitution of February 18, 2006

Under Article 3 of this Constitution, the Provinces and the decentralized territorial entities of the Democratic Republic of Congo are equipped with a legal personality and are managed by local bodies. These decentralized territorial entities are the City, the Commune, the Sector and the Chiefdom. They have the self-government and autonomy to manage their economic resources, human, financial and technical.

In light of the foregoing, the Constitution establishes two main principles that should help make effective decentralization. These are the principles of legal autonomy and financial independence, without which decentralization would have no content.

As for the modalities of implementation of these principles, they are assessed by the organic law of 07 October 2008.

B. Organic Law No. 08/016 of 07 October 2008 on the composition, organization and operation of decentralized territorial entities and their relationships with the State and Provinces

First of all, note that the above-mentioned organic law is the most important in terms of decentralization. It determines, in effect, including the rules on the organization of ETD However, in the context of this study, only the rules governing the Communes will hold our attention.

According to Article 46 of Organic Law mentioned above, it shall mean by all head of Territorial commune: all subdivision of the City or town with a population of at least 20,000 residents that a decree of the Prime Minister has given Status of a Commune.

It follows from the foregoing that the Congolese Parliament is innovating in the design of the Commune. Henceforth, it will not be due solely to an urban entity. Thus, rural communities can now be created in a Territory entity that is essentially rural in accordance with the Congolese administrative organization.

However, with respect to the approval of new Communes, the President of the Republic is not invested any more than Parliament. This power is vested in the Prime Minister. The allocation of such power to the Prime Minister is a merit to shorten the approval process. This avoids both the slow and cumbersome administration. Furthermore, it should be noted that this power and the resulting decisions are controlled by Parliament.

The organic law will be examined through the organs of Communes and skills, the resources of Communes, the control acts of Communes, the relationship between municipalities and provinces and the status of judicial authorities.

B.1. The bodies of Communes and their Jurisdictions

The Municipal Council, the communal executive College and the Municipal Mayor bodies are expected to lead the Communes.

B.1.1. The Municipal Council

The communal Board is the deliberative organ of the Commune. Its members are called councilors. They are elected under conditions laid down by the electoral law. The mandate of Municipal Council begins to validate the credentials by the City Council and ends with the installation of the new Council. The Municipal Council is entitled to fair compensation which ensures independence and dignity.

The functions of the City Council are listed in sections 50 to 52 of the Organic Law. Thus, the credentials by the City Council deliberate on matters of municipal interest include:

- Rules of Procedure;
- Street maintenance, planning, organization and management of parking;
- Maintenance of drainage collectors and sewage;
- Municipal lighting;
- Police measures for the convenience of passing on local roads and roads of general interest;
- The development plan of the municipality;
- Acts of disposition of property in the private domain of the Commune;
- The development, maintenance and management of procurement of municipal interest;
- The construction, installation, maintenance and management of public parks, sports facilities and play areas, construction and maintenance of public buildings belonging to the Commune, the organization of landfills and service waste collection, construction, development and management of venues;
- Organization and management of an emergency service and first aid to the people of the Commune;
- Organizing and managing a health department, the sanitation program, the vaccination of the population, promoting the fight against HIV / AIDS and endemic diseases;
- The police shows and public events;
- The initiative to establish nurseries, primary, secondary, vocational and special, in accordance with standards established by the central government;
- The construction, rehabilitation of buildings of kindergartens and nursery schools of the entity, the organization of kindergartens and nursery schools, the establishment of structures and implementation of paragraph c programs for adults;
- The creation and management of cultural centers and libraries;
- The establishment of structures and projects of municipal interest between the City and neighboring municipalities;
- Local Public Service, the organization of municipal services in accordance with law, the creation and organization of public services, public communes in compliance with national legislation;
- The adoption of the budget revenues and expenditures, the adoption of annual accounts, the approval or rejection of gifts, donations and legacies granted to the municipality, the management control of financial resources, approval of the program and control the execution of the program, domestic borrowing for municipal needs;
- The partnership between the Municipality, the private sector and NGOs;
- The arrangements for implementation of taxes and communal rights in accordance with law;
- The authorization of the participation of the Commune to Capital companies engaged in the municipal interest;
- Authorization of participation of the Municipality in partnership with one or more other neighboring municipalities to cooperate in solving various problems of common interest;
- Planning and development programming of the Commune;

- The City Council elects the Mayor and his deputy under the conditions set by the electoral law;
- Approve the program developed by the Communal Executive College;
- Adopts the proposed budget of the municipality;
- Gives, when required, advice on any matter related to the disclosure.
- It shall by decision. In the eight days of its adoption, the decision is transmitted to the Governor of the Province which has a period of fifteen days to make its views known. After this time, the favorable opinion is deemed granted. In case of disapproval, it is withdrawn. In this case, the decision is referred to the City Council for a second deliberation. The decision subject to a second decision is adopted, either in its original form or after modification of the provisions concerned with the absolute majority of the members of City Council;
- The City Council shall make regulations for administration and police. These regulations are not contrary to law or regulation issued by higher authority;
- The City Council may impose sanctions on police regulations of penalties not exceeding seven days of penal servitude and a fine of 15,000 Congolese francs or one of these penalties.

Given the foregoing, the City Council is assigned the role of a real parliament with greater powers but communal. And according to the Congolese legislator, the list of powers available to the said Council is an example, which means that these skills have no limits when it comes to deliberate on matters of communal interest. These enormous skills can not be fully exercised if the City Council is dynamic and has a political will.

Moreover, a careful reading jurisdiction of the City Council shows that in almost all areas, the Municipality has no exclusive power. Therefore, in these areas, it is better to talk about extending the powers, instead of transferring skills. Indeed, the State and the Province can still take initiatives in almost all areas of municipal interest, and their decision is binding on the municipality. Thus, with decentralization, state and Francois LUCHARIE and Yves LUCHARIE[50], the Municipality acquires a new dimension: it is no longer only as regulating its own affairs but also as contributing to the settlement of state affairs. Therefore, the municipality contributes to the administration of the State.

From the perspective of the calling of the responsibilities of the State and the Commune, the result is an important consequence: the first is indeed responsible for the decisions it makes even replaces the Commune as second, it bears responsibility for decisions taken by its own organs.

B.1.2. The Communal Executive College

The Communal executive college is the management body of the municipality which implements the decisions of the council. It consists of the Mayor and Deputy Mayor and two other members called communal Aldermen. The Mayor and his deputy are elected from within or outside the council. They are conferred by order of the Provincial Governor within fifteen days of the announcement of results. The Aldermen are appointed by the municipal mayor within or outside the municipal council taking into account the criteria of competence, credibility and community representation. This designation is subject to approval by the council. There can be no confidence motion submitted before 12 months after the election of the municipal executive.

[50] Francois LUCHARIE and Yves LUCHARIE, *The right of decentralization*, Col. Themis, PUF, Paris, November 1983, p. 256.

The College provides municipal executive tasks of municipal interest listed in Article 59 of the Organic Law. These are the following tasks:

- Execute the laws, edicts, regulations and decisions of the higher authority and the decisions of the City Council;
- Prepare and propose to the City Council the draft budget of the municipality, the proposed additional funding and transfer of credits;
- Develop, introduce and implement the program of economic, social, cultural and environmental of the Commune;
- Perform the portion of the development program of the City assigned to the Commune;
- Submit to the City Council the annual accounts of receipts and expenditures;
- Publish and notify decisions of the City Council;
- Directing the services of the Commune;
- Manage the revenue of the Municipality, direct expenditures and ensure proper bookkeeping;
- Administering the institutions of the Commune;
- Direct the work to be done at the expense of the Commune;
- Manage the assets of the municipality and maintain its rights;
- To implement the development plan of the municipality;
- Mandate, the assent of the municipal council, the persons to represent the interests of the Commune in societies where it has acquired stakes;
- Mandate, the assent of the municipal council, the persons to represent the City in the associations which it belongs;
- Receive reports from representatives of the Commune in societies and associations.

The College executive is expected to play the role of municipal government. Like the City Council, its powers are so illustrative set by the legislature. Thus, whenever the municipal interest so requires, the College should have the freedom to intervene. The administration are therefore justified in not tolerate inaction College municipal executive and therefore require the latter initiatives that have an impact on their well-being. What would serve, in effect, the powers are not exercised or who are partially or timidly exercised? Undoubtedly, it would be a citizen if the administration asked the City Council to reverse a College liability by the vote of a motion of censure.

As the authority of the Municipality and Head of the municipal executive College[51], the Mayor is vested with the following powers:

- He assumes responsibility for the proper administration of its jurisdiction;
- He is an officer of civil status;
- He is judicial police officer with general jurisdiction;
- He is Budget Chief Authorizing Officer of the Municipality;
- He is the municipality in court vis-à-vis third parties;
- He executes and enforces the laws, edicts and national and provincial regulations and decisions, and urban and municipal regulations;

[51] Organic Law No. 08/016 of 07 October 2008 on the composition, structure and functioning of the decentralized territorial entities and their relations with the State and the Provinces, art.60

- He ensures the maintenance of public order within its jurisdiction. To this end, he has the units assigned to the National Police;
- In an emergency, and when the City Council is not in session, the Mayor may, municipal executive College course, make regulations for administration and police and punish violations with penalties not exceeding seven days of penal servitude and a fine of 5,000 Congolese Francs or one of these penalties.

Unlike the powers of the council and municipal executive of the College, those assigned to the mayor are limited. The latter cannot act outside of the tasks listed above, lest his deeds are void for lack of absolute material.

The examination of the organs of the Commune and skills emerges a constant such bodies enjoy broad powers. Also, the legislature is to provide resources to enable the municipality to fund its various interventions as part of its devolved powers.

B.2. The financial resources of Communes

Note that the principles established by the Organic Law[52] indiscriminately affect all decentralized territorial entities (Cities, Towns, chiefdoms and sectors). Thus, the principles of financial autonomy are outlined as follows:

The finances of an entity or regional authority are distinct from those of the Province.

The financial resources of an entity include the regional authority's own resources, resources from the revenue allocated to the Provinces national character, the resources of the National equalization as well as exceptional resources. The decentralized territorial entity establishes the mechanisms of recovery.

The budget of a territorial entity that is incorporated into decentralized revenue and expenditure in the budget of the Province, in accordance with the financial law.

The accounts of an entity or regional authority are subject to review by the General Inspectorate of Finance and the ECA.

B.2.1. Own resources

Own resources of an entity or regional authority include minimum personal tax, revenue participation, local taxes and duties. The tax is imposed and collected in accordance with law. The minimum personal income tax is levied for the exclusive benefit of Communes, sectors or chiefdoms.

Revenue shares of the decentralized territorial entity include profits or income of their equity stake in public enterprises, mixed economy companies and associations to momentary economic purpose.

Taxes and duties include local taxes of common interest, taxes specific territorial entity decentralized administrative and revenue generators attached to the acts which the decision rests with it.

Taxes consist of common interest of the special charge of traffic, the annual tax on the issuance of the license, the various taxes on consumption of beer and tobacco, the tax area of forest concessions, the Tax on the area of mining concessions, the tax on sales of precious materials of craft production and all other taxes imposed by the central government and returning in whole or in part to the decentralized territorial entity under the law.

[52] *Idem*, art.104 to 107

The allocation of the total fees of mutual interest between the decentralized territorial entities shall be established by legislation instituting such taxes, after consulting the Conference of Provincial Governors.

Taxes specific to each entity or regional authority are taxes levied on local matters not imposed by central government.

A territorial entity that collects revenues decentralized administrative acts related to generators whose decision is within its jurisdiction.

B.2.2. Resources from revenues of a national character

The decentralized territorial entities are entitled to 40% of the share of revenue allocated to the national character in Provinces.

The distribution of resources among decentralized territorial entities is based on the criteria of capacity, area and population. The decree determines the allocation mechanism.

B.2.3. Resources of the National equalization

A decentralized territorial entity may receive resources from the National Fund of equalization. It should be noted that it is not yet operational.

B.2.4. The unique resources

The resources consist of outstanding domestic debt which an entity or regional authority may be used for financing investments, subject to supervisory control to be exercised by the Governor of the Province in accordance with Article 96 of the Organic Act under review. Also parts of the exceptional resources are donations and legacies available to a decentralized territorial entity.

B.3. The control acts of Communes

The law does not provide a specific control in the Communes. This is a control that is performed on all decentralized territorial entities. Thus, under sections 95 and 96 of the organic law under review, the Provincial Governor shall exercise supervision over the acts of decentralized territorial entities. He may delegate this authority to the Administrator of the territory. Guardianship over the actions of decentralized territorial entities is exercised by an a priori and a posteriori control.

It appears, moreover, Article 97 of the Act, the following shall be subject to a priori control: the development of the preliminary draft budget to validate compatibility with macroeconomic assumptions in forecasts of the national budget, revenue projections and the inclusion of mandatory spending, creating taxes and issue debt in accordance with the law on classification of taxes and financial law, the creation of industrial and commercial, equity participation in companies; signing contracts with financial commitments in various forms of equity participation; police regulations with penalties of penal servitude, the execution of works on capital expenditure State budget as a client delegate acts and actions that may lead to structured relations with foreign states, the territorial units of foreign states, whatever the form, the decision to use the negotiated procedure agreement, notwithstanding the rules and threshold volume markets normally subject to tendering procedures, in accordance with the law on public procurement code.

The same provision creates a residual category by providing that all other acts not on the list noted above, are subject to subsequent verification.

Acts subject to prior control are transmitted to the Governor of the Province before being submitted for deliberation or execution. The governing body shall have twenty days from the receipt of the draft measure concerned to publicize its opinions. After this period, the draft act is subject to deliberation or execution.

The negative decision of the supervisory authority is justified. It is subject to administrative and / or jurisdictional.

The silence of the supervisory authority within thirty days is an implied rejection. In this case, the entity or regional authority may appeal to the Administrative Court of jurisdiction Appeal's.

The Provincial Governor shall organize at least once a year, a meeting with chief executives of decentralized territorial entities to enable them to coordinate and harmonize their views on matters within their remit.

The control is of paramount importance with regard to the effects it can produce over the governance of decentralized territorial entities in general and in particular of Communes. It is indeed likely to lead the authorities of these entities not to abuse their powers vested by law. It can also encourage these authorities to manage their bodies so that the relationship will result from their control do not be negative.

B.4. The reports of communes with the State and Provinces

Under sections 93 and 94 of the Organic Law, the Mayors are local executive authorities and represent the State and the Province in their respective jurisdictions. They assume, as such, responsibility for the proper functioning of State and provincial services in their bodies and ensure the smooth running of their respective jurisdictions. They coordinate and oversee in their respective entities, the services under the authority of the central government or the Province.

When the Communes are not autonomous entities and their assigned skills are not exclusive, it is quite logical that close relationships are developed with them, the State and the Province. Skills attributed to the Communes may in fact be exercised by the State and the Province to greater efficiency. Thus François LUCHARIE and Jean LUCHARIE[53] suggest talking about extending the powers in place of the transfer of skills. It cannot be otherwise since it is true that municipal finances are minimal and would not therefore achieve the same micro-projects. Furthermore, the attribution of legal personality in the Communes does not make these small states in a state. They are and remain small elements of the set, the state and elements of the subset that is the Province.

B.5. The legal status of the municipal authorities

The law[54] provides that no councilor shall be prosecuted, investigated, arrested, detained or tried for opinions expressed or votes cast by him in the exercise of its functions. It may not, during sessions, be prosecuted or arrested, except in cases of red handedness, with the consent of the Council to which it belongs. Not in session, he may be arrested without the authorization of the Office of the Council, except in cases of red handedness, authorized prosecution or a final sentence. The detention or prosecution of a Council shall be suspended if the Council of which he is required by the Member. The suspension shall not exceed the duration of the session.

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[53] François LUCHARIE and Jean LUCHARIE, *Op.cit.*, p.256.

[54] Read the Organic Law No. 08/016 of 07 October 2008 on the composition, structure and functioning of the decentralized territorial entities and their relations with the State and the Provinces, Sections 120 and 121.

The Mayors and their deputies and the councilors are, in criminal cases, litigants at the High Court.

It is clear from the foregoing that the municipal authorities enjoy a privileged legal status. The aim of the legislator is to enable them to exercise their functions freely and independently without fear of arrest or be subject to pressures of any kind whatsoever. Clearly, the legal status reinforces communal leaders in their quality of decentralized authorities.

II. THE LEGAL AND FINANCIAL AUTONOMY AND ITS APPLICATION IN COMMUNES OF BAGIRA AND KADUTU

This will be mainly in this part, to identify and analyze the factors for and against the implementation of the legal and financial autonomy in the municipalities of Kadutu and Bagira. In this regard, we believe the following elements can fulfill the legal and financial autonomy in the municipalities mentioned above: the public services, generating revenues, expenses and the human and material resources.

1. Brief presentation of the Communes of Kadutu and Bagira and their characteristics

The Municipalities of Kadutu and Bagira are among the three communes of the city of Bukavu.

The Municipality of Kadutu is densely populated: it has 233,058 inhabitants, including 280 foreigners. It has the largest market in the town of Bukavu, and even the whole province of South Kivu. This market contributes greatly to the economic viability of the Commune. In addition, it significantly intervenes in the formation of revenues of a significant fringe of the population of the Municipality in particular and the City in general. In terms of wealth, it is considered the second richest commune of the city of Bukavu after the Ibanda. Its proximity to the Commune of Ibanda and accessibility to public transport has facilitated economic and commercial growth.

As for the Municipality of Bagira, it is the least populated of the city of Bukavu. It has 155,893 inhabitants, including 12 foreigners, broken down as follows[55]:

- Kasha: 101,327 habitants
- Lumumba: 29,313 habitants
- Nyakavogo: 25,265 habitants

The Municipality of Bagira is considered the poorest in the commune of the city of Bukavu. Designed by Belgian colonists to house state employees, the City has retained up to date the name "community dormitory." Indeed, state officials, after a day of work in their administrative offices located primarily in downtown Ibanda in commune did return to Bagira only in the evening. Currently, the term still has relevance if one judges by the masses of the people of Bagira who flock to the city center (City of Ibanda) every morning to perform their daily activities. In the evening, the same movement occurs when returning to home in Bagira. Access to transportation is not easy. Already in the morning, people who want to move to the Commune of Ibanda struggle to find a way out to travel at around ten o'clock. In the evening, back in the municipality of Bagira, we see that there are crowds in the parking Independence Square who come to the buses and taxis which are in short supply compared to people who want to board. Often, the rush, these means of transport lead to stampedes or fights. While the difficulties of transport is one of the major obstacles

55 Read the census report of the first quarter of 2009 commissioned by the Municipality of Bagira.

to the economic prosperity of the Commune, some people prefer to leave Bagira the City to settle in the Communes of Kadutu and Ibanda when their social and economic conditions are improved.

The fact is that the Municipality of Bagira is still perceived as not economically viable.

2. Public Services

The Municipalities of Kadutu and Bagira feature a number of services that make up the Public hall. These services are emanations of provincial services. As such, they do not enjoy legal personality, for receiving and executing orders, directives and instructions from the hierarchy at the provincial level.

The following services are organized in the municipalities of Kadutu and Bagira: Local Economy, Interior, Industry, Small and Medium Enterprises and Crafts, Tourism, Culture, Justice, Planning and habitat, Cadastre, Land Affairs, Internal Revenue Service; information Service, marital status, ...

3. The municipal budget

As with any budget, the budgets of municipalities of Kadutu and Bagira include both revenue and expenditure. The revenue and expenditure forecasts are modeled on. This implies therefore a degree of uncertainty regarding their realization.

The budget position of the Municipality of Kadutu was broken down as follows for 2009:

The entire budget was in the range of 525,720,636.76 Congolese Francs, or $ 584,134 US distributed as follows in terms of expected income[56]:

- Surrender: 426,202,077.28 FC
- Local economy: 6,415,828.12 FC
- Interior: 4,185,849.90 FC
- IPEMEA[57]: 38,219,400 FC
- Tourism: 9,047,288.80 FC
- Culture: 1,000,984.14 FC
- National Economy: 1,392,277.56 FC
- Justice: 141,047.40 FC
- Other: 946,384.56 FC

All resources generated locally are $ 4,185,849.90 FC, less than 1% of projected revenues.

It is clear from the foregoing that the Municipality of Kadutu places the bulk of its revenues on which the return would come from the Province, or shortly from 80% of the budget. Yet it must be noted that the term "surrender" is not suitable for decentralized management as well as financial independence that this mode implies. Indeed, the handover refers to the technique of administrative management that prevailed in the DRC before the promulgation of the Constitution of 18 February 2006 and the Organic Law of 07 October 2008 on the composition, organization and operation of decentralized territorial entities and their relationships with the State and the Provinces. Under the influence of these two texts, it is expected, 40% withholding at source of revenue generated by a national decentralized territorial entities, namely the Communes.

[56] Chronic administration of the Municipality of Kadutu, p.1
[57] This acronym stands for "industries, small businesses and crafts."

It is easily understood that the handover mechanism exists in an unconstitutional and illegal, because of the lack of implementation of the withholding by the central government.

Note that even this handover, which could serve as a palliative to the 40% withholding at source is rarely applied. Recall that according to the report of the League of Congolese anti-corruption, the province of South Kivu has been cited among the provinces that do not lend to decentralized territorial entities of the money allocated by central government.

The non-implementation of the transition process and handover by the provincial government of South Kivu to the Municipality of Kadutu to utilize the revenue from various taxes has had slow down effects on the development agenda of the municipality.. At this level, another problem arises: it arises because the population is very hostile to taxation. It is therefore not surprising that the municipality does realize only less than 1% of forecast revenues. When questioned on the basis of this hostility to taxation, the population justified by the fear that proceeds from the tax only enriches executives. The weak performance of taxation is well justified by poor governance. In this regard, the proposal formulated in a memoire[58] in a submission is relevant. Speaking of the low productivity of the land tax in the town of Bukavu, the researcher had suggested that good governance is practiced that would meet the needs of collective interest. Without the practice of good governance, he added, the Administration will invoke the principle of good non-allocation of tax revenues which prohibits taxpayers to make the payment of tax by counterparty.

Clearly, the problems discussed above make precarious to communal public finances. The logical consequence of this is impossible for the Commune of Kadutu to achieve its objectives.

On expenditures, the municipality of the Kadutu lists them down as follows:

- The Mayors and Deputy Mayors: $ 400 USD as a premium on the revenue earned
- 5 liters of gasoline per day
- 3 liters per day per km
- The other agents: $ 38 USD per month and $ 1.5 USD per day
- The taxing 10% of the money taxed by day

The expenses are summarized as follows: 60% for staff bonuses, 12% for social intervention, 28% for the ratio of research and secret funds. According to a municipal official who requested anonymity, secret funds research is a sum of money deducted on income and allowing the City to conduct investigations on activities likely to disturb public order.

From the above, note that expenditures reflect the image of the recipes. They are kept to a minimum, and are made almost as current expenditures necessitated by the daily operation of the Commune.

With regard to the Municipality of Bagira, the revenue projection situation was as follows:

- Projection 2007: 57,049,381,830 FC
- Production: 9,935,567 FC
- Projection 2008: 88,349,818.66 FC
- Projection 2009: 561,802,754.43 FC

Of all these projections, the cash for the year 2007 was amazing. It took effect on the appearance of a purely fancy projection that did not take into account the economic reality of the Municipality of Bagira. Even the City deemed the richest of the city of Bukavu, in this case the Commune of Ibanda, can make a forecast amounted to tens of billions of Congolese francs equivalent to $ 63,388,202 USD. Regarding the realization of this fancy

[58] The memoire issue which was defended by Justin MASTAKI in 2007 at the Catholic University of Bukavu.

forecast, it should be noted that it is about 6000 times lower than the estimated amount, or $ 11039.5 USD. So there is no commune measure between the forecast and the realization. -This is a ridiculous prediction that discredits its authors, and also raises the question of the competence / technical qualification of the latter.

2008 and 2009 forecasts are more or less realistic. However it can be noted that the 2008 seems to minus or less ambitious. How to understand in fact that the 2009 can be six times that of 2008? Moreover, the amounts of achievements for the two forecasts have not been found.

As for public debt, the Municipality of Bagira expected to contract 2,208,116.25 FC for 2007 and 441,550 FC in 2008. Until September 30, 2007, only 4000 FC has been made, while in 2008, no amount is mentioned. For the prediction of debt for 2007, implementation was very ridiculous. This is partly due to the fact that communication is not credible in the eyes of creditors. They fear not being paid or reimbursed if they would grant loans or supplies to the Commune.

The main expenditures in the municipality of Bagira concern: the premium agents to motivate office supplies and drain gutters. The revenue of the municipality is lower, it is impossible to extend the expenditures to be made. However, expenditure by the Municipality of Bagira is essentially conceived as operating expenses necessary since "they ensure the progress of public services through the treatment of officials and building maintenance"[59].

4. The main sources of revenue

These are activities over which the Communes of Kadutu and Bagira receive such fees and the issuance of the acts which requires the payment of costs by the beneficiaries.

The Municipality of Kadutu collects taxes on business activities that are exerted in different markets. It should be noted that most taxes levied in the general market of Kadutu is from the City of Bukavu. Taxes accruing to the Municipality of Kadutu appear as follows:

- Patent on petty trade payable once a year: $ 20
- Tax payable dealer every day: 100 FC
- Tax Slaughter: $ 1 USD per cow
- Tax Package: FC 500 per cow
- Tax payable booth once a year: $ 2

Other laws are issued by the office of vital statistics information. These acts are labeled and priced as follows:

- Announcement of marriage: $ 2
- Registration of marriage: $ 20
- Extract of marriage: $ 5
- Celebration of Marriage: 140 USD
- Certificate of celibacy: $ 2
- Certificate of good conduct: $ 2
- Death Certificate: $ 2

It should be noted that death certificates are the subject of great negligence and ignorance on the part of members of the family of the deceased. This neglect, dictated by the fact that the deceased's family thinks that there is no interest in obtaining a death certificate,

[59] Wenceslas BUSANE, *Public Finance*, Notes, U.C.B., Law G2, 2007-2008, p.28.

lost revenue to the municipality. In addition, many families are unaware of the deceased that the issuance of such a document is a legal requirement. This ignorance of the law also produces an adverse effect on municipal revenues.

In view of the foregoing, the extension of the Family Code with the population and the imposition of penalties on recalcitrant families would bring other families who have lost one of theirs to declare the death so as to be issued with a death certificate. In doing so, the Municipality of Kadutu receive if not all, at least much of the revenue from the issuance of death certificates.

For its part, the Municipality of Bagira, like its neighboring Kadutu, collects revenue from taxes and various certificates[60] that it issues. The nomenclature of these taxes is as follows:

- The patent petty trade payable once a year:
  - Category 1: $ 11 USD
  - Category 2: $ 16 USD
  - Category 3: $ 12 USD
  - Category 4: $ 33 USD

- The tax dealer is 100 FC per day per individual merchant. On average, the municipality receives 10,000 FC per day per market.
- The slaughter tax is $ 2 per cow
- The tax package is 250 CF per animal
- The tax payable on the stand once a year is $ 2.

Compared with the collection of the tax, there is a problem in the municipality of Bagira. Indeed, state officials, who constitute the majority of the population who are either unpaid or paid ridiculously, do not accept to pay the tax and their wives. In addition, the product of taxation is also bounded below by the following taxing the dishonesty of many of them. The Municipality shall provide to them they must issue receipts to merchants who have paid the tax. Most unfortunately, the taxing their own counterfeit receipts they issue to traders instead of the receipts of the Commune. The money collected by the taxing counterfeiters goes into the pockets of those in the Grand dame of the Commune. It is difficult to measure the extent of misappropriation of public funds, it is nevertheless certain that they represent a serious loss to the Commune. The situation is particularly serious because the taxes are much the largest source of revenue for the municipality, if the provincial government of South Kivu to implement the return[61] that could be used as a palliative to the lack of restraint 40% to the source of revenue to the national[62] character generated by the Commune.

[60] Acts on which the municipality collects revenues from Bagira are identical to those of the Commune of Kadutu and are priced at the same prices.

[61] The handover means a mechanism for allocating resources by an entity of a higher level to lower entities. The procedure of the mechanism requires that the revenue generated by the entity below is fully transferred to the superior entity which, in turn, will send a portion to the entity that produced lower. It should be noted that the nature of receipts that are sent to the superior entity and therefore are subject to surrender the benefit of the entity that produced them, are determined in advance by a legal text. In the DRC, this mechanism has been established during the period of centralization as a means of administration, that is to say, before the promulgation of the Constitution of 18 February 2006 and the Organic Law of 07 October 2008 on the composition, organization and operation of decentralized territorial entities and their relations with the State and the Provinces. Currently, the mechanism is still in force, while the DRC has adopted decentralization as a management technique of some territorial entities that the Communes. It is practiced instead of withholding the source which ought to ensure the financial autonomy of Communes.

[62] The Organic Law provides in Article 115, the decentralized territorial entities that are entitled to 40% revenue share in the national character allocated to the provinces.

The taxing engaged in such practices should be prosecuted under the provisions that protect criminal public finances. Indeed, the Criminal Code[63] provides for sanctions against public officials who commit crimes related to public finances. These offenses are the diversion of public funds and bribery; and shall be punished by imprisonment of 2 to 10 years, any official or public officer, any person charged with a public service to be diverting public funds and private, in effect taking place, buildings, titles, certificates, household effects that were in his hands[64] or under or by reason[65] of his office. Will also be responsible to an imprisonment from 6 months to 5 years, all public officials or officers and any person charged with a public service that are guilty of extortion and ordered to charge, demanding or receiving what they knew or should not be exceeded for duties, taxes, contributions, interest income or for wages or salaries.

In the same point, the law provides criminal and punishes breaches of public faith. Of these, it aims to protect public confidence in the monetary signs and individual savings considered the wealth of the nation[66]. The law[67] sanctions and counterfeiting, forgery and imitations of banknotes and coins by a prison sentence of 2-15 years. It also punishes[68] fraud, deceit, and breach of trust.

5. The human and material resources

Initially, we will identify the human and, secondly, we will take up the material.

5. A. The human resources

There is no need to remind that entities can always function where sufficient personnel are available. The Communes of Bagira and Kadutu have a staff that allows them to move.

At the top of the hierarchy are the mayor and his deputy as the two heads of the municipal executive. The elections are not yet required; communal councilors' and elder men are not yet installed. Therefore, the Mayor and his deputy remain to this day, solely responsible for the Commune. In Bagira, these two officials are under orders and pressure from the provincial and urban or highly placed politicians. They do not hesitate to ask the officials of the Municipality of Bagira to act in one way or another, when they feel their interests are at stake. This practice varies in intensity depending on whether it's from the Commune of Bagira or that of Kadutu. Injunctions and pressure directed to this Commune are of low intensity compared to those suffered by the Municipality of Kadutu. This reason accounts for these financial and economic issues. Indeed, the Municipality of Bagira is the poorest of the city of Bukavu. In this respect, it does not attract enough interest on the part of those authorities. Another explanation, which is general for all Municipalities of the DRC, worth noting: it shows the method of appointment of municipal officials. They are appointed rather than elected. They are appointed not by objective criteria but rather on the basis of political affiliation. Thus, once appointed, they are afraid not to obey the instructions and to resist pressure to not be revoked. -This is a serious breach of the legal autonomy of the Communes. In addition to the Mayor and his deputy, the numbers of staff of the Municipality of Bagira appear as follows:

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[63] Read sections 145 and 146 of the Congolese Criminal Code Book II.

[64] It uses' in virtue of his office "if the goods had to be returned. This is the amount of taxes or taxes paid into the hands of the accountant or the taxes of the taxing officer.

[65] However, it is said "by reason of his office" when the transfer of values has been made to the person because he was not authorized to require but spontaneously as a result of the confidence that the situation demands it occupies. This is the case the amount of damages given to the clerk.

[66] LWAMBA KATANSI, "The financial control of the Transitional Institutions: Semantic analysis of the subject, determination of the transitional institutions and test inventory of various financial controls," *in Legal Journal of Zaire*, 1995, p.83.

[67] Congolese criminal Code Book II, art.116 to 120.

[68] *Idem,* art. 95 to 96 bis and 98 to 100

- 46 agents on status, including 6 women
- 33 staff on contract
- 21 economic officers
- 12 temporary taxing agents, including 8 women.

Questioned because of the preponderance of women among the taxing, the Mayor responded that this is justified by the fact that women are more cooperative and negotiating. It emerges from the reply from the local authority that has been appealed to women in order to implement the above mentioned two talents in the performance of their duties. Also, they do include negotiating with vendors who are also taxpayers. While these skills are essential, we must not confuse the relationship under private law and which involve negotiation with those of public law which are binding in respect of individuals. Like taxes, the tax is in fact binding on any person who performs a taxable activity subject to the exemptions. Thus, the fee is mandatory for anyone who is liable. Therefore, women taxing don't negotiate with taxpayers to get them to pay the tax. Consumption tax, taxpayers would negotiate with the impression that they pay depends on their goodwill. However, it means that the mandatory nature of the tax would accordingly be reduced.

- 4 heads of markets
- 5 secretaries, typists and messengers.

Apart from the 21 economic officers, the Commune of Bagira has 100 agents who are very poorly paid. These agents each receive a bonus at the end of the week, ranging between 4000 FC and 2500 FC or 4.4 USD and 2.7 USD. The low motivation reduces the performance of agents. Most of them also consider this work as a hobby they have to leave once they find employment opportunities in other services. It is therefore not surprising, coming to the Commune that the vast majority of agents are not at their posts. The explanation of these massive absences is that the relevant officials went looking for work.

With regard to training and retraining of staff, note that it is extremely rare for it to be recycled and where training seminars are organized by civil society, only the leaders are invited with the exception of two women of the office of civil status who have received training organized by the NGO "APRODEPED" and fifteen other agents that have been recycled by the National Institute of Professional Preparation at the request of the latter. It should be also noted an important training enjoyed by the amount of the Commune. This training focused on finance and was organized by the Provincial taxes.

It is imperative that there is need to improve the living conditions of officers of the Municipality of Bagira to increase productivity.

On the Commune of Kadutu, the Mayor and his deputy are on the top. Unlike their colleagues of Bagira, officials of the Municipality of Kadutu are undergoing intensive pressures. This is due to financial and economic challenges posed by the Municipality of Kadutu. Recall that the Commune is the second richest town of Bukavu after the Ibanda. It focuses enough interest from provincial authorities, urban and even national. Like the Municipality of Bagira and all Municipalities of the Republic, injunctions and castigated pressures arising from the above procedure for appointing municipal officials. Drawing legitimacy of their respective political parties, they have proposed appointment to the President of the Republic. For fear of losing their jobs, they toe the injunctions and to yield to pressure from the authorities above mentioned and in violation of legal autonomy granted to the Communes. In Kadutu, the mayor and his deputy aside, the numbers of staff are as follows:

- 87 economic officers
- 41 agents known as «New Units»[69] including 7 women
- 112 temporary taxing officers including 42 women

Note that the Municipality of Kadutu has 150 staff on contract, broken down as follows:

- 40% of heads of districts
- 30% of heads of services
- 30% for other agents

In connection with the formation of these agents, it should be noted that recycling is done for the agents of the civil-state. Whenever it occurs, it is the work of member organizations of civil society and some state institutions and not the municipality itself. As for the administrative staff, it was recycled and trained in computer science by the NGO "APRODEPED"[70]. In the same point, we can lament the lack of recycling and training over the budget and finances of the Commune. It is indeed common knowledge that the area of Budget and Finance suffers from a lack of technical skills and extreme dishonesty of agents who appropriate the modest municipal revenues.

On average, agents of the Commune of Kadutu receive 38 USD per month as remuneration. As for the taxing officer, they receive 10% of the money taxed per day. Of course, this remuneration is higher than that granted to officers of the neighboring Bagira. However, it is nevertheless modest in relation to the cheret of life in the city of Bukavu.

5. B. Resources

The resources of the Communes of Bagira and Kadutu are very limited. This has a negative impact on performance.

Thus, the Municipality of Bagira has only two computers donated by the NGO "APRODEPED" and who have no printer. It has three more old mechanical machines. It does not have a vehicle.

As for the Municipality of Kadutu, it has three computers, two of which received from the APRODEPED and the other of the Provincial Division of Finance, a vehicle and four typewriters. As for computers, note that not all are operational because of the non-permanence of electric current and the lack of security fence of the Office of the registry office where the computers were to be used.

III. SOME SOLUTIONS FOR A SUCCESSFUL LEGAL AND FINANCIAL AUTONOMY IN COMMUNE OF BAGIRA AND KADUTU

As indicated earlier, the Communes of Bagira and Kadutu find it very difficult to carry out the legal and financial autonomy in accordance with the Constitution and the Organic Law. In this regard, we believe that the following actions can be implemented to resolve these difficulties. These actions are summarized as follows:

- Put an end to interference from provincial and city authorities;
- Ending the stalemate of the municipal authorities;
- Apply the 40% withholding at source;
- Raising awareness on tax compliance.

[69] Called "New Units" means officers who were recruited and who are expecting a number. The latter, once obtained, confirms the recognition by the state of the recipient agent.

[70] The acronym "APRODEPED" means "Association for the promotion and defense of the disadvantaged."

1. Put an end to interference of urban and provincial authorities

Provincial and urban authorities interfere in the competences of the municipalities of Bagira and Kadutu. They are injunctions to them and give them orders despite the decentralization legislation. They behave as if it were still from the technique of centralization that continues to prevail in the DRC. This prevents the local authorities to take steps within their competence. It is essential that local authorities continue their attitude of resignation to the interference, and they denounce them by all legal remedies in the courts empowered. Moreover, the holding of elections in the Communes would be run by elected officials, who are accountable solely to the local population from whom they derive their legitimacy. Such elections, failing to stop the interference, significantly reduce them. This would allow decentralization to be effective in the Communes of Bagira and Kadutu. According to the Independent Electoral Commission, the elections will be held next year . In addition, an effort to raise awareness of decentralization should be undertaken in respect of provincial and urban authorities.

2. To end the stagnation of local authorities

The municipal authorities are less enterprising, while the decentralization legislation gives them sufficient power in which they can move. As they say, they have a flexibility that they do not understand to advance their respective entities.

The Municipalities of Bagira and Kadutu could begin development on the basis of projects initiated and developed by them. They should therefore show themselves enterprising enjoying enormous powers vested in them by their law on decentralization. This would be an effective remedy against the status quo.

3. Implement the withholding of 40% of revenue at source

This possible solution, which is of a general nature, is to the central government of the DRC. The non-application of the withholding of 40% at the source of national revenue generated by the decentralized territorial entities, has catastrophic effects on the financial autonomy of municipalities of Bagira and Kadutu. It is also clear from their budget which they expect that they are largely funded by either the deduction or by its palliative retrocession.

The central government should implement the withholding of 40% of the revenue generated by such communes to achieve financial autonomy accorded to them. Without this autonomy, decentralization itself is deprived of one of its essential elements. This would also allow retention of Communes of Bagira and Kadutu finance development projects in order to meet certain needs of their citizens.

4. Awareness of the tax compliance

The populations of the municipalities of Bagira and Kadutu, at least the most part, refuse to pay the tax. Revenue received as tax does not reflect the actual situation of the tax base. However, the sums are paltry compared to the number of taxpayers.

Given the above, the populations of these two entities should be aware of tax compliance that requires everyone to pay the taxes to which it is subject. This awareness could be done by audio-visual, press, display, announcements in churches...,

CONCLUSION

This study, which focused on the relationship between the Communes of Bagira and Kadutu with the Province of South Kivu in the context of the legal and financial autonomy, comes to an end. It follows the logic of decentralization that has been enshrined in the Congolese

constitution as a mode of management of some territorial entities. In this respect, the Constitution of 18 February 2006[71] and the Organic Law of 7 October 2008[72] created all the Communes of the DRC in decentralized territorial entities. As such, they are pledged to the legal and financial autonomy. The objective set for this study was to verify the legal and financial autonomy is actually implemented in the municipalities of Bagira and Kadutu.

It emerged from our analysis that the degree of implementation of the legal and financial autonomy in the Communes is extremely low. Underlying this situation are such as multiple orders of the provincial and municipal leaders addressed to urban and non-application of the deduction of 40% of the revenues of a national character generated by the two Municipalities. However, we found that the Communes Authority of Bagira and Kadutu are immersed in a standstill due in part to the fact that they are reluctant to take initiatives for fear of being contradicted by the provincial and urban authorities and find themselves in conflict with them. In addition, the non-application of the withholding of 40% of revenues generated by these communes national character leads them in a position of begging in front of the Town and the Province. These Communes are indeed forced to negotiate or beg for money from the Town Hall and the Governorate to ensure they work. Within this framework it is planned that the handover must be performed by the Province of South Kivu, including the benefit of Communes, and especially those of Bagira and Kadutu. We noted that even this handover, which is supposed to level the non-application of the deduction mentioned above, is not made by the Province of South Kivu. This has also been denounced by the League of Congolese Fight against Corruption (LICOCO).

To overcome these problems, we suggested that compliance with the law on decentralization by city authorities, provincial or national authorities allow communal of Bagira and Kadutu to fully and freely exercise their prerogatives. Moreover,, elections shall be held so that the Communes would be administered by officials elected by local people. And the legitimacy derived from the basis of political affiliation and not encourages these officials to take steps within their competence.

Regarding the issue of financial autonomy, we have advocated if possible an implementation of the 40% withholding at source of revenues generated by national character of the Communes of Bagira and Kadutu.

Our discussion was structured around three axes: the first touched briefly on the transitional legislation for the management of Communes of the DRC. It focuses more on the legislation of the Third Republic which established the legal and financial autonomy for the benefit of all the Communes of the DRC. Transitional legislation, we have seen, continues to apply in respect of the status of local authorities and the organization of elections to the urban, municipal and local governments. In this regard, the mayors and their deputies are still appointed by the President of the Republic on proposal of the Minister of the Interior. These local authorities will now be chosen by local people after the elections mentioned above. As for the law on decentralization, which is in force in the Third Republic, it confers significant powers in the Communes. It also provides sources of revenue to allow the Communes to have the means to exercise their recognized powers.

The second sought to understand how the legal and financial autonomy is implemented in the municipalities of Bagira and Kadutu. Our analysis revealed that this autonomy is almost non-existent, in practice, in both Communes. The decentralization legislation remains to date, a dead letter in both entities. Orders and injunctions are frequently sent to the municipal authorities of Bagira and Kadutu by urban authorities and provincial governments. Moreover, these municipalities have the financial resources mainly from their

[71] Constitution of 18 February 2006, art..3.

[72] Organic Law of 07 October 2008 on the composition, structure and functioning of the decentralized territorial entities and their relations with the State and the Provinces, art.5

paltry taxes collected locally. The withholding of 40% to the source of revenue produced by these communes national character does not apply. In this respect, note that the budgets of these municipalities are waiting for their largely be funded by the withholding of 40% of the revenues of a national character, and if necessary by the handover. We found that even the return is not applied for the benefit of both Communes.

The third sought to identify possible solutions to a successful legal and financial autonomy in the municipalities of Bagira and Kadutu. Thus, we proposed that an end to interference of urban authorities and provincial officials in the skills of Communes of Bagira and Kadutu. These leaders must end the parallel stagnation by taking initiatives as part of their prerogatives. We also suggested that restraint is applied of 40% to the source of revenues generated by these communes national character. Given that the majority of the population refuses to pay taxes, we proposed that it be sensitized in tax compliance.

The legal and financial autonomy is both essential elements of decentralization. It gives municipalities of Bagira and Kadutu a real opportunity to embark on the path of development, trying to solve their problems through initiatives cast in the form of projects. Therefore, the obstacles to autonomy should be removed. Its effectiveness depends on it.

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TAXATION AND LEVIES UNDER THE NEW CONGOLESE FOREST CODE (DRC)

By **Adolphe KILOMBA SUMAILI***

Since its existence, Democratic Republic of Congo is a geological scandal in all aspects. Its potential is enormous and multi-sectoral. It has riches both in terms of tourism, mining as well as forest. However, these riches are often exploited by few to the detriment of the Congolese people many who have generally remained paupers. Only few people benefit from logging. Thus the paradox of geological scandal transcends beyond the mining sector to logging as well.

It appears that the 2006 Constitution acknowledged this fact and included in Article 58 the provision that "All Congolese have the right to enjoy national wealth. The State has the duty to equitably distribute and ensure the right to development. "This may be a lever of the policy of good governance in the logging in the Democratic Republic of Congo.

The basic text of the Congolese forest law and its enforcement dates back to April 11, 1949. The implementation of this system has proven difficult in the political, economic, social and cultural life. It is thus observed that since independence to date, the Democratic Republic of Congo does not have a proper forest system. This legal framework would ensure balanced ecological and social functions of the forest and mainstream the forestry administration to contribute substantially to national and local residents to actively participate in forest management so as to draw maximum benefit.

The subject under consideration takes a holistic approach with particular emphasis on logging in the province of South Kivu. The important point to consider is the question of whether taxation and incidental taxation on logging has led to Congolese political exploitation or conservation of Congolese forests.

The approach to logging, taxation and levies becomes a basic tool that serves as a criterion to evaluate the policy of the Democratic Republic of Congo to the exploitation of forests. However, in terms of conservation, it would be interesting to know if the Congolese government can use taxation and incidental taxation to conserve forests and spend, thereby exploitation for better tourism or ecological purposes.

The first approach consists of the use of taxation and levies for the optimal exploitation of Congo's forests, as relevant as it appears, has a pitfall in that the topic under review is consistent with the Southern Province of Kivu where logging is still traditional, unlike the western part of the Democratic Republic of Congo, where industrial logging is and where figures are available. Speaking of logging these days is not a topical issue. It's more a perspective if that became effective industrial exploitation.

The second approach focuses on taxation and levies as a tool for forest conservation particularly in the Province of South Kivu where logging remains, as noted above, rudimentary compared to that practiced in the west of the Republic. Therefore, the scientific interest is important for this region.

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Whatever the approach taken under consideration, the operating result, for sure, questions the distribution of revenue to meet the socio-economic needs of local communities. So is the issue of the effectiveness of the provisions of the new forest code on the distribution of revenue from logging. This has led to the question of choosing between state-owned and participatory management (contracting)[73] of forests in the province of South Kivu.

The previous development raises many questions, raises concern, stimulates debate and polarizes the debate. Thus, some of these issues need to be asked as part of this work:

- How to organize the legislature does taxation and levies of logging in the new forest code and what are the appropriate bodies in the provinces?
- The provisions of the new forest code on how to manage resources from logging are they effective? If not, what is the alternative?
- Decentralization, is it the panacea to the paradox of geological scandal in logging in the Democratic Republic of Congo?

As a hypothesis, taxation and incidental taxation organized by the new Forest Code, effective from August 29, 2002, seems to the advantage of decentralized territorial entities of the Democratic Republic of Congo. This is clear in Article 122 of the new Code which provides for the allocation of revenue from logging between provinces and the central government by 40% to the provinces and 60% to the central government. With this reform, the legislature seems to echo some financial aspects of decentralization in the allocation of revenue from logging.

However, the effectiveness of those provisions is fully stretched along the lines of section 224 of the Mining Code, which provides the same allocation in revenue from mining. Let's say in passing that the question of the effectiveness will be discussed every time we do exegesis of the provisions of the new Forest Code.

Moreover, decentralization seems to be a partial solution for the sound management of revenue from logging for the benefit of local people.

This study will focus on logging in the province of South Kivu, under the new Forest Code. The interest of this study lies in the fact that the population of the Province of South Kivu whose logging is about to be industrial, will need to know revenue generated from it. Its people must also know the manner provided by law for the management of forest revenues. The methodology used in this article consisted of the exegesis of Law No. 011/2002 of 29 August 2002 on the new Forest Code in the Democratic Republic of Congo. We then compared the law to everyday realities in the province of South Kivu to ensure their effectiveness.

This work is intended as a reflection framework based on three points:

- Organization of taxation and incidental taxation in the new forest code and its management bodies (Article 120 and 111 of the new forest code);
- The issue of decentralization in the new forest code (very strong statement on the local forestry administration). We will explore the foundations of decentralization posed by Congolese legislator in the new Forest Code. We will devote an analysis of the provisions listed as *lege ferenda*.

I. The organization of taxation and levies in the new forest code

We will make an inventory of forest legislation in the Democratic Republic of Congo indicating the innovations introduced by the new law.

[73] Participatory forest management: what is management of recognizing local people the ability to manage forests according to the customs and habits to enable them to maximize dividends for grassroots development

A. Innovations introduced by the new Forest Code.

Congolese law has made several reforms in various areas of national life. Forty two years after the establishment of forestry system increasingly inadequate, it was urgent to make several reforms. In this context of obsolescence of texts, it has been noted that the legislature replaced the old forest system to introduce a new one.

Through these reforms undertaken, the Democratic Republic of Congo has recognized the role played by the forest ecosystem in the balance of the biosphere at both the international, continental, national and even local level.[74]

That is why this country has ratified many international conventions and is committed to align its domestic legal system in relation to the conventions ratified by it. In its statement of reasons, the Congolese Parliament believes that the new Forest Code is consistent with modern principles of resource management and international conventions on the environment.

The new forest code introduced several innovations, unlike the old legislation on forests.

At the institutional level, the Congolese state is now required to develop a national forest policy evidenced by a national forest plan to be revised periodically to reflect the dynamics of forest industrialization. The legislature has found better classify and declassify forests by ministerial orders following the procedure specified in the order of the President of the Republic. This Act provides for three categories of forests, unlike the old law which did not provide.

These are about classified, protected and standing production forests.

"The forests are by definition private areas of the state that cannot be occupied whether for logging or culture. Nevertheless, local residents are empowered to levy, for their needs, dead wood."[75] They are usually subtracted from the protected forests in response to a public inquiry for their concession.

Protected forests mean forests with a certain amount of rights or with a constitutional protection in some countries. This term refers to the forests where the indigenous species are legally accorded protection and are therefore protected from any further depletion.[76]

The production forest on the other hand refers to a reserved forest but which regularly provides wood for socio-economic purposes. With good management, harvest levels are offset by the planting and re-growth of the forest that will continue to produce wood indefinitely.[77]

In addition to the above innovation, the Congolese law has created d reform forest registry at both headquarters and the provincial administration.

If the mission of the provincial cadastre forest is to keep all contracts and maps relating to forest management, national cadastre forest, however, is called, while having the same mission, to build a database for the Ministry responsible for forests to develop forest policy based on reliable information.

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[74] Explanatory Memorandum to the Act No. 011/2002 of 29 August 2002 Forest code

[75] http://www.environnement.gov.ml/index.php?mact=News,cntnt01,print,0&cntnt01articleid=42&cntnt01showtemplate=false&cntnt01returnid=122

[76] http://www.sciencedaily.com/releases/2010/03/100316083719.htm

[77] http://www.freewebs.com/irwantoforester/definition.html

The latest innovation at the institutional level is the creation by Parliament of the Congolese National Advisory Council and advisory boards of provincial forests. The first deals primarily with planning and coordination of forestry at the national level while the second monitor forest management in the provinces and other decentralized units. They also give advice in the draft classification or declassification of forests.

Apart from the innovations made at the institutional level, a legislator operates other works in forest management. We can note the light of the new Congolese forest code, any forest to concede the subject of a discovery so as to make it free and clear of any right. This discovery requires the consultation of local populations of the forest to ensure social peace and quiet enjoyment of forests which is granted.

To ensure the sustainable development of natural resources, the Forest Code introduces two new concepts in the terminology of forest management that is *the forest inventory and forest management.*

The forest inventory is to assess the forest resource at a given time. In addition to the species and diameter of each tree inventory, other parameters can be met, such as people, height, soil type, grass plants, etc.[78]

The forest in turn consists of the rational planning of the management of a forest plot or ideally homogeneous or consistent.[79]

The development is a strategic tool that does not fit all and must be periodically updated. It is applied on a case by case, depending on the context and history. The Manager's assumptions, makes case works or simplifications for its technical and managerial choices, for example about the choice of species, the rate of replenishment, management step by step, in bouquet or clear-cutting, diameter or age fruiting "effective" rate and maximum number of trees per hectare folding, seasons of yards of cut, the maximum size of the cuts, the number of seed companies to keep per unit area, strategy of unloading, the amount of dead wood, large wood and dead wood and very large space to protect them from exploitation, etc..[80]

With this sense of innovation and clear distinction between the timber and the land grant, the law states that the timber is an interest in land "sui generis" as relating only to the woods. This real estate is accompanied by specifications in which specified the rights and obligations of contracting parties.

With the new forestry code, the timber can be acquired in two ways: one main award and the other exceptional, voluntarily. However, local communities, that is, in fact, local people can acquire for free timber on their ancestral land.

Comparing this code to the old law made by the decree of April 11, 1949, the law inserts into the forest system specific provisions relating to forestry taxation. This differs from ordinary taxation and aims to establish a forest taxation policy that is able to ensure both the sustainable management of forest resources, an incentive for better forest management and reconciliation of development goals the forest industry and the increase of forest revenues. All these innovations have their basis in both internal and external reasons.

Internally, the basic text of the Congolese forest regime and its enforcement dates back to April 11, 1949. The implementation of this system has proven difficult as in the political, economic, social and cultural life. It is thus found that for 42 years after its accession to

[78] http://www.cilss.bf/predas/telechargement/Inventaire%20forestier%20BF.pdf
[79] Benoît Boutefeu , "Forest in France: the search for sustainable management through history," in Vertigo-mail in the journal Environmental Science, vol. 6, No. 2, September 2005 accessed 27 September 2011.
[80] Ibidem

national and international sovereignty, the Democratic Republic of Congo had not yet developed a forest management system appropriate in legal framework that allows both the forest to complete, in balance, its ecological and social functions, the forestry administration, to contribute substantially to national and local residents, to actively participate in forest management to maximize profits.

Externally, the international community in general and the United States, in particular, are greatly aware of the importance and necessity of conservation of the environment. Just to be convinced, to count the number still in exponential growth of international conventions and agreements concluded in the environment. The summits have proliferated around the issues of environment and forests.

The innovations introduced by the new forest code was understood, it is timely to reflect on how it organizes the forest taxation and levies unlike the old law.

Resource management issues logging is one of the key issues in the politics of exploitation of forest resources and conservation. Since the dawn of time, the Democratic Republic of Congo has seen situations that did not promote its economic development and growth, so the standard of living of its population has remained at the lowest level.

Already the 2007 report by FAO on the situation of the world's forests provide valuable information on the sector and shows the vital role that forests play in maintaining the climate and ecological heritage of humanity[81]. In the same view, the report on forest conditions in 2006 established at the initiative of the Congo Basin countries[82] and external partners in the partnership for the forests of the Congo Basin (PFBC) emphasized the "poly functional "of the forest including the contribution of the latter in providing food, shelter, clothing and heating for the population.[83]

Indeed, the poly-functionality of forests due to the role more and more remarkable in the forest in the world today. Despite its non-negligible contribution to climate change, the forest is also used to maintain the ecosystem and biodiversity. The wealth of species can also be capitalized in pharmacy.

The main constant that emerges from these two reports lies in the non-reassuring status of forests in Africa. Indeed, Africa's forests over the years suffered a marked decline in their coverage. According to FAO, the annual net loss of forest cover was about 4 million hectares between 2000 and 2005 in Africa which is 55% of the loss of forest cover recorded in the world.[84]

Among the worst affected countries include the Democratic Republic of Congo. From 2000 to 2005, it lost nearly 319 thousand hectares of forest, a percentage ranging from 0.2%[85] to 0.33%[86] of the total area of its forests. Beyond the quantitative reduction of forest areas is the loss qualitative including some types of primary natural forests and the loss of people in endemic areas, which is a concern. The DRC is classified by FAO and the PFBC among the countries with advanced levels of deforestation[87].

The situation is alarming for the Democratic Republic of Congo in terms of forest fires. According to the Joint Centre of Research of the European Commission (CRE) has conducted a remote sensing survey on Wild land Fire in Africa, the DRC is among the leading in terms

[81] FAO, *State of the World's Forests* 2007, Rome, 143pp.www.fao.org/docrep/009/a0773f00.htm, accessed October 10, 2009.

[82] Countries that are part of the Congo Basin are the Democratic Republic of Congo, Cameroon, Congo / Brazzaville, Equatorial Guinea, Gabon and Central African Republic.

[83] PFBC, *forests state* in 2006, pp.1-256 on http://www.cbfp.org.org/documents/Les-forêts-du-bassin-du-congo-etat-2006.pdf

[84] FAO, State of World's Forests 2007, p.5.

[85] *Idem*, p109

[86] PFBC, *forests state,* 2006, p84. This report estimates the loss at nearly 339 thousand hectares or 0.33% in 2005

[87] FAO, State of World's Forests 2007, p.5.

of forest fires[88]. The study notes in particular that "Africa contains sixty-four percent of the global area ravaged by fire in 2000, when 230 million hectares were destroyed by fire, or 7.7% of the total lands of this continent. A follow-up study in 2004 found similar results »[89] The same study noted that "in accordance with what was reported in 2005 at the Regional Conference for Africa of FAO (...), two areas where fires are frequent particularly stand out: the first consists of northern Angola and southern Democratic Republic of Congo ... "[90] This picture is dark and draws our attention to know the exact causes. However, far from the list, it is important to raise some important questions: Is it because of armed conflict? Poverty growing? On the ineffective or inadequate legislation? In inequitable distribution of resources? Or more generally a lack of good governance? Among these, those of inadequate legislation draw our attention in this study and justify the reform made by the Congolese legislator.

Still speaking of the environment and its importance in today's world, it is important to note that the last summit in date, which attracted a large number of players in the field of forest conservation and global warming, is Copenhagen among other objectives to reduce greenhouse gas emissions and forest conservation.

In May 27, 2010, the city of Oslo hosted over 50 national delegations for a conference on climate and forests. The purpose of this meeting was the implementation of a program to fight against deforestation. For the DRC, the Reduced Emissions from Deforestation and Forest Degradation (REDD) provides support for up to two million dollars.[91]

REDD aims to reduce the destruction of forested areas in these countries by half by 2020 and to eliminate it by 2030. It also aims to encourage rich countries to fund projects to protect forests in the South. According to the Office Program of the United Nations Environment Program (UNEP) in Kinshasa, the other objective of this conference was to create an agency to monitor the financial assistance provided to poor countries to protect their forests.[92]

Before addressing the issue of taxation and levies taxation and management bodies under the new Forest Code, it is imperative to highlight the forest landscape of the Republic of Congo and increase the gap between it and living standards of the Congolese people.

B. Forest landscape of the Democratic Republic of Congo.

It was noted, without effort, a gap between the living standards of people and natural resources. Yet the Democratic Republic of Congo is home to the largest forest in Africa and the second largest tropical forest in the world[93]. It has a forest cover ranging from 128 to 170 million hectares[94], or 47% of the forests of Africa, half of them in rain forest and the other half in open forest and savannah.

For lack of serious inventory, lack of resources, given the extensive nature that is not estimated. The DRC is the first African countries by the extent of its forests and most important for preserving the global environment. *This is the second largest rainforest in the world after Brazil and the fifth largest forest in the world after Russia, Canada, the United States and Brazil, to Indonesia, Malaysia and Papua New Guinea.* This group of countries, the Democratic

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88 *Ibidem*

89 *Idem*, p.7

90 *Ibidem*

91 FAO, State of World's Forests 2007, p.5

92 www.radiookapi.net accessed on May 29, 2010.

93 Introduction by Mr. Armand De Decker, Belgian Minister for Development Cooperation at the Brussels International Conference on the sustainable management of forests in the DRC, Palace of Egmont, 26 and 27 February 2007.

94 Permanent Service of Inventory and Forest Management (SPIAF), 1995, forest map synthesis of Zaire, FAO, 2005. Global Forest Resources Assessment .http :/ / www.fao.org accessed 27 March 2010.

Republic of Congo is the least industrialized.[95]

Forest ecosystems of the Democratic Republic of Congo contain a large number of plant and animal species that put it in a good position on the world and Africa. Democratic Republic of Congo is the fifth in the world for its plant diversity. It is the first African-wide regarding the diversity of mammals and birds and third in plant diversity after Madagascar and South Africa. It has 409 species including mammals, 1117 species of birds, 400 species of fish and more than 10,000 plant species.[96]

There are four natural World Heritage sites: the Virunga Park (since 1979), Garamba (1980), Kahuzi-Biega (1980) and Salonga (1984).[97] These sites are home to rare and peculiar species. The rate of endemism among plants and small mammals are also high, "6% of its mammals and 10% of plants were found in the DRC. The country contains 12 of the 30 centers of plant endemism in Africa identified by the NCU and the WWF. It also contains two areas of endemism of birds identified by Birdlife International."[98]

Paradoxically, despite all these riches, the Congolese people are among the poorest in the world.[99] Analysts of the world in this field agree on this point: "There are few other countries in the world that are both economically and as dilapidated as rich in natural resources" [100] or still "... the negligence[101] of the past resulted in the paradox of a people economically poor in a country naturally rich." Therefore, the situation in the Democratic Republic of Congo is unique in several respects notably characterized by the gap between poverty and population abundance of natural resources.

This paradox is no longer part of a shadow of a doubt, the World Bank representative in the international conference on management of forests in the DRC, as a wish, said: "May the newly elected institutions absorb the paradox that afflicted the DRC throughout its history: that of extreme poverty in an extremely economically rich country in regard to natural resources, can now enjoy the extraordinary natural heritage to the Congolese people, while continuing to serve the global environment. "[102]

All the same it is simple to make the remark, the same paradox continues its way of a good man without any difficulty. The Congolese people, in general and South Kivu, in particular, continue to languish without hope, in an indescribable misery.

It is obvious that this paradox is due to several causes to be found in various areas. It seems that the main cause, and not exclusive of others that may exist, is to be found in the type of governance set up by the political and administrative authorities. This view is corroborated by the report prepared by the consulting firm ARD for Development Cooperation of the United States (USAID), which had sponsored.

It states that: "the danger that hangs now on the forests of DRC is in weak governance, that is, the probability that the government is unable to properly regulate access to forest resources and, once the concessions granted to control the operation within these to ensure that the limits of the concessions are met. The fact that the government has no ability or

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[95] SPIAF Annual Report, 2000, p.10.

[96] Quoted by L. DEBROUX et al, *Forests in DRC post-conflict*. Analysis of a Priority Agenda, p.13

[97] See the site of biodiversity in the DRC on www.biodiv.org

[98] *Ibidem*

[99] According to the PRSP, the DRC has grown backwards. Gross domestic income per capita was 380 dollars in 1960, the second after that of South Africa, and now sails around $ 100, or about 29 cents a day. The report titled German cooperation: the DRC's natural resources-development potential released in April 2007 states that the current trend were to continue, the DRC should not reach most of the Millennium Development Goals set by the UN, p.5

[100] Final report of the Trust Fund for strengthening governance in the forestry sector in the post-conflict situation in the DRC, in June 2005, p.5, no.8

[101] L. DEBROUX et alii, *op.cit*, p.12.

[102] www.conforrdc.org: Read especially the speech of Mr. S. LINTNER, World Bank representative at the International Conference on the sustainable management of forests in the DRC held in Brussels in February 2007.

willingness to control the local and foreign concessionaires could mark the beginning of widespread logging which could quickly deplete the country's timber resources."[103]

The same report continues as follows: "It is not simply to restore governance systems and revive a stagnant economy, but the challenge is much more difficult to reform completely the current system of economic governance which is unsuitable. It will, for that, check the criminal and corrupt system, and gradually replaced by transparent systems and institutions, which are fair and democratic. "[104]

The management system for forestry taxation was characterized by the centralization of environmental expertise for the benefit of the central government and a lack of political will to develop laws and regulations for the implementation of the policy of natural resources. The State, and especially the central government, through the Minister of Environment and the headquarters of the Department of the Environment located in Kinshasa, has virtually absolute powers of management and administration.[105] This state of affairs has not changed with the new forest legislation as will be noted later in this work.

It turns out that not only the central government does not develop local forestry administrations of substantial financial and logistical means to ensure their mission, but does give them little legal powers to take action. All taxes collected by local governments should be sent to the central government, which then is reluctant to surrender even a franc. It should be emphasized in the meantime that centralization can be understood as a system in which the administrative decision-making is concentrated at the top of the state, that is to say at the central authority, and more specifically, the departmental authorities. Administrative tasks are concentrated in the hands of the state that assumes a hierarchical and unified administration[106]. It is also the system where no right of initiative of subordinate entities is recognized or promoted. It executes that decided by the central government. Much better said with Professor Garry SAKATA that *centralization can be summarized in the verticalization of Powers*.[107]

This system of governance based on centralization has produced adverse effects on the Congolese people.

In this context, the Democratic Republic of Congo has made an ambitious reform of the forestry sector, which aims to contribute to macro-economic development, conservation of nature and improving the living standards of the population. The need to balance the needs of private forest companies, government requirements and those of local people is the basis for the 2002 Forest Code, developed under the auspices of the World Bank.[108]

Article 20 of the new Forest Code provides that "no forester, no exporting or processing of forest products can, regardless of the tax which it is subjected, be exempt from payment of duties, taxes and royalties in accordance with this law or its implementing measures." Already this provision excludes favoritism built most of the time in system of governance in the Democratic Republic of Congo.

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[103] S.COUNSSEL, "Forest governance in the DRC. The perspective of an NGO "Forest and the European Union Resource Network, March 2006, p.25

[104] S.COUNSSEL, *op.cit, p.26.*

[105] Garry SAKATA M.TAWAB, The governance of natural resources: from centralization to a decentralized and participatory, where forest resources in the Democratic Republic of Congo., PhD thesis, UCL, 2008-2009, p.24.

[106] Under Congolese law, F. Vunduawe te Pemako, Treaty of administrative law, Larcier, Brussels, 2007, p.405.

[107] Garry SAKATA…,*Ibidem*

[108] Theodore Trefon, *The forest sector reform in the Democratic Republic of Congo: social challenges and institutional weaknesses,* http://www.cairn.info/resume.php?ID_ARTICLE=AFCO_227_0081 consulted on May 25, 2010.

No trader can benefit from any exemption. Exploitation must be subject to tax obligations by the new Forest Code. By this provision, the legislature considers the Congolese forestry sector as part of its tax base. However, the implementation is always difficult to follow. The texts of laws of the Republic of Congo suffer from a problem of effectiveness. Policy implementation is often lacking.

The legislature provides in Article 122 of the new Forest Code, that: "The products of forest taxes and fees are paid to the Treasury account and distributed as follows:

- Acreage Fees: 40% of the decentralized administrative entities wood forest products and 60% in the Treasury.
- Slaughter Tax: 50% National Forest Fund and 50% in the Treasury;
- Export Taxes: 100% to the Treasury;
- Taxes of deforestation: 50% to the Treasury and 50% in the National Forest Fund;
- Taxes reforestation: 100% National Forest Fund. «

In paragraph 2 of that article, the following provision is expected: "the funds resulting from the allocation referred to in paragraph 1 of this section in favor of decentralized administrative entities, *are used exclusively to carry out infrastructure Basic Community interest* '. The legislature continues to in paragraph 3 of that article, those funds rightfully belong, with 25% to the province and 15% distributed to the entity concerned.

In the fourth paragraph it is stated that these funds are paid into an account of the respective administration of the province and the city or in whose territory the operation takes place. If it is true the Congolese Parliament have to implement reforms in this attractive sector, it is, however, unfortunate that these provisions remain a dead letter. *It is a serious problem of their effectiveness. The legislature did a good job of outlining the idea of decentralization on the management of forest revenues.* Already, it predicted the spirit of the current Congolese constitution for the Third Republic, which provides that 40% of revenues are reserved for decentralized administrative entities and 60% to the Treasury.

Of course, it would be absurd to say that the legislature has decentralized the management of forestry revenue as long as the text is silent with respect to the management bodies of the latter. Hence, the need for legislative reform to set the management bodies of the windfall forest in province. To take shape, decentralization requires the creation of management bodies in the provinces. Thus, Article 122 of the new forest code lays the groundwork for the financial autonomy of the provinces in logging.

This provision of the Forest Code suffers from a lack of regulatory enforcement. In fact, other jurisdictions and players play only the role of performers. Indeed, "the excessive centralization of national structures logically leads to a model of Directors of the Napoleonic type, that is to say prescriptive, and not very suitable for the management of problems related to environment and development"[109] and it's very inefficient.

Despite the option exercised by the legislature, the central government continues to use the centralization of the rest which was repealed by the constitution of February 18, 2006. Failure to follow the text continues to maintain a system to the detriment of the Congolese people living on logging.

Up to date, these provinces have a logging industry which hardly benefits from any of their revenues granted by the new Forest Code. They still lack sorely infrastructure with a general lack of development indicators. This is the case of the Province of Equator, Eastern Province, to name a few. As of July 6, 2010, the Governor of the Province of Equator was to prohibit the

[109] S. DOUMBE-BILLE, "Evolution of the institutions and means of implementation of the Environmental Law and Development", EJN, 1-1993, p.34.

export of unprocessed logs.[110] By this measure, the Governor intends to encourage loggers to install the saw mills and the wood processing industries locally to create jobs for the benefit of local communities.

The Province of South Kivu where logging is still a tradition, currently and in the future, in the short or medium term, will see its working forests at high risk of being in the same situation. This province has an abundance of forest reserves in the territory of SHABUNDA which is concentrated largely in BUNYAKIRI in Kalehe where forests are being decimated for massive domestic purposes in Mwenga in the forest of ITOMBWE and of course in park of Kahuzi-Biega.

Already, the province is a victim of the paradox in the mining sector. The same paradox is likely to implement the forest plan. It is urgent; it seems to be that these texts are disseminated to the base in the territories concerned primarily namely Shabunda, Mwenga, Kalehe and Kabare. With this extension, the public becomes aware and will put pressure on the authorities in power to enjoy their rights properly.

Also, the provincial authorities must take ownership of the provisions of the new Forest Code to press more on the central government. *A plea to that effect from the central authority is an emergency*. This is how the central government will waive the centralization, which in the example of other factors, continues to maintain the Democratic Republic of Congo in the childhood of humanity since its independence.

Faced with these current weaknesses, it is unlikely that local people benefit from reform in this sector. That is confirming that the Democratic Republic of Congo is not a rule of law, because the equitable redistribution of wealth is totally absent.

It is urgent that the central register on the path of respect for the rule text of the rule of law in resolving questions of national life is a characteristic element of the rule of law. The Constitution of February 18 has clearly defined the shape of the Democratic Republic of Congo as a highly decentralized state. This decentralization should already be applied in terms of financial independence. Policy based on near-absolute authority of the state results in the mechanisms of exclusion of others while in this area would "reverse the traditional principle of Directors, and give greater autonomy to the basic social structures."[111]

After explaining the manner prescribed by the Congolese legislator on the distribution of tax revenues from logging between central and decentralized administrative entities, discussed to highlight the bodies responsible for management and administration forests. Also, it is necessary to specify at the outset that his organs are deprived of all legislative power in forestry.

Still in the light of the new forest code, it is anticipated management institutions and administration of forests in Article 24 to Article 35. It is willing to Article 24 that "the responsibility of management, administration, conservation and monitoring of forests and the police department with the responsibility of the forests within its remit." Apart from the Ministry responsible for forests within its remit, it is also created at the national and provincial cadastre forest and a national advisory council of forests and provincial advisory boards. These are the three bodies set up by the new forest management and forest administration.

These bodies have naturally various missions. The ministry with the forest retains its powers to the top of the pyramid in terms of ranking, as the responsibility of the management,

[110] www.radiookapi.net accessed July 6, 2010.
[111] S. DOUMBE-BILLE, *op.cit.*, p.34.

conservation and monitoring of forests and the police, vested by section 24 of the new Forest Code. Under the law, the department is constantly working in collaboration and consultation with other departments whose functions may affect the forestry sector. It also works with other stakeholders, including the economic private sector and non-governmental organizations working in this field.

The new forest code provides the Minister with the forests in his attributions may delegate his signature to others. In Article 25, the Forest Code provides that the Minister may, by order, delegate all or part of the management of forests to legal persons under public law or associations of public benefit in order to protect and enhance them and to conduct research or other activities of public interest.

He may also delegate, under section 26 of the new forest code, in whole or in part, the powers under this Law, the Provincial Governors, *except the power to regulate its rightful order inalienable*. Despite the fact that Parliament has laid the groundwork for decentralization in the new forest code, it is nevertheless true that more work needs to be vis-à-vis the options exercised by the constitution of February 18, 2006. This constitution gives provinces a large autonomy. This was reinforced by the law on the principles of self-government of provinces of the Democratic Republic of Congo.

Under the new constitution, the provinces are headed by provincial governors, who are the provincial governments and who have provincial assemblies features. The provincial governor should have wide powers in the administration and management of forests. Hence the urgent need to revisit the new Forest Code in order to adapt to the realities of the current administrative of Democratic Republic of Congo. The provincial government, through the provincial Ministry of Environment should have more powers in this matter.

In light of the new Forest Code, the Minister having the forests within its remit is to provide responsible administration of resources and appropriate instruments to enable it to ensure effective implementation of this Law and its implementing measures.

According to Article 27 of the new Forest Code, the Minister must provide the services responsible for operations and seizure of hammering; hammer forest whose imprint is made to the Ministry of Justice and Keeper of the Seals.

Like most pieces of legislation of the Republic of Congo, the provisions of the new forest code suffers badly from a serious problem of effectiveness. The services of the Ministry of Environment did not escape the debacles that continue to be experienced in the Congolese administrative government.

In the Province of South Kivu, the Provincial Division for the Environment has no necessary and sufficient means to conduct business. The logistics are absent and the bureaucratic infrastructure is poor. The staff is almost absent due to a wage policy of misery. No database is available with the exception of archives dating from the colonial era, which to date have not been updated.

The central government centralizes all the powers and requires the immediate transfer of all taxes collected at the provincial level. It does not listen to the return for the running of its office located in the provinces. It then follows the underhand practices, influence peddling, cronyism and of course, corruption in the management of the forest estate in the Province of South Kivu. Decentralization of the forest estate is an emergency to revitalize the forest sector not only in the South Kivu Province but also in all other provinces with the forests of the Democratic Republic of Congo.

The provincial Ministry of Environment should have more authority and autonomy of decision, as it should also be done for the mining sector, in terms of management and administration of forests. It will of course work with the national ministry.

The second body established by the new forest code in the administration and management of forests is the forest Cadastre, as the Mining Cadastre for the mining sector. The Forest Cadastre is created at both national and provincial levels under Article 28 of the new Forest Code. It is responsible for the conservation of arrested classification and declassification of forest, forest concession contracts, deeds of assignment of forests to local communities, orders awarding the management of forests, orders of delegation power of forest administration, cartographic, all laws of real rights, encumbering the laws listed in bunks b, c and d above. The Minister having the forests in its attributions determines the modalities of organization and functioning of the forest Cadastre. As we have already invoked the forest cadastre works under the supervision of the Ministry responsible for forests within its remit. The forest cadastre can be held in a locality if necessary. To date, it must be remembered that it is the Ministry of Environment which administers the forests.

In the province of South Kivu, there is not yet a forest cadastre, eight years after the promulgation of the new Forest Code. However, by examining the powers of this body under the new forest code, it appears that it is solely responsible for the conservation and is not provided with additional powers.

That said, the administration of the sector continues to cause problems until the installation of the division of the environment in the province which exercises powers under the working conditions of its own. Alternatively, the Provincial Governor and provincial MPs should increase pressure on the central authority in order to install this important service in the provinces. In this way the problem of the effectiveness of the provisions of the new Forest Code will be solved. Of course, the need for reform is still required. But the implementation of this service in the province would be a big step in the rationalization of management in this sector. *However, the reform incorporating aspects of decentralization remains a panacea.*

Still speaking of the reform in the management of forestry revenue, it should be noted that the technique implied repeal of several provisions of the new forestry law in the Constitution of 18 February 2006 and the law on principles of self-government of the provinces. The law clearly defines how the provinces will be administered under the option of decentralization lifted by the new constitution. *Thus, contrary to all the provisions or to the constitution are automatically tacitly repealed by the legislature. However, legislative reform of the new forest code retains its weight in gold with respect to aspects related to the management bodies of the windfall forest.*

The third body set up by the new forest management and forest administration is the National Consultative Council of forests and provincial advisory boards of forests under Article 29 of the new forest code of which the organization is functioning and composition are fixed respectively by decree (order to date by the constitution of February 18, 2006) the President of the Republic and Minister's order.

It is clear from this provision that the President of the Republic is also involved directly in the field of environment beyond the minister. This adds further decision-making process with regard to the latter of the two organs. *Decentralization would also once again avoid the mad administration.*

The National Advisory Council of forests is responsible for advising on planning projects and coordination of forest policy, projects relating to forest management rules, any method of classification and declassification of forests, any proposed legislation or regulations relating to forests and any issue it considers necessary relating to forestry. Again, the law weakens the powers of the board because its opinions are only advisory. The authoritarian decision may or may not be considered. He can also do without engaging its responsibility. Provincial Advisory Council on Forestry advises on all draft classification or declassification of forests in the province and, in general, on any matter referred to it by the Provincial Governor. It may refer to the Governor of any issue it considers important in forestry. The

members of this council can access in the performance of their duties, all forest concessions. Here too, this body is not yet in the province of South Kivu. The Environment Division practices it, awaiting its functions.

Having examined the bodies responsible for management and administration of forests in the DRC, it appears that the principal in decision-making in the field of forest management remains with the minister of forests in its powers, to date the Minister of Environment. He works in collaboration with other bodies whose powers are largely limited to the preservation or advisory opinions. The provincial governor cannot decide in this matter by delegation of the minister of forests in its functions.

The Forest Code deserves a revisit to the creation of bodies responsible for the management of forestry revenue in the provinces. This reform would help provinces to benefit from the financial provisions of the new Forest Code to their advantage. In this context of decentralization, it is urgent that this reform to be effective in the provinces, the forests are now managed by the Provincial Governor, the Provincial Ministry of Environment assisted by the division of the environment, the Provincial Advisory Board in collaboration with the large national Department of Environment and Forest Land Registry.

It is important that the Forest Code is reviewed in accordance with the provisions of Articles 202 to 220 of the Constitution of the Third Republic. Development Programs like agriculture, forestry, energy, national interest and coordination of programs of provincial interest is part of the exclusive competences of the central government under Article 202, paragraph 25 of the constitution of February 18, 2006, as the land use, water regime and forest appears in paragraph 16 of Article 203 of the Constitution which defines the aforementioned concurrent jurisdiction between the central and provincial power. Also, among the exclusive powers to the provinces, the development of agricultural and forestry programs and their implementation appear under section 204 of the constitution.

The fact of finding the forestry sector both in the exclusive powers of the central authority in the concurrent jurisdiction between the central and provincial authority and the exclusive provincial jurisdiction is inclined to think that it is possible to set up while respecting the principles of decentralization, a common policy between the central and provincial power management and forest administration.

Thus, decentralization is seen as a solution to the paradox of geological scandal in logging in the Democratic Republic of Congo. Far from seeing in the aforementioned constitutional provisions conflict of duties, national and provincial authorities concerned should instead find an opportunity to work more for the sound management of logging in the Democratic Republic of Congo.

Since decentralization has more merit than disadvantages, it is important to examine and discover what it would bring lasting solutions to the problem of geological scandal and forestry in Democratic Republic of Congo.

II. Decentralization of forest taxation, a panacea to the paradox of the forest scandal in Democratic Republic of Congo.

In this second point of this research, we will consider successively the rationale for a decentralized forestry taxation and making proposals for *lege ferenda* on the modalities of payment of the revenue to decentralized administrative entities (A), the risks inherent in a emerging process of decentralization (B) and decentralization as a way of approximating the population of the organs of decision making (C).

A. Reflection on the rationale for a decentralized forestry taxation and proposals for *lege ferenda* on the terms of payment of proceeds to decentralized administrative entities

Fiscal decentralization is a valuable tool for implementing policies for the benefit of basic entities. If transfers of power are not accompanied by transfer of resources, decentralization is likely to remain theoretical. In forestry, the current Forest Code is the first text to introduce the concept of forest taxation. Its explanatory memorandum explains that "forest taxation differs from ordinary taxation and aims to establish a forest taxation policy that is able to ensure both the sustainable management of forest resources, incentives to better forest management and a reconciliation of development goals of the forestry industry and the increase of forest revenues."[112]

The Forest Code fails to acknowledge the role of taxation in relation to local authorities. By transferring the funds of the central government to provincial and local taxes by the form of provincial or local taxes, or by allowing state and local entities retain direct or indirect taxes raised so far by state by taking a percentage of all taxes collected, fiscal decentralization contributes to the development of lower entities[113]. Import duties, taxes and charges are provided on the land granted, slaughter, export, reforestation and deforestation.

The Constitution of 18 February 2006 has identified the area as the last step of the decentralized administrative entities. The funds resulting from this distribution are used exclusively to achieve the basic infrastructure of Community interest. They are paid into an account of the administration of the province, city or territory in whose exploitation takes place.

As the Democratic Republic has been characterized for decades by management based on centralization, this provision of the new forest code polarized controversies and create differences over interpretation. This article (122) of the new forest code gives rise to two types of interpretation regarding the transfer arrangements. The central authorities of the Democratic Republic of Congo argue that the fee must be paid directly and entirely to the Public Treasury account by the operator, which lends the part due to the decentralized entities.

For their part, the decentralized administrative entities and civil society believe that the operator must pay directly to the provinces 25% and 15% in the decentralized administrative entity under section 122 of the Code under review. A priori, the payment of the fee to one or the other entity should not be a problem if the Congolese government was functioning normally, which unfortunately is far from the case.

Indeed, if the fee is paid to central government, often the part due to decentralized administrative entities they are not surrendered, either because they do not have a bank account, or because the banking system is non-existent or finally, because in the path between the central and local destination, resources are dissipated, amputees or drawn off. As par *lege ferenda*, it is important that the terms of payment of the proceeds from timber royalty to be rethought. The Forest Code for the license fee on the amount granted, exclusively, to the achievement of basic infrastructure of Community interest, such as road construction or repair of school or hospital construction fountains, etc.. In this paper, we concur with Professor Garry SAKATA for a direct payment in favor of the jurisdiction of the place of decentralized operations.

The margin of local authorities is limited by law for the destination of these funds would require that the local decentralized administrative entities organized in local management committees of forestry fees prior to its payment. This committee would include local

[112] Explanatory memorandum of the new Congolese Forest Code
[113] Garry SAKATA, *op.cit*, p.245.

authorities, opinion leaders in the middle, group leaders and heads of communities, women and youth. This committee will develop a concerted project of Community interest.

Under the control of the executive committee and the local government concerned and through the power of control exercised by the entities hierarchically superior to the local EAD, the operator could help achieve the construction of infrastructure up to the agreed amounts due.

If decentralization is a solution already approved by the Congolese Parliament, it has risks, however, if its application is not monitored or is premature.

B. The risks inherent in an emerging process of decentralization

Decentralization, as it appears healthy, there are risks in developing countries. In such countries as the Democratic Republic of Congo, where decentralization is not yet well done, there are still some doubts and misgivings on the part of central authorities to transfer permanently and significant skills and resources as provided by the legal existing instruments.

This is not specific to the DRC or Africa. The OECD cites Nicaragua where "while decentralization formally delegated broad functions to local authorities to ensure local development, the National Assembly was responsible for the approval of municipal budgets, thereby reducing greatly the political powers and resources at local levels."[114]

The Central Authority refuses to transfer skills arguing that local authorities do not have the experience and capacity to manage natural resources so they can acquire such skills if they do not transfer.

J. JUTTING et al, write about it: "The central governments tend to justify their interference in local politics by emphasizing the lack of local capacity. However, this argument usually hides a real reluctance to delegate authority. The experience of countries like Indonesia, Morocco, Pakistan and Thailand shows that in the years following decentralization, local governments are able to increase low, indeed, their abilities. Delegation of authority may result in the learning process by doing that, thanks to initiatives by local authorities, helping to strengthen their capabilities."[115]

Thus, the risks should not be seen as barriers to decentralization but as elements to consider in a comprehensive strategy to implement a process of decentralization.

Similarly, arguments about the capacity are systematically used by the central ministries to block the transfer of powers to local authorities. There is a certain aversion from the central government to delegate authority before the evidence of competence is made, but without power, local authorities lack the conditions to gain the experience necessary to prove their ability. Similarly, there is no basis to demonstrate that the ability was acquired. Both players are now drawing daggers. None of them dares to take the first step. At the same time, local people continue to suffer.

Moreover, arguments based on lack of capacity are often used as an excuse rather than being fair reason not to delegate authority. Strategies must be developed to address and resolve this problem. The central authorities shall, first, delegate the powers to enable local authorities to enter the sphere of governance and decision making.

[114] J.JUTTING, E.CORSIS, A. STOCHMAYER "Decentralization and Poverty Reduction", Insights, No. 5, OECD 2005, p.1
[115] *Idem*, p.3

It follows from this that the implementation of decentralization in the forestry sector is a dangerous issue, if left unchecked; the results can be catastrophic for the population which continues to be poor while the elites in political administration and industrial investors get richer in an insolent manner.

Although there is a risk in case of a premature application and unsupervised, decentralization contributes significantly to the approximation of the administration of the governed.

B. Decentralization as a way of approximating the population of the organs of the decisions.

Decentralization applied in forestry brings the citizens living in the forest where decisions are made about the forest. In so doing, it helps to build local democracy by providing a dynamic discussion and dialogue on forest management. In this case, management takes into account local conditions and increases, consequently, the effectiveness of decisions. Indeed, the transfer of powers to the local entities opens the way for the establishment of democratic institutions in which farmers can participate, make decisions and defend their interests.[116]

A better understanding of the environment and more open competition lead to a better match local needs and better policies. These improvements will create efficiencies in the operation and service delivery in particular. Any decentralized system building the capacity of citizens' control over officials and local politicians, opportunities to achieve greater transparency and thus reduce corruption and improve overall local governance, are increasing. The improvement of local governance should help to reduce the vulnerability of the poor.[117]

Decentralization has a positive impact on poverty reduction since it allows the poor a greater voice and improves their access to better quality public services, reducing their fragility. The granting of authority, such as monitoring, logging, construction and repair of roads, bridges, schools and health centers for the license transferred to the benefit of local entities contribute to the improvement of living standards of local communities and villages.

These activities also help create local jobs and reduce economic and social tensions. As a result, the income of local people increases. Thus, decentralization can also be seen as an instrument of reducing poverty among local communities.

CONCLUSION

This article has focused on taxation and incidental taxation in the new forest code: bodies, management arrangements, issue of the new configuration of the state. In this work, it was discussed thinking about the management of taxation and levies of logging. To get there, it was, at first, just to meet the innovations of the new Forest Code of the Republic of Congo. With this reform, the Congolese Parliament has set up provisions for the now decentralized administrative entities to benefit from the windfall resulting from logging.

It also noted that the new forest code is breaking with the old system of forest management that was becoming inadequate to face multifaceted changes observed in various areas of national life. The forest should only be used in the industrial sense of the term but should also play an important role in the balance of the global ecosystem.

[116] J.JUTTING, E.CORSIS, A. STOCHMAYER "Decentralization and Poverty Reduction", Insights, No. 5, version of 05 June 2007, p.1
[117] *Ibidem*

The Congolese forest code also determines the appropriate authorities to deal with forestry issues. The Minister having the forests within its remit and happens to be the center of all decisions. It works naturally with the Land Registry National Forest late in the day to deploy the national territory and advisory boards.

In this regard, it should be noted that all provisions of the new forestry law contrary to the letter and spirit of the new Congolese constitution and the new law principles on the free administration of provinces should be of application. *One can say that they are automatically repealed by the technique of implied repeal.*

However, the reform of the new Forest Code does not lose its importance. The Congolese Parliament should revisit it to clearly define the bodies involved in managing forests and its products in the province. The definition of these bodies is a key factor in establishing a sustainable process of decentralization in the Democratic Republic of Congo. The new forest code has asked that the foundation of financial decentralization in Article 122. Without the creation or definition of the management bodies by this provision, benefit to local people and decentralized administrative entities remain elusive.

Taking into account the paradox that is currently observed in the forestry sector, there has been talk of proposing decentralization as a system of management and administration of forests in the Democratic Republic of Congo. Given the many limitations centralization has shown, decentralization could lead local people to enjoy their wealth and give more chances to the effectiveness of various provisions of the new forest code which, moreover, requires urgent reform.

The basic questions of this dissertation, it must be remembered, in response, are: How the legislature organizes taxation and levies of logging in the new forest code and what are the appropriate bodies in the provinces?

The provisions of the new forest code on how to manage resources from logging are they effective? If not, what is the alternative? Decentralization, is it a panacea for good management of forestry taxation?

*Given the discussion made in the body of this article, the assumptions are verified and therefore valid*ated. The new forest code organizes forest taxation in favor of decentralized administrative entities. Of course, the question of effectiveness remains open to the extent those provisions are difficult to apply. Decentralization, in turn, has an important role to play in enabling local people to benefit directly from their resources. And therefore, decentralization could contribute to poverty reduction.

Since the problem of the effectiveness of the provisions of the new Forest Code is acute, we suggest that the authorities of the decentralized administrative entities, the Governor of the provinces, in collaboration with civil society, a leading advocacy with executive authorities and legislation to get the application without delay of all these provisions that favor decentralized administrative entities. They will, in the meantime, work for a plea for the reform of the new Forest Code to the National Assembly.

As a work of improvement, this essay requires further research and for its comments enrichment today more than ever and tomorrow more than today as it is true that there is "a grain of sand at the edge of the ocean of knowledge".

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THE MANAGEMENT OF BASIC EDUCATION BY PARENTS IN DRC: POSSIBLE REMEDIES

By **Arnold NYALUMA MULAGANO** [*]

INTRODUCTION

1. Since the mid-1980s the Congolese state has gradually detached from its constitutional obligation, reaching a climax in 1992. This year, the teachers' strike culminated in a blank academic year without succumbing to the government's whims.

   In South Kivu (a Congolese province) the following year, the teachers union met with the parents' association. This meeting was born out of an agreement [118] under which the parents committed to an exceptional payment support (called premium or motivation) of teachers just to allow the resumption of the academic year. This interim measure has not only been kept to date but it has spread throughout the country. It has finally been endorsed by the State which has abandoned all charges related to public education to parents.

2. The consequences were long coming. While in 1995[119], 23% of children were admitted to school at the age of 6, the rate fell to 17% in 2001. A comprehensive diagnosis of the Government[120] informs that "the gross primary enrollment declined from 92% in 1972 to 64% in 2002. At all levels, the quality of education has fallen sharply. The products formed no longer meet the needs and requirements of development.

3. Faced with this bleak picture, parents and teachers have resolved to revoke the agreement of 10 October 1993[121]. Despite the revocation practice is kept up to date.

4. The concern of this study is whether and on what basis the victims of this practice can take legal action and if so what claims are justifiable.

5. To meet its international commitments, the constitution of DRC provides for the right to education (art. 42-45)[122] and Law No. 86 -005 of 22 September 1986 in which Article 9 states "the State has an obligation to provide education for children in primary schools and ensure that all Congolese can read, write and calculate. As such, it has an obligation to implement all appropriate mechanisms at the structural, educational, administrative, financial and medical education."[123] The Law on Child Protection[124], states in Article 38 "the State guarantees the right to education by making free and compulsory primary education."

6. Do these instruments offer any guarantees of justiciability to children who could not access (or continue) school because of the "premium" practice? Just after Claudia Scotti-Lam[125] noted that "the essence of any international treaty is to present a binding on the Contracting States. If the contractors on Economic, Social and Cultural Rights had

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[119] Memorandum of Understanding between the SYEZA and ANAPEZA of October 10, 1993, unpublished.

[120] National Report of the Democratic Republic of Congo, Ministry of Primary, Secondary and Vocational Education, Kinshasa, August 2004, p. 7 and art

[121] André Yoka Lye Mudaba, "The cultural dimension in the program of the DRC government 2007-2011, "in Congo-Africa, 47th year, No. 417, September 2007, p.558.

[122] Report of the Joint Meeting of ANAPECO-SYECO in February 6, 2004, unpublished.

[123] Constitution of the Democratic Republic of Congo, JOC, special issue, February 18, 2006, p.22.

[124] Act No. 86-0005 of 22 September 1986, JOC, Special Issue, December 1, 2005, p.4.

[125] Law No. 09/001 of 10 January 2009 on child protection, JOC, special issue of May 25, 2009.

wanted to deny them the character of international obligations, they could stick to adopt resolutions and other international non-mandatory. "

7. On this basis, it is necessary to check whether the order in Congolese domestic law that may have a direct and thus start a legal action for violations. First section 215 of the Constitution establishes the supremacy of treaties, on the other section 153 authorizes the court to enforce them. Congolese Justice and could apply not only the provisions of the African Charter on Human and Peoples' Rights makes no distinction between categories of rights"[126] but also those of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and they will be expressed by the national legislature. It is recognized that "standards of a purely declaratory internationally can become binding law that gives them even a constitutional status"[127] Provided that these texts contain provisions that are "clear and precise."[128]

8. Applicable text "programmatic and progressive" which is "devoted not to individual rights of individuals"? The Committee on Economic Social and Cultural Rights[129], case law[130], and an abundant doctrine can see that the programmatic nature does not preclude judicial review.

9. The direct effect, and to limit the standstill effect, would therefore discourage the practice of "premium" in the DRC to the liability of the state. The question remains, what kind of internal dispute lends itself to such control between the court, the administrative court and the constitutional court. There is also the question of the nature and modalities of their decisions. If all these avenues are open and many others, it remains true that a comprehensive study should help to certify, confirm or deny such optimism in favor of the rights for over a half century to make them justiciable.

10. It is possible that a mechanical reading of Article 2 of the International Covenant on Civil and Political Rights, for example, the Congolese judge recalls the decision of the United States' Supreme Court that "ensure the minimum subsistence to citizens is not a matter for the courts. "[131]

11. We therefore verify the hypothesis that the obligations to social rights are amenable to judicial review[132]. The question of means does not relieve the State[133].

12. Of course, part of our discussion, we impose a limit, so let us devote our thoughts to the theory of direct effect and the effect of the passage standstill effect in terms of how the right to education is received in the Congolese legal system. It is necessary then from the evaluation of the practice of "premium" and its consequences before examining the rules applicable to these facts through the sources of the right to education. Of these, we will release the contents of the law in question and the obligations to the state by insisting on their degree of enforceability. Which will lead to discovering the judicial guarantees that due in the domestic and the international order and claims, or more violations that these courts are called upon to punish and so too the nature of the said penalties?

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I. THE PRACTICE OF "PREMIUM" IN REGARD TO THE INTERNATIONAL COMMITMENTS OF THE CONGOLESE STATE

A. THE PLACE OF THE STATE: THE PRACTICE AND CONSENQUENCES

13. In the Memorandum cited above, parents and union pin on the situation created by the state as a result of non-payment of wages. They denounced the strike of 1992 -1993. Section 1 sets the date for the new school year. Article 2 establishes the management, saying "pending the payment of teachers' salaries by the government, their employers, parents will agree to a sacrifice as a primary responsibility for educating their children and will carry costs of specific intervention to support teachers and school operations." The letter of the agreement, it appears that this is a provisional text and informal. There is indeed, no statutory and legal relationship between the parents' committee and the teachers union. The parties did not intend that their agreement would run until the end of the school year. That is why they have stipulated in Article 6 "during this special and difficult time , no other fees will be charged to parents." The measure was taken in the vernacular and official name of "premium teachers" would continue to date. Successive governments would not only live with but generalize across the country.

14. As would be expected, in a country where the GDP per capita does not exceed $ 10 per month, the consequences were disastrous. Many children from poor families are thus excluded from school. As an illustration, according to a UNICEF[134] report a child from 6 to 14 years out of every three has never attended school and may never visit it. One out of four children in first grade reaches the fifth grade.

15. UNDP[135] attributes this to lack of support by parents (79%) followed by causes such as war, lack of staff, illness (15%), the distance to school (4%), lack of school (2%).

16. Before the excesses of this practice, the Teachers Union and the committee of parents had signed a new agreement[136]. The memorandum of 1993 agreement was terminated. After reminding the parties that the premium (the concept shown here) is not an entitlement, they agreed to send a memorandum to the authorities.

17. Despite the revocation and multiple legislative and regulatory acts that remind the free education and the prohibition of "premium", the practice has continued until during the 2010-2011 school year. Given this persistence, a second agreement[137] was reached January 25, 2010 between the Teachers Union of the Congo (SYECO), Catholic Teachers Union (SYNECAT), the Union of Protestant Teachers (SYNEP) and the National Association of Parents of Congo, the Association of Catholic parents and the association of Protestant parents. The first article dedicated to "the repeal of the MoU of 10 October 1993 with the consequent removal of the support of teachers by parents, commonly called" premium "over the whole province of South Kivu. In legal terms, this agreement adds nothing to the decision of 6 February 2004 referred above. On the political front against by two contextual entrust an obvious symbolic value. First few months earlier, a round table on Education, convened by the provincial government had considered the matter and had decided to abolish the premium on 31 December 2010. By "burying the premium," parents and teachers placed the government to account. Then the agreement was followed by a major public event as a base with the coordination office of civil society, thus taking to witness the "lifeblood" of the province. A funeral dirge was sung and the immortal agreement of 10 October 1993 was "buried". But this folklore could only

[134] Committee on Economic, Social and Cultural Rights, Obs. Gén.n 3 quoted by Olivier Frouville, op.cit. p. 448

[135] UNICEF, National Survey on the situation of children and women, MICS2 synthesis report, http: www.unicef.org / drcongo.htlm.

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move one iota on our insensitive government. Instead, the head of state signed an order introducing free classes in first, second and third primary throughout the country except the city of Kinshasa and Lubumbashi. By this act, the head of state institutionalizes the violation of the Constitution and all national and international instruments mentioned above. So these days parents can continue to support the education of their children. The poorest are resigned to keep them at home if they are not recruited by a gang or militia.

18. Central to this reflection is a concern: the justiciability for those out there who have found themselves excluded from education by the said practice hence the need to check if they have individual rights or at least claims litigants.

B. SOURCES OF LAW IN DRC

1. International sources

19. Whether universal or regional treaties, the treaty system is organized into law by two important articles of the Constitution. Section 215 provides that "treaties and international agreements duly concluded upon publication are superior laws." Section 153 adds that "the courts, civil and military, apply the duly ratified international treaties, laws and regulatory acts provided they comply with laws and custom, provided that it is not contrary to public order and morality." These provisions embody the direct applicability of treaties in the domestic Congo by giving them extra prominence on domestic law provided that the right to education is rooted in these treaties.

1. 1. The universal sources

We will mention here only the main texts.

1.1.1. The International Covenant on Economic, Social and Cultural Rights

This pact is binding in DRC since 1 November 1976[138]. It enshrines the right to education in Article 13. Thus, victims of the "premium" can claim a violation of this article which as we noted above is directly applicable in DRC.

Is this sufficient to permit judicial review?

1.1.2. Convention on the Rights of the Child

This agreement is directly applicable in DRC since September 28, 1990[139]. The practice of the premium being reached after three years, people have seen this excluded from the training system, can rely on the rights guaranteed by Articles 28 and 29. Could a judge condemn the Congolese State which has committed to a progressive realization of this right? We see here that the judge retains the power to control, as the progressive realization does not deprive the beneficiaries of any right to claim.

1.2. Regional sources

Unlike other systems, the O.A.U. now African Union has the advantage of not distinguishing between categories of rights.

[138] Protocol suppression premium, January 25, 2010, unpublished.
[139] http :www3 .unhchr.ch / fr.

1.2.1. The African Charter on Human and Peoples' Rights

The DRC ratified the Charter dated 20 July 1987[140] and its protocols. Article 17 guarantees the right to education. The Congolese people under the jurisdiction could invoke before the courts if the Congolese practice of "premium" they could not continue or initiate the studies, at least at primary level (in our study).

The judge will he succeed?

1.2.2. The African Charter on the Welfare of the Child

Adopted in Addis Ababa, July 11, 1990, effective November 29, 1999, the African Charter on the Welfare and Rights of the child is applicable in the DRC since March 28, 2001[141]. It enshrines the right to education in Article 11. And those who have not benefited from this provision as a result of the "premium" may appeal to the courts.

2. National sources

20. The Congolese Constitution reflects the will of the State to fulfill its international obligations particularly regarding the right to education. That materializes into law Act No. 86-005 of September 22, 1986.

2.1. The Constitution

In addition to the above provisions that give a direct application of treaties, the preamble of the constitution "reaffirmed the commitment to the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, to Conventions of United Nations on children's rights and the rights of women and the international instruments on the protection and promotion of human rights." Sections 42 to 44 are devoted to the right to education. Free and compulsory primary education is enshrined in these provisions.

2.2. Framework Law No. 86-005 of 22 September 1986 on national education and law No. 09/001 of 10 January 2009 on Child Protection

This law organizes education and indicates the obligations of the State for an effective right to education. The law of 10 January 2009 reaffirms the obligation of school and free education.

C. CONTENT OF THE RIGHT ORDER AND CORRESPONDING OBLIGATIONS OF THE STATE

Examination of the prerogatives of individual rights (or legitimate claims) arising from these sources can enter the corresponding obligations on the part of their debtor is the state and provides tools accordingly to the judge assigned to perform its control.

1. The free education

21. Free primary education is enshrined in the International Covenant on Economic, Social and Cultural Rights, Article 13, 2, a), the Convention on the Rights of the Child, Article 28.1, has, the African Charter on Rights and Welfare of the Child, Article 11.3, has the

[140] http :www3 .unhchr.ch / fr.
[141] http : www3.aidh.org

Constitution, Article .43,4 ... To the Committee on Economic, Social and Cultural Rights [142] "nature of this requirement has no ambiguity. This right is expressly formulated to indicate that primary education should be borne not by the children or parents or guardians. Registration fees imposed by government, local authorities or schools, and other direct costs, constitute disincentives to the exercise of the right and may jeopardize its realization. They often result in a net decline of that right. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when it is not the case), or the obligation to wear a relatively expensive school uniform, can also be considered from the same perspective. Other indirect costs may be permissible, subject to review by the Committee on a case by case basis. "

Outside of the Constitution which enshrines a current (primary education is free), other texts rather announce a commitment to achieving progressively.

22. What obligations arise from such a commitment?

According to the Committee[143] "that the International Covenant on Economic, Social and Cultural Rights provides an approach that is part time, in other words progressively, can not be misinterpreted as depriving the obligation of all meaningful actual content. On the one hand, this clause allows you to save the necessary flexibility, taking into account the realities and difficulties involved for any country that strives to ensure the full enjoyment of economic, social and cultural rights. On the other hand, it must be interpreted in light of the overall objective, and indeed the purpose of the Covenant, which is set to the States Parties clear obligations regarding the full enjoyment of human in question. Thus, imposes an obligation to move as expeditiously and effectively as possible towards that goal. " The Belgian Council of State has in the case M'FEDAL[144] allowed to specify the obligations corresponding to the free education "Whereas it appears from the wording of Article 14 that the need for progressively by provisions of the law mandatory and free primary education does not delay the immediate implementation of the principle enshrined in Article 13.2, has, in states that have not yet reached that goal, that However, States that have already posted such provisions in their domestic law, the same article imposes an obligation directly and immediately applicable to not waive in future. "

From there emerges a positive obligation to fulfill it to the States which had already in their domestic laws. International engagement strengthens the internal assets. Therefore the same as the text would not have in the international order as a constraint, this commitment later in the internal order would perfect its legal validity. But history[145] tells that primary education was free in the DRC since 1960. It follows therefore that if other states for these texts instituted progressive commitments, commitments later in the internal Congolese have given them one called immediately. The doctrine[146] also states that "the DRC being party to the International Covenant on Economic, Social and Cultural Rights since 1972 can not escape this obligation to which it has freely consented. It will therefore have the maximum of its available resources to materialize the free education. "

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[142] Instruments relating to human rights and international humanitarian law ratified by the Republic of Congo, JOC; special issue, September 2001, p.39.

[143] Committee on ESCR, comments No. 11 (1999). Action Plans for primary education 20th Session, Geneva, April 26 to May 14, 1999, www.aidh.org / UN-GE / Committee-Drteco / hp-desc. htm.

[144] Committee on ESCR, The nature of the obligations of States Parties, General Comment No. 3, 5th Session, 1990, www. aidh.org / UN-GE / Committee-Drteco / hp-desc.htm.

[145] Olivier de Schutter and Sebastian van Drooghenbroeck, op.cit., P.314.

[146] Mariamu Safi, The right to education in the DRC state and prospects of the legislation, Memoire for campus degree, Catholic University of Bukavu, 2004-2005, p.57 unpublished.

What would happen if the Congolese government had not previously bound by its laws? The Committee on ESCR has identified in this case, *the obligation to act*[147]; "in the English text, the obligation is "to take steps" (action) in French, states undertake" to act "and in Spanish "*a adoptar medidas*" (to adopt). Thus, while the full realization of rights may be achieved progressively, steps towards that goal must be in a reasonably short time after the entry into force of the Covenant for the States concerned. These steps must be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. The State can not absolve itself by extending indefinitely the realization of free education. It is required to adopt a plan within two years[148]. This period should be interpreted as meaning within two years from the date of entry into force of the Covenant for the State concerned, or within two years of a change in the situation in the origin of the disregard of the obligation. This obligation is a continuing one and States parties to which it applies because of the prevailing situation are not exempted by the fact that they have not acted in the past within the two year limit. The plan must cover all measures to ensure implementation of all necessary elements of the law to ensure the full realization of this right. Otherwise, the scope of the article would be undermined. "Therefore," the Congolese government has an obligation to provide education for children at primary level and ensure that each Congolese can read and write. As such it is obliged to implement all appropriate mechanisms at the structural, educational, administrative, financial and medical.[149]"

Onto this primary obligation to act is a secondary obligation to justify delay or failure. If the justification is based on inadequate resources, the ESCR Committee has stated that "for a State to invoke the lack of resources when it does not even pay its minimum core obligation, it must demonstrate that every effort was made to use all the resources at its disposal to satisfy, as a priority, those minimum obligations.[150]" This is also the position of the doctrine[151] which states that States without an obligation of result have an obligation of means and can therefore be condemned if they do not implement policies to improve this or that law or otherwise if they are implementing policies that make it worse.

Free also implies a standstill obligation. The progressive nature of these rights implies the prohibition of claw back on the progress made. This doctrine is supported by the decision of the Belgian State Council[152] which ruled that "Articles 13 and 14 of the ICESCR does not impose immediately and unconditionally to make primary education free to all. They needed to move towards the free. Implicitly, but certainly, they prohibit at all times the States to enact measures that would run counter to the commitment they made. This commitment includes at least the right of fixing of the existing situation.'' For the committee[153] "a strong presumption that the pact does not allow any retrogressive measures taken in respect of the right to education, as well as other rights enumerated therein. Thus, in considering the Maurice report of the committee said it was concerned about the reintroduction of fees at the tertiary level, which is a deliberate step backwards. "Now the situation is indeed similar in the DRC where education was free in 1960 and the practice of "premium" was introduced in 1993.

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147 Ngondankoy Nkoy-ea-Loongya, Congolese law of human rights, Academia - Bruylant, Louvain-la Neuve, 2004, p.303.

148 Committee on ESCR, The nature of the obligations of States Parties, General Comment No. 35th Session, 1990, www.aidh.org / UN-GE / Committee-Drteco / hp-desc.htm

149 Committee on ESCR, comments No. 11 (1999). Action plans for education primaire.20è Session, Geneva, April 26 to May 14, 1999, www.aidh.org / UN-GE / Committee-Drteco / hp-desc . htm.

150 Art.9 of the Law of September 22, 1986.

151 Sciotti-Lam, op. cit.p.484.

152 Jean Paul Costa, Towards a judicial protection of economic, social and cultural rights in the man on the threshold of the 3rd Millennium, Essays in honor of Pierre Lambert, Brussels, Bruylant, 2000, p.152.

153 Belgian Council of State, September 6, 1989, e M'Feddal crts c. the Belgian State. With a score by Michel Leroy, "The power, money, education and judges", quoted by Jean-Marie Dermagne, the free education, Bernadette Schepens (ed.) What rights in education? Teachers, Parents, Students, Proceedings of the conference and des13 May 14, 1993, Faculty of Law of Namur, Regional Law Centre, Namur, 1994, p.35

In summary the following obligations arising from the free education: the obligation of immediate realization for States which had already established the right of their national law, the obligation to take measures that tend towards free as a corollary, the obligation to justify inaction or delays in the realization of free for States which had not yet committed themselves, and for all the standstill obligation in addition to the obligations to respect and protect.

2. Compulsory education

23. Compulsory education for primary school appears in the ICESCR (art. 13, 2, b), the CRC (Art. 28, 1, a), ACRWC (art. 11, 3, a), the constitution (art .43, 4), the Law of September 22, 1986 (s.115 and 116), the Law of January 10, 2009, section 38. Again international sources include a commitment in time when the constitution grants a right of immediate application. Section 115 of the law imposes an obligation in Congolese school children aged 5 to 15 years. But paragraph 2 states "However, compulsory education will be established in phases determined by the following specific local governments and the general development plan of national education." considering on the sidelines of the constitution, the law stands behind the regime of progressive realization. We will see in the second chapter how the judge should resolve this conflict. For now, it is worth noting that the obligation rests with the householder (art.116) and can lead to criminal sanctions for failure to prove the non-existence of a school within 5km radius or absolute poverty (art.137). For the Committee on ESCR[154] "this element highlights the fact that neither parents nor guardians, nor the state should consider access to primary education as optional. Likewise, it reinforces the principle that access to education must be open to all without discrimination based on sex, as also specified in Articles 2 and 3 of the Covenant. "The doctrine[155] justifies this obligation by the fact that "education of young people is beyond the individual interest and of direct interest for each member of the community."

24. What is ultimately the exact content of compulsory education? It should first be noted that everywhere it appears "free and compulsory education," we cannot consider separately the compulsory and free education. Otherwise[156] "the introduction of compulsory education and its gradual increase would have been emptied of meaning if they had been accompanied by a guarantee that each child can access education without pecuniary obstacle." Therefore the obligation may be understood in terms of demands made to parents to enroll children in school. And proposed compulsory education leads in the Congolese head of state an immediate obligation in protection of ensuring that parents or guardians cannot remove children aged 5 to 15 years from school.

    The state also has an obligation to *perform services* for physical containment barriers pecuniary or logistical issues that could undermine compulsory education. The fact that the State has included the implementation of this obligation in time reflects its desire to bring together the means to that end. This does not differ, however, due to the extent that the constitution has opted for an immediate payment; the principle of the clause more favorable will be applied.

3. Educational pluralism and academic freedom

25. These principles are affirmed by the PIESC (article 13, 3-4), the CRC (Art. 29, 2) ACRWC (art. 11, 4), the constitution (art. 43, 4; Art. 45, 1), the law of September 22, 1986 (art.10).

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154 Sciotti-Lam, *op.cit* ; pp.239-240.

155 Committee on ESCR, comments No. 11 (1999). Action plans for education primaire.20è Session, Geneva, April 26 to May 14, 1999, www.aidh.org / UN-GE / Committee-Drteco / hp-desc . htm.

156 J. De Groof, Right to education and academic freedom, Centre for Policy Studies, economic and sociales ASBL, Brussels 1984 p.71.

According to Ngondakoy[157] "educational pluralism has a double aspect. It presupposes the existence of several networks of learning, whether public or private. It then assumed the tolerance of common scientific, philosophical or religious group within the education system. . "The educational pluralism is thus the condition of freedom of education in its different facets. As regards the obligations they imply that the State there may be noted that these principles are affirmed in Article 2 Protocol number 1 of the European Convention on Human Rights[158]. That states have resumed in the rights whereby justiciability is not questionable enough to confirm with the Court that[159] "no watertight division separating the sphere of economic and social rights of the scope of the Convention" Like all rights in the Convention requires that law State the *obligation to refrain* from any action which might impede the exercise or enjoyment and protect this right against harming others. But since the Belgian Linguistic case, the court held that abstention does not exhaust the obligations of the State[160], "the government argues that the European Convention is a convention for the Protection of Civil Rights, a civil law does only negative obligations and the right to education, as guaranteed by the Convention does, therefore, that negative obligations. In its judgment of 23 July 1968 the court interpreted the right to education as a right *of access and right to get* (our emphasis). "In order of Chypre C. Turkey of 10 May 2001[161], the court noted "that the authorities after organizing primary education in Greek have not done the same for the secondary can only as a denial of the substance of the law concerned." The Court announces a true *positive obligation* (our emphasis). It is therefore clear that freedom and pluralism of education necessarily result in the head of state a positive obligation in the European case is subject to control by a judicial body. If we should conclude here, this would be sufficient to qualify the division maintained between social rights and civil and political rights.

4. Equality in school

26. The principle of equality has its source in the ICESCR (Art. 2, 2), the CRC (article 2), the ACHPR (Article 2 and 3), ACRWC (Article 3), the constitution (Art. 3 and 4), the Law of September 22, 1986 (Article 5, 2). According to Keba Mbaye,[162] "ACHPR guarantees the right to equality on public goods and services. Any person, not just the citizen has the right of access to public goods and services in full equality before the law. According to Ngondakoy[163] "the first principle that governs the matter of the right to education is that of equality before the law, or more precisely, the equality of all before the means and structures in place to access an education system." Thus the committee[164] ranks among the obligations immediately due and therefore justifiable and non-discrimination. While Article 14 prohibits discrimination as to the rights guaranteed by the Convention, Frédéric Sudre[165] notes that Protocol 12 brings any right afforded to individuals by national law within the scope of control exercised by the Court. A similar provision exists in the ACHPR and the Congolese Constitution; it is clear that judicial review shall be exercised.

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157 Xavier Ghuysen and Xavier Drion, News of the obligation to free, Michael Pâques, The right to education, Liege, éd. Permanent Training, CUP, 1998, p.9

158 Ngondakoy Nkoy –ea-Loongya, *op.cit* ; p.299.

159 Olivier De Schutter, Tulkens, Sebastian van Drooghenbroueck, Code of International Law of Human Rights, 3rd ed., Bruylant, Brussels, 2005, p.387.

160 Order Airey against Ireland October 9, 1979 quoted by Pierre-Henri Imbert, Opening Remarks of the Symposium on Social Rights, or demolition of a few clichés, (ed.) Constance Grewe and Florence Benoit-Rohmer, University Press of Strasbourg, p .11.

161 Marc Bossuyt, The prohibition of discrimination in international law of human rights, Brussels, Bruylant, 1976, pp.214-215

162 Sebastian van Drooghenbroeck, The European Convention on Human Rights. Three years of jurisprudence of the European Court of Human homme1999-2001, Journal of the Courts, Larcier, Brussels, 2003, p.223.

163 Keba Mbaye, Human Rights in Africa, Paris, ed. Pedone, 1992, p.181.

164 Ngondakoy Ea-Loongya, *op.cit.* p.298.

165 Committee on ESCR, comments No. 11 (1999). Action plans for education primaire.20th Session, Geneva, April 26 to May 14, 1999, www.aidh.org / UN-GE / Committee-Drteco / hp-desc . htm.

5. Creation and funding of schools

27. Part of the doctrine is unequivocally "the Congolese government was held in several types of bonds from the creation of schools to the subsidization of private schools.[166]" This doctrine adapts with a combined reading of Articles 4 and 6 the Education Law (quoted above), Article 4 stipulates that the state creates conditions and the necessary structures and Article 6 stipulates that education is provided by public institutions created by the State or private schools approved by it. If it seems obvious that the state should fund its schools and help approved private schools, the issue is not resolved so far. In fact, the sharpest criticism against social rights involves such an obligation, what type of action is able to induce the State to establish schools? For the right to education, is there a requirement to establish schools or is it applicable to only existing schools? Since the principle of subsidiary leaves the state free of its submissions, it would be risky to confirm the first term of the alternative. It therefore seems more correct to say that the Congolese have the right to free and compulsory education at primary level and the state is free to choose the means that is suitable for its implementation, not being bound by an obligation of result. As noted by Francis Gaudu[167] "in many cases, simply put social actors able to act to ensure respect for social rights. The realization of social rights, however, often requires a more intense action of the State: technical regulations and technical public service. "So the Congolese state can choose between creating public schools, the grant of this service to individuals or liberalization, in practice the three techniques are combined. The important thing is that the choice made to allow the State to fulfill its obligations.

After this first chapter, we retain the right to education has in the Congolese legal content that leads to the state obligations in their nature do not differ from those derived from other rights, namely: respect, protect, fulfill (or justify the delay or failure) and to limit the obligation to stereotype the standstill or acquired situation and which are amenable to judicial review.

II. POSSIBLE REMEDIES AGAINST "THE PREMIUM" FOR TEACHERS

A. POSSIBLE REMEDIES IN DOMESTIC LAW

1. Integrating the right to education in the block of constitutionality: constitutional review

28. Claudia Sciotti-Lam[168] "finds that in young democracies, the law does not distinguish between different sources of international law of human rights. These are needed in domestic law, whatever their origin, whether domestic or international, or nature, mandatory or declaratory. This observation is based in particular on the place of the universal declaration of human rights in the constitutions." According to Maurice Kamto[169] " because of the entrenchment, judicial guarantee them [...] from, first through control of the constitutionality of laws and secondly, through the litigation rights and freedoms. "This is indeed the case in DRC. The right to education with constitutional action of unconstitutionality is open to the governed for breach of obligations. Article 162 of the Constitution grants every person the right to petition the Constitutional Court not only as a defense but also by action. The task of the litigant is even easier than "in a dispute of legality, it is not necessary that the individual can derive subjective rights of

166 Frédéric Sudre exercise of "jurisprudence - fiction": the protection of social rights by the European Court of Human Rights, Florence Benoît-Rohmer and Constance Grewe (ed.), op.cit, p.157.

167 Ngondankoy-ea-Loongya, *op cit* p.306.

168 François Gaudu, social rights, Remy Cabrillac, Marie-Anne Frisian, Thierry Revet (dir.) Fundamental Rights and Freedoms, 3rd ed, Paris, Dalloz, 1996, p.474.

169 Claudia Sciotti-Lam, *op.cit.* p.253.

the international instrument which it relies, and which, in the legal International, entered into force at the site of the State against which it is invoked. It is sufficient that the applicant be accepted as having an interest in provoking review of the legality of the regulation that affects it."[170] The control of constitutionality is not about the conventionality. But the moment one acquires a constitutional convention, constitutional judge must determine whether the acts and rules below conform to it especially that it has value above laws in the case of the DRC. By "[171]double-checking, the constitutional court is a model of sanction violations of human rights."

A priori control, under section 160 of the Congolese Constitution allows preventive protection while the ex-post control under sections 161 and 162 of the Constitution provides redress for violations of the rights guaranteed. The law of several jurisdictions supports this position.

In South Africa[172] the Constitutional Court said "the state must create conditions that allow individuals of any condition of access to decent housing." Furthermore, *in Minister of Public Works and Others v Kyalami Ridge and Others*[173] said it that without access to education, to adequate food, health, social security and housing, the poor cannot participate equally in social life of the country.

In Egypt[174] the High Constitutional Court made under section 17 of the ACHPR. Decision No 40/16 (53) involved in Article 3 of Law No. 99 of 1992 on social protection of students. This law imposed an annual contribution more important for private institutions. A father of three children enrolled in private schools referred to the Tribunal of First Instance of Tanta, seeking reimbursement of his contributions and invoked the unconstitutionality of article. The court has seized the High Constitutional Court for a plea of unconstitutionality. The court shall examine the compatibility of its products with article 40, 18 and 7 of the constitution. It insists especially on the right to education, which requires positive actions which the State must guarantee the right to schooling in non-public without discrimination. The court then states that these principles were recognized in the Universal Declaration of Human Rights (Art 26), the International Covenant on Economic Social and Cultural Rights (art13) and Article 17 of the African Charter on Human and Peoples Rights. The court therefore concludes the unconstitutionality of the article.

The Madagascan High Constitutional Court[175] decided that "a court's judgment entered in violation of the international bill of human rights and the ACHPR which are part of domestic law in Madagascar, as set out in the preamble to the constitution. "
In Benin[176] Mr. Moise Bossou has censored the Constitutional Court order No. 260/ MISAT/DC/DAI/SAAP of 22 November1993 on terms and conditions of registration of associations [...]. The court found that the interior minister has encroached upon the domain reserved to the law by sections 25 and 98 of the Constitution and Article 10 of the African Charter on Human and Peoples' Rights.

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170 Maurice Kamto, "African Charter, international instruments of protection of human rights, national constitutions: the respective joints," Jean-Francois Flauss and Elisabeth Lambert-Abdelgawad (dir.), The national implementation of the African Charter of Human and Peoples' Rights, Brussels, Bruylant, 2004 pp. 37-38.

171 Olivier De Schutter and Sebastian van Drooghenbroeck, International Law of Human Rights to National Judge, Brussels, Larcier, 1999, pp.321-322.

172 William Drago, The effectiveness of sanctions for the violation of fundamental rights in the countries of the Francophone community in AUPELF-UREF, the effectiveness of fundamental rights in the countries of the Francophone community, Proceedings of International Symposium on 29th September to 1st October 1993, Port Louis, p.537.

173 Giorgio Malinverni, Draft Additional Protocol on Economic, Social and Cultural Rights, in Florence Benoît-Rohmer and Constance Grewe (dir.) op.cit, p.99.

174 Maurice Kamto, *op. cit*, p.39.

175 Elisabeth Lambert-Abdelgawad, Application of the African Charter on Human and Peoples' Rights in North Africa, and Jean-Francois Lambert-Abdelqawad Flaus, op. cit. p116.

176 Claudia Sciotti-Lam, *op.cit* .p.277.

In Italy[177] "the Constitutional Court says mandatory standards program and therefore the unconstitutionality of laws are inconsistent with them. (In that they prevent the achievement of objectives established by the constitution makers). "

In Belgian[178] Court of Arbitration (Constitutional Court today) held that the fundamental rights and freedoms which must be respected in the legislation to education result not only from other provisions of Title 2 of the Constitution but also international treaties on this subject which are mandatory for Belgium. The court can determine whether the impugned legislation does not violate Article 2 of Protocol to the Convention concerning the right to education ".

The Supreme Court of Canada[179] "ruled in March 15, 1990 in *Mahé v Alberta* that the province of Alberta had the obligation to establish the structures of public education that the Constitutional Charter of Rights guarantees the francophone minority. "

Interpreting of that law, the integration treaties in the block of constitutionality is a function not of binding nature of these in the international order but the legislative will. Therefore, as is the case in the DRC, the legislature may give the text a justiciability to which its authors could not draw, which is consistent with the subsidiary principle of international control.

2. The role of the administrative judge

32. Alay Gregory[180] notes that "litigants, strong decisions in favor of the constitutional court, may appeal to the administrative judge to request on his part that draws the consequences by condemning the state government or the compensation for damages caused to citizens, match the needs of damages. "It will be recalled that in most cases before the constitutional court as a defense in connection with a particular dispute. The judgment thus rendered just answer a question to allow the administrative judge to decide. On this occasion, the administrative judge shall give effect to a right-treaty and integrated into the block of constitutionality. Apart from this hypothesis, control of legality, traditional mission of the administrative judge does not preclude litigation of social rights. Christoph Gusy[181] saw that "the rights - claims are realized by formal laws whose justiciability is not discussed. Thus the jurisdiction of administrative tribunals is not generally excluded if a right - debt is at stake or if that right is infringed in a particular case. "In this case "[182] the remedy for violations by the State in respect of duties of abstention [...] or the duties of benefits [...] is to use the cancellation of all illegitimate acts of the State. Normally, the cancellation is followed by execution as a new act, this time in accordance with law or, where appropriate, a disclaimer of opinion in accordance with law. "In addition, Jo Baert[183] has identified cases where the State Council treats educational institutions such as free utilities functional whose decisions are subject to its control. Applying this case law in the DRC, when these decisions come to break the content of the right to education, they would not escape the administrative magistrate.
A question remains open. Control of legality can be extended to control the

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177 Grégoire Alaye, "The administrative court of Benin and freedom," Etienne Picard, op.cit; P187

178 Alessandro Pizzorusso, generations of rights in Florence Benoit-Rohmer and Constance Grewe (dir.) Social rights or demolition of a few clichés, University Press of Strasbourg, 2003, p.26

179 Rusen Ergec, the arbitration court and the international and European judge. Censorship of the legislature: the litigant from the Court of Arbitration, the Strasbourg Court and the Court of Luxembourg; Delpérée Francis, Roland and Anne-Rasson Verdussen Marc (dir.) Perspectives on the arbitration court, Bruylant, Brussels , 1995, pp.208 art.

180 Ghislain Otis, The injunction power of the judge as a condition of the effectiveness of human rights; AUPELF-UREF, op.cit, p.574

181 Gregoire Alaye,*op.cit .p.191*

182 Cristoph Gusy, Social rights are they necessarily unjustifiable; Florence Benoît-Rohmer and Constance Grewe (dir.), op.cit, p.39

183 Blaise Knapp, The penalty for a violation of fundamental rights; AUPELF-UREF, op.cit, p.647-648

conventionality? The answer is yes since the pyramid texts applied by the courts established by Article 153 of the Constitution is as follows: treaties, laws, regulatory acts, custom. The administrative judge therefore could censor decisions and executive action taken in violation of various treaties cited as the source of the right to education. We can, however, whether the legality issue which extends to constitutional legality which involved the rights recognized by the treaties.

The answer comes from a Tunisian judge[184] "the Tunisian administrative court has invoked the constitution to define the theory of exceptional circumstances which has the effect of extending the powers of government by removing the illegality of administrative acts decreasing it. [...]. Tunisian Administrative Court devotes the superiority of the constitutional law on the statute and a fortiori, regulations, without proceeds, it is true, to a constitutional review. It admits, by way of interpretation, or rather of appreciation, a solution giving precedence to the constitutional law on the inferior legality. "

3. The role of the judicial court

29. Constitutional litigation as well as the bulk of administrative litigation are contentious objectives. It may happen that the applicant satisfies the cancellation of a measure or the invalidation of a standard. But more often it will need continued judicial court for relief, the judgment of the court providing the basis for its action.

The courts may invoke the African Charter in two ways; argument on legal basis applicable, opening proceedings or guide to legal interpretation[185]."

For the right to education in the DRC, the question does not arise to the extent that article 153 of the constitution confers on the courts of the judicial competence to implement treaties duly ratified moreover, are placed at the top of the normative hierarchy. In this regard, Nigeria[186] has an appeals court decided, based explicitly on the ACHPR, the rights contained in that Charter was incorporated into Nigerian law, every Nigerian could rely on Article 24 of the Charter enshrining the right to demand respect for environment said right to its advantage rather than relying on Article 20 of the constitution that was not relevant here.

This first option can sometimes cause difficulties to the extent that certain constitutional provisions require, for their application of laws or regulations which are only under the supervision of a judge while the control is rather the constitutionality of the constitutional court. In this case, the second option applies. Guardian of fundamental freedoms, the judicial court without engaging the control of constitutionality must apply in any case to punish violations of the rights and freedoms guaranteed by the constitution. In its mission it will be guided by the interpretation suggested by the constitution and treaties (which are part of the block of constitutionality). And in Italy[187], "in the ordinary courts may infer from the judgment of the court in the ordinary interpretation of the rule to be followed in this case, direct application of the constitution.

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184 Jo Baert, Qualification of administrative Authority in institutions; Bernadette Schepens (dir.) op.cit. pp.164-178

185 Ridha Ben Youssef, The contribution of the administrative court in the consolidation of fundamental rights: the Tunisian example, Etienne Picard (dir.), Justice Administration and fundamental rights in the Francophone world, Bruylant, Brussels, 1999, p.171

186 Franz Viljoen, The application of the African Charter on Human Rights and Peoples by the national authorities in Southern and Eastern Africa, Jean-Francois FLAUSS and Elisabeth Lambert- Abdelgawad (dir.) op. cit.p76

187 Sciotti-Lam *op.cit ;* p.40

4. The question of resources, intervention of third parties and state responsibility

30. The question here is what role can the judge when the state invokes the insufficiency or lack of resources to meet its obligations. Due to the separation of powers, the judge seems ill-advised to include in the budget of the State or entity for an online education. As claimed by an American judge, ensuring the well-being is not for the courts. The judge may nevertheless ensure that in exercising its sovereignty Parliament budget does not violate state obligations regarding the rights of man. Two applications were lodged before the constitutional court against the 2008 budget for violation of the prerogatives of the provinces[188]. It would be possible to introduce a similar claim for violation of state obligations with respect to education, especially since Prime Minister announced in Parliament that the government does not yet have the means to achieve the free primary education. We do not follow this path which seems more political than legal. We remain in the case of an individual applicant who seeks compensation following a breach of the obligations of the State educational matters. Olivier de Frouville[189] notes that "in determining whether a State has discharged its minimum core obligation to consider the constraints on the country considered material resources. The only exception is in the specific regime of article 14 in *compulsory and free primary education*. The committee concludes that a State party cannot escape the unequivocal obligation to adopt an action plan on the grounds that it lacks resources. Otherwise, there is no justification for the unique requirement contained in Article 14 which applies, almost by definition, in cases where financial resources are insufficient. "The State cannot invoke the argument justifying resources without having used all those available. However, for the right to education at primary level, no justification is possible.

In addition, the resource issue does not arise at this point in the DRC. Just compare the share allocated to education budget vis-à-vis the privileges of the rulers.

B. INTERNATIONAL MECHANISMS

If the doctrine is an agreement on the primacy of national courts in the implementation of ESCR[190], it is unanimous on the fact that national ownership must be evaluated[191]. This is where by results appears elsewhere as in the principle of subsidiary.

1. The supervisory bodies of the African Charter on Human and Peoples Rights

31. The ACHPR does not distinguish between the three generations of rights; its mechanisms of control are exercised including the right to education. Mutoy Mubiala[192] realizes that thanks to a dynamic interpretation of the African Commission has managed to [...] "adjudicate" on the Economic, Social and Cultural Rights. Olivier de Frouville[193] confirms that "the African Commission had to adopt both a principle and a method of interpretation to transcend the traditional categories of human rights. The principle is that of the justiciability of all human rights recognized by the Charter. "Thus in the case of the Ogoni People against

188 Alessandro Pizzorusso, *op.cit ;* p.27

189 http : www.radiookapi .org.

190 Olivier de Frouville, *op.cit*., p.244.

191 Olivier de Schutter, System lesson on protection of Human Rights, Master in Human Rights, FUSL-UCL-FUNDP.2007-2008, unpublished, Giorgio Malinverni, op.cit.p.98

192 Olivier de Schutter, lesson ... ibid; Remy Ngoy Lumbu, The establishment of the mechanism of individual communication before the Committee on Economic, Social and Cultural Rights: a contribution to the study of additional ways for an efficient implementation of the pact regarding these rights, Ph.D. Thesis, Catholic University of Louvain, May 2008, p.212.

193 Mutoy Mubiala, The African regional system of protection of human rights, Bruylant, Brussels, 2005, p.89.

Nigeria[194] shows that "the African Commission will apply any of the rights contained in the African Charter. The Commission takes this opportunity to clarify that there is no law in the African Charter that cannot be made effective. "The method is to clarify the law for each "four levels of obligations" incumbent on the State, namely the obligation to respect, protect, promote and fulfill rights. Applying the method to the case, the commission finds a violation of the right to health, right to the environment within the right of peoples to freely dispose of their natural resources, the right to adequate housing (implied right, corollary of the combination of sections of Articles 14, 16 and 18 § 1) ... ". In its finding of April 4, 1996[195] "the African Commission on Human Rights and Peoples found a violation of art.16 of the Charter, which guarantees the right of everyone to health, because the respondent Government had failed in its obligation to supply a village with drinking water after a water pipe break. "While the authority of the commission makes no real decisions of judicial acts, which vests in the African Court on Human Rights and Peoples. If properly managed, the court[196] could become a powerful bastion of human rights on a continent where these standards are often disregarded. The court may, at first, give the necessary powers to the African Charter and strengthen the work of the Commission. Moreover, the law developed by the court, regarding the rights which are widely recognized in domestic legal systems of most African countries, could serve as a reference point and inspiration for powerful domestic courts, governments and civil societies in different countries, at the interpretation of these rights. At the current law, if the Commission had before it the question of "premium teachers in DRC "It is clear that no legal obstacle would prevent the review in light of the relevant provisions of the Charter and condemn the Congolese state. DRC then Zaire was condemned by the same Commission. At its 18th session in October 1995[197] in Case of Free Legal Assistance Group and Others c. Zaire [African Commission on Human Rights and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995)] it decided "Article 17 of the Charter guarantees the right to education. The closure of universities and secondary schools as described in communication 100/93 constitutes a violation of Article 17. "This is the wave of closures related to the strike and other disorders dependent triggering of the democratic process that was behind the introduction of support for basic education by parents. It goes without saying that this entry of the Commission could not contradict itself.

If the issue is well settled at the regional level, it is not the same at the universal level.

2. UN mechanisms

32. There is no need to repeat here the limits of control exercised by the Committee on Economic, Social and Cultural Rights. We note, however, with the doctrine[198] that "the great merit of it is to have constantly tried to disprove the dogma of the character" programmatic "and" non-justiciable "on Economic, Social and Cultural Rights. It has to do, seek to identify obligations "immediately applicable" [...] in the national legal systems. " Since actual "[199]rights are not immediately applicable to the extent that they can be immediately applied by the judiciary and others in many national systems. "The Committee will then control how the application is made by the States. In doing so, the courts could rely on the findings and observations of the Committee to determine the extent of commitments of the state and appropriate steps to comply. It is certainly far from a real judicial control. The entry into force of the Additional Protocol to the International

194 Olivier de Frouville, *op.cit* .p261.

195 Comm. No. 155/96, Social and Economic Rights, Action Center, Center for Economic and Social Rights / Nigeria, oct.2001, 15th Annual Activity Report of the African Commission on Human Rights and Peoples .2001 to 2002 , Appendix 5 cited by Olivier de Frouville, op. cit, p.261.

196 Giorgio Malinverni, Draft Additional Protocol on Economic, Social and Cultural Rights; Florence Benoît-Rohmer and Constance Grewe (dir.), op.cit, p.101

197 Christopher Heyns, The role of the future African Court on Human Rights and Peoples Jean - Francois Flauss and Elizabeth Lambert - Abdelgawad (dir.) op. cit, 245 -246.

198 Library of Human Rights at the University of Minnesota www1.umn.edi./humanrts/cedaw

199 Olivier de Frouville, *op.cit*.p.236.

Covenant on ESCR establishing a mechanism for individual communication, when ratified by the DRC will clarify some of these reservations. But already today the existing mechanism provides an effective remedy. One can doubt the value of the findings and recommendations but it is not surprising to find the Committee's FADs (or even the judgments of the Supreme Court) remain a dead letter, at least for the case in the DRC. The willingness of the state plays an important role.

From a strictly legal, national and international justiciability of ESCR has peculiarities but it is certainly a range of modalities of implementation. As an illustration, we will indicate the violations may be punished and the way forward for the modalities of those penalties.

C. JUSTICIABLE VIOLATIONS AND THEIR REMEDIES

1. Justiciable violations

As Remy Ngoy said[200] "justiciability is facilitated by the precision of state obligations that by the definition of subjective rights granted to beneficiaries." Thus "the question is whether the obligations that the Covenant requires States, departing from these rights, is sufficient clarity to enable the Committee not to indicate in detail what measures should be taken, but of identify the head of state some behaviors that are sufficiently clear violations of these obligations. It is more appropriate in this regard to consider the enforceability of the obligations that the Covenant requires States[201] ".

1.1. Clear violation

33. The doctrine[202] suggests ways of distinguishing violation of unsatisfactory performance. The unsatisfactory performance can be assessed against the criteria proposed by Olivier de Schutter[203] "namely the availability, quality, economic accessibility or affordability, physical accessibility, the accessibility of information and to the acceptability ". According to Olivier de Frouville[204] "violation of a law is clear when it can be determined intuitively. A clear violation can also be recognized when the obligation is sufficiently precise and the action or omission intended manifestly contrary to that obligation. "Although the doctrine as to distinguish the two, we consider the failure to a minimum of every right as a form of defiance. Progressive realization cannot be confused with the inertia; the State must undertake a departure for the obligations it has undertaken. The courts are well able to censor any of these obligations.

1.2. The adoption of retrogressive measures

34. The adoption of retrogressive measures is perfectly amenable[205]. On several occasions it appeared that the fact that the state take steps returning on advance that may constitute a violation that may or (must) correct the judge. The case of Mauritius is the most eloquent, or the facts under consideration actually correspond to this assumption. The judge applying the principle of standstill and can punish any regression. The option is to resolve the existing situation. Its justiciability is no longer questioned today[206] , there is a field open to the judge for the justiciability of social rights.

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200 Remy Ngoy Lumbu, *op.cit*.p 205.
201 Remy Ngoy Lumbu, *op.cit*.p.15.
202 Olivier De Schutter, the optional protocol on the International Covenant on Economic Social and Cultural Rights, Working Paper 2005/03, ucl, www.cpdr.ucl.ac, be, crido.
203 Giorgio Malinverni, *op.cit*.p.113.
204 Olivier de Schutter, *Protocole …op.cit*.
205 Olivier de Frouville, *op.cit* ; p.241.
206 Giorgio Malinverni, *op.cit*.p.111

1.3. Discrimination in the implementation of rights

35. A court is well able to determine whether the principle of non discrimination in the exercise of these rights is respected.[207] It will ensure both the active discrimination and passive discrimination[208] by punishing any differential treatment - without acceptable justification, two categories of persons in a situation comparable or identical treatment of the two persons in non-comparable situations. The gap between cities and villages, the disparity between the number of girls and boys in school ... illustrates the need for control of passive discrimination. The Congolese legal system with regard to equality before the law and equality in the enjoyment of rights, the judge found there by a way to punish violations of the rights to education.

2. Possible measures (sanctions procedures)

2.1. Finding of the violation with freedom left to States

36. According to Olivier de Schutter[209], "it will not for the Committee to indicate positively that the state must do to fulfill the obligations imposed by the Covenant, it will be for him to see that his attitude is or is not consistent with these obligations. The state will always have the choice of means by which to fulfill the obligations imposed by the Covenant. If the result of a finding of violation such way it is closed, it can explore other avenues within the limits imposed by the requirements of the Covenant ". This approach shares a dominant doctrine which allows the state to use the means most suitable for this purpose. In the domestic, it allows in particular to guarantee the separation between the judicial function and that function to govern or legislate.

2.2. Cancellation of contrary measures (that violate)

37. We admitted that social rights are part of domestic law of each State and thereby constitutes a violation of any illegality that has to get the judge. For the case of DRC treaties include the block of constitutionality and occupy the top of the hierarchy of the courts to enforce. It follows that the actions of the margins of treaties guaranteeing the right to education may be canceled by the judge as the case been as unconstitutional or illegal. In many cases of cancellation will be sufficient to end the violation and its consequences.

2.3. The issue of affirmative action, injunctions to the State

38. Positive measures are unrelated to social rights litigation. Just refer to the positive steps that the European Court has taken under Articles 6 and 8 to make it possible to order the State to be provided or to provide. Regarding the right to education, the Belgian linguistic judgments and especially Cyprus c. Turkey accredit this thesis.

In this respect the bodies of the American Convention on Human Rights[210] are showing great originality. The application of the Charter by the courts actually lends itself to this technique and with full jurisdiction to offer such administrative judge this possibility, and the judicial court guardian of fundamental freedoms can not help to indicate the remedial measures required.

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207 Read Sebastian Van Drooghenbroeck, Social security is it a human right? The logic of the "third" in the service of the effectiveness of Article 23, 2nd paragraph, constitution and Isabelle Chop, in C. Note A., No. 137/2006, 14 September 2006. when Arbitration and standstill Court meet ...

208 Giorgio Malinverni, *op.cit*.pp.103-104

209 Sebastien Van Drooghenbroeck, Lesson of collective dimensions of human rights, Masters Degree in Human Rights, FUSL-UCL-FUNDP.2007-2008, unpublished

210 Olivier de Schutter, *Protole…op.cit.*

CONCLUSION

At the end of our reflection, we can say with Sebastian van Droonghenbroeck[211] that "the direct effect of a standard would be less tied to the un-conditionality of it as" relative proximity talks "with the existing legal system with the result postulated by this international standard. "Indeed starting from the analysis of so-called" premium teachers in South Kivu in the DRC, we found that the right to education guaranteed by international treaties was received in the Congolese legal system integrating the power of the constitutionality and occupying the top of the hierarchy. Therefore, the aforementioned practice of enrolling in the margin obligations inherent in this law, victims have remedies in the domestic courts of the constituent who received the mission to apply primarily to conventional standards but also in the International courts who control the action of national courts. It is true that the right to education, mainly at primary level has the magnanimity of the detractors of ESCR not in terms of its nature but its social significance. What is already enough to relativist the gap maintained between the two categories of rights. This study assumes that social rights are justiciable in the DRC by the will of the constituent parts but also to the ACHPR. From there some jurisdictions have come to recognize individual rights to private individuals and even in regimes that fail at this level of protection, we realized that individuals under the jurisdiction of a State were creditors (beneficiaries) obligations of the State allowing them to justify their interest to act before the Courts. This conclusion emerges from the particular analysis of the role of treaties in the trial lens. Even when the text would not be called immediately, it appeared that the judge will have to limit to ensure that the state holds the fixing of the existing situation and work to say the right in accordance with objectives that the state is committed to achieve. The judge not only intervenes in cases of apparent violations, but also to regressive measures or implementing discriminatory.

When the measures, it is required to adopt, there are cases where it is limited to the cancellation action violating the law guarantees, sometimes it will be limited to a finding of violation by leaving the choice of means to repair its State and in some cases it will be well empowered to issue directions to summon the state. Thus, the theory is true of the direct context. The question of the justiciability of international solidarity in particular is left open.

[211] Julie Ringelheim, System lesson on protection of Human rights, Masters Degree in Human Rights, FUSL-UCL-FUNDP.2007-2008, unpublished

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