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VOLUME 11

FOREWORD

Two years ago, the Democratic Republic of Congo celebrated her fiftieth independence anniversary. Apart from various events during the festivities, the occasion granted opportunity to more than one Congolese to take stock of everything in those five decades.

The articles in this issue of the African Law Study Library would like to reflect on what the Congolese have done, what they do and what they should do "for the DRC to finally take off"

Indeed, from 1960 to 2010, the history of this country in the heart of the continent of Africa was essentially marked repeatedly by political and institutional crises, and looting by armed conflict, as well as the fall of the macroeconomic sector.

Thus, concentrating first on the subject of armed conflict, Symphorien Kapinga Kapinga, thoroughly examines the case concerning Armed Activities on the Territory of the Congo (DRC v. Uganda) and notes that more than five years after delivery of the judgment of the International Court of Justice negotiations between the two countries are engaged through diplomatic channels to determine the amount of remedy and any compensation.

To prevent any attempts of further attacks, the Security Council has assigned the mission of the United Nations Stabilization Mission in Democratic Republic of Congo (Monusco) another term whose scope is examined by Mukiramfi Samba.

On the socio-economic aspects, two articles focus mainly on cooperation between the DRC and International Financial Institutions. The first, presented by Joseph Cihunda Hengelela, attempts to take stock of action taken with the financial resources available to the Congolese authorities by the World Bank, while the contribution of Paulin Punga Kumakinga is mainly devoted to International Monetary Fund interventions in the DRC until reaching the completion point under the Heavily Indebted Poor Countries Initiative (HIPC).

Furthermore, the article by Sarah-Noallie Lomboto Elumbu on "the impact of monetary policy of the Central Bank on the inflation rate in the DRC: instruments, implementation and results" examines the impact of the mandate entrusted to the Central Bank in creating conducive conditions for the revival of economic activities in the DRC.

In addition, Yves-Junior Manzanza Lumingu scrutinizes the legal framework, the current situation and prospects of Sino-Congolese economic relations.

Finally, addressing the question of accession of the DRC to OHADA, Balingene Kahombo reflects on the impact that the unification of the law as intended by the OHADA might have on the systems in place in Member States in order to move towards national prosperity.

While recalling that the views expressed in this work are those of the authors, we hope all readers of the African Law Study Library, this issue included, will find a tool that guide all those interested in the promotion of the rule of law in the Democratic Republic of Congo.

Jean-Michel Kumbu **Hartmut Hamann** **Yves-Junior Manzanza Lumingu**

THE CASE OF ARMED ACTIVITIES ON THE TERRITORY OF CONGO (DRC V. UGANDA): THE RELIEF DUE TO THE CONGOLESE STATE AND THE COLLATERAL VICTIMS OF ACTS OF WAR

By **Symphorien KAPINGA KAPINGA NKASHAMA**[*]

INTRODUCTION

The case concerning Armed Activities on the Congo Territory, the circumstances that surround it and its consequences because of the death and suffering of millions of people is one of the most complex and most tragic cases[1] before the International Court of Justice known for its traditional mission of resolving disputes between States by the application of international law[2].

This case was the subject of three complaints filed by the Democratic Republic of Congo (DRC) before the International Court of Justice against Uganda, Rwanda and Burundi respectively dated 23 June 1999[3], whom she accused of **committing acts of armed aggression on her territory[4].**

Through these three requests, the DRC was at the same time before the international body for the grave violations of human rights and international humanitarian law that individuals living in her territory at the time of the assault victims were from States armed forces of the "aggressors".

But this has resulted only in one judgment for compensation of December 19, 2005 compelling Uganda to pay damages to the Democratic Republic of Congo for the fact of internationally wrongful acts of which Uganda is liable[5].

Indeed, under that judgment, *"after consideration of the case and taking into account the nature of the internationally wrongful acts for which Uganda has been convicted, the Court held that these facts* ***have led to harm to the DRC and to the people on her territory.*** *Having established that this harm was brought about to the DRC by Uganda, the Court finds that the latter is required to repair such damage as a result. "*[6]

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1 As the judge noted in his statement KOROMA appended to the judgment.

2 Article 38 of the Statute of the International Court of Justice.

3 Under the late President Laurent Desire Kabila, succeeded in leading the country through a rebel group (AFDL), including previously supported by Uganda and who had managed to oust the late President Mobutu May 17, 1997. He entered into open conflict with his former sponsors and was assassinated on 17 January 2001 and replaced by the current president, then chief of the army, presented as his biological son

4 Queries against Burundi and Rwanda have been struck by the Court. The DRC had submitted a new application against Rwanda accusing her of massive and grave violations of human rights and international humanitarian law. But in its judgment of February 3, 2006, the International Court of Justice declined jurisdiction, Rwanda has not recognized the jurisdiction of the court. For further details on these applications, see www.icj-cij.org; see also TSHIBANGU KALALA, "requests the DRC in the case of activities in the territory of the Congo against Rwanda, Burundi and Uganda to the International Court of Justice: the first analysis and comment," in *Journal of African Law* , RDJA, Brussels, No. 13, 2000, pp.96-109.

5 Judgment of 19 December 2005, Case Concerning Armed Activities on Congolese territory, (DRC c / Uganda). Read full on www.icj-cij.org.

6 *Idem,* par.260- 261

Note that the nature, form and amount of compensation are left to the discretion of the parties. In case of disagreement, the Court itself will decide at a later stage of the procedure. More than five years after that judgment, negotiations between the two countries are engaged through diplomatic channels to determine the amount of remedy and any compensation[7], but this diplomacy does not seem to give the expected results so far.

This study intends to address the following concerns:

- What is the nature of the injuries suffered by the DRC for which it can expect a remedy?
- What could be the nature and form of this remedy?
- What are the rights that individuals, collateral victims of acts of war charged in Uganda can be learned from this judgment of the ICJ?

To answer this, we will try first to describe the political and diplomatic context of this case (I), before examining the nature of the damage to the DRC (II). It will also question the requirement for Uganda to remedy the damage done to the DRC and the various possible forms of reparation (III) and the rights of individuals, victims of the horrors of war, learned of the judgment of the International Court (IV).

I. THE POLITICAL AND DIPLOMATIC BACKGROUND OF DRC/UGANDA

The case concerning armed activities on the territory of the DRC is the result of a tragic conflict involving a dual nature in addition to domestic political forces, six African states that have fought on Congolese territory from the 2 August 1998 to 15 August 2002[8].

Indeed, Uganda initiated and supported a rebel group called the Congo Liberation Movement (CLM), and the dissent of the Rally for Congolese Democracy (RCD), while Rwanda was the iron hand of the RCD then the RCD-Goma remained loyal and mostly composed of Tutsi.[9] Democratic Republic of Congo for its part was supported by some countries of SADC Angola, Zimbabwe, Namibia and some times, the CHAD in her self-defense:[10]. Some have not hesitated to describe this conflict as «*the first African world war*"[11].

The complexity and delicacy of the case concerning Armed Activities on the Territory of the Congo lies in the fact that when the international judicial body was examining it, it was often the subject of other peaceful initiatives at both regional (CEMAC, SADC, regional (AU), and universal (UN) levels[12]. The Security Council, the principal organ of the UN, responsible for

[7] The same judgment also condemned the Democratic Republic of Congo to repair the damage caused to Uganda because of its armed forces that had attacked including the Ugandan Embassy in Kinshasa and subjected to maltreatment of Ugandan diplomats in Embassy premises and at Ndjili airport, August 20, 1998, (par.306-344) in violation of the Vienna Convention on Diplomatic Relations adopted on 18 April 1961 and entered into force April 24, 1964.

[8] The circumstances of the outbreak of war, read Braeckman C., *Towards the Second Congo's independence*, Scream Edition, Brussels, 2008, p.83 et seq., Theodor Hanf, for a country to plunder? Test to locate the Congolese crisis, in *Pamphile Mabiala Matumba-Ngoma, Theodor Hanf and Beatrice Schlee (ed.)*, *The Democratic Republic of Congo: a democracy at gunpoint,* publications Konrad Adenauer, Kinshasa, 2006, pp. .21 and the following., Pamphile Mabiala Matumba-*Ngoma*, The long political transition in DRC (1990-2006): Positive aspects and vicissitudes, *Idem*, pp.46-48; Read also Lannote Olivier, Democratic Republic of Congo: War Without Borders: Joseph Desire Mobutu to Joseph Kabila, ed. Grip, 2003,

[9] See Duir Katond, Boongi Efonda and Ngabu Bura, *History of International Relations*, Sirius Publishing House, Kinshasa, 2008, p.141.

[10] Ibidem.

[11] Anastase Shyaka, relations between Rwanda and Uganda: sources of conflict factors and prospects of peace consolidation in Anastase Shyaka (eds), *Conflict Resolution in Africa of the Great Lakes,* Editions of the National University of Rwanda, September 2004, p.218. see also Braeckman C., *the Congo issue*. *Central Africa after Mobutu*, Fayard, 1999.

[12] For details, read with interest Mampuya Kanunk'a Tshiabu, The armed conflict in Congo-Zaire: its circumstances and its management in terms of United Nations law, Ed.Vandoreuvre-lès-Nancy, 2001; John Berchmans Labana Lasay'Abar, political negotiations and the

maintaining peace and international security is so involved in the dispute to the point that the outcome of this judicial body that the Court is essentially consistent with the opinions expressed by the Council in these different resolutions[13].

All these political and diplomatic efforts culminated in July 10, 1999 to the signing of the cease-fire in Lusaka[14] and the bilateral agreements between the DRC and Uganda[15] on the one hand and Rwanda on the other hand[16], under which the belligerents undertook to withdraw their troops from Congolese territory and to normalize their diplomatic relations. To support the peace process, the Security Council of United Nations has even created the United Nations Observer Mission in Congo (UNOMC) [17] in its resolution 1279 (1999) of 30 November 1999, following resolution 1258 (1999) of 6 August 1999 on the deployment of military personnel linking the region of the Democratic Republic of Congo[18] and is therefore the result of the commitment made by the UN and the OAU with the agreement of the parties to the conflict to facilitate and deploy an appropriate force in the DRC to ensure implementation of the cease-fire[19].

However, it is clear that the issue of remedy for damages caused to the DRC and individuals living on her territory because of these military activities were discussed neither in these various peace agreements nor by the Security Council of the UN as it did during the case of the aggression of Kuwait by Iraq[20].

Only after the fighting scandal occurred in 2000 and 2001, three successive times, between Rwanda and Uganda in Kisangani, the third Congolese town that the Security Council will be forced to qualify for the first time that Rwandan and Ugandan troops as uninvited[21] troops asking them to repair the damage caused by their armed activities.

About the remedy to the DRC and other victims of the horrors of war in the peace process, Ferdinand Mushi Muguma notes, not without reason that: *"rather than radicalize his claims and talking head-up, the Congolese state, since the Lusaka Agreement and those of Sun City, does only that to make concessions and abdicate without any redress."*[22]

The issue of remedy for war victims has not been raised in the process of settlement of internal conflict. The Global and Inclusive Agreement on Transition in the Democratic

peace process in DRC, in *Pamphile Mabiala Matumba-Ngoma, Theodor Hanf and Beatrice Schlee (ed.), The Democratic Republic of Congo: a democracy at gunpoint*, op.cit. p.89 et seq.

13 This is also the finding of Judge Koroma, in his declaration appended to the judgment.

14 See the full cease-fire in Congo-Africa Lusaka, No. 388, October 1999, 483-498; See also United Nations document S/1999/815.

15 It can be mentioned among others: the Uganda-DRC bilateral agreement of 15 August 2002 containing three essential points: the withdrawal of Ugandan army unconditionally and without delay, resumed the cooperation between the two parties and the normalization of their diplomatic relations; Ngurdoto Agreement of September 8, 2007.

16 See the Pretoria Agreement of 30 July 2002. For details on this Agreement, read Pilo KAMAGI, The peacekeeping in the DRC by MONUC. Case of Bunia, *in Anastasius SHYAKA (ed),* op.cit. p.71.

17 The mission has changed its name since 1 July 2010 and is now called'' Organization Mission in the UN Stabilization of Congo (MONUSCO), cfr resolution 1925 (2010). On the mandate of MONUC and its evolution, See Kabungulu-Ngoy, H.. "The mandate of MONUC and the implementation of the Lusaka Agreement," Congo-Africa, No. 349, November 2000, p. 529 and s.

18 See Doc. UN, S/RES/1279 (1999), 30 November 1999, paragraph 8.

19 Chapter 8, I of Schedule A of the Lusaka agreement stated *"The United Nation, in collaboration with the AUO should constitute, facilitate and deploy an appropriate force to the DRC to ensure implementation of this Agreement."*

20 In this case, it is true, the unique Security Council had provided such compensation by its resolutions 689 and 705 adopted in 1991. For details, read Ruzie, D.. *Public international law*. 14th edition, Dalloz, Paris, 1999, p. 210; see also Martin, P.-M. *Public international law*, Ed Masson, Paris, 1995, p.210

21 See in this sense, MINANI BIHUZO R, Stability Pact From Nairobi to the Act of Engagement of Goma, issues and challenges of the peace process in DRC, CEPAS / RHODECIC Editions, Kinshasa, 2008, p.13-14.

22 Ferdinand Mushi Muguma, The chance factors of inter-ethnic coexistence in the eastern DRC, in *Pamphile Mabiala Matumba-Ngoma, Theodor Hanf and Beatrice Schlee (ed.), The Democratic Republic of Congo: a democracy at gunpoint*, publications Konrad Adenauer, Kinshasa, 2006, p.69

Republic of Congo signed in Sun City in December 17, 2002 following the inter-Congolese dialogue was limited to the formation of a national unity government with the participation of rebel forces whose troops were integrated into the Congolese national army[23].

In addition, a general amnesty for acts of war was given to all former rebels under the Inter Congolese Dialogue without the position of victims of the horrors of this war, which was not discussed; of which it amounted to questions from some authors : *"But how, in the specific case of the Congo could we reconcile the need for justice with the pursuit of the establishment and consolidation of the nascent democracy, proofreading and dressing wounds (still current) of past and social peace, eradication and resentment of the victims of abuses of the very people who have risen to the pinnacle of power? "[24].*

Thus, the judgment of 19 December 2005 involves a political and diplomatic context quite different from that in which this matter was set in motion before the Court: former rebels as were backed by foreign powers such as Uganda are now part of the Kinshasa Government[25]. In addition, the DRC and Uganda, long in open war, have normalized diplomatic relations at the time of delivery of the judgment[26].

In the aftermath of that judgment, the Ugandan Minister of Information, James Nsaba Buturo said: *"We respect the judgment, but that does not mean the fact that we went to DRC because our national interests were threatened", "This is not the first time a country goes beyond its borders to crack down on terrorism," he added. "We are convinced that we had good reason to make the decision we made," he affirmed.*

"The government never went to the DRC to loot resources," he further assured. *"This has never been the policy of Uganda; it was the action of individual officers. If the Court has evidence of this, it should prosecute these individuals,"* he said. The minister refused to speak directly of compensation claimed by the ICJ, but he said that the DRC and Uganda *"would sit and talk about this problem"[27].*

The question of the nature, form and amount of remedy due to the DRC is now under the jurisdiction of the Government which should use its diplomatic channels to get there. Otherwise, a negotiated solution may bring the case to the same International Court of Justice.

More than six years after that judgment, negotiations between the two countries are engaged through diplomatic channels to determine the amount of remedy and any compensation[28], but this diplomacy does not seem to give the expected results so far.

Questioned by the National Assembly on the matter, following pressure from Congolese civil society, already crying for complacency or even complicity[29], the Congolese Minister

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[23] For details on this Agreement, read Jerome Bonso, Constitution of the Transition and Global and Inclusive Agreement, LINELIT Editions, April, Kinshasa, April 2004.

[24] KANGULUMBA Mbambi Vincent, Transitional Justice, repair of damage resulting from gross violations due to armed political conflict and peaceful democracy in post-conflict in the DRC, "in BAKANDEJA WA MPUNGU G., Mbata Betu KUMESU Mangu A. and KIENGE-KIENGE INTUDI R., (ed), *Participation and responsibility of actors in the context of emerging democratic in Democratic Republic, Proceedings of scientific meetings of the Faculty of Law, University of Kinshasa*, 18-19 June 2007 PUK, 2007, p.419

[25] The new regime in Kinshasa, which succeeded that of the late Laurent Kabila, appears to be more favorable to that of Kampala.

[26] With the reopening of their embassies in Kinshasa and Kampala

[27] AFP, December 20 2005 - 17:15

[28] The same judgment also condemned the Democratic Republic of Congo to repair the damage caused to Uganda because of its armed forces that had attacked including the Ugandan Embassy in Kinshasa and subjected to maltreatment of Ugandan diplomats in Embassy premises and at Ndjili airport, August 20, 1998, (par.306-344) in violation of the Vienna Convention on Diplomatic Relations adopted on 18 April 1961 and entered into force in April 24, 1964.

[29] Leaders in power now, are all ex-rebels and former allies in Uganda and Rwanda. It cites in particular the Foreign Minister, Mr Alexis Mwamba Ntambwe who comes from the RCD, former ally of RWANDA. See the reactions of Congolese civil society on the issue

of Justice suggested that *"it had initiated the damage assessment missions to the Congolese people concerned. The ad hoc committee, all factors, strengths and relevant factors taken into account, fixed the amount of compensation to twenty-three billion five hundred fourteen million nine hundred twenty-eight U.S. dollars. The evaluation report of all injuries suffered by our country was sent to Uganda through the foreign ministers of justice and human rights who traveled to Kampala on 25 and 26 May 2010."*[30]

II. THE DAMAGE SUFFERED BY THE DRC BECAUSE OF UGANDA

Recall that according to its judgment, *"after consideration of the case and given the nature of the internationally wrongful acts for which Uganda has been convicted, the Court held that these facts* ***have led to harm to the DRC and to the people on her territory"***[31]

II.1. Harm criterion

By prejudice, this shall mean any harm as a result of a wrongful act on the rights of others. This damage may be physical (property damage), moral (emotional damage), and body (psychological damage)[32].

Property damage refers to damage caused to property or other interests of the State or its nationals and may be evaluated in monetary terms. For psychological damage, it is the suffering caused to the individual, the loss of loved ones, a personal insult or an invasion of privacy.

It should be pointed out that under international law, we link the damage suffered by the persons within the State to their nationality[33].

II.2. Nature of injuries suffered by the DRC due to Uganda

So we will try to limit the damage mentioned by the Court in the case under consideration, and which are consecutive to internationally wrongful acts charged in Uganda, namely the occupation of the country, serious violations of international humanitarian law and looting of natural resources of the Democratic Republic of Congo.

II.2.1. Invasion of Congolese territory, a violation of state sovereignty

The national territory is the space on which the population of a State is of paramount importance in several respects: political, economic, legal ... for it determines the limits of state powers and is entitled to exercising these powers[34].

As per the obvious facts and recognized by the parties themselves, the Court had no difficulty in recognizing the presence of soldiers of the Defence Force of Uganda People (DFUP) on Congolese territory. Indeed, while rejecting the hypothesis of the presence of Ugandan

in www.lepotentiel.cd
30 Newsletter, www.mirepa-rdc.info
31 Paragraphs 261-262
32 Article 31 paragraph of the draft articles on international liability
33 Read Martin, P.-M. *Public international law*, Ed Masson, Paris, 1995, p.205.
34 On different conceptions of the territory of a State and its importance, read with interest: BULA-BULA Sayeman, *Public International Law Course*, University of Kinshasa, Kinshasa, 2005, p.147; Basue Babu-Kazadi G., *International Life* , PUIC, Kinshasa, 2004, pp.12-13;-Ntumba Luaba-Lumu, *Constitutional Law Officer*, EUA, Kinshasa, 2005, p.30.

troops in the attack on Kitona[35] to be insufficient evidence, the Court indicated, however, that the facts concerning the military operation by Uganda in the east between August 1998 and July 1999 are subject to relatively minor differences of opinion between parties.

In an operation called «Safe Haven», conducted by the Ugandan military high command, the Court finds, Uganda has captured several towns in eastern countries including: Aru, Beni, Butembo Watshia, and Kisangani. . Thus, based on evidence in the record, the Court established the towns taken by Uganda during this period and the corresponding dates of capture[36].

Still worse, the Court states that it is not disputed by the parties that General Kazini, commander of Ugandan forces in the DRC, had created the new province of «Kibali-Ituri» in June 1999. Based on Article 42 of Regulation 1907 of The Hague, the Court takes Uganda as an occupying Power in Ituri district in Eastern Province.

The Court concludes that Uganda's responsibility is dual because of any acts of its armed forces contrary to its international obligations and lack of vigilance required to prevent violations of human rights and international humanitarian law by other players in the occupied territory, including rebel groups acting on their behalf[37].

From the foregoing, it is established beyond dispute that Uganda violated the sovereignty and territorial integrity of the DRC. The unlawful military intervention by Uganda was of such magnitude and of such duration that the Court has considered a serious violation of the prohibition of the use of force contained in paragraph 4 of the Article 2 of the UN Charter.

The invasion and occupation of part of Congolese territory by Ugandan troops from the August 2, 1998 was a humiliation for all the people, causing a huge **moral damage to the Congolese state**. Traces remain of the frustration perceptible up to date[38] despite the normalization of diplomatic relations between the DRC and Uganda as well as Rwanda.

II.2.2. Serious violations of international humanitarian law and human rights

Not unreasonably qualified foreign war in the Congo[39], therefore it is easy to understand the atrocities that accompanied such a war and the heavy price paid by civilians, Congolese territory had become the bastion of war crimes and crimes against humanity the most ignominious.

Several published reports on this particular nature of conflict, by various United Nations agencies and NGOs have reported serious violations of international humanitarian law and

[35] The DRC had argued in its application and its submission that Uganda and Rwanda had organized, August 4, 1998, an airborne operation, flying their troops by air from Goma town, located on the eastern border of the DRC, Kitona, which lies some 1800 kilometers away, at the other end of the country, on the Atlantic coast.

[36] See paragraph 72-91 of the judgment.

[37] Paragraph 166-180.

[38] There is a part of the Congolese opinion which is an anti-Rwandan or Ugandan expressed in certain circumstances, including the gold joint operations in eastern DRC to likes of Mr Vital Kamerheré, then President of the National Assembly and which earned him his ouster as head of the Lower House, when he declared: *"Now you say that Rwandan troops entered Congo, I prefer to believe that this is wrong. If its true, it's just serious. "* cfr Congo-Africa XVIII year (April 2009), No. 434, p.311

[39] The DRC war has given the face of the extension on Congolese territory from 10 years of war in Rwanda, the Rwandan Patriotic Army are crossing swords with the ex-FAR and other Rwandan militias. It will also be an extension of 16 years of war in Uganda, the Ugandan army who will continue its NALU rebels. 8 years of war in Burundi, the Burundi army facing its multiple rebellions (FDD, FNL), 25 years of the war in Angola, the Angolan army plunging its fight of Savimbi's UNITA on Congolese territory. See MINANI BIHUZO R, *ibidem*

human rights committed throughout the Congolese territory, particularly in the Eastern areas of country.

For its part, the International Court of Justice, on the record, considered that there is credible evidence sufficient to conclude that the DFUP troops committed murder, torture and other forms of inhuman treatment against the civilian population, destroyed villages and civilian buildings, they have failed to distinguish civilian and military targets, and to protect people during clashes with other fighters, they have incited ethnic conflict and failed to take measures to stop it, they were involved in the recruitment of child soldiers and they did not taken any action to ensure respect for human rights and international humanitarian law.

As a result, by the sufferings of various kinds imposed on her people, the DRC has at the same time an enormous moral damage. There is interdependence between the injury suffered by the Congolese people in person and/or their property and moral damage that these sufferings incur for the DRC. It can also result in material damage if the DRC demonstrates that she had to commit funds to compensate people.

The Court states that if it ruled on the violations of international law on human rights and international humanitarian law committed by the Ugandan armed forces in the Congo, acts committed by various parties in the complex conflict knows that the DRC have contributed to the suffering of the Congolese population[40].

II.2.3. Looting of natural resources

It is now generally accepted that the root cause of armed conflicts in rehearsal in the DRC remains the envy of immense natural resources that bulge the region, this has led to an international organized crime for its control, operation and marketing of precious materials[41]. This was confirmed by the various expert reports on the illegal exploitation of natural resources in DRC where we can read in part as follows: *"the main reasons for the conflict in the DRC have become access to five key mineral resources: colombontalite, diamonds, copper, cobalt and gold as well as control and trade. "*[42]

The report adds *"looting, extortion and forming criminal associations are becoming common things in the occupied territories. These organizations, which have ramifications and connections worldwide, constitute to serious security problems in the region. "*[43]

Faced with these various reports, the International Court of Justice, after reviewing the case, concludes that it has no credible evidence to establish that there was a Uganda government policy to the natural resources of the DRC, or that State begun its military intervention for the purpose of obtaining access to Congolese resources.

The court however, found ample and convincing evidence to conclude that officers and soldiers of the DFUP, including the highest ranking officers, participated in the looting and

40 Paragraph 205-221.

41 Read in this sense, Lwamba Katansi, op.cit.p.13

42 The panel of experts mandated by the Security Council has established four reports on the exploitation of natural resources and other wealth of the DRC April 12, 2001 and an additive, November 13, 2001, May 22, 2002 and October 16, 2002. Consultation on http / / www.df.gou.fr / conflit-grands-lacs/pillage-ressources-naturelles-rdc.sh; see also Richard SEZIBA, UN is illegal exploitation of natural resources and Other Forms of Wealth of the Democratic Republic of Congo: Rwanda's response, *in Anastasius Shyaka* (ed), op.cit. p.47 et seq.

43 Idem, No. 214, see also Research Group on Mining in Africa, the trade route of the Congolese colton: an Uqam survey, Faculty of Political Science and Law, 1 May 2003, www.unites.uquam.ca / grama; Dietrich Christian, *criminalized economy of diamonds in the DRC*, Occasional Paper No. 4, International Peace Information Service, collection smillie.

exploitation of natural resources of the DRC and the military authorities took no action to stop these activities.

The Court concludes that Uganda has engaged its international responsibility for acts of plunder and exploitation of DRC's natural resources committed by members of the DFUP in the territory of the DRC, the violation of his duty of care regarding these acts and breach of its obligations as an occupying power in Ituri, pursuant to Rule 43 of the Hague of 1907, as to all acts of plunder and exploitation of Natural resources committed in the occupied territory[44].

As it can be seen, plundering and exploitation of natural resources attributed to Uganda have caused enormous material damage to the DRC, for years of private enjoyment of its heritage. So, would the DRC reach to determine monetary value of natural resources exploited by Ugandan troops?

III. THE OBLIGATION OF UGANDA TO REPAIR THE DAMAGE CAUSED TO THE DRC

We will try to briefly examine the legal basis for the obligation to repair the damages charged by the Court onto Uganda (1), and the possible forms of remedy to be allocated to the DRC (2).

III.1. Legal basis for the obligation of Uganda to repair the damage

A breach of an international obligation normally succeeds the liability. This principle is enshrined in Article 1 of the draft articles of the Commission International Law (CIL) on the responsibility of States for internationally wrongful act which states: *"Every internationally wrongful act of the State is liable."*[45] It must either terminate its continuing, or provide insurance and guarantees of non-repetition if circumstances require.

Article 30 of the draft states: *"The responsible State is required to fully repair the damage caused by an internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of the State* ". Jurisprudence, at least since the case of the Chorzow Factory accepts commonly that obligation to repair in any violation of an international commitment[46].

The International Court of Justice upheld this principle in the case under consideration, when it stated: *"After consideration of the case and given the nature of the internationally wrongful acts for which Uganda has been convicted, the Court considered that these facts have resulted in an injury to the DRC and to persons on her territory. Having established that this injury was caused to the DRC by Uganda, the Court finds that it is required to repair such damage as a result. "*[47]

We know also that in international law, States parties to have a dispute before the ICJ are required to comply with its decision to execute the judgment. This is a customary obligation enshrined in the UN Charter (Article 94 § 1).

Also, recognizing the jurisdiction of the Court to hear the dispute, Uganda is presumed to accept the judgment to intervene and to comply in good faith. Otherwise, the Congo will

[44] Paragraph 237-250.
[45] Text adopted by the Commission in 2001, and appears in the annex to resolution 56/83 of the General Assembly of 12 December 2001.
[46] PCIJ, 1927, skill judgment, Series A, No. 9, p.21
[47] Judgment of 19 December 2005, par.260-261, Case Concerning Armed Activities on Congolese territory, (DRC c / Uganda). Read full on www.icj-cij.org.

have to resort to enforcement of the judgment through the Security Council that the UN can "make recommendations or decide upon measures to implement the judgment"[48] (Article 94 § 2 of the Charter) or resort to cons-measures that correspond to a unilateral action against a State which has placed an unlawful act or hostile behavior[49].

However, the peculiarity of this judgment is that the Court left to the two States parties to the case of latitude to appreciate the nature, form and amount of compensation, particularly because of the multiplicity of damage and the circumstances complex in which they were due, with the possibility to intervene in subsequent proceedings in case of disagreement, although it has determined the deadline to the parties[50].

III.2. Remedies

Responsibility under international law, remedy serves to erase, as expressed by the Permanent Court of International Justice in the Chorzow case, "... *all the consequences of the illegal act and reestablish the situation which have existed if that act had not been committed "*[51].

This is the usual principle of *restitutio in integrum*. But in general, the repair can take different forms, the most obvious being the payment of compensation[52] (B) and may also take other forms such as restitution (A) and satisfaction (C), jointly or separately[53].

III.2.1. Specific restitution

Specific restitution is the for the state responsible for the internationally wrongful act to restore the situation that existed before the wrongful act was committed and therefore provide that restitution is not physically impossible. This is to restore the s*tatus quo ante* without necessarily targeting the theoretical situation of the time because, even in a state, it would have evolved.

In our case, Uganda will have to return by way of example vehicles, minerals, sums of money and other property looted and carried away from Congo by its military which may still be available today. In addition, specific restitution may also involve the delivery of a similar thing, the same nature and species. This is called restitution by replacement.

Of course, most of time, specific restitution is generally impossible for various reasons, mostly the kind of damage (psychological damage ...), the repair will take the form of monetary compensation.

III.2.2. Monetary compensation

This is the payment by the State responsible for an internationally wrongful act of the injured State of a sum of money corresponding to specific restitution which is impossible. In reality,

[48] But this procedure is random with respect to a client state of a permanent member of the Security Council as Uganda presented as serving the United States of America.
[49] The effectiveness of cons-measures to obtain enforcement of a judgment depends on several parameters including number of the power of the beneficiary state. Against the measures, read with interest BULA-BULA Sayeman, *op.cit*. p.261. Martin, P. -M, *op.cit*.p.254.
[50] Sadio Diallo in the case between the DRC to Guinea, the Court had granted the parties six months to determine the nature, form and amount of compensation (ICJ, judgment of 30 November 2011, paragraph 164.
[51] PCIJ, 1927, judgment on the merits, Series A, No. 17, p.47
[52] Everyday language speaks of compensation, this term is more explicit.
[53] Article 34 of the draft articles on State responsibility for internationally wrongful acts.

most often setting of the amount of repairs is done by diplomatic means. In all cases, the compensation must normally cover only repair without any need to add the damages and punitive interests.

But we can always consider damages for losses that are not covered by the payment which takes place in specific restitution (e.g. loss of earnings), but it is still necessary that the injury be certain.[54]

It may be mentioned that apart from the diplomatic and judicial process, it is sometimes the resolutions of international organizations that can address the problem. Thus in the case, it is true that aggression of Iraq against Kuwait in 1990, are resolutions 689 and 705 of the Security Council, adopted in 1991 which provided such repairs[55].

In the case under consideration, it should be recalled that according to statements by the Congolese Minister of Justice who spoke to the National Assembly in May 2011, the Congo has claimed the sum of monetary compensation of *" twenty-three billion five hundred and fourteen million nine hundred forty three thousand nine hundred and twenty eight American dollars (USD 23,514,943,928, "* at the end of the damage assessment missions which had been initiated to the affected communities.

He added that *"this assessment report of all injuries suffered by our country was sent to Uganda through the Ministers of Foreign Affairs, Justice and Human Rights who visited Kampala on 25 and 26 May 2010 "*[56].

The question that arises is whether this amount represents the damages suffered by the Congolese state only, or if also it covers repairs of all damages suffered by civilians, collateral victims of armed conflict as it is that the request of the DRC did not foresee the diplomatic protection of her citizens[57].

III.2.3. Satisfaction

Some damages especially moral damages cannot be repaired either by restitution or compensation to well accommodate the methods of satisfaction. It may consist in an acknowledgment of the breach, an expression of regret, a formal apology or any other terms agreed between the parties. However, satisfaction should not be disproportionate to the injury and may take a humiliating form to the responsible State.

It should be noted that the various forms of relief are not exclusive of each other and it is possible to have both a formal apology and financial compensation to be paid. Such was the case in the Rainbow Warrior, in the first phase; France had to present both the apology and to pay seven million dollars for damages and interests[58].

It may be noted that the statement by an international responsibility of a subject in itself may constitute «appropriate satisfaction.» It is therefore for Uganda and the DRC to determine the forms of relief which are most appropriate to the nature of the damage.

[54] Read about it: Martin, P.-M., op.cit.pp.209-210.
[55] Martin, PM, op.cit. p.210
[56] Response of the Minister of Justice Luzolo Bambi LESA to the topical issue with debate on the execution of the judgment delivered on 19 May 2005 by the International Court of Justice in the DRC against Uganda, drawn on the site News flash, http / / www.mirepa-rdc.info
[57] See the application initiating the proceedings of 23 June 1999
[58] See RGDIP, 1987, p.1054-1060.

IV. RIGHTS TO COMPENSATION FOR SPECIAL VICTIMS OF ACTS OF WAR

The internationally wrongful act attributable to a State may cause harm either to another state or individuals or both entities simultaneously. This was stressed by the International Court of Justice when it considered that the internationally wrongful acts for which Uganda was found liable for the damage have resulted in harm to the DRC, as well as *"all persons on her territory."*[59]

We try to examine in the context of the case concerning Armed Activities in Congo successively damage to individuals (1), the legal basis for their right to compensation (2) and possibly open remedies for damages to them (3).

IV.1. Damages suffered by individuals

These damages include, among other violations of physical integrity of a person or his property, mental distress, particularly following the loss of a loved one, or bodily harm, or any human rights abuses of the human person, as guaranteed by international humanitarian law and human rights.

Advocate for his part in the case concerning Armed Activities on the Territory of the Congo between DRC and Uganda, the International Court of Justice considered that there is credible evidence and sufficient to conclude that the DFUP troops committed murder, torture and other forms of inhuman treatment against the civilian population[60], destroyed villages and civilian buildings, they failed to distinguish civilian targets and military, and to protect the population during the fighting with other combatants, they incited ethnic conflict[61] and failed to take measures to stop it, they were involved in the recruitment of child soldiers and they took no measures to ensure respect for human rights and international humanitarian law[62].

As recognized by the Court, it is quite undeniable that Congolese and foreign individuals, living on the territory occupied by Ugandan troops, Rwanda and its allies have suffered enormous damage to both goods and people clearly identified or at least identifiable murders and assassinations, private banks looted, safety-deposit box, vehicles, agricultural products, livestock taken to Uganda, villages burned, houses destroyed, plantations and factories damaged, families separated...[63]

Special Rapparteurs, High Commissioners[64], National[65] and International[66] non-governmental

[59] par.261-262 of the judgment.

[60] It will long remember the massacres of Kasika, Makobola, Katogota; of fighting in Kisangani between Rwandan and Ugandan armies with summary executions in Kavumu, the bridge Tshiopo, mass rape as a weapon of war, cannibalism and other atrocities. Cfr DRC, Ministry of Human Rights of, White Papers, Volumes 1, 2, 3.4 and special copies.

[61] It is thought here to the tragic conflict Hema-Lendu in Ituri which resulted in massacres and other atrocities. About this conflict and the part of Uganda, read with interest Kamaragi Pilo, The peacekeeping in the DRC by MONUC in Bunia cases, *resolution of conflicts in Africa Great Lakes,* Editions of the National University of Rwanda, September 2004, p.74 et seq. ; Anastase Shyaka, op.cit.p.28 et seq.

[62] Paragraph 205-22

[63] For details, read the DRC Ministry of Human Rights, White Papers, Volumes 1, 2, 3.4 and special copies.. See also Bulambu KIT AMBU, *Dying in Kivu, the Tutsi genocide in the killings in eastern Congo-DRC*, Les Editions du Sidewalk-The harmattan, Kinshasa-Paris, 2001;

[64] These include among others the UN Special Reporter on the situation of human rights in the DRC, the UN Special Reporter on summary executions and extrajudicial, the United Nations High Commissioner for Human Rights ...

[65] As the African Association of Human Rights (ASADHO), Collective Action for the Development of Human Rights (CADDHOM), Collective Organizations of young South Kivu (COJESKI), Lotus Group in Kisangani , Friends of the Nelson Mandela Human Rights (ANMDH), ...

[66] These include among others Amnesty International, International Committee of the Red Cross (ICRC), Human Rights Watch (HRW), International Rescue Committee (IRC), Catholic Misna Agency, ...

Organizations, have published multiple reports on serious violations of human rights on Congolese territory, occupied by foreign troops, including those of Uganda, thus making this conflict the most documented in the world.

It can be evoked by way of illustration that the report of UN Secretary General commenting on the fighting between Rwandan and Ugandan army in Kisangani in June 2000 as he exclaims that *: "fighting (...) have been particularly destructive, both sides using artillery, mortar and automatic weapons. Besides the deaths and injuries among civilians and many soldiers died in combat, this had the effect of severely damaging the power plant, hydroelectric dam, the cathedral and at least one hospital in the city. Many homes, including those held by MONUC military observers, were destroyed or severely damaged. Electricity and water were cut, and there is concern that there are cases of cholera because people used water from the river. "*[67]

However, it should be noted that in her application of June 23, 1999 to the Court, the DRC has not sought at the same time in this forum, complaints related to infringements of the rights guaranteed to individuals during the war, in so doing, it has not set in motion the mechanism of diplomatic protection as provided by law[68] for its nationals victims of the war.

IV.2. Individual rights to reparation to victims of acts of war

According to a well-established rule of customary nature a party to the conflict is liable for all acts of people who are part of its armed forces. It must make reparation[69].

If over time the repairs were still owed to the States even if they are individuals who have been victims of internationally wrongful acts, there is a trend now under the influence of Human Rights recognizes the right of victims of violations of International humanitarian law to individual reparations with the possibility to obtain the conviction of state civil liability without the intervention of another State.

Indeed, the right to reparation for victims of serious violations of international humanitarian law is enshrined in numerous international treaties[70]. The United Nations adopted the basic principles and guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law, which stipulate that the victim of such abuse are entitled to adequate reparation, effective and prompt the damage suffered[71].

Thus, the international responsibility of a state once established, can directly be born right in favor of a person or entity other than a State as implied by the drafters of the draft articles on international responsibility of the State[72].

The issue of legalization of law remains questionable. In other words, is the judicial body competent to determine the hearing of the responsibility of each State and assess the extent of reparation, a binding decision to grant benefits?

67 Third Report of the Secretary General of the UN Security Council of 12 June 2000, S/2000, see also the Eighth and Ninth Report on MONUC http://daccesdd, un.org / doc / UNDOC / GEN / NOO / 468/65/IMG/N0046869.pdf

68 See the remarks of Bertrand BAUCHOT, *The protection of individuals in international law*, Master Thesis, University of Lille II, 2001-2002, p.58 et seq. http / / www.memoireonline.co

69 Rule in Article 3 of the Fourth Hague Convention Respecting the Laws and Customs of War on Land of 1907 and Article 91 of Protocol I Additional to the Geneva Conventions of 1949.

70 See the Universal Declaration of Human Rights (Art. 8), the International Covenant on ICCPR (Art. 2.3), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6), the Convention against Torture (Article 14), the Convention on the Rights of the Child (art. 39), and the Rome Statute of the ICC (Rules 19 and 68) .

71 These principles, which were revised several times as part of the Commission on Human Rights, were finally adopted in final form by the General Assembly in its resolution 60/147 of 16 December 2005.

72 Paragraph 33 of the draft articles on international liability.

IV.3. Rights litigation of collateral victims of acts of war

It is true that the right of victims to compensation is related to the appeal stating that every victim has the opportunity for redress, to seek remedies easily accessible, prompt and efficient, whether through criminal, civil administrative or disciplinary.

Thus, as pointed out by Professor Eric David, *"the victims of violations of the law of armed conflict could perfectly apply directly to the responsible State"*[73], so should it be that effective internal or international remedies be open to them.

But to date, there is only one court of international humanitarian law which could receive complaints from victims of the war and approve the repairs to allocate, with possible liability of the belligerent States.

It should be noted, however, that judicial decisions on internal victims often impose a heavy burden to demonstrate that there has been civil fault causing injury and criminal law to prove the identity of the perpetrator committed at their expense.

In addition, if such procedures are illusory in the territory of the State whose responsibility is involved, they come up against so far the principle of immunity from jurisdiction when they are organized on the territory of the forum state[74].

Before the International Court of Justice, only States can be accessed at the exclusion of individuals. When they are victims of internationally wrongful acts attributable to a State as in the case under consideration, can not rely solely on their governments which will take up the cause and endorse their claims by the mechanisms of diplomatic protection[75].

Sometimes, victims may resort to regional courts to protect human rights which have territorial jurisdiction to enforce their rights under international humanitarian law with constraints that impose such remedies to victims.

CONCLUSION

Ben Yamin Ferenz, former prosecutor at the Nuremberg Tribunal, rightly said that *"there can be no peace without justice ..."*[76]. Thus, emphasized the close relationship and dialectic between peace, reconciliation and justice in all human societies, whether in interpersonal relationships as well as interstate[77].

But very often, interstate relations are conducted through the game of interests of management, influence and power. Thus, the judgment of the International Court of Justice made on 19 December 2005 in the case concerning Armed Activities on the Territory of the Congo between Uganda and Uganda provides an illustration.

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73 Eric David, *Principles of the law of armed conflict*, second edition, Bruylant, Brussels, 1999, p.571

74 Whose territory the acts were committed.

75 On diplomatic protection, read with interest Berlia Georges, Contribution to the study of diplomatic protection, in French directory of international law, Volume 3, 1957, pp. 63-72,

76 Cited by Ntangada E., "From Peace to Justice collective repression: the changing international law" in the book CCM, No. 6: *Peace to Justice: the challenges of national reconciliation,* Butare National University, Publishing , November 2002, p.22

77 In this sense read, Nehemiah MWILANYA, *Pact on Security, Stability and Development in the Great Lakes Region (introduction),* CPN / DRC, Kinshasa, October 2007, p. 4

Initiated in the context of war between the two States, the case led to a stop almost seven years after in a political and diplomatic support for the state condemned to repair the International Court of Justice. Thus, its execution depends on the presence of forces on both sides, and their interests too.

As for individual victims of these conflicts, they are not direct beneficiaries of the judgment in this case especially because the DRC had not, in its application before the Court, asserted their own rights to compensation by the mechanism of diplomatic protection. However, the Court had the advantage of recognizing the fact that the internationally wrongful acts charged in Uganda have harmed both the DRC and the persons on her territory.

However, although the individual right to reparations for victims is universally accepted in international law, the issue of effective and timely prosecution of this right remains a headache for the victims and a challenge to international humanitarian law.

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MANDATE OF MONUSCO: CONSENSUALISM AS A PROOF OF UNILATERALISM

By **MUKIRAMFI SAMBA***

INTRODUCTION

After more than a decade of United Nations presence in the DRC as an operation for peacekeeping, the mission entrusted to it has evolved over the events. Created for the implementation of the Lusaka Agreement[78], the Mission of the United Nations in the Democratic Republic of Congo (MONUC) has engaged and made enormous strides in observing the cease-fire, monitoring the disengagement of troops toward recovery, taxation and consolidation of peace in this country.

Curiously, open debate sparked by the Congolese Government for an early withdrawal of the mission, the Security Council of the United Nations in its resolution 1925 adopted on 28 May 2010, decided that the Mission will be called from July 1, 2010 *'' United Nations Mission on the Stabilization of the Democratic Republic of Congo''* or'''' MONUSCO, replacing MONUC[79]. Consequently, the Council assigned the mandate to the new Mission on one side to protect the civilians and on the other, for stabilization and peace building in the Democratic Republic of Congo. This raises questions.

This article seeks to examine the substance of this new mandate. How this mandate is different from that of MONUC to the point of replacing or creating another name? What would be the part of the Congolese request for withdrawal of MONUC in this change?

Indeed, with regard to requirements of the Congolese Government, the UN seemed to keep a certain serenity seeking to temper their demands or speculation government on the withdrawal of MONUC in the Congo[80]. We are therefore entitled to ask whether this attitude of the International Organization is a way of acting according to its own principles, even if a government has to adopt them or not. We witnessed a soft showdown, of course, which had not yet talked about. If the Congolese government was trying to save face to make it look a national opinion, but also informed about his failures, it was able to defend the independence and sovereignty, there was no evidence so far that UN would give in to this governmental request. The UN position is to be considered in resolutions 1856 (2008), 1906 (2009) and 1925 (2010) of the Security Council of United Nations.

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[78] To end the conflict began in Aug. 2, 1998; the mediation efforts of the international community led to the signing of a cease-fire said the Lusaka July 10, 1998. Art. III, 11a of this Agreement, the parties asked the Security Council *"(...) constitute, facilitate and deploy a force of peacekeeping in the DRC to ensure implementation of this Agreement"* . They even told in advance the mandate of this force to the next paragraph 8 of Schedule A of the Agreement: *"The mandate of the UN force should include peacekeeping and peacemaking following below (...) "*. And taking into account the requests of the parties to this Agreement, the Security Council established the United Nations Organization Mission in the UN in the Democratic Republic of Congo (MONUC) by resolution 1279 of November 30, 1999. It must be said that at that time, the parties to this Agreement, concerned about the effective end of hostilities, could not, be too soon, considering the peace building as one of the Force missions requested.

[79] Res. 1925 (2010), § 1. See *Understanding the MONUSCO mandate*. *Resolution 1925 of the Security Council*, October 2010, p. 1.

[80] Cihunda Hengelela Joseph," From the MONUC to MONUSCO: Peace between rupture and continuity in the DRC", in Mbata Mangu Betukumesu A. (Ed), *The UN and the DRC in 50 years of independence. From ONUC to MONUC: Results and Prospects, in press.*

We intend to conduct this analysis through a changing of the mission first, and then the actual content of the subsequent term.

I. CONTEXT OF TRANSFORMATION OF MANDATE

If the establishment of United Nations operation consent of the host is essential, the question of its removal, even progressive, appears to be guided by objective criteria which hold the Security Council to the point, as revealed in the case under consideration that can be overridden. It should analyze the will of the Congolese Government on the withdrawal of MONUC on one hand and the imposed position of the Security Council on the other.

I.1. Congolese demand the withdrawal of MONUC: A determining factor, but insufficient

The recurring nature of insecurity and the attitude of MONUC are all objective data that justified the official position of the Democratic Republic of Congo.

I.1.1. Objective data to support the MONUC

Government demand for the withdrawal of MONUC aroused debates, outrage and fear among all actors in the peace process in DR Congo. Among the population, fear of upsurge of violence by armed groups was real[81]. Humanitarian organizations operating in the eastern part of the country warned that premature withdrawal of UN forces would be a disaster for the country's stabilization. In a report entitled 'A Fragile Future, Oxfam said that without a strong UN presence, Congo might face a general resumption of hostilities, negating the gains of the historic 2006[82] elections. Beyond these positions, it is necessary to examine the underlying reasons for the request of the Congolese Government.

The Congolese Government and MONUC did not seem to maintain a good relationship since October 2008. The cause of this distrust may be found in the conduct attributed to MONUC staff, including their complacency and complicity against CNDP rebels.

As far as the Congolese opinion is concerned, this was not a guardian angel of peace, but a cover distribution of death of Congolese by the Rwandese[83].

First, at the beginning of the transition, the case of a Major Kasongo who had rebelled against the DRC Government' point of view violate the agreements of the inter-Congolese dialogue. It was noted as a result of large scale killings in Bukavu attributed to Jules Mutebusi and Laurent Nkunda, without any intervention of MONUC. What had caused bloody riots in Kinshasa against its facilities. But what shocked world opinion is the fact that UN peacekeepers left civilians being massacred by the CNDP soldiers without any reaction from them. Such failure contrasted with their mandate to protect civilians. Professor Noel

81 Xinhua," DRC, MONUC Ituri divests" http://french.peopledaily.com.cn/International/6962331.html (Accessed April 26, 2010). The departure of UN troops in certain parts of Dingila Ango, Dakwa and Banda in Ituri alarmed people who feared the return of rebels to the RLA.

82 Bangos R., " Following Oxfam , a premature withdrawal of MONUC would be a humanitarian disaster for the Congo," http://www.grioo.com/blogs/Hobbysnews/index.php (accessed February 18, 2009). The African Association of Human Rights (ASADHO) called on the Congolese Government to reconsider its request for the withdrawal of MONUC with regard to the surprise attack of Enyele in Mbandaka.

83 Ossembe Lukadi Kalema J.," Role of the General Office of Government Affairs Officer of the Mission of the United Nations in the Democratic Republic of Congo (MONUC) in front of the Headquarters Agreement (SOFA) signed between the Democratic Republic of Congo and the United Nations", *Journal of African Human Rights and Democracy,* No. 030, Vol. I, October-December 2010, p. 390.

Obotela Rashidi summarized the criticisms of MONUC in these terms: «The deteriorating situation puts MONUC in an uncomfortable position. North Kivu, Ituri, South Kivu and North Katanga immerse in insecurity. What is then the role of MONUC? Many criticisms have been leveled against it.[84] «

Finally, under the alleged weaknesses as far as MONUC is concerned, there are also «almost constant involvement of troop-contributing States.»[85] This refusal of peacekeepers to protect civilians during the campaign of rebel groups could not hide the deficit in the command of UN troops present in DR Congo.

The involvement of these States has manifested itself in three aspects: the refusal of the losses that entails the withdrawal of troops against a rebel attack, the reluctance of states to place their troops under UN command and commitment to the mercantile of some Third World countries[86]. The difficulties of UN Forces Command explain the resignation, a week after taking office, of the Spaniard Vicente Diaz de Villegas appointed by the Secretary General to command the forces of MONUC.

Taking care not to lose troops in Congo, the supplier states asked their military not to intervene, even when it comes to protecting civilians. The interest and commitment has resulted in a mercantile racketeer taste on the part of peacekeepers who have not hesitated for some to engage in mining. This resulted in a racketeering solidarity with the armed groups. Taken in this light, the warm embrace of Laurent Nkunda by Indian Colonel Sahora Chand at the end of the mission could not have made a shocking surprise. But what would have most offended the government authorities are certain attributes of sovereignty violated by certain officers of MONUC[87].

Many other claims are to be borne by MONUC from complicity in the illegal plundering of natural resources in arms trafficking with the Congolese militias. This attitude on the part of MONUC could not remain indifferent to the President of the Republic[88]. It is in this context that the request for withdrawal is born of MONUC as it began to serve the interests of peace in Congo.

In short, it noted with regret that despite enormous services rendered by the UN in the DRC, these facts and the actions of MONUC personnel were consolidating thesis of the need to supervise the activities of such personnel as civilian and military.

But this request was aware of the importance of the presence of MONUC in the Congo.

I.1.2. Formal request of the Congolese Government

The announcement of the intention of the Congolese state to see MONUC withdraw at the time had led to misunderstandings amplified by repetitive interviews of Congolese Minister of Information and Communication. Hence the need to search the contents of this demand and government policies that accompanied it.

[84] Obotela Rashidi, N, "Africa News, November 2008," Congo-Africa, No. 430, 2008, p. 855.
[85] Vircoulon, T., "Ambiguity of international intervention in the Democratic Republic of Congo", African Politics, No. 98, 2005, p. 82.
[86] *Ibidem*
[87] See Cihunda Hengelela Joseph, op. cit.
[88] The climate of distrust of MONUC read through the response "incredible" President Joseph Kabila, on the occasion of the joint press conference with his Rwandan counterpart Paul Kagame in Goma. On the question of when the withdrawal of MONUC, Joseph Kabila met the reporter that he did not know and he had to ask this question to MONUC itself. A few months later, the position of President of DR Congo will be alleviated when he announced himself the imminent extension of MONUC's mandate through Resolution 1906 of 23 December 2009.

It was during his stay in Mbuji-Mayi (November 29, 2009) that President Joseph Kabila held a press conference during which he had already announced the extension of the mandate of MONUC. He said these words: *"The mandate of MONUC will again be renewed for six months from the month of December. The desire of the Congolese government is to receive a disengagement plan of MONUC until 30 June 2010, because we think, and this is the case, since the beginning of this year, there is a clear improvement of security situation in the Eastern part of the country "*[89] If one can believe these words of the President of the Republic as reported by Radio Okapi, Resolution 1906 and the disengagement plan from the current government from June 30, 2010 are not new facts for both partners.

Before the reactions provoked by the requirement by the Government of a disengagement plan of MONUC, especially among humanitarian organizations, President Kabila brought precision to appease the spirits. He said the Government had not asked MONUC to pack up and leave the Congo immediately, but begin to prepare. He later said that: *"We asked MONUC to present us with a disengagement plan, I hope it will be soon or at least before the end of this year. It is based on (sic) of this plan we will finally study with MONUC practical arrangements for this phasing."*[90] One may well criticize the government's approach of unilateralism in setting a time limit.

Security Council Resolution 1906 adopted on December 23, 2009 would exacerbate the divergence between the views of the Congolese Government and the UN about the MONUC presence on Congolese soil. The reaction of the Congolese Government with respect to this Resolution 1906 was unequivocal. It was for the UN mission to present a plan of phasing out from the end of June 2010. We witnessed for the first time a showdown between the Congolese Government and the United Nations since the creation of MONUC and its establishment on Congolese soil.

The disagreement of the Congolese Government and the UN was not limited simply to the time of withdrawal of MONUC. It also relates to a kind of authoritarianism restricting the «prerogatives» of sovereignty. Present at the meeting of the Security Council at which Resolution 1906 was adopted, the Permanent Representative of Congo to the UN, Ambassador Ileka Atoki, wanted to clarify the position of his country and stated: *"The Congolese women and men desire peace and peace now. The DRC is the cause of the breakdown situation of peace and security faced by the Great Lakes region. My resolution urges your government to adopt legislation and implement this within six months of existence of life in this Resolution. For no reason on earth would we return to some form of authoritarianism be it the Security Council.*[91]*"* The provisions of Resolution 1906 from the Permanent Representative complained Congolese recalls well the trusteeship that CIAT exercised throughout the period of transition[92].

One could not think that the work of reforming the army and police in addition to hunting the armed groups could be completed in five months. The UN response was awaited in the Congolese opinion on the approach of the expiry of the mandate of MONUC. Scientifically, the UN response was to confirm or not the outdated principle of consent. Consideration of Resolution 1925 of 28 May 2010 reveals the limits of this principle which confirms that the United Nations are not totally bound by this principle and they can circumvent around the chagrin of the host State.

[89] http://www.radiookapi.net (accessed March 15, 2010).
[90] http://www.radiookapi.net (accessed March 15, 2010).
[91] http://www.lefigaro.fr/flash-actu (accessed March 3, 2010).
[92] http://www.radiookapi.net (accessed March 15, 2010).

I.2. Imposition of the advent of MONUSCO by the Security Council of United Nations

In practice the United Nations, among the benchmarks that will help determine when the process of peace consolidation is sufficiently advanced to allow the transfer of certain responsibilities include:

- The absence of heavy fighting and violations of human rights on large scale and respect the rights of women and minorities;
- The effective implementation of DDR veterans (men and women, adults and births) and progress towards the restoration or creation of institutions responsible for security;
- The capacity of the national armed forces and national police to provide security and maintain law and order under civilian control and respect for human rights;
- Progress towards an independent and effective judicial and penal system;
- The restoration of state authority and the return of basic services across the country;
- The return and resettlement of displaced persons with minimum disruption or conflict in areas of return or resettlement, and
- The effective establishment of legitimate political institutions after free, fair and transparent elections, women and men get equal opportunities and enjoy equal rights to vote and to contest[93].

The mission should seek multiple sources of validation regarding the level of progress made and should not hesitate to report a possible worsening of the situation. In this respect, the operations of peacekeeping must resist the temptation to overly optimistic assessments of progress.

Thus, through Resolution 1925 the Security Council, while *noting progress in the DRC, given the challenges that the country has had to overcome the past 15 years, emphasizes the urgent need for long-term stabilization of the country, to implement a comprehensive reform of the security sector and to achieve, as the case for disarmament, demobilization and reintegration (DDR) of Congolese armed groups and disarmament, demobilization, repatriation, resettlement and reintegration (DDRRR) of foreign armed groups (...)*[94]. The Council further underlines *the serious security issues raised, the Democratic Republic of Congo, particularly in the Kivu and Eastern Province, the continuing presence*

[93] These accompanying measures of government demand are developed by Joseph Cihunda, op cit. The first accompanying measure of the government decision and dispelled doubts about the willingness to see without evasions from MONUC is the convening of the Supreme Council of Defense by President Joseph Kabila and whose objective was the examination process withdrawal of the UN Mission. This was mainly to find out what the Government should do to the withdrawal of UN forces did not provoke instability in DR Congo. It seems that this review was dictated by the adoption of Council Resolution 1906 of UN Security which extended its mandate until 31 May 2010, with the intention of extending it further twelve months. He was then a question of how to prepare to prevent the possible withdrawal of MONUC beyond the month of May 2010 does not undermine the peace already acquired. The meeting of the Supreme Defense Council was held at the time the French Alain Le Roy, Deputy Secretary General of the UN in charge of peacekeeping in DR Congo for staying in contact with the Congolese authorities in the presence of UN forces. The work of the Supreme Defense Council was spent on essential tasks that must be completed before that MONUC should retire. Among these tasks, there were the professionalization of the army through various training provided by bilateral and multilateral partners, equipment to support FARDC operations against FDLR and the LRA, through the operation "Amani Leo" jointly planned and conducted with MONUC in respect of International Humanitarian Law, International Law relating to Human Rights and Refugee Law. Obviously, the Supreme Defense Council were to find it impossible to perform such complex tasks that would strengthen the capacity of the army in the five months preceding the date of May 31, 2010. The tasks were immense: MONUC and FARDC had to do an inventory so that the withdrawal of peacekeepers, especially in sensitive areas of eastern DRC, can not jeopardize the security issue. This strategic review required for prior to the withdrawal of MONUC, which would be followed by the FARDC is going smoothly or precipitation. We know, by its Resolution 1906 the Security Council had instructed MONUC to redefine the terms of its reconfiguration while giving priority to its efforts to protect civilians and to coordinate operations with the FARDC to disarm Congolese and foreign groups, in particular the FDLR and the LRA.

[94] United Nations, *Peacekeeping Operations of United Nations. Principles and Guidelines*, New York, 2008, p. 98.

of armed groups, the need to ensure the authority of the State, the risk of renewed conflict with the return of refugees and displaced persons and illegal pursuit of natural resources and commitment to avoid a security vacuum does the return of instability in the country[95]. Also, the Council says *it is very concerned about the humanitarian situation and the situation of human rights in areas affected by armed conflict, condemning in particular the targeted attacks against civilians, widespread sexual violence, the recruitment and use of child soldiers and extrajudicial executions...*[96]

According to changing circumstances, it is sometimes necessary to modify these benchmarks during the mission.

Whatever these benchmarks adopted, they are regarded as intermediate targets as part of a broader effort to build a lasting peace where implementation will allow the international community to move progressively from the post-conflict to stabilization in the consolidation of lasting peace and the promotion of socio-economic recovery of long-term[97].

The withdrawal of a peacekeeping operation of the UN must be planned and implemented in consultation with all international and local partners to minimize the disruption of their programs and the impact on the population and host country environment[98]. Wherever possible, these benchmarks should be defined in consultation with national counterparts. In the instant case, the official position, but ambiguous Government of the Democratic Republic of the Congo mentioned above who was not included in the logic of practice of OMP, there was no more in the Security Council to decide the authority, given the situation described above, the first extension of the mandate of MONUC until 30 June 2011 and, then, having found that *the DRC had entered a new phase* of its new name, MONUC, from 1 July 2010[99].

II. CONTENT OF THE MANDATE OF MONUSCO

To believe resolution 1925 discussed below, this is the light of changing circumstances that the Security Council considered it necessary to give the mandate of the UN mission in the country a new direction, paying particular attention to peace-building to strengthen and advance the country's stabilization[100]. There were special reasons to see the Mission name change as it is remembered that not only under the same mandate that MONUC has repeatedly been fundamentally changed, but above that it has also, implicitly occupied the stabilization of the country?

This brings us to answer this question, first look at the remains of the mandate of MONUC and bequeathed to MONUSCO before accuracy of the innovations brought by the latter.

II.1. Continuity of the MONUC mission by MONUSCO

It should be pointed out that an objective analysis of MONUSCO current evidence to suggest that it stands in continuity with the involvement of the United Nations in the

[95] Res. 1925, fourth consid.
[96] *Idem*, fifth consid.
[97] *Idem*, 11th consid.
[98] United Nations, op cit, p. 99. The Security Council requested in this regard *to United Nations agencies and other international partners to focus their efforts to help the Democratic Republic of Congo to improve the conditions necessary to ensure effective protection of civilians and sustainable development in the country* and invited the United Nations team and the same partners as above *to support the Government of the DRC in its efforts to consolidate peace and development activities to ensure long term stability* (Resolution 1925, § § 9 and 10).
[99] This requirement should be seen as part of a consultation prior to the withdrawal of MONUC. Thing that has not been made as indicated in note 14 supra.
[100] Res. 1925, op. cit, § 1st.

peaceful settlement of the situation in the DRC, especially in lieu of another subsidiary body instrument of execution and control of its decisions[101]. Thus, it inherited its staff of MONUC civilian and military, infrastructure, equipment, etc.. To continue the tasks still ongoing replacement of that day. Is that the operation of peacekeeping UN MONUSCO, beyond any mandatory, provides traditional missions and other, related to its multidimensional nature.

II.1.1. Traditional missions bequeathed by MONUC

Even if the resolution establishing the MONUSCO does not expressly provide, it should inherit some original missions that justified the creation of a UN mission in DRC. This is the case of violations of the cease-fire and disengagement of troops (troop withdrawal), though there are still some on Congolese soil.

With regard to MONUC, the actual creation was not given until 30 November 1999[102], the Security Council has assigned on the basis of Chapter VI of the UN Charter, respectively, and essentially missions to facilitate the implementation of the Lusaka Agreement, secure the observance of the cease-fire, and institutional support to end the armed conflict. They derive from the general scheme of the relevant Council resolutions, which determine their nature. They therefore changed at each stage of the conflict. Until the official end of the conflict, one can identify three phases.

The initial mandate of MONUC, more consistent than that of liaison personnel which it followed, is set out in paragraph 5 of resolution 1279 the Security Council:

"A) To establish contacts with the signatories to the cease-fire, at headquarters and in the capitals of the signatory countries;
b) Liaise with the Joint Military Commission and provide technical assistance in carrying out its functions under the cease-fire, including investigation of violations of the cease-fire;
c) Provide information on security conditions in all areas of operations, including local conditions affecting decisions about the introduction of United Nations personnel;
d) Develop plans for the observance of the cease-fire and disengagement of forces;
e) Maintain contact with all parties to the cease-fire to facilitate the delivery of humanitarian assistance to IDPs, refugees, children and others of human rights, including the Rights of the Child. "

This mandate will certainly justify the establishment by MONUC of a real group of military observers (500). But gradually as the situation developed, the Security Council envisaged the study of measures to expand the mandate and allow passage to the next phase.

This is the phase of the actual launch of the UN mission with resolution 1291 of 24 February 2000, sending 5,537 soldiers, plus the necessary support staff.

In paragraph 7, it can raise new evidence about audit mandate:

"A) to monitor the cease-fire and investigate violations of the cease-fire;
b) Establish and maintain continuous liaison with the field headquarters of the military forces of all parties;

[101] MONUSCO, op cit, p.5.
[102] We develop this functional duplication in our memory MUKIRAMFI SAMBA, *control obligations relating to the mandate of a peacekeeping operation. Case of* MONUC, master's thesis, University of Kinshasa, 2007-2009.

e) To supervise and verify the disengagement and redeployment of parties;
f) Within its capabilities and its areas of deployment, monitoring the implementation of the provisions of the cease-fire on the supply of ammunition, weapons and other war materials to theatre of operations (...);
g) To facilitate the delivery of humanitarian aid and ensure respect for human rights (...);
h) To cooperate closely with the Facilitator of national dialogue, to give him support and technical assistance and coordinate activities of other UN agencies for this purpose;
i) to deploy experts in anti-mine action to the extent of the problem posed by mines and unexploded explosives, to coordinate anti-mine action (...) ".

One could point out, compared to that mandate at first glance, significant progress in terms of both military and political: better enforcement of the cease-fire[103], disengagement of forces and their effective deployment (...), the stimulus process of inter-Congolese dialogue (...), some easing by the release of political activities[104].

The third phase of the warrant was on the disengagement of forces including the question of passage which was heralded by resolutions 1291 § 11, 1392§ 6 where the Council.

"Requests the Secretary-General to submit (...) disengagement plans and elements of an updated concept of operations";

and 1341, § 20 where the Commission notes

"It is willing to consider a further review of the concept of operations for MONUC, when appropriate and according to the changing situation, to monitor and verify the withdrawal of foreign troops (...) ".

In a more unclear terms, through resolution 1376 of 9 November 2001, the Security Council *"supports the start of phase III of MONUC deployment under the concept (...)"*, but requires, in paragraph 12 , measures to be observed by the parties.

This mandate has remained the same for a long time (DDR and DDRRR). For example, in the Pretoria Agreement[105], the role of MONUC in the withdrawal of troops is the verification (§ 1), reunification and disarmament of ex-FAR and Interahamwe (§ § 7 and 8.2) and repatriate them to Rwanda (§ 8.4).

In short, the task of ensuring the safety of the territory of the DRC for MONUC involved, the obligation to observe and report, in the shortest possible time, the position and movements of armed groups and foreign military presence in key areas of insecurity; monitor compliance with the arms embargo (see below); seize or collect arms and related material that would fall into Congolese territory in violation of relevant provisions on the arms embargo ; assisting Congolese customs authorities to prevent cross-border movements of weapons, assisting the Government in enhancing its demining capacity[106].

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103 Res. 1279, through which the Council decides that the military liaison personnel (...), including a multidisciplinary team in the field of human rights, information, medical support, protection of children and business policies, and support staff, assist the Special Representative would be the UN Mission (MONUC) (§ 4).

104 Among the few violations of the cease-fire, it mentions "the renewed fighting in the pocket and taking Moliro by RCD-Goma (...) a major violation of the cease-fire" and occupation of Pweto by the same rebel movement (Res. 1399 § § 1-4).

105 Mampuya Kanuk'a Tshiabo, A., *The armed conflict in Congo-Zaire, its circumstances and its management in terms of law of the United Nations*. Nancy: AMAED, 2001, p. 109.

106 Agreement signed on 30 July 2002 (S/2002/914) by the Democratic Republic of Congo and Rwanda on the withdrawal of Rwandan

These tasks are certainly held in life, but also to the survival of the Democratic Republic of Congo[107]. In our opinion, these tasks are valid even if not expressly included in resolution 1925 (2010) for two reasons. First, *reaffirming its commitment to the sovereignty, territorial integrity and independence of the Democratic Republic of Congo* the Security Council warned against any stressful and occupancy inclination of foreign countries in this sense as in the past. It is in this sense that we should understand the fear of the Council of the *risk of a recurrence of conflicts*[108], including wars of aggression and rebellion. Then, *noting that the process of Goma and Nairobi agreements of 23 March 2009 contribute to stabilizing the situation in eastern Democratic Republic of Congo and instantly calling upon all parties to respect and implement these agreements in their entirety, including* the Council which vest into the question of withdrawal of troops. Indeed, these agreements are rooted in both the Pretoria and Luanda on the withdrawal of Rwandan and Ugandan forces, where it was also raised the issue of various armed groups. This is a process.

II.1.2. Multi-dimensional bequeathed by MONUC

In its evolution the MONUC mission, one can see that after the formal cessation of hostilities, MONUC has been given the latitude to impose peace, if necessary by armed forces, and conduct actions so as to consolidate the hard-won peace. Almost all of these tasks are subject to resolution 1925 (2010).

A. Peace enforcement to protect civilians and UN staff

The peace enforcement involves the application, with the authorization of the Security Council, coercive measures, including use of military force, to maintain or restore peace in situations where it has determined the existence a threat against peace, a breach of the peace or act of aggression[109].

With an ongoing armed conflict in the provinces of Kivu, MONUC had entered a phase of peace enforcement to assist the Government to dismantle the FDLR, protect vulnerable communities from violence by rebels and establish the authority of state and the rule of law[110].

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troops. The role of MONUC is almost the same in the Luanda Agreement signed on 6 September 2002 by the Democratic Republic of Congo and Uganda on the withdrawal of Ugandan troops.

107 Read Mazyambo Makengo Kisala, A., op. cit, p. 161.

108 Read Mukiramfi Samba,'' The mandate of MONUC: Versatility for life and survival of the Democratic Republic of Congo'', in Andre Mbata Betukumesu Mangu (ed), *The UN and the DRC in 50 years independence. Of ONUC in MONUC*: *Results and Prospects* (in press). Through its versatile or multidimensional mandate, MONUC was able to help the DRC to avoid the risks she raced or continue to run a hand in its existence as a modern state and also the difficulties in establishing its authority throughout the national territory. Life returns to the popular idea of the'' balkanization'' of the DRC or the Somaliazation'''' All Africa Great Lakes evoked by Cheuzeville H., *Chronicles of African wars and hope . DR Congo, Uganda, Rwanda, Burundi, Sudan*, Aix-en-Provence: Perseus Publishing, 2006, p.181. Somalia has no government, is beset by rival armed groups who tear each other apart since 1991. It is precisely in this sense that Braeckman, C., *The new predators. Power politics in Central Africa,* Paris: Fayard, 2003, p.51, refers to the'' failed state'', which Somalia was the first costs and Mobutu's Zaire was to follow. As for Reyntjens, F., *War of the Great Lakes. Shifting alliances and conflicts offshore in Central Africa*, Paris: L'Harmattan, 1999, p.48, to justify conflictuality in the region, had already noted: "(...) the Zairian state has virtually disappeared, leaving a hole'' '' gaping with porous borders, virtually devoid of national army and administration (...) ". 109 Until March 2003, the Security Council has consistently expressed its determination to preserve "national sovereignty, territorial integrity and political independence of the Democratic Republic of Congo and all States in the region (...)" , recalling the "obligation" to respect them, even "the principle of inviolability of borders of African States (...)" (Res. 1234, consid.1, 2 and 3, § § 1 and 2, 1258, consid.3; 1273, consid. 2, 1279, consid. 2, 1291, consid. 3. The Council also requires clearly "that Uganda and Rwanda, which have violated the sovereignty and territorial integrity of Democratic Republic of Congo, withdraw all their forces from the territory of the Democratic Republic of the Congo without further delay (...) "(Resolution 1304, § 4 a)).

109 Res. 1925 (2010), the fifth recital.

110 United Nations, *Peacekeeping Operations of United Nations*. *Principles and Guidelines*. New York, 2008, p. 19. MONUC is under Chapter VII of the UN Charter. This authorizes it to use all necessary means, within its capabilities and areas of deployment of its units, to deter any attempt of use of force to threaten the political process from any armed group , foreign or Congolese, in particular

Indeed, by resolution 1291 of 24 February 2000 already, the Security Council decided to give MONUC the right to take *necessary measures*[111], in areas of deployment of its infantry battalions and as it deems it within its capabilities, to protect personnel, facilities and equipment of the United Nations, as well as those of the Joint Military Commission, which shares the same premises, security and freedom of its staff, and protect civilians under imminent threat of physical violence[112]. MONUC had been authorized to use force outside self-defense, to defend the civilian population, the «necessary measures» including the use of force.

This protection became, by resolution 1856, *a priority* for MONUC as it had for new "mandate in the following order of priority:

« *(…)*

a) Ensure the protection of civilians, including humanitarian personnel, who are under imminent threat of physical violence, particularly violence allegedly committed by any party to the conflict;
b) Contribute to the improvement of security conditions in which humanitarian assistance is provided, and assist the voluntary return of refugees and displaced persons;
c) Ensure the protection of personnel, premises and facilities and equipment of the United Nations;
d) Ensure the security and freedom of movement of United Nations and Associated Personnel;
e) Carry out joint patrols with the police and national security forces to increase security in the event of civil unrest; (...) "[113].

The task of protecting the civilian population was for the military component of MONUC. It focused its activities in the most volatile areas, that is to say those hosting armed groups both foreign and domestic (Ituri, North Kivu, South Kivu, northern Katanga) and Kinshasa town[114].

Issues of special protection of certain categories were also asked[115].

The protection of UN personnel and civilians is also indirectly provided by the assistance of MONUC in the disarmament process.

These operations forced disarmament of armed groups are armed groups, both national (DDR) and foreign (DDRRR). Indeed, disarmament, demobilization and reintegration of Congolese armed groups in the clear mandate of MONUC from 2003 by section 17 of resolution 1493. This process, which was provided for in the Global and Inclusive Agreement signed at the conclusion of the inter-Congolese dialogue[116], sought voluntary departure, with the assistance of MONUC, in coordination with UNDP.

the Ex-FAR and Interahamwe, and to protect civilians under imminent threat of physical violence.

111 These measures apply to both the consolidation of peace. We analyze here in that they have caused, and cause and imposed military intervention on the part of MONUC to ease tensions, atrocities and other situations considered dangerous.

112 The same formula is found in resolutions 1856, § § 5 and 6 and 1906, § 6.

113 § 8 of the resolution.

114 § 3 of the resolution. This order will be prioritized in the mandate reiterated in resolution 1906, § § 5 a) (while referring to Resolution 1856), 7-18.

115 Professor Mazyambo Makengo Kisala, A. class achievements in this field through insecure areas, op.cit., pp.163-166. But with the current evolution of the situation, the energy is concentrated more in the Kivus as foreseen in the Security Council (see below).

116 These are questions that we develop further in peace building. We are referring here especially since the mandate of MONUC demanded, in some cases use of armed force, therefore peace enforcement.

The mandate of the new MONUC will be strengthened by resolution 1355 of 20 June 2001. This resolution authorizes MONUC to provide assistance for disarmament, mobilization, repatriation, rehabilitation and reintegration (DDRRR) of armed foreigners[117] on Congolese territory, mainly the Interahamwe[118]. This mission will become usual for other resolutions, since the issue of armed groups continues to be the real threat to the process.

Under resolutions 1856 (2008) and 1906 (2009), MONUC has been fully available to bring its support, provided such operations are planned jointly, and whether carried out by FARDC battalions that received training of MONUC[119]. It is in this context where it is reported that military operations by the FARDC in eastern DRC, with the support of MONUC, continued to dislodge foreign and Congolese armed groups of their honors and residual allowed the government to extend its control in previously inaccessible areas, etc..[120] .

One can illustrate here after the launch of the Uganda-DRC joint offensive against the army of the Lord's Resistance Army (LRA) in December 2008, the security of the Eastern Province has deteriorated significantly[121]. According to MONUC military reports, 82 joint military operations were conducted against the LRA[122].

Also, since the beginning of Operation Kimia II in North Kivu, it was noted the increasing number of attacks against civilians by FDLR rebels on the grounds that they allegedly collaborated with the FARDC. That rape, arbitrary arrests, acts of vandalism, massive looting, abductions and bans of movement of demonstrations of civilians used as weapons of war to spread terror among the villagers[123].

In response to these acts of retaliation by the FDLR, 50 operational bases have been installed to protect Community territories in North and South Kivu; peacekeepers to mount regular patrols from their base. Coordination between humanitarian organizations and civilian components of MONUC has also led to the «protection» and «planning» joint and recent deployments of Joint Protection Teams (DAT) in the most vulnerable areas. This would lead to a better ability to anticipate the movements of people and their concentration, to prioritize areas for delivery of humanitarian protection of civilians. It is therefore an important support given to FARDC operations against FDLR.

A report of the Secretary-General reports that since September, MONUC and FARDC have worked on planning the next phase of operations against the FDLR, which led to the development of a joint operational directive, whose strategy was to" *clear, hold and build.* "[124] It's the same resolution 1925 (2010), through which one can see that, even if the tone seems

[117] Professor Mazyambo Makengo Kisala said that the Lusaka Agreement, itself, had been mainly interested in the disarmament of foreign armed groups operating in DRC, and it's a lesser extent that its signatories were interested in the disarmament of national groups , referring to the disarmament of civilians holding illegal weapons (op.cit., p.167).

[118] we can cite according to their country of origin the armed groups still active: among the six groups in Uganda cited the Lusaka Agreement, only the Allied Democratic Front (ADF) and the Lord's Resistance Army (LRA) have remained active DRC, Burundian armed groups, the Forces for the Defense of Democracy (FDD) and National Liberation Forces (NLF) stayed longer in the DRC and Rwandan armed groups , one can mention the old Rwanda Armed Forces (ex-FAR), Interahamwe. For further details, read Ossembe Lukadi Kalema, *The issue of disarmament, demobilization and repatriation of Rwandan armed groups ex-FAR and Interahamwe in the peace process in DRC. Case of the Democratic Liberation Forces of Rwanda (FDLR).* Masters thesis, University of Kinshasa, 2001-2003, p. 41 et seq.

[119] § 32 of the resolution.

[120] Res. 1856, § 3) and g); Res. 1906, § § 5 b), 19-28.

[121] 30th report of the Secretary-General on the Mission of the United Nations in the Democratic Republic of Congo (S/2009/623), December 4, 2009, § 2. See also § § 3 and seq.

[122] Between December 2007 and August 2008, the LRA has killed 1,233 civilians and abducted 654 children and 980 adults.

[123] For details, read MONUC, *Information Kit*, January 2010.

[124] MONUC, *Information Kit, idem*.

to have declined somewhat, the responsibilities assigned to MONUSCO in this area are particularly support or support for Government actions of the DRC, which is primarily the responsibility of protecting its people[125].

With MONUSCO, it comes to a point of *completing the ongoing military operations in the Kivu and Eastern Province and thereby reduces the possible threat posed by armed groups and restore stability in sensitive areas*[126]. The concept provides sufficient evidence to complete the continuity of this action initiated by MONUC.

B. Peace-building

It includes measures targeted to reduce the risk of a resumption of conflict[127] and lay the foundations for sustainable development, including through the strengthening of national capacities for conflict management at all levels[128]. The activities of peace-building are the structural causes of armed conflict through a comprehensive approach. This is precisely what the Secretary-General of the United Nations said about the Peace-building (DRC) *"means that in a country emerging from conflict, to restore the authority of the State, to revive the dialogue between government and civil society, to enable it to regenerate and to establish the foundations of institutional economic and social development. "*[129]

To consolidate the gains of peace, the Security Council support MONUSCO to support the efforts of the Congolese authorities to strengthen and reform security institutions and the judiciary[130]. Hence MONUSCO help the DRC government to strengthen its military capabilities, including military justice and military police and, if the Government so requests, will help train FARDC battalions and military police support institutions of military justice. The police reform, justice and strengthening the authority of the State in the territory liberated from armed groups are all actions that will support MONUSCO.

Curiously, this situation in the DRC already presented its own challenges[131], which had been brought to the Security Council to refocus the mandate of MONUC. This mandate, even today, is in support of the Government in certain sectors, particularly in the context of the Plan of Stabilization and Reconstruction Developed by the Government (STAREC) and the International Strategy Supporting Security and Stabilization (ISSSS).

Concerning, first, the restoration and extension of state authority, one must go back to supporting the transition, where the MONUC Force provided security for leaders of the transition and institutions in the capital Kinshasa. MONUC has maintained contact with all parts of the Transitional Government (TG) and has acted as a facilitator for the three joint commissions, etc..[132] .

[125] 30th report of the Secretary-General on the Mission of the United Nations in the Democratic Republic of Congo, § 11.
[126] Res. 1925 (2010), § 4 h-k. The Council does not remember the demands on the armed groups and militias, in comparison with resolutions 1856 § 2 f-I and 1906 §§ 19-28.
[127] MONUSCO, op cit, p.8.
[128] Recall that, officially, the armed conflict ended in 2003 with the signing of the Comprehensive inclusive by the Congolese parties, which the agreement has paved way for the transition that will lead to elections in 2006. So theoretically, operations design from 2003, although in reality some acts traceable to the consolidation of peace had been laid long before the conflict ended.
[129] United Nations. *op.cit*., p.19.
[130] Report of the Secretary General on the work of MONUC, 2006, New York, § 18.
[131] Read MONUSCO, Understanding the Mandate MONUSCO, Resolution 1925 of the Security Council, October 2010, p.7.
[132] MONUC was still in Congo (officially at least) following a legacy of the war that would have made more than 4 million people from 1998 to 2003. Still persist : the illicit exploitation of natural resources that continue to fuel internal conflicts, ethnic strife and unresolved land, the limited impact of the Government outside Kinshasa, a low capacity for governance, lack of effective institutions to provide quality services and the rule of law, violations of human rights with impunity, corruption "endemic," the challenge of state authority by heavily armed rebels in the east, integration of former rebels into the FARDC and the unfinished

With the assistance of MONUC, political and administrative reunification of the country has already achieved and a sense of security began to revive.

With resolution 1925 (2010), discussed, but in the same vein, the *strengthening of state authority*. The Council identifies this building as one of key indicators to determine the start of the withdrawal of the mission. These indicators include at least the deployment of an effective police force and civil administration in the liberated zones of armed groups, in order to avoid a security vacuum that could lead to institutional and the return of instability. The implementation of national security forces and sustainable business, and establishment of effective legal institutions are necessary steps towards the restoration of a sufficient level of security and the rule of law.

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Resolution 1906 of December 23, 2009 reiterates that the responsibility for reforming the security sector is the primary responsibility to the Government of the Democratic Republic of Congo. The Council encourages the latter, in cooperation with MONUC and its international partners, to build a multiethnic army base (...) to strengthen the ability, discipline and professionalism of the FARDC[133]. It also requests MONUC to coordinate the efforts of the international community for this purpose and provide military training (...) to FARDC. The Council went further, asking the Congolese authorities to establish, with the assistance of MONUC, in accordance with international standards for the FARDC and national security forces, so as to exclude all candidates who have committed violations of international humanitarian law and violations of human rights and take legal action against these persons, if any (...)[134].

As per The assistance Unit on the rule of law, its main objective is to contribute to the promotion of good governance in the DRC through the advancement of judicial and correctional institutions and other related organizations, in collaboration with players of the national justice sector, UN agencies and international partners.

This Unit has supported the reform of the judiciary by providing technical support to the Congolese authorities, particularly in developing project plans, is actively seeking donor support for projects, participates in the Joint Commission-DRC of international partners on issues of justice and correctional facilities with a particular focus on quick impact projects in the short term and the development of long-term strategic plans, it also provides logistical support to the efforts of the Congolese partners to advance the administration of justice and corrections in the area of military justice and civil, and finally it works in collaboration with Congolese and international partners to ensure integration of international standards within the Congolese texts and practices[135].

reform of the security services required for the establishment and maintenance of state authority across the country.

[133] MONUC, *Overview of the roles ...* op. cit., p. 10.

[134] MONUSCO, *op cit*, p 7.

[135] MONUC, *Understanding the mandate of MONUC*, *op.cit.,* P. 17.

In short, MONUC, in cooperation with other international partners, has been concerned with the strengthening of the rule of law in the DRC by providing direct support to the reform of the judiciary and the various legislative reforms.

This mission was also transferred to MONUSCO in that resolution 1925 (2010) which gives it mandate to assist the Government to strengthen its military capabilities, including support of military justice and helping to reform the military police. In terms of police reform, the resolution strengthens the mandate to more than MONUSCO mobilizes donors to provide equipment and funds for this training. Finally, according to Strategy Congolese justice reform, it is requested MONUSCO to develop and implement the multiannual program for United Nations support to justice, focusing on the development of the criminal justice (police, courts, prisons).

Concerning the electoral assistance and securing the electoral process, the MONUC mission carried two resolutions: 1496 of July 28, 2003 and 1565 of 1 August 2004. The task was undertaken by the Electoral Division of MONUC, which was mandated to provide assistance to the Independent Electoral Commission (IEC).
In the elections of 2006, it helped in strengthening the institutional capacity of the IEC, the preparation and publication of the roadmap of elections, in the feasibility study regarding the electoral process, in setting up the preliminary election calendar, as in determining the budget of the electoral operations and technical support to ensure that the legislative framework for the process conforms to international standards and is acceptable to both the IEC and the international community[136].

As for the security of the process, it was planned and coordinated by the Technical Group of Electoral Security, created in 2005 and which included representatives of the Transitional Government, MONUC, the European Union and other major donors[137].

Currently, resolution 1925 (2010) implores the possibility for MONUSCO to provide the Government of the DRC a technical and logistical support for the organization of national and local elections, at the express request of that Government.

136 § § 30 et seq. of the resolution.
137 MONUC, *idem*, p. 21.

WORLD BANK ASSISTANCE TO THE DEMOCRATIC REPUBLIC OF CONGO: MANAGEMENT ISSUES, ACCOUNTABILITY OF THE ACTORS AND FUTURE PROSPECTS

By **Joseph CIHUNDA HENGELELA***

'Tshinguvu tshia kusomba, keshi kutshijikiya mangunji'[138]
Proverbe Tshokwe

INTRODUCTION

The resolution of what is today called the Congolese equation requires both critical and holistic thinking. This reflection must be made not only on what is identified as the roots of evil but more importantly Congolese on proposed solutions that the Congolese leaders were devised and applied to political, economic and social in DR Congo. The equation is precisely the Congolese underdevelopment resulting in poverty, which itself paradoxically coexists with the multitude of potential to grow.

The question recurring and ongoing is that of knowing why the Congolese do not develop despite the abundance of natural and mineral resources that abound the ground and subsurface soil of their country. Where would be the causes of the failure alleged or proven of the Congolese to propel their country to a self-centred, sustaining and sustainable development. In any case, the persistence of underdevelopment in the Congo is not due to natural and physical factors.. It also seems, despite the fact that poverty hits the population; its permanence and growth are primarily the result of bad policies (their design and / or application) by the Congolese political authorities.

Cardinal Laurent Monsengwo highlighted the responsibility of the Congolese politicians in the underdevelopment of the country when he wrote that:

> *"The Democratic Republic of Congo has suffered for long from a lack of political will. The rigor of the thinking that can be considered for change needs to feed more of a commitment to act effectively and to do better. It is via that can pass the construction of a new Congo, transformed by the commitment and responsibility for each other.*[139]»

In the same vein, Delly Sesenga Hipungu identifies the main problems that ruin the Democratic Republic of Congo, arguing that:

> *"... The Congo lies in an ethical impasse due to a political immorality: lack of sense of duty, desecration of the state and public authority, individual irresponsibility, lack of love for the general interest, weakening deliberated by the public, reluctance to institutionalize the exercise*

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138 This proverb can be translated as follows: We do not ask on the forks borrowed the gong before playing. In other words, it is ridiculous to base all hopes on loans.

139 The Monsengwo Pasinya, "Preface," in Sesenga Hipungu D, *Direction for Change. A bet of the reason for the DR Congo,* Paris, L'Harmattan, 2011, 11.

of power in favor of its personalization, any dilution of state culture, deprofessionalization of administrative functions[140] ... «.

This finding of a national deputy is an actual description of the state of governance of the Congolese state. This state of moral and material decay due to primarily the quality of the ruling political elite and has a negative influence on all public policy development. It is the same policy on cooperation with the International Financial Institutions (IFI). It is against this background that this study aims to analyze the relationships between the World Bank Group and the Democratic Republic of Congo. The Congolese authorities have used the services of the IFI to try to solve problems of the people that the national financial resources could not cover. There then arises the question whether this remedy has helped the Congolese to achieve the objectives of national development and therefore reducing the poverty of its inhabitants. What is the status of this cooperation in terms of achievements and failures? What are the challenges that this cooperation has faced? What are the prospects for a reorientation of the cooperation of the Democratic Republic of Congo with the institutions of the World Bank Group?

For many years the Social Science Research in Africa has been very critical of the IFI because of their responsibility for the escalation and persistence of poverty in Africa since the imposition of Structural Adjustment Policies (SAP). African relations with the IFI must now be thoroughly analyzed to lay the foundations for sustainable development and self-centered as we enter the twenty-first century and second half-century of independence that has just begun for most countries. Regarding the Democratic Republic of Congo, options should be taken serious so that the future is not like the mess of the past. This study has set itself the objective of contributing to the improvement of cooperation with institutions of the World Bank Group. It is important at this stage to place the responsibilities and failures from some success, to invent a process that interventions of the World Bank Group are truly serving the cause of the (re-) construction of the country and control against poverty in the Democratic Republic of Congo.

The World Bank Group has five international institutions: the International Bank for Reconstruction and Development (IBRD), International Finance Corporation (IFC), the International Development Association (IDA), the International Centre for Settlement of Disputes related Investment Disputes (ICSID[141]) and Multilateral Investment Guarantee Agency (MIGA[142]). Given the volume of interventions, this reflection will be limited to the analysis of three institutions: IBRD, IFC and IDA. The terms of the World Bank Group and World Bank itself refer simply as part of this study to these international institutions.

Thus, the study is structured in four parts as follows: the first section deals with the legal framework of cooperation between the DRC and the World Bank Group, the second part is the inventory of this cooperation, the third part establishes the responsibility of players in this cooperation and the fourth item is an outline of the prospects for the future of relations between Congo and the World Bank.

[140] Sesenga Hipungu D, *Direction for Change. A bet of the reason for the DR Congo, Paris*, L'Harmattan, 2011, 215.

[141] The DRC had to resort to ICSID for some cases of financial disputes with certain creditors in the context of secondary buyouts of commercial debts with primary creditors, members of the London Club.

[142] Cooperation with MIGA has been slow to be run effectively because of non payment by the DRC of its contribution. It is in the activities of the Project on private sector competitiveness that financial support was provided to the Government to formally join MIGA.

I. LEGAL FRAMEWORK FOR INTERVENTION OF THE WORLD BANK IN THE DEMOCRATIC REPUBLIC OF CONGO

The legal bases of cooperation of the Democratic Republic of Congo with the institutions of the World Bank Group are in the statutes of these organizations and financial instruments of accession of the DR Congo. It should be noted that agreements have been signed to each program to support specific projects. These agreements are the foundation side of the relationship between the Congolese government with the Bretton Woods institutions.

The statutes of the IBRD were adopted on July 22, 1944 at Bretton Woods (New Hampshire) United States of America. Under Article I of these statutes, the IBRD aims to help the reconstruction and development of territories of Member States by facilitating the investment of capital for productive purposes. It is also to help the restoration of economies destroyed or disrupted by war and rehabilitation means of production to the needs of peacetime. Capacity building for resource development and the means of production of the least developed countries is also an objective of the World Bank.

The International Finance Corporation (IFC) was created on May 25, 1956 in Washington and is a separate entity within the Group of the World Bank[143]. In particular, it aims to help finance the establishment, development and expansion of private productive nature. IFC seeks primarily to promote economic development by encouraging productive enterprises and capital markets that work well in member countries[144].

The International Development Association (IDA) was established in Washington on January 26, 1960. It aims to encourage economic development through increased productivity and living standards of people in the world where it is established[145]. The IDA credits are primarily addressed to countries whose per capita annual income is below U.S. $ 895[146]. IDA also funds projects designed to preserve the environment, to create conditions conducive for private enterprise development, strengthen the infrastructure or support reforms aimed at liberalizing the economy of the countries concerned.

The objectives of the IFI under review contribute to achieving the United Nations goal of achieving international cooperation in solving international problems of economic and social nature[147]. The DRC is a focus these agencies because it was experiencing economic and social difficulties. These difficulties persist to date, despite forty years of cooperation. Indeed, after experiencing years of poor political and economic governance, socio-economic infrastructure, the DRC has been destroyed by war and the country seems bankrupt. Hence the necessity of reviving the project of its (re-) construction.

This (re-) construction can not be done without the support of international partners, among which figures prominently the World Bank. However, the DRC has a history of financial cooperation with IBRD, IFC and IDA. It is important to make an inventory of their past relationships, to establish accountability in aid management and focus on future prospects.

[143] Section 6 of the bylaws of the IFC defines the relationship between the Bank and the Company. The provisions of this section shall not prevent the Corporation from making arrangements with the Bank's physical structure, personnel and services, and for reimbursement of administrative expenses paid by either organization on behalf of other. Nothing in this Agreement shall make the Corporation liable for the acts of the Bank and the obligations incurred by it. The Bank will not be further liable for the acts and obligations of the Company.

[144] Department of Public Information of United Nations, *ABC* ..., 60-61.

[145] Article I of the Statutes of the International Development Association, Washington January 26, 1960.

[146] Department of Public Information of United Nations, ABC ..., 60.

[147] Art. 1 par. 3 of the UN Charter, San Francisco, June 26, 1945.

II. INVENTORY OF ASSISTANCE FROM WORLD BANK TO THE DEMOCRATIC REPUBLIC OF CONGO

The DRC is a member of the World Bank and developed cooperation with its various institutions throughout the government. Cooperation with IBRD and IDA was terminated at independence. It was relaunched in 1969 before being suspended in July 1993. This suspension was occasioned by the non-payment by the DRC of its arrears on external debt to these multilateral institutions. After this long period of suspension, the cooperation between the DRC and the World Bank was relaunched in June 2002.

During the period characterized by the suspension of cooperation, the DRC and IDA in 1998 concluded three grant agreements related to institutional support. These donations were intended primarily to capacity building of the National Statistics Institute, NSI, for the production price indices. Then, to support the work of the Ministry of Mines for the development of the new Mining Code. Finally, the gift was intended also to the proposed banking reform initiated by the Central Bank of Congo. Dated June 16, 2000, the World Bank has concluded another grant agreement to finance the Economic Recovery Program for an amount of U.S. $ 5,000,000. To ensure the implementation of the funding agreement, it was decided to put in place the establishment of Central Coordination Office (BCECO).

Cooperation between the DRC and IFC in1970s. The agency contributed to the Congolese capital of the Company Development Finance (SOCOFIDE became SOFIDE) with an amount of U.S. $ 750,000. Since 2007, IFC decided to settle in the DRC in order to better support of the private sector in the DRC.

The amount actually borrowed the different rescheduling of Congolese external public debt called an audit that must provide details of the allocation of these funds. This approach has the advantage of helping to identify the root causes of non-repayment that has characterized the Congolese state.

For choosing a qualitative approach, different amounts allocated to the DRC by these institutions are not included in this study. It is also important to note that the debt of the DRC with respect to the World Bank was to the tune of 832 billion U.S. dollars by reaching the completion point under the HIPC Initiative. In terms of volume of public debt, the World Bank was the first creditor of the DRC.

From the volume of debt (832 billion dollars), one can infer that the money borrowed was colossal. But when we choose to compare the amounts of money to the achievements that were made in terms of development, the stock of cooperation can be considered mixed. Not only the investments made with the aid did not generate profits for the payment of the debt, but mostly they have failed to reduce poverty among the Congolese people.

In addition, the international debt of the DRC has contributed to the disintegration of the state and the increasing misery of the population, with the exception of the political elite and their cronies. Claims relating to basic social needs of the population and the inability of the state to book a satisfactory answer are a black hole of financial cooperation of the DRC with the institutions of the World Bank.

Should we take budget of cooperation between the DRC and the institutions of the World Bank Group? Where do we draw the conclusions from these relationships? It should still be answered in the positive reflection on a trial balance to project the future of this cooperation in the present inability to stop it. The problem does not seem that important to break the international financial cooperation, but the management of this cooperation does not become a burden for the country difficult to bear, an impediment to development it was supposed to bring. What conclusions can we make from the interventions of the World Bank in DRC? To answer this question, it is necessary to make a historical review of the genesis of cooperation between the DRC and the international financial institutions.

As they write Angela N. Khaminwa and Pedro Alba, the Democratic Republic of Congo gained independence when its economy went into recession. This was aggravated by the political crisis of 1960. The advent of Mobutu in power gave birth to sign of agreements with the IFI on IMF proposal to revive the national economy. After the results ephemeral[148], external circumstances such as the oil shock of 1973, declining copper prices and internal such as Zairianization, attempts to use the planned economy leading to the collapse of the economy[149].

Immersed in these new economic challenges, the country continued to borrow more and unable to refund the growing debt at the same time. The World Bank initiated a number of steps that led the IFI to interfere in the management of the Congolese state reflected by the fact that the borrowed money absorbs the sovereignty of the borrowing[150]. So

> *"... The Bank called for reduced or concessional loans for the Congo to ensure that the heavy debt burden does not paralyze the economy. Donors, actively engaged to clean the Zairian economy, created the Office of the Public Debt Management (ODEGEP) in 1978 placed teams of technical assistance from the Bank of Zaire and the Ministry of Finance and planning, and took over management of the Office of Customs and Excise in an effort to increase revenues. In 1983, the IMF reforms have also allowed the country to start paying its debts. During the period 1984-1985 the debt service has increased 88% over the last two years'. In addition, the rescheduling of debt (which was often in negative terms, and brought little relief) was a tool often used by the government and its partners.*[151] «

Institutions of the World Bank will maintain their presence in government bodies to the suspension of cooperation which took place in 1993. At the resumption of cooperation in 2001, it's the same logic that will be maintained under new forms. These new forms have resulted into the development of the Strategy Document for Poverty Reduction, PRSP. Criticism aside for this document is that it kept a cord with Structural Adjustment Policies (SAP). It differs however in the social aspect which it joined in theory. Implementation of the Strategy Document for Growth and Poverty Reduction (PRSP)[152] in the Democratic Republic of Congo has had the only success that has allowed the country to reach the completion point under the Initiative Heavily Indebted Poor Countries (HIPC). On the social plan before the completion point is equal to after the completion point.

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148 Khaminwa NA & Alba P, "The World Bank: Moving Forward by incorporating lessons from the past", in Manfred Schulz (ed.), *Holders of sustainable development in DR Congo. Recent developments in the political, economic, religious, cultural and civil society*, Kinshasa-Berlin-CEPAS Publishing Spektrum, 2009, 480 argues that under the reforms, we recorded an increase of taxation which contributed to doubling revenue and transformed the Z13 million deficit in the first half of 1967 into a surplus of Z4, 8 million during the second, ... private investment increased, partly because of the investment code of 1969.

149 Khaminwa NA & Alba P, "The World Bank: Way Forward ... *op. cit*., 480.

150 Eyeffa Ekomo S, "Structural adjustment in the Central African countries: achievements and prospects", in Pidika Mukawa D and Tchouassi G (ed), *Central Africa. Economic crises and control mechanisms*, Dakar, CODESRIA, 2005, 31.

151 Khaminwa NA & Alba P, "The World Bank: Way Forward ... op. cit., 480.

152 Democratic Republic of Congo, *Document of the Strategy for Growth and Poverty Reduction (PRSP),* Kinshasa, July 2006.

The social consequences of SAP were devastating especially socially. They led to a social implosion aggravating poverty: the layoffs of several employees with an impact on family life, the disintegration of the public health system and that of education[153], rising crime caused by inequalities glaring between social classes. Fidele Tshingombe Mulubay made the observation that the implementation of SAP in the Democratic Republic of Congo since the recovery in 2001 is no different from previous policies.

> *"... A careful observation, he argues, can meet the same methodological approach ... with the same phases, the same instruments and same goals. Thus, the cyclical adjustment in the short term with the Enhanced Interim Program (RIP), there has been structural adjustment in the medium term (2002-2005) with the Government Economic Program (PEG[154]) for the transition from phase of economic stabilization and recovery phase of growth that would go with the start of construction of the PRSP scheduled for 2006[155]. «*

Certainly, structural adjustment has had disastrous consequences throughout Africa[156] for the people and state officials. It has allowed against IFI to recover some of the debt. President Mobutu stressed this kind of dichotomy when he denounced the payment of two billion dollars from 1984 to 1986 when he had received during the same period public assistance to the tune of a billion dollars. He noted with some cynicism satisfaction IFI and the social crisis in the country[157]. He said:

> *"I have launched many programs in close liaison with the IMF and World Bank, but none of them leads to the expected growth and development. All formulae that have been proposed finally have had the opposite effect: negative transfers of capital to creditor countries to service debt on the one hand, and more loans on the other,. [158]»*

It was therefore necessary to establish the responsibility for the improper performance of the agreements between the DRC and the World Bank Group and their consequences on the Congolese population.

III. LIABILITY MANAGEMENT WITH THE HELP OF WORLD BANK TO THE DEMOCRATIC REPUBLIC OF CONGO

The search of the causes of the lack of positive results after Group interventions of the World Bank in DRC can be in two periods. This is a part of the period when the management of aid was the exclusive concern of the Government of the Republic and on the other hand, when the institutions of the World Bank Group decided to assist the Government to enable it to meet its financial commitments in respect of its international creditors. As demonstrated in the context of the current situation, poverty has continued to grow during both phases of cooperation.

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[153] Mbata Betukumesu Mangu A et al, *universities and academic freedom in the Democratic Republic of Congo*. *Desolation*, Dakar, CODESRIA, 2005, 13-14.

[154] With regard to the RIP and IIP, read about this topic Ngonga Nzinga V, "Review of Interim Enhanced Program and Mid-term review of the government's economic program," *economic report*, Vol.1, No.1, October 2003, 13-26.

[155] Tshingombe Mulubay F, "Populorum Progressio encyclical: An alternative vision on adjustment policies," Congo-Africa (June-July-August 2007) No. 416, 392.

[156] Riccardi A, preventive Peace, Paris, Salvator, 2004, 15 quoted Michel Camdessus, who noted the existence of entire areas plunged into misery by the violence of the economy. He said, these areas *"... can cause great despair, nothing may reinforce the hope of a better future for themselves or at least for his children";*

[157] Mobutu, *Dignity for Africa*. *Interviews with Jean-Louis Rémilleux*, Paris, Albin Michel, 1989, 178.

[158] Mobutu, *dignity* ... op.cit., 180-181.

The first phase of the management of loans obtained from the World Bank Group is clear responsibility of the Zairian government in repeated failures due to poor economic policy choices that have not allowed the state to repay money borrowed to agreed deadlines[159]. Indeed, political leaders in Zaire have established a system of governance that has resulted in a predatory economy and the selling off of state property. Note that some of the achievements made with borrowed money were of great importance for the national economy. However, the inability of political leaders remains the major cause of this economic debacle.

The gigantic complex of Inga can be considered as a white elephant. But the opaque management of revenues from the sale of electricity to foreign countries including all handicap hydroelectric development of this site whose mission is to supply electrical energy to the whole of Africa, part of the Middle East and Western Europe. Instead of concentrating efforts to value investments, the Zairian government was addicted to prestige spending including lavish spending of sovereignty.

In the second phase of cooperation that begins with the interference of Institutions Group of the World Bank in the national management of development assistance, the responsibility is shared. On the government side, the leaders continued their predatory attitudes by violating the agreements through the budget overruns, implementation of unexpected expenses and the portion reserved for major expenses of sovereignty[160].

Responsibility of IFI in general and the World Bank Group in particular is the fact that the austerity policies imposed to the national government was anti-social.

Collete Braeckman recalls that the DRC then Zaire had served in the 1970s of the first testing ground for structural adjustment. She said:

> *"... It was launched in Zaire that the practice of covering health care, requiring patients to pay, at least in part, medical consultations and interventions so that health facilities can become self-sufficient. Self-financing of education also dates from this period where parents are forced to pay tuition from their pockets and pay salaries for teachers too, a practice that continues up to to day.*[161] «

Mabi Mulumba notes that when the Zairian government was in the program with the IMF and World Bank, the severity of the measures imposed by these institutions led to blocking the functioning of the state and public investment particularly in the field of infrastructure. The debt service alone accounted for in the state budget was 50% of the total[162]. Mr. Katanga Mukumadi, then finance minister, recalled in a dry tone IFI their responsibility for the deterioration of the social sector of the country in a match which should be incorporated in part:

> *"Need I remind you that between 1983 and 1986, at the request of the IBRD, we proceeded to the mass dismissal of university professors of colleges and teachers of primary and secondary as well as public government officials. Social projects of obvious utility such as schools and hospitals were arrested at the request of your institution*[163]. «

[159] Mukoko Samba, "Economic Policy in DR C: Lessons from three decades," economic report, Vol. 1, No. 1, October 2003, 27-41.

[160] Mabi Mulumba, *The excesses of predatory management*. The case of Zaire, now Democratic Republic of Congo, Kinshasa, CEDI Editions, 2002, 87 wrote that "*... throughout the Second Republic and the political transition period, financial and budgetary laws were never met. Thus, the state budget had ceased to be an instrument of management and development to become a source of enrichment of individuals because of the informal way in release of the budget. "*See too Rwanyindo Ruzirabwoba," The behavior of Zairian public finance since 1960, "in Kankwenda Mbaya (ed.), The Zaire. Towards which goals?, Dakar, CODESRIA, 1992, 283-306.

[161] Braeckman C., *Towards the second independence of the Congo*, Kinshasa-Brussels, Scream Africa Editions, 2008.160.

[162] Mabi Mulumba, *The excesses of predatory management ... op.cit.*, 79.

[163] Mabi Mulumba, *The excesses of predatory management ... op.cit.*, 84.

Responsibility for the World Bank can also be established through its contribution to legal development in the Democratic Republic of Congo. Indeed, as part of its initiatives for improving the business climate, the World Bank to help reform including code and mining cadastre, forest code, investment code, labor code. According to the Governor of the Central Bank of Congo, Jean-Claude Masangu Mulongo, structural reforms have allowed *"the attraction of new capital such as those involved in the cellular telephony sector (...) and reprocessing of minerals (...[164]) «.*

Legal and judicial development to which the World Bank has had to contribute is not blameless. These reforms are tinged with a liberal economy borrows in the pay of Western multinationals. The World Bank has been the preferred means to prepare and facilitate access to resources of transnational corporations in the Democratic Republic of Congo. Edem Kodjo had already denounced the exploitation of the World Bank in these terms:

> *"The system implemented with the active involvement of Western countries used to channel their domination, as shown by the action of multinational firms. But thanks to financial institutions created by Bretton Woods that the West, ..., ensure their dominance in the world. The International Monetary Fund (IMF) and International Bank for Reconstruction and Development (Bird) impose a vision and concepts that are hardly neutral States who use them. These institutions shall make their aid to restructure the economy according to the liberal philosophy of the Western world. They disrupt the economic and social structures of countries that request them, reforming state structures, orient their economies, so that the survival of the States concerned depends on the goodwill of the West. Both organizations appear most often as the "armed wing" or the Trojan horse of the West for control if not domination of the global economy[165]. «*

Reforms driven by the World Bank intervened during a troubled period for the country. It was during the period of the war and after it, as the World Bank initiated the multiple structural reforms. All these reforms, believing Rigobert Minani, were included as part of structural adjustment[166] that has not borne fruit expected throughout Africa[167]. Observations made with respect to the World Bank concerning the collusion between business and multinationals accused of looting of natural resources in the Democratic Republic of Congo. The silence of the IFI with regard to the plundering of natural resources and their about-face from the conclusion of contracts in China[168] is evidence of the complicity or acquiescence of the Bretton Woods in the defeat in the Democratic Republic of Congo.

World Bank may be satisfied with having financed the construction of schools, health centers, have established a supply chain for ARVs for patients living with HIV / AIDS; for funding reform Public Sector Enterprises or the rehabilitation and modernization of road. For saving the lives

[164] Masangu Mulongo JC, "The Democratic Republic of Congo gained the enhanced Heavily Indebted Poor Countries (HIPCs)," Economic report, Vol. No. 1, October 2003, 5.

[165] Edem Kodjo, *The West: Challenge of decline*, Paris, Stock, 1988, 75.

[166] Minani Bihuzo R, "The issue of mineral resources in DRC: site inventory and prospects," *Congo-Africa* (September 2007) No. 417, 508.

[167] See in the thinking of Gibbon P et Adebayo O Olukoshi, *Structural Adjustment and Socio-Economic Change in Sub-Saharan Africa. Some Conceptual, Methodological and Research Issues*, Uppsala, Nordiska Afrikainstitutet, 1996 ; Adebayo O Olukushi, *The Elusive Prince of Denmark. Structural Adjustment and the Crisis of Governance in Africa*, Uppsala, Nordiska Afrikainstitutet, 1998; Atieno Ongile G, *Gender and Agriculture Supply Responses to Structural Adjustment Programmes. A Case Study of Smallholder Tea Producers in Kerico, Kenya*, Uppsala, Nordiska Afrikainstitutet, 1999; Mupedziswa R & Gumbo P, *Women Informal Traders in Harare and the Struggle for Survival in an Environment of Economic Reforms*, Uppsala, Nordiska Afrikainstitutet, 2001, Obi IC, *The Changing Forms of Identity Politics in Nigeria under Economic Adjustment. The Case of the Oil Minorities Movement of the Niger Delta*, Uppsala, Nordiska Afrikainstitutet, 2001.

[168] Read Marysse S, "The standoff between China, DRC and the IMF: the revision of Chinese contracts in DRC," *economic and social papers*, Vol. XXVII, No. 2, November 2010.

of peoples and supported the education of Congolese children, one can only find satisfaction. But the worrying problem is not that of making a litany of achievements. Cooperation between the DRC and the World Bank should not be reduced to these achievements, even multiplied by hundred will not make the development of the DRC.

In contrast the cooperation should be based structural within an institutional framework conducive to sustainable development. However, it seems clear that this framework does not yet exist. The State as a partner is hard to assume the functions return. In other words, government authorities have instituted a mode of governance that do not differ from that of the Second Republic. Managing the first mandate of the Third Republic has shown it is not enough to have elected leaders that they comply with the requirements of democratic governance and the rule of law. Baptism of elections does not necessarily make leaders to respect democracy and the rule of law.

When a failed state, any cooperation with its partners can only suffer the consequences. The case where by Mike Kasenga had reminded the Congolese many bad memories of the predatory management of the Second Republic. Mike Kasenga, owner of Business Group Mike retained all the markets of rehabilitation and upgrading of roads in the city of Kinshasa. The granting of these markets had performed with suspicious ease. The contract was signed in June 2007 by Minister of State for Infrastructure, Construction and Reconstruction on behalf of the Government. Finally, this contractor did not perform the work agreed. He was arrested but was acquitted by the court for lack of evidence. Meanwhile, the State was rolled in this case.

IV. OUTLOOK FOR EFFICIENT COOPERATION BETWEEN THE DEMOCRATIC REPUBLIC OF CONGO AND THE WORLD BANK

Reflecting on the future cooperation between the DRC and the World Bank Group vests in learning from the past, capitalizing on the success and correcting failures. There is no way to think of a breach of this cooperation or resign themselves to others in the cause of our misfortune. Responsibility for the World Bank as established is the result of the inability of political leaders to honor their commitments with regard to these international financial institutions. If the Zairian government was responsible at the time, the IMF and World Bank could not afford to sell off the sovereignty of the state and contribute to the deepening of poverty of the population. Where is the need for developing a national strategy for financial cooperation.

IV.1. Financial 'credibility' recovery of DR Congo on the international scene

With the attainment of completion point under the HIPC Initiative[169], the external public debt of the state was reduced. This relief was meant to offer the government the opportunity to respond to these international financial obligations. The portion of the debt remaining unpaid is minimal and it can no longer be an obstacle to a new international financial borrowing. It was thought to engage in a new loan to accelerate the development of the Democratic Republic of Congo. It should begin to design a comprehensive and ambitious plan of development for DR Congo whose financial cost can go up more than thirty

[169] Debt stood at 13, 704.9 billion dollars, or 125% of GDP in December 2009. The canceled portion of U.S. $ 10.774 billion, or 80% of total allocated as follows: U.S. $ 491 million to the IMF, 1, 832 billion U.S. dollars for the World Bank, U.S. $ 7.4 billion to the Paris Club and the rest for other creditors who are not members of the Paris Club. The current debt remained at 2, $ 931milliards U.S., 24% of GDP at the end of 2010. This relief is the largest and first to be granted under the HIPC Initiative. Potential, www.kongotimes.info (Accessed June 14, 2011).

billion dollars. This loan was to be invested in agriculture, livestock, fisheries, energy and infrastructure including transportation. All these investments will be made with the aim to put Congo back in to its place of a granary of the continent and provider of clean water and electricity.

But such a loan is conceivable to a state that is able to assume all its regulatory functions. Such a state which must be democratic in management of public affairs that is transparent and the government is able to account for its management. The DRC has not yet reached this stage. The first mandate of the Third Republic gave birth to a phantom state whose fingerprints are critical of poor governance (corruption and impunity) and the violation of human rights. In these circumstances it is difficult to advise a loan with international financial leaders of public institutions whose leadership in the management has substantial limitations and defects. A change of political personnel through free and fair elections can change the outlook for the establishment of a truly democratic rule of law state in the Democratic Republic of Congo[170].

The political crisis that emerged after the presidential and legislative elections of 28 November 2011 do not augur well for the future of the DRC. The democratic process has been a lame duck. The advent of the rule of law is undermined. It is difficult to envisage a context of financial cooperation with political authorities whose legitimacy is questionable.

IV.2. Need for a Consultation Framework for the management of international borrowings in DR Congo

As recognized by the World Bank,

> *"Policies that rely on consensus, participation and transparency have longer lasting effects. An institutional framework built on these principles and partnerships involving all sectors of civil society are a condition of development.*[171] *«*

In this same thinking, Ruth Meena thought that

> *« …the aid process has to be transparent and participatory. The targeted population should participate not as passive actors but effective actors who are able to autonomously identify their own problems and articulate their needs*[172]*".*

Both authors emphasize on the need for popular participation in the development process in Africa. This is already supported by NEPAD whose implementation depends on the goodwill of the international partners of Africa and the Heads of State and Governments of Africa.

More than in the past, civil society is now organized to participate in this consultation forum whose opinions are both in the process of borrowing, repayment management that will be mandatory and consistent. We must welcome the initiative of the Catholic Church which asked the Government some information on the allocation of funds from reaching the completion point. However, it is necessary to push the action until further to institutionalize through a permanent forum for consultation.

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170 World Bank, *Development in the twenty-first century. Report on World Development, 1999-2000, Washington, 2000, 9.*

171 World Bank, *Development in the twenty-first century* ... op. cit., 3.

172 Meena R, « Democracy, Good Governance, and Popular Participation. What Role for Donors?", in Kifle H, Adebayo O Olukushi & Wohlgemuth L (ed.), *A New partnership for African Development. Issues and Parameters*, Uppsala, Nordiskainstitutet, 1997, 44 (40-45).

CONCLUSION

Accelerating the development of the DRC requires enormous financial resources. The sources of these are internal and then external through cooperation with financial institutions including those of the World Bank Group. Given the lacklustre experience of the past, the Democratic Republic of Congo will create an environment that is both legislative and institutional management in international borrowings. Most important to note is that the new process of borrowing must be an initiative shared by the whole national community that will be involved in project management that caused these loans. It is without a doubt that today the IFI are part of a cooperation which the Congolese people will not sufficiently be involved. If the correctness of the IFI that allows them to believe only reason that is theirs, push them to also learn from their cooperation with Democratic Republic of Congo[173].

173 Cfr. Amin S., *Financial Crisis? Systematic Crisis?* Dakar, CODESRIA, 2010.

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THE INTERVENTIONS OF THE INTERNATIONAL MONETARY FUND IN THE DEMOCRATIC REPUBLIC OF CONGO: LEGAL BASIS, REVIEW AND OUTLOOK

By **Paulin PUNGA KUMAKINGA***

I. INTRODUCTION: Crisis and legal basis of the IMF intervention in the DRC

Immediately after independence of the Democratic Republic of Congo[174] on June 30, 1960, severe political and institutional crisis broke out which was reflected in the socio-economic and financial sectors.

The mutiny of the police force, which was the triggering event of the crisis, led to a formal rupture of bilateral cooperation between Congo and Belgium[175], and therefore a mass exodus of expatriate staff who kept the public administration and justice and the public sector as a whole.

The lack of qualified personnel in the machinery of government seriously affected the economy, the productive sector as a whole was set wrong.

Soon, the Congolese government was deprived of financial means to cope with the multifaceted crisis raging in the country, Katanga and South Kasai[176] who chose to secede from the face of power in Kinshasa, then Leopoldville.

International assistance to which the government had appealed from July 1960 was not just military[177]; it was also technical and financial too.

Indeed, with regard to economic and financial assistance, the government in Leopoldville could not be directed only to the United Nations, as the Congolese Government could not, at that time, take matters directly to the International Monetary Fund (IMF) who recognized it as much member state[178].

At the beginning of the Second Republic, Mobutu inherited a socio-political and economic chaos, undertook reforms, particularly in the economic field. Economic development and economic independence were the major goals set upon the installation of the new regime[179]. The economic boom of 1967-1972, sometimes attributed to the currency reform of 1967,

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174 No sooner had the celebrations marking the independence ended, July 5, 1960, Congo had to deal with the mutiny of the Public Force party of the base Thysville, currently Mbanza Ngungu before winning the national territory.

175 Belgian military interventions, except those who were authorized by the agreement of Luluabourg, took place without the permission of the Congolese Government, in violation of the Treaty of Friendship signed on the eve of independence. Therefore, by writing a telegram from Kindu July 14, 1960, Kasa vubu and Lumumba broke diplomatic relations with Belgium.

176 Katanga and Kasai, two mining areas, have historically been the largest contributors to the budget of the Congolese state. Successively announced their secession on July 11 and August 8, depriving the central government resources for its action.

177 Military assistance was requested to address the security situation deteriorated by the mutiny of the Police Force and the Belgian aggression; technical assistance to fill the deficiency in administrative and financial assistance to cope with financial crisis.

178 The Congo has formally joined the International Monetary Fund September 28, 1963. However, 7 June 1961, President Kasa vubu wrote to UN Secretary General a letter in which he requested financial assistance. See. “Financial assistance to the Congo and Congo-UN Agreement of 10 June 1961”, *Congolese Studies*, No. 1, March 1961, p. 11-18.

179 Mobutu, *Speeches and messages, 1965-1975*, Volume 1, Paris, Editions J.A., 1975, p. 130.

sometimes to the good performance of copper prices[180], prompted arrogance on the part of the President, but somewhat tinged with pride vis-à-vis international partners. Indeed, in one of his legendary speeches, there was the view of mistrust vis-à-vis international financial institutions:

> the new regime has refused the Judah's kiss of high finance and has taken steps to monetary and financial stabilization that were necessary, first to fight against the black market and rising prices and secondly to control changes and ensure the fair value of Congolese franc[181].

However, it is important to note that the IMF was not, during this period, completely sidelined by the Mobutu regime. Because, from 1966, there was a clear cooperation with this institution, but that turned around the program include technical assistance, logistical support and financial assistance[182]. For example, between 1966 and 1969, the amounts of technical assistance to the DRC by the IMF amounted to U.S. $ 246,000[183].

But the time of economic boom was short. As early as 1973, the manifestation of the crisis was real and it was felt by the Zairian population. The economic collapsed, the crisis of the first half of the decade demanded a forceful intervention by the International Monetary Fund.

The crisis in Zaire's economy would quickly lead to a debt crisis to external partners. Its origin was an explanation both in the international and national levels.

When between 1967 and 1972, the Congolese economy (Zaire) was growing, and that the good performance of copper on the world market would bring major currencies in Congo, the government began to launch major investment so-called « prestige «[184], the Inga hydroelectric dam and the Inga-Shaba line, the city of the voice of Zaire, steel Maluku, the center of international trade of Zaire (CCIZ)[185], etc..

Meanwhile, following the increase in oil prices on the world market, Western banks were so flooded of petrodollars that the Western states began to encourage the borrowing of the southern states. Thus, it was for most of these countries, namely, the Congo, the period of indebtedness blind[186], but mostly non-productive debt[187].

While the debt was already a dominant feature noticeable and the economic crisis, measures of Zairianization accelerated the downward spiral of the Zairian (Congolese) economy.

Facing many difficulties in running the country, President Mobutu and his government formally decided to appeal to international partners including the International Monetary Fund.

But on what basis the International Monetary Fund should intervene in Zaire at the time?

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180 Mukoko Samba, "Economic Policy in the DRC: lessons of the past three decades," *economic report*, vol. 1, No. 1, October 2003, p. 30.

181 Mobutu, *op. cit*., p. 30.

182 Ministry of Foreign Affairs and International Cooperation (DRC), *Yearbook of cooperation*, Kinshasa, 2007, p. 4-5.

183 idem

184 Prestigious Investments are those investments of consummation, that is to say, those who contribute nothing in terms of species financial. Some have described them as "white elephants".

185 Baharanyi Naciyimba, S., "Democratic Republic of Congo reached the completion point under the Initiative of Heavily Indebted Poor Countries: Challenges and Opportunities," *Congo-Africa*, No. 448, October 2010, p. 650.

186 Mbaya J. Kankuenda, *The Political Economy of predation in Congo - Kinshasa. Origins to the present 1885-2003*, Kinshasa, Montreal-Washington ICREDES Editions, 2005, p. 126.

187 Baharanyi Naciyimba, S., *op. cit.*, p. 650.

At this level it should be recalled that the International Monetary Fund was established to promote monetary cooperation among its members (the industrialized states) for the maintenance of a stable monetary system and able to support increased international trade and to help states reduce temporary imbalances in their balance of payments, by providing conditional cash assistance[188].

As seen, expressly invited by the Zairian government, the IMF had to intervene to achieve the objectives assigned to it by the first article of its statutes[189].

Formal interventions of the IMF in the Democratic Republic of Congo were made first through programs of stabilization and structural adjustment and then, recently, through the initiative of Heavily Indebted Poor Countries (HIPC).

II. OVERVIEW AND EVALUATION INTERVENTION OF THE INTERNATIONAL MONETARY FUND IN THE DRC

II.1. The IMF, stabilization programs and structural adjustment

Stabilization programs are not actually different from the structural adjustment programs. They have intensified the intervention begun by the first and, with more stringent measures than during the implementation of stabilization programs.

Nevertheless, across both types of programs, it was an adjustment of macroeconomic frameworks that which was known of serious imbalances. It was, more specifically, to "restore the balance of payments by reducing domestic demand (consumption and investment) to meet the debt service whose terms have gone up by higher rates."[190]

II.1.1. Stabilization programs of 1976-1977

There are two programs designed by the Zairian government, with assistance from the International Monetary Fund: the first in 1976 and the second in 1977[191].

Indeed, the debt policy disorderly conducted by the DRC between 1967 and 1972 was that on 31 December 1973, the amount of the debt amounted to about three million U.S. dollars[192], before ending up with an outstanding nearly 2 billion U.S. in late 1977[193].

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188 Musulay Mukonde, P., democratic rights and obligations in sub-Saharan francophone PhD in Law, University of Montreal, 1999, p.250.

189 Under Article I of these statutes, the goals of the International Monetary Fund are:
I) To promote international monetary cooperation through a permanent institution which provides a mechanism for consultation and collaboration with regard to international monetary problems.
II) To facilitate the expression and balanced growth of international trade and thus contribute to the establishment and maintenance of high levels of employment and real income and development of the productive resources of all member states, the primary objectives of the economic policy;
III) To promote exchange stability, to maintain among the member states tidy exchange arrangements and to avoid competitive exchange depreciation. IV) To assist in establishing a multilateral system of payments of current transactions between member states and eliminate exchange restrictions that hamper the development of world trade; V) To give confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards, thus providing them the opportunity to correct maladjustments in their balance of payments without resorting to destructive measures of national or international prosperity;
VI) According to the above, to shorten the duration and lessen the degree of disequilibrium in balance of payments of states member.

190 Sesanga Hipungu Dja Kaseng Kapitu, *socio-political space and state security in sub-Saharan Africa*, Ph.D. thesis, University of Grenoble II, 2001, p. 523.

191 Mobutu Sese Seko, Speeches, addresses, messages 1976-1981, Volume 2: (1979-1981), Paris, Editions J.A., 1983, p. 50.

192 Idem, p. 44.

193 Baharanyi Naciyimba, S., op. cit., p. 651.

According to Mobutu[194], the commitments made by the government through the first program were structured mainly on the following:

1 ° adjustment of the exchange rate which was to allow a transfer of resources to the sector of farms and restore public and private consumption in real terms for the supply of goods and services;

2 ° a restrictive policy on imports to decrease the volume of external payments arrears;

3 ° the reduction of public expenditure, fixing them to 680 million Zaire, against 745 million in 1975, and capping at 90 million Zaire currency expenditure of the State, so as to clear both the volume of funding and supplies necessary to the national economy;

4 ° lending limits to 170 million Zaire, 110 million for companies and individuals, and 60 million Zaire in favor of the State;

5 ° adjustment of wages and prices;

6 ° the debt restructuring in the medium and long term, in order to lighten the load in 1976 and subsequent years.

This program which was to be implemented over three years until March 1979 sudden halted, because its goals were not met. Indeed, in the official discourse[195], the results achieved were not particularly good with regard to the management of external payments and public finances.

If the management of public finances was not orthodox, they could not reasonably expect good results. In reality, this program could not continue running after the failure of quantitative criteria (net credits to the State, Net foreign assets) due to the non-mastery of state expenditure consecutive to the two Shaba wars[196], which had caused extra-budgetary expenditures.

Since the financial balance could be achieved in this context and that the economic recovery hopes were dwindling, the brave decision was to break the continued implementation of the program, taking all possible consequences in terms of responsibility.

Following the failure admitted to the first program, the government began to concoct a second stabilization program called «recovery program» by the regime. The objectives of this plan were mostly financial, that is to say, it sought to restore balance in public finances.

However, like the first, this program would not win much success. And not only endorse this failure, Mobutu strove to persuade the Congolese that had complied with its commitments, proceedings included:

- The settlement of arrears of interest accrued in 1975 and in September 1976;
- Negotiating with the IMF a stand-by credit;
- The establishment of provisions for settlement of arrears of principal amortization due from banks and payable between October 1, 1976 and February 28, 1977, and thereafter[197].

To share with international partners responsible for the failure of this program, Mobutu[198] merely denounced a broken promise:
Remember the famous $ 250 million that, under the aegis of the First National City Bank, a consortium of private banks had promised to make available to Zaire and, to date, is only a vague nightmare economic responsibility for my country.

[194] Mobutu Sese Seko, *op. cit.*, p. 51.
[195] Idem
[196] Baharanyi Naciyimba, S., *op. cit.*, p. 652.
[197] Mobutu Sese Seko, *op. cit.*, p. 52.
[198] Idem

The question worth asking is whether the financial situation will be actually money paid by these private banks? Could it be otherwise or on each trip abroad, President Mobutu traveled with trunks stuffed with hard currency in appreciable quantities?[199] According to Emmanuel Dungia[200], from 1965 to 1978, the disastrous management is the fact of prestige expenditure and brilliant actions laughable to meet the needs of an infantile megalomaniac. How could we accept this paradox that appeal to international financial partners in order to stem the economic crisis - and the financial mismanagement of the currency, characterized by recklessness and extravagance?

In any case, these first two stabilization programs that were designed to stop the deterioration process of the national economy and reduce inflation[201], had clearly failed.

Despite the financial mismanagement characterized by the Zairian economy, as the country was hardly at the end of sustained arm and could not, according to the terms of Fernand Tala-Ngai[202], resist dropping.

Unable to drop the arms, the President of the Republic devised a new public investment program he called «Mobutu Plan», in reference to his own name. Curiously, the Zairian government presents its turnaround plan at an international forum and is committed together to achieve a stabilization program under IMF[203] supervision. Unfortunately, like its predecessors, the "Mobutu Plan « also died a natural death without the many projects it contained had no time to realize the hopes he had aroused[204].

Mobutu[205] himself explained the coincidence of two plans by the fact that in the "Mobutu Plan «, there was a part of the «economic and financial stabilization by the control and regulation of demand.»

Why is the government, already struggling to successfully implement an economic program, try to embrace the both?

The failure of economic stabilization and financial programs took the IMF to toughen its reform measures at the beginning of the 1980s through programs called «structural adjustment».

II.1.2. Structural Adjustment Programmes of 1983 and 1989

Before the conclusion of structural adjustment programs under the aegis of the IMF, it is important that we review other stabilization programs which were concluded between 1978 and 1981. It's because they seemed to maintain the status quo that had to go into high gear, with much more drastic measures.

Structural adjustment is indeed an institutional process leading to the adoption of economic and financial agreements with developing countries with the Bretton Woods institutions. They endorse a reform program in exchange for financial assistance provided mainly by bilateral donors.

199 Dungia, E., *Mobutu and money of Zaire. Revelations of a diplomat, former Secret Service agent*, Paris, L'Harmattan, 1992, p. 111.
200 Idem, P. 15.
201 Mukoko Samba, *op. cit*., p. 30.
202 Tala-Ngai, F., DRC-2001: *clicks decline*?, Kinshasa, Editions Social Analysis, 2001, p.145.
203 Mukoko Samba, *op. cit*., p. 30.
204 Idem, P.31.
205 Mbaya J. Kankwenda, *op. cit*., p. 130.

The IMF structural adjustment is a process that aims to restore the external current account to reduce the production cuts in the short term and to preserve the ability of the economy to continue growing[206]. This among others was the goal of the first structural adjustment program which was negotiated and concluded in September 1983.

Indeed, conscious of his government's inability to cope with the structural deterioration of the economy, Mobutu signed a Letter of Intent, September 12, 1983 to solicit the intervention of the IMF through a program that was to:

1 ° gradually restore the fundamental balance, including balance of payments and public finances.
2 ° revive the economy, reducing inflation pressures;
3 ° restore internal and external credibility through sound, transparent and rigorous financial management[207].

Realizing the political commitment of government to ensure economic recovery, the IMF decided in September 1983, to financially support the economic reform program of government that had been established. This required liberalization of all sectors of the economy and undertake deep reforms on the currency, exchange rate policy, improved public financial management as well as price liberalization, trade and external payments[208]. Conducted strictly by the Kengo government for two years, structural reforms could lead to some results, particularly in the macroeconomic area. For example, the liberalization of exchange and trade allowed the consolidation of distribution channels for goods and services and the recovery of private investment. In terms of price stabilization efforts were translated into an increase in the price index of 19% in 1984, 39% in 1985 and 38.3% in 1986[209]. As part of the debt service during the two years of program implementation, Zaire had paid two billion dollars to its Western creditors, while it received only one billion assistance during the same period[210].

As seen, the economic results achieved from 1983 to 1986 were very encouraging both in terms of mastering the management of public finances despite unexpected expenses, those in terms of price changes and exchange rate of Zairean currency[211].

However, these results can not obscure the serious deterioration of the social[212] situation which also resulted in the brutal execution of this program of economic and financial adjustment. Indeed, the fact that the adjustment program which was being executed advocated for the withdrawal by the state of the social sectors of health and education,

206 Bakandeja wa Mpungu, G., *Public finances. For better economic and financial governance in the Democratic Republic of Congo*, Kinshasa-Brussels, Larcier-Africa Editions, 2006, p. 157.

207 Mobutu Sese Seko, Speech on the occasion of the solemn opening of the special session of the MPR, Kinshasa, May 17, 1984, p. 10.

208 Mutamba Lukusa, G., Congo */ Zaire. The bankruptcy of a country. Macroeconomic imbalances and adjustments (1988-1999),* Paris-Tervuren, African Institute-CEDAF-Harmattan, 1999, p. 19.

209 Idem, p. 19 - 20.

210 Mobutu, *Dignity for Africa*. *Interviews with Jean-Louis Rémilleux*, Paris, Albin Michel Edition, 1989, p. 178.

211 Mutamba Lukusa, G., *op. cit*., p. 19.

212 Kalele-ka-Bila, *IMF and social situation in Zaire. Basusu na Bisengo, basusu na Mawa*!, Lubumbashi, Laboratory of Applied Social Sciences (labossa), 1984, p. 14-23, shows how the policies of devaluation, liberalization, wage freeze, reduction of state spending: 1 November 1983, many housewives were very unpleasantly surprised by the scarcity of sacks of maize flour whose price rose from 350 to 800 zaires between September and early November, the CEO of Gecamines of the time, Umba Kyamitala citizen, had received a severe reprimand from the Office of the President of the Republic for having, contrary to instructions of the IMF conducted a wage increase of its implementing agencies, after the last credit of U.S. $ 850 million received from the IMF, a presidential decree and a ministerial order of the Department of Public Service had to be immediately signed for hurriedly put an end to the career of 2212 officers of command. Denouncing also an "authoritarian liberalism" imposed by the PAS between 1981 and 1990, André Mbata Betukumesu Mangu et al, *universities and academic freedom in the Democratic Republic of Congo*, Dakar, CODESRIA, 2005, p. 14 lament the reduction of staff salaries of the university, the removal of scholarships, catering and accommodation for students, operating costs allocated to institutions and research grants, the closure of libraries and laboratories, etc.

retrenchment of public servants, its effects were strongly felt and provoked social unrest which forced a Central Committee of the MPR, meeting in its second special session in June 1986 to limit payment of external debt service from export earnings to 10%.[213]. Dissatisfied with this decision, the IMF stopped supporting the program unilaterally in protest for non-compliance by the Congolese.

The same situation was repeated with the program that was concluded in June 1989, three years after the end of the first structural adjustment program. Indeed, this new program, to correct the adverse effects of previous one incorporated a social dimension in the economic and financial adjustment. But, following the disappearance of $ 450 million representing cobalt export earnings, the program was stopped in December 1989 for non-compliance criteria[214].

Stopping this program resulted into a decade of non-structural cooperation between the IMF and the DRC then Zaire. The logical consequence was the accumulation of debt arrears. It should be noted here that the external debt of the DRC in late 1980 had already reached $ 4.5 billion. Thus, the 1990s would only contribute to the plight due[215] to the absence of a formal program with the IMF and thus the accumulation of arrears.

Here is the sequence of events leading to the end of structural cooperation with the IMF and with all donors of international funds as described by Baharanyi Naciyimba[216]:

> In April 1990, the DRC is declared ineligible to IMF resources, which is like a final warning, followed in December 1992 by the declaration of non-cooperation by the IMF, which is banishment from the international financial community. Finally, came in June 1994, the suspension of voting rights and related issues.

Discontinued in June 1989, structural cooperation with international financial institutions including the IMF wouldl resume in June 2001 under a different mode of action called the « Initiative of Heavily Indebted Poor Countries « (HIPC).

II.2. The International Monetary Fund and the Initiative of Heavily Indebted Poor Countries in DRC

The Initiative of Heavily Indebted Poor Countries is a new version of structural adjustment programs designed by donors and international funds. However, to mark the difference with 80 years of PAS, it is important to explain the concept of the HIPC Initiative, to bring out the eligibility criteria and to review the admission and the course of the DRC under the HIPC Initiative.

II.2.1. Concept and content of the HIPC

The Initiative of Heavily Indebted Poor Countries (HIPC) is an international mechanism for debt relief, which provides specialized assistance to poor countries. In other words, the term

[213] According to Evariste Mabi Mulumba, *The excesses of predatory management*. *The case of Zaire, now Democratic Republic of Congo*, Kinshasa, CEDI Editions, 2002, p. 87, between 1983 and 1986, 50% of budget expenditures were allocated to the repayment of external debt. The Central Committee's decision to limit them to 10% could only provoke a reaction from the IMF.

[214] Cfr Baharanyi Naciyimba, S., op. cit., p. 653.

[215] The accumulation of unpaid financial obligations vis-à-vis the IMF in 1989 that $ 18.9 million in 1989, the arrears reach $ 362.2 million at the end of 1994. Three years later (1997), the Central Bank of Congo estimated the total outstanding external debt of $ 12.651 million. See Mutamba Lukusa, G., *op. cit*., p. 62 and 145.

[216] Baharanyi Naciyimba, S., *op.cit*., P. 653.

"Highly Indebted Poor Countries Initiative", a comprehensive approach to debt reduction for heavily indebted poor countries that carry out programs, adjustments and reforms supported by the International Monetary Fund and the World Bank.

This came about after the G7 summit in Lyon in France in 1996 where the IMF and World Bank set up the initiative for Heavily Indebted Poor Countries whose mission was to be lower to sustainable levels the debt burden of all beneficiary countries of the initiative.

The implementation of the HIPC Initiative involves two main stages: the decision and completion point.

II.2.2. Objectives and eligibility for HIPC

Besides the fundamental objective of the HIPC Initiative which is to provide some poorer countries of the world the respite they need in the form of reducing the level of debt and expenses related to its service, other objectives include:

- Ensure a permanent exit from the cycle of debt rescheduling;
- Promote economic growth;
- Free resources for social spending by overflow.

Regarding the eligibility of a country to HIPC, it should be noted that it is not automatically open to any poor country. For a country to be eligible for the HIPC Initiative, it must meet four criteria:

- To be eligible for concessional assistance from the IMF and World Bank;
- Cope with unsustainable debt;
- Have fully implemented the reforms and sound economic policies in the context of programs supported by IMF and World Bank;
- Have formulated a strategy document for poverty reduction (PRSP).

When a country has made sufficient progress towards meeting the above criteria, the respective Boards of the IMF and the World Bank formally decide on its eligibility for relief, to reduce its debt sustainability thresholds agreed. It is the accession at the point of decision[217].

Once a country is admitted to the decision point, that is to say, it benefits from the aid granted under the initiative, it aims at a reduction greater than those resulting traditional mechanisms.

To reach the completion point and receive full support, the country admitted at the decision point must provide a further proof of satisfactory performance under adjustment programs and reform supported by the IMF and World Bank, and also must fulfill a number of conditions including:

- The successful implementation of fundamental reforms of structural policies approved at the decision point;
- The maintenance of macroeconomic stability;
- The adoption and implementation of the strategy of poverty reduction for at least one year.

Upon reaching the completion point, the bilateral and commercial creditors to proceed reducing the net present value (NPV) of the outstanding debt proportional to the total

[217] The decision point is the date or the terminus *a quo* from which the IFI decides the eligibility of a country with debt relief under the HIPC initiative (90% cancellation of debt stock) and thus the debt reduction that will make the debt of that country "sustainable".

amount of their claims on heavily indebted poor country concerned, while those multilateral creditors, they shall effect further reduction to achieve a sustainable debt level.

It should be noted that the period between the decision point and completion point is called «interim period». It is generally estimated to be three years extendable, provided that all the conditionalities to lead to the completion point are not met.

This test for extensions of time for reaching the completion point, the DRC had to cross it and it lasted almost thirty-three months.

II.2.3. Process of the DRC through the HIPC Initiative

A. Context of the resumption of relations with international financial institutions

We said above, the structural break in relations between the IMF and the DRC has not also won the will of the recovery from both parties. However, all attempts and all IMF missions that have succeeded in Kinshasa from 1994 to 1996 did not achieve many results.

Just after taking office, Kabila had also developed several economic programs, but none of them had the support of traditional partners, despite the excitement generated at the Brussels conference that brought together the friends of Congo.

This attitude of the international financial community finally rebelled against Laurent Kabila who withdrew and ruled out any cooperation with international financial institutions.

With the entry of Joseph Kabila in January 2001 that cooperation would be restored.

Indeed, in his inaugural address Jan. 26, 2001, the successor to Laurent Kabila clearly and expressly manifested his desire to see the DRC reconnect with the international financial institutions:

To support our own efforts, I ask the international financial community to help us to mobilize human, technical and financial resources to accelerate our program of national reconstruction[218].

Thus, in June 2001, the government launched, with the assistance of the IMF, two successive economic programs[219].

B. Economic programs of the Government under the HIPC Initiative

a. Interim program strengthened (IPS)

This program was concluded with the IMF in June 2001 and was to extend until March 2002. Its main objectives were to break hyperinflation, open the economy to the outside and lay the foundation for a strong and sustainable growth[220].

[218] Kabila Kabange, J. , "Speech on the occasion of his inauguration, Kinshasa, January 26, 2001," *Congo-Africa*, No. 352, February 2001, p. 74 to 75.
[219] Masangu Mulongo, JC., "The DRC reaches the decision point under the Initiative for Heavily Indebted Poor Countries," *Congo-Africa*, No. 383, 2004, p. 156.
[220] Ngonga Nzinga, V., Interim Program Assessment and reinforced mid-term review of the government's economic program, "*Economic report*, Vol.1, No. 1 October 2003, p.14.

In macroeconomic language, objectives of the IPS are well summarized by Gaston Mutamba[221]:

- Break hyperinflation (which reached 511.2% at end of 2000);
- End the dispersions on the market change;
- Liberalize the economy and open it to the world;
- Establish an environment more conducive for economic growth, particularly in private sector;
- Lay the foundation for reconstruction and economic recovery.

To support this interim program, the World Bank granted the Congolese government $ 50 million under an exceptional gift, pending substantial funds that were to follow the proper execution of the program.

Thus, to achieve good results, the government undertook reforms in the monetary, fiscal and structural as well as sectoral policies.

In the budget Plan, the government established and implemented rigorously in terms of government cash, cash basis, that is to say that the expenditure was ordered on the basis of the actual resources mobilized[222].

As seen, the fiscal measures have been to tightly manage the process of revenue mobilization, but also to spend only what has been previously stipulated in the budget.

However, in monetary terms, it was operated on devaluation of an 84.1% of national currency against the U.S. dollar, and a new exchange regulation which was put into effect allowing the free movement of foreign currencies[223].

It will be recalled that during the reign of Laurent Kabila, foreign currencies were no longer legal tender in the DRC. Points of exchange were also sent to banks and border crossings. The Kabila government would do this again with the liberalization of foreign exchange market as part of a floating exchange rate regime.

The major structural and sectoral reforms have focused on the one hand, on the promulgation of a law on the liberalization of prices of goods and services except for water rates, electricity and public transportation subject to the Ministerial pre-authorization and, s the establishment of automatic and transparent pricing oil on the other. The monopoly of buying and operating in the diamond sector was abolished and the sector liberalized as well[224].

It is noteworthy that it is in the execution of the IPS that the Congolese government has undertaken important structural reforms to improve or consolidate the macroeconomic environment. Of these measures, we must also count the enactment of a labor code, the institution of commercial courts, and the enactment of a new mining code. It was also during this period that the Steering Committee of the Public Enterprise Reform (COPIREP) was established, all under the auspices of the World Bank.

All these reforms have had an impact on the satisfactory completion of the IPS, because the results below have been met:

221 Mutamba Lukusa, G., *straightens the economy of Congo - Kinshasa. Balance sheet and conditionality*, Paris, L'Harmattan, 2003, p. 158.
222 Ngonga Nzinga, V., *op.cit*, p.14.
223 Idem
224 Ngonga Nzinga, V., *op.cit*, p. 15-18.

- Hyperinflation was indeed broken, because it was reduced to 3.8% in January 2002;
- The exchange rate was characterized by relative stability between 2001 and March 2002;
- The state budget was an important part of financial restructuring, since the major accounts of the state were closed with a surplus of 1.2 billion Congolese francs in 2001. Overall, revenue grew from a monthly average of 2.46 billion Congolese francs for the first five months of 2001 to a monthly average of 6.9 billion Fc for the first three months of the launch of IPS or be multiplying by 2.8.[225]

With these satisfactory results, the impact of the IPS would be consistent, that is to say, these results have led to:

- The lifting of sanctions imposed by the IMF in the DRC since the beginning of the 1990s, for non-compliance and thus to accumulation of arrears (inadmissibility to Fund resources, declaration of non-cooperation, suspension of rights voting and related rights);
- The clearance of arrears of the DRC vis-à-vis the IMF (these are Belgium, France, the Republic of South Africa and Sweden in April 2002 that provide a bridge loan of $ 519 million USD to pay down its debt arrears);
- The granting by the World Bank an economic recovery credit of $ 350 million;
- Signed an agreement to restructure the foreign debt within the Paris Club;
- The granting by the World Bank budget support of USD 42 million;
- The granting by the EU financial assistance of $ 5 million.

The positive sanction imposed by the Boards of the Bretton Woods for the correct execution of IPS has enabled the DRC to immediately conclude with the IMF another program[226] that relays the previous and prolongs the objectives.

b. Emergency Multi-sector Rehabilitation and Reconstruction (EMRRP)

Concluded in June 2002, this program was a three-year program as its terminus *ad quem* was planned for 2005. Unlike the predecessor, the new government's economic program (PEG) benefited from financial support owing to DRC's eligibility to IFI after the clearance of its outstanding debts.

The amount of financial support for the program was 580 million SDR, or 870 million U.S. dollars, under the Poverty Reduction and Growth Facility (PRGF). The announcement was made on the day of the agreement, but the disbursement would take place gradually after each assessment or review.

Out of this amount, 420 million SDR was immediately disbursed out of which 402 million was used to repay the bridge loan obtained from South Africa, Belgium, France and Sweden, which allowed the DRC to clear its arrears to the IMF. The rest of the PRGF loan, or 160 million SDR, was divided into six portions each 26.7 million SDR with disbursements made in six months, subject to quantitative performance and structural criteria."[227]

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225 Idem

226 The government's economic program was called "Emergency Multisector Rehabilitation and Reconstruction" (EMRRP), whose priorities are health, agriculture, education and infrastructure. See Mutamba Lukusa G., straightens the economy ... *op.cit.*, P.159. With this emphasis on health, education, agriculture, and infrastructure, this program differs from the former Office PAS who advocated the disinterest of the state on social sectors. In this way, this program could temper with the severity and effects of adjustment.

227 Luwansangu, P. and Tshiunza Mbiye, O., "The IMF between the 'flexibilisme' of quantitative criteria and the rule of structural criteria," *Congo-Africa*, No. 400, December 2005, p.549.

The EMRRP, commonly known as PEG, had an overall objective[228], which was actually an extension of the IPS targets and specific objectives summarized hereafter by Kalonji Ntalaja[229]:

- Remove provisions on the functioning of the financial and exchange market: new exchange regulations, a new banking law, new statutes and reform program of the Central Bank of Congo (BCC).
- Liberalization of prices: assets (e.g. petroleum products) and services, excluding salaries to be paid on time, without arrears;
- Abolition of monopolies and buying diamond mining, and requirement of a certificate of origin;
- Judicial reforms, including the establishment of commercial courts for economic disputes.
- Tax Reforms, dashboards, and a one-stop monitoring of activities and customs receipts, control of taxation and incidental taxation oil, supervision of exemptions, acts of the General Directorate of Administrative and State Revenue (DGRAD) and management financial authorities, of the value added tax (VAT), etc..
- Sectoral reforms: which are mainly under the supervision of the World Bank and with support from bilateral partners, particularly in public enterprises, the financial sector, mining, infrastructure (transport, water, electricity), mining and forestry, etc..

Given the objectives alongside the implementation of the PEG, expectations were numerous and high. But what were the results?

Between June 2002 and July 2004, the program was broadly satisfactory. The IMF conducted four bi-annual reviews that were successively concluded on March 24, 2003, July 23, 2003, 3 March 2004 and July 12, 2004.[230]

Following successful implementation of the program, especially between June 2002 and March 2003, the DRC had access to the decision point under the HIPC initiative on July 23, 2003. This step foreshadowed normally reaching the completion point in 2006.

However, it is important to indicate that assessments had taken place up to date each time accompanied by the following exemptions to certain abuses in the management of public finances. Indeed, in terms of public finance, state revenues had certainly increased during the execution of PEG, because they represented 11.7% of GDP in 2004 against 7.6% and 9.6% respectively in 2002 and 2003. But this effort to mobilize revenue dids not come with a real control of public expenditure, which rose from 6.6% of GDP in 2002 to 12.8% in 2004[231].

The difficulties in the implementation of PEG started from 2004 with the increase in military spending dictated by the deteriorating security situation in the eastern region of the country with the emergence of new heads of the rebellion namely, Lawrence Nkunda and Jules Mutebusi.

To cope with it, the government was forced to incur extra costs thereby creating macroeconomic imbalances.

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[228] The overall objective of EMRRP consists essentially of three sequences: the stabilization of the macroeconomic framework (2001-2002), Reconstruction (2002-2004) and development from 2005.

[229] Kalonji Ntalaja, "Three readings of the performance of the Congolese economy in 2002," *Economic report*, vol.1, No.1, October 2003, p. 46.

[230] Luwansangu, P. and Thiunza Mbiye O., *op.cit*., p. 553.

[231] Idem, P. 554.

Thus the results of PEG were implementation of important structural reforms since 2002 whose progress slowed in 2004 for reasons mentioned above.

However, the course of the fifth review was taken to the satisfaction of the Board of the IMF, and the DRC received SDR 26.7 million or about 40 million U.S. dollars for this position of the PRGF.

With the granting of this position, the total amount disbursed stood at 553.3 million SDR. The DRC also received from the World Bank, under budget support, a sum of 90 million U.S. dollars out of which 42.5 million would be spent on settlement of a portion of domestic debt to the effect of claim of economic activity, and $ 47.5 million for the retirement of civil servants.[232]

A sixth review, the combination of all criteria, all marks completion point triggers revealed that PEG had not achieved its main goals, despite some midterm positive sanctions. Especially, «the monetary base level conditionality of any stabilization program supported by the IMF-had grown well beyond the limits»[233]. This strong growth in public spending would be related to the acceleration of «security spending», the policy approach of the Apocalypse announced in June 30, 2005 «[234].

Almost one year later, in March 2006, the IMF announced the suspension of the program for wide timeout. Conscious of its responsibility for the faiure, the DRC took note of the decision of the IMF. It was necessary therefore to prepare to begin a long journey to a completion point that clearly receded.

c. *Informal programs and issues in the conclusion of a new government's economic program*

Following the suspension of PEG in March 2006, the Government of the Republic began new negotiations with the IMF to show its willingness to move forward. It concluded between 2006 and 2008 two informal programs: first a rolling program of consolidation "to standardize the country's macroeconomic situation and initiate some reforms[235], and a priority actions programme (PAP) that we consider the translation of the PRSP into concrete actions.[236]

All these programs have not yielded conclusive results. Admittedly, one can not deny that the success of these programs are temporary stumbling to the mismanagement of public finances, as one can not ignore the great challenge posed from the 2007 which was the «Collaboration Agreement» between the Gizenga Government, under Minister of Public Works and Infrastructure, Pierre Lumbi, and a consortium of Chinese companies.

Indeed, this «deal of the century»[237] had become the stumbling block in the continuing negotiations between the DRC and the IMF for the conclusion of a new formal agreement, and the standoff[238] it aroused packed up all international partners of the DRC meeting in

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232 Luwansangu, P. and Thiunza Mbiye O., *op.cit.*, pp.556-557.
233 Idem, P. 554.
234 Idem, P. 556.
235 Luwansangu, P. and Thiunza Mbiye O., op.cit., p.556.
236 Nshue M. Mokime, A. , "Admission to the HIPC Initiative and reach of the completion point by the DRC. What happened and what can we expect?" Economic and social papers, Vol. XXVII, No. 2, November 2010, p. 161.
237 Braeckman, C. *Towards the second independence of the Congo*, Kinshasa-Brussels, The Scream - Africa Editions, 2008, p. 176.
238 Marysse, S., "The standoff between China, DRC and the IMF: the revision of Chinese contracts in the DRC," *Economic and social papers*, Vol. XXVII, No. 2, November 2010. For partners of the DRC, this agreement was seen as a "sabotage" of all the efforts of

the Paris Club that represented the IMF. It lasted a good two years before the barriers were lifted on 24 October 2009 by the signing of the amendments made as a rider on the contract which the review was eagerly demanded by the IMF.

October 31, 2009, the IMF and the World Bank wrote to Congolese Prime Minister a letter in which they declared the collaboration agreement and almondy compatible with debt sustainability and concessional financing package, with a grant element of between 42% and 46%[239].

However, the outcome of the situation was in its infancy. It remained as bilateral partners gathered in the famous "Paris Club". After their discharge given in November 25, 2009, at the same time they invited the DRC to demonstrate sound management of public finances. After obtaining guarantees, the IMF announced at its meeting on 11 December 2009 the conclusion of a new economic program with the Congolese government.

d. New Government Economic Program (PEG2)

The terms of reference of the formal program concluded with the IMF in December 2009 are contained in the letter of intent to the IMF Managing Director at the time, Mr. Dominique Strauss Khan, by the Congolese Prime Minister Adolphe Muzito.[240]

The objectives[241] of this program can be summarized as follows:

- In the macroeconomic framework, the government is committed for 2009-2012: to achieving an average growth rate of 6.6% supported by a resumption of mining and infrastructure reconstruction projects, to reduce the rate inflation to 9% by 2012 by implementing prudent monetary and fiscal policies (avoiding the need for funding of the Central Bank and ensure price stability in a floating exchange rate), maintaining gross international reserves to equivalent of approximately 10 weeks of imports at the end of the program period.
- Under structural reforms will focus on increasing domestic revenues, the strengthening of public financial management, restriction and the recapitalization of the BCC, the strengthening of monetary policy and banking supervision, and measures to put the economy on a path of strong and sustainable growth.

In fact, with the signing of this agreement, the DRC would continue its path starting from the acquired PEG1, suspended in March 2006 before heading to the sixth quarterly review. That is why six months were allowed before reaching the completion point under the HIPC Initiative. The Agreement of 11 December 2009 was approved with 551 million U.S. dollars and interim HIPC assistance of 73 million U.S. dollars.

the IFI to leave the DRC of its unsustainable debt situation. Although at first glance, the agreement was welcomed by the Congolese, with its exceptional nature of barter (win-win), its technical aspects hid its "non-concessional" that continued to denounce the West through IMF. For partners of the DRC, there would be nothing to clear existing debt under the HIPC Initiative at the same time if the Congolese government pledged, from state guarantees, to enter a new cycle debt that would result from the Chinese contract.

239 Cfr. Prosperity, No. 1753 of November 4, 2009.

240 November 30, 2009, Adolphe Muzito wrote to Strauss Khan and said: "I am pleased to announce that we have made significant progress in the face of concerns about the impact on debt sustainability of large mining projects and infrastructure essential development of the country, as provided in the Sino-Congolese (...). In this context, the Democratic Republic of Congo is seeking financial support from the IMF under the Poverty Reduction and Growth Facility (PRGF), July 2009-June 2012, amounting to SDR 364.45 million (or 65% of the share). In addition, we request the resumption of aid Interim SDR 45.66 million under the enhanced HIPC initiative (...). To partially fund payments of the IMF that mature during the period of twelve months from December 2009 ". See Muzito, A., "Letter of Intent to IMF Managing Director, November 30, 2009", http://www.imf.org, accessed June 20, 2011.

241 Idem.

The challenge of reaching the completion point was huge for the government, and it was like a sword of Damocles hanging over the heads of leaders. Hence, it was necessary to combine energies to meet this challenge.

It should however be recalled that the DRC was starting the final turn of its journey in the context of HIPC international financial crisis whose impact was certain in the Congolese mining sector.

At the macroeconomic level, this financial crisis led to real floating indicators: «the growth rate of GDP was 2.8%, an inflation rate of over 50%, weak import revenues was experienced a deficit financing took place with the advances of the Central Bank of Congo, the fiscal deficit worsened, foreign exchange reserves reached a low record of 25 million U.S dollars or 1.7 weeks making it impossible to import the BCC intervention on the foreign exchange market «[242].

Despite this somewhat gloomy picture, the government bravely embarked on a rigorous management of public finances. During this time, it significantly reduced government spending (by retention of salaries of civil servants), by asking people to «tighten their belts» not to miss the course of the completion point.[243]

The government's main priorities were limited to:

- Ensure a Strong economic growth;
- Bring inflation below 10%;
- Strengthen public financial management;
- Reduce debt to sustainable levels and accelerate structural reforms.[244]

At the bi-annual review conducted by the IMF, these key findings emerged:

> Inflation was at 4.5% in late June 2010, the national currency had appreciated against foreign currencies from the month of February before stabilizing in recent months, more than 80% of measures planned under the various reforms had been actually executed, several key actions, considered as the completion point triggers had been executed successfully.[245]

In light of these results the Executive Boards of IMF and World Bank announced on 1 July 2010 the benefit of external debt relief for the DRC, amounting to 12.3 billion dollars on a plate of 13.7 billion that the country owed to multilateral creditors (20%) and members of the Paris Club or bilateral creditors (80%)[246]. With this announcement, the DRC had reached the completion point under the HIPC initiative.

The completion point under the HIPC initiative was not the terminus *ad quem* or the ultimate point of IMF intervention in the Democratic Republic of Congo. But it was a necessary step that has seen massive debt to external partners being alleviated substantially. What conclusions can we then draw, before considering some prospects?

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242 Jean Claude Masangu quoted Munsala Buakasa, D, "The IMF Resident Representative in Kinshasa: the economic prospects of the DRC in 2011 are favorable," http://www.lobservateur.cd, accessed June 20, 2011.

243 In the official language, the completion point was described in the population as a panacea, that is to say a solution to all their misery and burden created by external debt.

244 Cfr. Press Release No. 09/445 of the Board of the IMF published December 11, 2009, *Prosperity,* No. 1781 of December 14, 2009.

245 Cfr. Obotela Rashidi, N., "Africa News," *Congo-Africa*, No. 451, January 2011, p.75; the decision of the Bretton Woods met resistance from some bilateral creditors, such as Canada. Thus, meeting in Paris, members of the Paris Club and Brazil finally took on 17 November 2010 a decision favorable to the DRC, which was to pay off U.S. $ 7.35 billion of Congolese debt stock. After this joint decision, each partner must make a specific statement of cancellation of debt of the DRC. It was then that in April 26, 2011, the U.S. announced the cancellation of 1.823.76900 USD and which was then followed by Belgium (USD 773 million), France (800 million), Italy (USD 740 million), Netherlands (400 million USD), etc..

246 Baharanyi Naciyimba, S., *op.cit*., P.665.

CONCLUSION: achievements and prospects of interventions

The structural adjustment programs of 1980s-1990s as applied in the DRC failed. And responsibility for this failure should be shared between both parties, that is to say between the IMF and the Democratic Republic of Congo then known as the Republic of Zaire.

For the IMF, we should note that its programs did not favor human development, their goal was focused on financial cyclical for the treatment of the debt issue.

These programs have increased poverty and social inequality, they created the social frustrations because of the rigid conditionalities, the wage freeze and sanitation agents they imposed. In short, SAP was likely to "kill" the man instead of promoting his socio-economic development.

The Zairian government's responsibility in the failure of SAP is to be in the non implementation of commitments, primarily through an unorthodox management of public finances. All the SAP were never executed to completion because of budget overruns caused by unforeseeable expenditure.

With regard to the HIPC Initiative, its only advantage is to have substantially contributed to the cancellation of external debt of the DRC, which dangerously crippled the country's development process.

But as an adjustment program, the HIPC Initiative is focused on financial restructuring which the development impact has very little perceptible to the population. Today, the Congolese rightly wonder what the point of completion has brought in their daily lives.

It seems that reaching the completion point was conditioned among others by the partial implementation of the PRSP, which is a strategy for poverty reduction. It means that poverty reduction where access to health care, potable water, electrical energy, education, optimal transport conditions remains problematic for the Congolese.

According to Baharanyi Naciyimba[247], the HIPC initiative is primarily intended to ensure the sustainability of repayments and strengthening of structural adjustment under the guise of generosity.

However, it is important to recognize the contribution of the international financial community and the efforts of the Congolese authorities which have lead to the HIPC initiative, although the prospects further require more attention.
Indeed, the International Monetary Fund interventions in the Democratic Republic of Congo have been justified by the debt crisis which led to serious imbalances in the balance of payments.

For nearly five decades, the IMF has been working as best they could, together with the Congolese leaders to reverse this crisis through programs of financial adjustment. Certainly, the debt was substantially reduced but not fully recovered.

Completion point of HIPC, the multilateral debt was estimated at 2.931 billion USD.[248]

[247] Baharanyi Naciyimba, S., *op.cit*. p. 655.
[248] Obotela Rashidi, N., *op.cit*, p.75.

The question to be asked now is how should the Congolese leaders deal with this debt and the cooperation with the Bretton Woods institutions and other development partners? Should we continue the cooperation? Should we break it? If we have to continue, how do we go about it?

It is obvious that cooperation with the IMF will continue, as with other bilateral partners. First, we must carry to completion the three-year program which has facilitated the achievement of the completion point, producing the reforms already started.

Regarding debt, the government must work to repay. But it is obvious that for other borrowings to be undertaken, good governance is recommended.

In his letter of intent to the DG of IMF, Prime Minister Adolphe Muzito made firm promises:

> the government is determined to lead a prudent external debt policy, particularly by using the gifts and highly concessional loans which carry a much higher grant element of 35% to finance the country's development. More importantly, it will not contract or guarantee any loan that would jeopardize debt sustainability[249].

The hope is that debt policy is to be coordinated between the DRC government and parliament, with the participation of civil society. Because debt is a matter for all the people, for it is them who feel its effects through the sacrifices that they are obliged to make, they must therefore consent.

Going into debt is not a bad thing. However, the debt should not be unproductive as it was in the past. The debt must not mortgage the future of the country, especially the development of future generations. It must also and above all have a management policy and Orthodox Resources Manager of the State. For if unconsciousness persists in governance, the DRC could find itself again in the debt trap.

249 Muzito, A. , *Op.cit.*

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THE IMPACT OF MONETARY POLICY OF THE CENTRAL BANK ON THE RATE OF INFLATION IN THE DRC: INSTRUMENTS, IMPLEMENTATION AND RESULTS

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INTRODUCTION

The Government's commitment translated into action its economic decisions, the renewed confidence which manifests itself in terms of internal and external partners incorporating assets for the economic future of the DRC. In a context of strategies of poverty reduction, maintenanceand satisfactory implementation of macroeconomic policies aimed at controlling inflation for general price stability are essential. This would create conducive conditions for the revival of economic activity.

The diagram representing the classic law of supply and demand taught by MISHKIN is that when demand increases, prices rise, and when it decreases, prices do the same[250]. It is due to this notion that action is based on central bank. According to economics, inflation[251] comes from excess liquidity. In other words, the volume of currency in circulation is much greater than the volume of goods and services. That is to say, if the currency in circulation increases, individuals increase their demand for goods and services. If this demand is not accompanied by an increase in production, prices rise.[252]

Central banks can then affect the inflation rate by changing the growth rate of money supply with their monetary policy instruments. The central bank of a country is an institution of the State that implements monetary policy[253]. It plays all or part of the following three roles:

- Ensuring the issuance of currency in circulation and contribute to the setting of interest rates;
- Supervise the functioning of financial markets; ensure regulatory compliance by financial institutions;
- Acting as banker of last resort in case of systemic crisis.

The current statutes of central bank prioritize the mission of this institution with a "clear mandate on price stability rather than on economic growth that was previously essential."[254] Indeed, price volatility is a source of uncertainty, distorts economic decision making and impedes economic growth. However, very often, this instability results from the inflation

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250 MISHKIN F. e. a., Money, Banks and Financial Markets, 7th ed., Pearson Education Ed, Paris, 2004, p. 34

251 Inflation is a continuous increase in the price level. It is the excessive increase of the amount of notes issued by the central bank. There are generally two types of inflation: inflation from the demand and cost inflation. In the first case, inflation stems from excess demand or expenditure in relation to immediate possibilities of production. The causes of inflation are monetary demand (excess government spending, excess liquidity and excess bank credit), psychological (behavior of economic agents) and economic (weaknesses and local production). In the second case, inflation results from rising prices of different production sectors.

252 CARARE A., STONE M., "*Why focus on inflation*? , "In Finance & Development, June 2004, p. 24

253 Monetary policy is the action by which the monetary authority, usually al central bank acts on the supply of money in order to fulfill its objective of price stability. It also strives to achieve the other objectives of economic policy (growth, full employment, external balance).

254 CARTENS A and JACOME L. I. H., "*Taming the Monster*," in Finance & Development, December 2005, p. 26

that can be defined as «a continued rise in prices generally expressed by the index of consumer prices, given that this index measures the change in the cost of a basket goods and services, including housing, electricity, food and transportation. «[255]

Central bank may seek to achieve the objective of price stability through several instruments, which allow it to vary the money supply in the country and the cost of loans to individuals and businesses. The main instrument is the setting of rates. It can also use the mounting levels of reserve requirements, open market operations (buying and selling of government securities) to reach a target of interest rates in the short term or stare directly into the discount rate (rate which the central bank lends to commercial banks). Interventions on the foreign exchange markets are also an instrument among others. When central bank sells(that is to say, when individuals buy, for example, treasury bills), money supply in the economy declines and interest rates rise. Rising interest rates reduce demand (especially housing, consumer durables and capital goods) and, in principle, inflation. The rate change is the primary means of a central bank to act on the economy.

In this perspective, the Central Bank of Congo (BCC) plays this role with the monetary backdrop of research of national prosperity. Law No. 005/2002 of 07 May 2002 on the establishment, organization and operation of the Central Bank of Congo[256] clarifies and expands the mission of giving the Bank independence and the appropriate legal means. This independence is especially in the definition and implementation of monetary policy. It is quite limited in its functions of cashier of the State.

The BCC has five main tasks include: custody of public funds, saving and monetary stability, the definition and implementation of monetary policy, control of all banking activity. It is the Economic and Financial Advisory of the Government[257].

Backup and monetary stability are the result of monetary policy and exchange that are the means used by the Central Bank of Congo to preserve the internal and external value of the currency the «Congolese Franc» (CDF). Monetary policy is the stability of general price level and exchange that aims to preserve the value of the national currency against foreign currencies in the context of liberalization of foreign exchange.

The Central Bank of Congo is also responsible for the custody of state funds. It thus provides for the duties of cashier of the State. It receives and retains its local funds making up the Treasury. In this case, independence is quite limited because the Bank will not incur an expense without a government decision, referred by the Department of Budget and sequenced by the Ministry of Finance.

For reasons of transparency, the 2002 Act requires the transmission of reports of the Auditors to the Government. It also directs the annual audited accounts of the BCC in the Official Gazette.

In the control of banking, the Bank develop laws and guidelines applicable to banks, savings cooperatives and credit unions, credit institutions and other financial intermediaries that operate on Congolese territory[258]. It has within it a direction of supervision of financial intermediaries to better monitor their banking activities.

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[255] CARARE A., STONE M., "*Why focus on inflation?*, "In Finance & Development, June 2004, p. 24

[256] Law No. 005/2002 of 07 May 2002 on the establishment, organization and operation of the Central Bank of Congo, in *J.O.*, special issue, January 20, 2010.

[257] Article 176 of the Constitution of 18 February 2006.

[258] The instructions are on the collection of laws and regulations relating to currency, exchange and credit monitoring of financial intermediaries, the fight against money laundering and terrorist financing, in *J.O.*, special issue, January 20, 2010.

Moreover, the 2002 Act establishes three governing bodies and sets out the procedure for appointing leaders of the latter. These bodies are the Board of the Bank, the Governor and the College of Auditors[259]. They are appointed by the President of the Republic for a term of five years renewable once for the Governor, four years renewable once for the Vice-Governor, and three years, renewable for other members.

To achieve the objectives of monetary policy, we must control the monetary base. For this, the issue of currency and financial circulation are key variables in the evolution of prices and exchange rates. The BCC does this by monitoring the amount of currency in circulation, and by the implementation of monetary and exchange rate.

Hence the interest is in how the BCC has included in the definition and implementation of monetary policy in recent years. What were the instruments and their impact on the economy? What was the inflation rate during these periods. In light of all the crises experienced by the DRC, how did the BCC as an institute issuing body and definition and implementation of monetary policy and how has it evolved to deal with that. How come this bank operates despite the unstable political climate of the country.

Thus the study is divided into two parts. The first part is an analysis of the legal foundations of the macroeconomic framework of the BCC, and the second deals with interventions in controlling monetary liquidity.

I. LEGAL BASIS OF THE MACROECONOMIC FRAMEWORK: JURISDICTION OF THE BCC.

The Bank is responsible for defining and implementing monetary policy of the country whose main objective is to ensure the stability of general price level. It acts independently in achieving this goal by supporting the Government's economic policy[260].

To do this, the BCC will use various instruments whose purpose is to ensure a sufficient level of liquidity in the domestic economy. These instruments are the procedures of refinancing the short and long term. In addition, the BCC limit the power of money creation by commercial banks by imposing a reasonable level of reserve requirements.

By implementing the monetary policy operations, the BCC acts as a suction and pressure pump in the words of PATAT[261]. Operations and monetary policies designed either to provide the economy of the liquidity it needs either to absorb additional liquidity, source of inflation. Consider the skills of the Central Bank in monetary policy (1) and foreign exchange (2).

I.1. Monetary policy operations: maintaining a stable general price level.

There are two types of monetary policy operation. There is on one side the transactions intended to refinance the national economy and, on the other side, those designed to siphon liquidity.

I.1.1. Refinancing operations of the economy: a study of Directive No. 4 of the BCC

Refinancing operations are governed by the provisions of Directive No. 4, banks of 27 May 2009 enacted by the BCC. This text provides counterparties, eligible assets as collateral and

[259] The bank board is the supreme body of directors and the Governor's management body.
[260] Art. 3 of the Law No. 005/2002 of 7 May 2002
[261] PATAT JP, op.cit., p. 17

refinancing terms. It follows from the provisions of Articles 10 and 14 of the above mentioned statement that the eligible party against for refinancing are only commercial banks.

In accordance with Article 8 of Law No. 005/2002 of 07 May 2002, the BCC requires guarantees from banks that come to its counters. Article 2 of Directive No. 4 provides that the refinancing of banks by the Central Bank is subject to the collateral effects of public or private securities of good quality. This quality is evidenced by several elements. If for securities issued by the Treasury of the signatory is sufficient[262], the private securities must meet certain requirements.

There are two methods of refinancing of banks, namely: short-term loans, which consist in reverse transactions of Congolese francs by the BCC to commercial banks with a maturity of seven days, renewable at the discretion the BCC and standing facilities granted to commercial banks to cover their particular debtor position late in the day at the clearing chamber. This is an assignment of intraday liquidity: money is lent on a daily basis for a maturity of more than 24 hours taking into account non-working days[263].

Interest rates of these two operations are not identical. Counter operations of short-term loan interest rate are made at the BCC, while counter operations of the standing facilities are made at rate plus[264]. In addition, interest related to securities lending short-term shall be deducted and interests on the operations of the standing facilities are collected in arrears[265].

The importance of distinguishing between the two windows is: standing facilities are intended to provide liquidity on a daily basis, to signal the general stance of monetary policy and supervise the market rate on a daily basis. In the contrary, temporary transfers play a role in steering interest rates, management of bank liquidity and signaling the stance of monetary policy.

I.1.2. Control of bank liquidity: an analysis of instructions No. 10 and 20 of the BCC

To control the level of bank liquidity, the BCC uses the Treasury notes or reserve requirements.

A. Commercial paper

The commercial paper (CP) is governed by Directive No. 20 to banks of 12 September 2008. It is defined as "a way of short-term debt issued by the Central Bank and the tradable on the secondary market." It is thus an instrument used by the BCC for its refinancing in case of reduction or enlargement of the monetary base. It consists of lending or deposits to banks under liquidity.

The subscription amount is the amount assigned by the BCC for its own account or on behalf of third parties. The amount set by the BCC is the minimum at which commercial banks and other financial intermediaries must subscribe. The interest rate is the rate used on each submission. This rate is annual, based on 360 days, to two decimal places and applies to the maturity of subscription. After calculating the amount of the interest rate must stop at two decimal places. The reimbursement amount is the value of the subscription plus interest.

[262] Admittedly, the credit worthiness of the Congolese treasury is very deteriorated after the failure of operations to repay Treasury.
[263] Art. 10 of Directive No. 4
[264] Art. 11 and 16 of Directive No. 4
[265] Art. 13 and 18 of Directive No. 4

The maturity of the CP is 7, 14 or 28 days from the date of the subscription. Banks and other agents that subscribe to notices of tenders called by the BCC have the option to redeem within 7, 14 and 28 days after their subscription and it is in this period that the banks can attach results. Interests generated by subscription to CP are tax exempt. The drain of liquidity using the CP is normally performed by way of tender. Procedures for tendering follow six operational steps: the announcement of the tender, the preparation and submission of bids by the parties against the collection of bids, award and announcement of results, reporting individual results of the auction and settlement of trades. BCC has two different types of tendering procedures: the standard tenders and quick tenders. The two procedures are identical, except for the time frame and scope of parties. For standard tenders, a maximum period of 24 hours elapses between the announcement of the tender and the notification of the allotment result (the time between the submission deadline and the announcement of the result is two hours for quick tenders).

B. Reserve requirements

Instruction No. 10 to banks of 26 October 2009 set the required reserve ratio. Under this provision, banks are required to hold minimum reserves on the books of the BCC. The plate and the coefficient of the reserve requirement is as follows: the reserve requirement consists of assets in domestic currency bank account available to the BCC.

Banks that do not meet the requirement of a constitution of reserve requirement are penalized by a penalty equal to the interest rates on standing facilities increased by half sitting on the amount of the deficiency in the reserve requirement for corresponding period.

By monetary policy, the BCC shall ensure the stability of general price level, to safeguard the internal value of the currency. It balances the demand and supply of money by controlling liquidity, source of inflation. But that's not enough for monetary stability. It will also control the level of cambiaires transactions to back up the external value of the currency.

I.2. Foreign exchange operations: prevention and correction by the BCC

As part of a floating exchange rate, domestic currency circulates concurrently with foreign currencies. Prevention is for the BCC to gather as much information as possible on foreign exchange transactions. When the foreign exchange rates experience a significant upward fluctuation, the BCC must intervene on the foreign exchange market to correct the balance.

Consider on one hand the supervision of foreign exchange (1) and, secondly, the BCC interventions on the foreign exchange market (2).

I.2.1. Supervision of foreign exchange: a means of prevention

Since May 27, 2001, the Enhanced Interim Program (EIP) and the Government Economic Program helped stabilize the Congolese franc by eliminating fixed exchange rate to adopt floating exchange rates. There was a reduction in the gap between the indicative rate (official) and the parallel rate. Foreign exchange transactions involve transactions between residents and non residents involving the use of foreign currency as a transaction currency or unit of account. Under the provisions of the exchange regulations of the BCC, these transactions are subject to prior statements. The system used by it is decentralized in the sense that traders make their returns from commercial banks. Then, these banks validate documents exchange and ensure, if necessary, the repatriation of foreign currency proceeds by the operator[266]. The main role of the exchange rate policy is to prevent or fight against transitory shocks by ceasing fluctuations in the exchange rate and maintaining the appropriate level of international reserves.

However, there are transactions subject to prior authorization or approval of the BCC. This is the export or import of banknotes denominated in foreign currencies[267] and the opening of exchange offices[268].

I.2.2. BCC interventions on the foreign exchange market: correction means

The foreign exchange market is organized in the DRC by a convention between commercial banks and the BCC[269]. However, it should have a broad acceptance of the exchange market as the supply and demand of foreign currency at some point. This supply and demand influence the course of exchange of foreign currencies against the national currency and the volume BCC to intervene when fluctuations are important. To do this the BCC conducts the auction of foreign currency. It launches bidding on purchases or sales of foreign exchange to balance demand and supply of the national currency alongside foreign currencies. At this stage, the exchange rate policy aims to minimize the differences between the indicative exchange rate and the parallel exchange rate.

To allow the BCC to intervene on the foreign exchange market, the state has available reserves in foreign currencies that the institution must grow. When these reserves are insufficient, the Congolese state can use its right to draw on the IMF or seek financial support of this institution. This situation is often recurrent in DRC given the weakness of foreign reserves estimated at one million U.S. dollars[270] and frequency fluctuation of currency crises in the balance of payment.

At this level, it is important to consider the intervention of the BCC through its various instruments in the Congolese economy and see their effectiveness. Otherwise, consider some possible solutions for better growth and economic stability.

II. INTERVENTION OF THE BCC IN CONTROL OF THE MONETARY BASE

To avoid inflation, the BCC shall ensure that the monetary base consists of currency in circulation (main component about 65% of the money)[271], deposits in commercial banks and other deposits (deposits in financial institutions, not banks). It also monitors trends in the supply of the domestic currency against foreign currencies. It works by injecting or puncturing the liquidity of the currency exchange market.

Thus the study of the action of the BCC in relation to instruments on inflation will be based on the auction of commercial paper (CP) and the preservation of purchasing power (1) on

[266] The Investment Code and the Mining Code exempt from this principle by allowing traders to manage non-resident accounts in foreign currency. The obligation to repatriate the currency is thus reduced.

[267] Circular No. 282 of the BCC March 5, 1999 concerning the physical export and import of banknotes denominated in foreign currencies and cash transport on national territory.

[268] Administrative Instruction No. 007 of 13 July 2003 regulating the activity of forex exchange.

[269] This agreement included in the Code of Laws and regulations on currency exchange, credit, monitoring of financial intermediaries, the fight against money laundering and terrorist financing, in *J.O.*, Special Issue of January 20, 2010 , pp 181-187

[270] Central Bank of Congo, Annual Report 2009

[271] The money supply consists of the monetary base plus provisions for imports and foreign currency deposits.

one hand, and liquidity management and other perspectives on the other (2). The review covers the period from 2007 to 2010. In addition, an evaluation of interventions for the BCC shows the rate and level of inflation, and the level of punctures made on liquidity through the sale of commercial paper for a better outcome, and consider sustainable solutions to safeguarding the purchasing power of the national currency.

II.1. Award of CP and preservation of purchasing power: liquidity regulation

Of the three instruments available to the BCC, the commercial paper (CP) is used to regulate liquidity in the short term and to respond particularly to permanent shocks on bank liquidity. It is for this reason that we have interest in this study. It is an instrument that BCC uses often compared to others because it has the advantage of making short and long term gains. It facilitates the fight against the off shocks. It was during these years that the BCC has strongly appealed to the instrument. A comparison is made between the evolution of the monetary base and the volume of outstanding CP. This leads to consider the fluctuations in the inflation rate to highlight the effects of monetary policy conducted by the BCC by the award of CP which is selling treasury bills to commercial banks to increase or decrease the volume of the monetary base. The monetary base, consisting mainly of currency in circulation, should not be enough for consumption. i.e. the consumer of the currency must have enough to purchase the goods and services they need. In case of reduction of the monetary base, domestic prices will tend to increase. This would be a source of inflation. In this case, consumers will lose confidence in fiat money (currency).

Exchange rate policy that the BCC has set has two main objectives: to leverage the variations in exchange rates and improve the level of international reserves. This is to safeguard the purchasing power of the national currency, regulate its behavior with respect to foreign currencies by injecting or puncturing on liquidity.

In 2007, monetary policy implementation would be cautious and restrictive due to the maintenance of real interest rates (interest rate)[272]. These rates are payable when used to pay the CP. The BCC has modified these rates four times this year. This rate increased from 40 to 50% in February, it returned to 40% in April, passing 30% in May to finally stabilize at 22.5% in July. The rate remained unchanged until the end of the year. Subscriptions to the CP totaled 461 billion CDF in December 31[273]. Puncture in liquidity of this instrument was 151.1%. It went from 388.4 billion of CDF in January to 461.1 in December. The annual inflation rate was 9.9%, there have been five phases with the highest inflation in January and February (respectively, 23.6 and 25.5) and August (10, 0), which also remained so until the end of the year.

Inflationary periods result from increased fuel prices and food products resulting in an increase in transport prices[274]. The national currency depreciated sharply at the beginning of the year. A situation that has its origin in the preference of economic agents, to hold the foreign currencies against the national currency. The BCC strategy was to broaden and deepen the foreign exchange markets by the acceptance of the CDF under payment by the mine operators, taxes and fees. The intervention of the BCC on the market is 5.6% due to foreign exchange purchases, made by it, amounting to 66.9 million USD. This was also the only intervention of the year.

[272] The rates are the interest rates set daily by the central bank, which help regulate economic activity. They determine the cost for commercial banks to obtain refinancing from the central bank.

[273] Annual Report of the BCC 2007

[274] Idem

The following year, 2008, the BCC has not changed the objectives and instruments of monetary policy. This year has witnessed four phases of inflation. Originally monetary inflation from January to March has been increasing. This push stems from the monetary financing of budget deficit in late 2007 and the resumption of hostilities in the East. BCC as the cashier of the State and responsible for the implementation of monetary policy acted to prevent a rise in domestic price formation. The food and energy crisis caused rise in prices of finished goods in the months of March until July.

On the international market, the price per barrel rose from 147 USD in July to USD 65.3 in October, thus inducing a reduction to a decline in petroleum products. . From October to December, a relaxation in monetary and fiscal policy caused by spending on security following the resumption of armed conflict in eastern countries, inflationary pressures resurfaced where currency depreciation was marked by high dollarization of market in 2008. The rate would undergo 3 adjustments. In January (24.6%) in June (30%) and December (40%). The annual inflation rate resulted in 27.5%. The award of CP totaled 1,444.0 billion CDF. This was an increase of 165% because it had to deal with the delayed effects of fiscal shocks and inflation costs[275] by taking the price increase internationally[276]. Following the resumption of armed conflict in eastern DRC, a situation requiring availability of funds, the BCC did not try to influence liquidity being reached due to the fluctuations in exchange rates. The exchange market was animated only by banks and exchange offices.

Exceedances of budget targets in 2008 led to a monetary situation marked by tensions related to the liquidity in 2009. Monetary policy was restrictive to deal with liquidity pressures and the general price levels. The policy rate was raised from 40 to 55 and 65% in January, for a recent reform in October. Regulation of liquidity made in February, mainly by the operations of awarding CP (2395.7 billion CDF) kept rates stable until July. In response to the expansion of bank liquidity, inflationary pressure, induced by the deteriorating financial situation of the public sector, and also especially the international financial crisis, the BCC undertook a further tightening of policy to secure the inflation rate to 53.4% and the rate to 70% by the end of the year.

To enhance the implementation of monetary policy, the BCC has used the exchange rate policy through transfers of currency. The lagged effects of the budget deficit and the financial crisis caused a sharp depreciation of the currency in the first quarter. The BCC intervened by selling foreign exchange to improve the exchange rate on the market. Approximately 48 million USD was sold in the second quarter. Another sale by auction took place in June without preventing depreciation due to the reappearance of budget deficits. Cost overruns in 2008 caused by government overspending to try and fight against conflict in eastern DRC influenced the economy. BCC could not control inflation shocks despite all its interventions. The domestic price formation kept growing throughout the year. One more puncture in December would result in a slower pace of expansion of liquidity[277].

The year 2010 remained characterized by a deflationary trend. The rate was gradually adjusted to 22% at end of December. The rate of inflation stood at 9.8% and a monetary base increased by 29.6%. The volume of CP reached 3512.1 billion CDF. On purchases of 1159.8 million USD and sales of 1,053.9 million USD, the BCC reached a sale of 10.0 million USD in January, and purchases of 157.0 million USD from March August to fight against the

275 The cost-push inflation is characterized by an increase in a product carrying the others. Example: the price of fuel affects the price of transport.

276 Report of the BCC 2008

277 Annual Report 2009

pressures in the market after the New Year festivities. The beginning and end of the year showed impairment while the year was stable.[278]

This raises the question of why the BCC does not deal with shocks, which are endogenous and exogenous source of inflation.

II.2. Liquidity management and prospects for the effectiveness of monetary policy.

The BCC has a monitoring framework that allows it to have time to useful information on the evolution of its essential guidelines for the conduct of monetary policy and regularly monitoring the situation[279]. It aims to raise awareness of the transmission channels of monetary policy, the nature of shocks and their impact on the different objectives and the adjustments required in the handling of instruments needed to find and preserve price stability.

There is an undeniable relationship between money, price and interest. The supply and demand of money jointly determine the price level changes which are reflected in the inflation rate, which in turn influences the normal interest rate.[280]

During the period under review, the achievements of the monetary base have been progressive, as well as the behavior of the instruments of monetary and fiscal policy. Inflation rates are highly variable finding their sources to domestic and external shocks. Fluctuations were remarkable in January and September. The major causes were the lagged effects of the budget deficit, armed conflicts, the international financial and economic crisis, rising prices internationally. We may say the same causes always produce same effects.

The intervention of the BCC through its instruments is considered low and sometimes nonexistent (2008). With its monitoring framework, the BCC may well study the causes of perceived impact on liquidity and act on prevention, instead of suffering the effects of known causes and which are subject to revision for better effectiveness of monetary policy conducted by it. The role of monetary factors including the stock of CP was overlooked at the beginning of its launch (2007), but after testing the benefits it offers on the regulation of liquidity, the BCC educate economic officers, particularly banks, in using this instrument. Interventions on purchases and sales of foreign exchange must act in prevention and not in correction. Prevention is better. This is to intervene before feeling the effects of increased demand.[281]

Congolese economic policy faced permanent liquidity shocks related to public sector deficit. This situation has returned throughout the study period, and the differences between September and November, to join in the festivities of New Year that cause constant inflation. Budget deficits caused by government spending causes a decrease in the amount of currency in circulation. The BCC, serving as cashier of the State spends more than it collects[282]. This creates shocks that result in excess payments and disruptions in major markets. In this context, the BCC tightens its monetary policy with higher interest rate and maintaining the required reserve ratio to mitigate the expansion of the monetary base.

278 Annual Report 2010
279 Annual Report 2009, pg 19
280 BAYARD J., *The power of the central bank on monetary emission*, ECB, January 2006, pg 32
281 BALLIE R. and McMAHON P., *The foreign exchange market*, Ed ESKA, Paris, 1997, pg 21
282 KABUYA KALALA F. and MATATA PONYO M., op.cit., p. 43

Exchange rate policy is more relaxed without the effect of safeguarding the purchasing power of the national currency. Economic agents and residents prefer to link their currency transactions in local currency which depreciates sharply. Savings and balances are settled in foreign currencies despite the BCC strategies to encourage the use of the national currency and its timely intervention on the foreign exchange market interventions also judged as ineffective.

CONCLUSION

Interventions of the BCC are a remarkable step forward, but their effects on different policy areas are not visible. Exchange rates fluctuate with the usual transitory shocks, which reinforce the beliefs of traders on the trust granted to the national currency. This causes excess liquidity of the domestic currency involving an increase in demand resulting from currency inflation[283].

An absence of restrictive fiscal policy stifles the effects of a good monetary policy[284]. The advantage to ensure its independence does not subordinate its action to the reaction of fiscal policy can act as prevention against shock that may come of it[285]. It also has the advantage of giving signals to the markets by reassuring economic agents on the ability and willingness of the monetary authority to rectify the situation. It also establishes responsibility by separating the money from those budget initiatives[286]. As a result, monetary policy can be implemented, at least in the short term, in any fiscal slippage from the time the monetary authority has the free choice of its instruments.

[283] Read BETOINE A., BASSONI M., *International monetary problems*; Ed Armand Collin, Paris, 1997 and CHAINEAU A., *Mechanisms and monetary policies*, Collection "Quadriga", PUF, 2000

[284] CARARE A., STONE M., *"Why focus on inflation?* , "In Finance & Development, June 2004, pg 22

[285] Read The HERON E. and MOUTOT Philippe, *central banks need to be independent?*, Prometheus Collection For or against?, Bordeaux, 2008; CUKIERMAN e. a., *Measuring the independence of central bankand its effects on policy outcomes* in Word Bank Economic Review 6, 1992 ; PATAT JP, "*Some questions about the independence of the central bank"* in Journal of Financial Economics, No. 22, 1992

[286] CHAINEAU A., *Mechanisms and monetary policies*, Collection "Quadriga", PUF, 2000, pg 36

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ECONOMIC RELATIONS BETWEEN THE DEMOCRATIC REPUBLIC OF CONGO AND CHINA: LEGAL FRAMEWORK, CURRENT STATE AND PERSPECTIVES

By Yves-**Junior MANZANZA LUMINGU**[*]

"Do not be afraid to make mistakes, [But] correct them as they arise "(Deng Xiaoping)

INTRODUCTION

By dint of being presented as the new world power which will play an increasingly vital role in the political and economic policies of the future, China is now a myth which the African imaginary delights, is it loved, is it suspicious or do turns away, without anyone trying to find out exactly what the rise of this country is for our nations, reveals Kä Mana[287]. It is in this context that economic relations between the DRC and the People's Republic of China whose focus happens to be the Chinese breakthrough on the African continent, marked by the first China-Africa Summit from 3 to 5 November 2006 in Beijing.

Indeed, said Colette Braeckman, "while Africa did not interest anyone, China, was bucket (...), eager to assert itself as a great power on the international stage, to deploy its expertise, [and] to ensure sources of supply."[288]

With specific regard to Sino-Congolese relations, it is the signature of the Convention of collaboration on the development of a mining project and an infrastructure project in the DRC which will lay the groundwork for cooperation hailed by some, but criticized by others and thereby causing mixed feelings.

Some believe that China would be an alternative that may provide new opportunities for African countries given the imbalance generated by the international economy and in which many countries are marginalized. Others also argue that the agreements with China are often secret negotiations that do not reflect the development needs of African countries and who are not interested in equality issues, social justice, environmental, in short questions of human rights.

As a result, many trials, press articles and television reports have been devoted to the issue of *Chinafrica* sometimes to express a "sigh of relief" and an ardent hope after decades of dictates of the Bretton Woods institutions and their masters on the *continent of woes*, sometimes to denounce "the theory of clothes of Saints Peter and Paul."

Inspired by these studies, this reflection is a critical analysis of the issues raised by the phenomenon of Chinafrica, but operated in the specific context of Sino-Congolese from 2008 to 2011. It will therefore be subject to analyze thoroughly the cooperation agreement signed

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287 Kä Mana "China-Africa. The issues of cooperation, "in *Congo-Africa*, No. 425 (May 2008), p. 391-401

288 Preface to Serge Michel and Michel Beuret *The Chinafrica: Beijing to conquer the black continent*, Paris, ed. Grasset and Fasquelle, 2008.

on 22 April 2008 by the Congolese government and the consortium of Chinese companies and identify the current state of commitments it has given birth before considering prospects.

I. LEGAL FRAMEWORK OF ECONOMIC ON SINO-CONGOLESE RELATIONS

The Summit held in Beijing in November 2006 marked a major turning point in economic relations between China and African countries in general. Indeed, taking advantage of this opportunity, the Chinese President had encouraged Chinese companies to invest heavily in Africa. However, China announced the opening of its market to 440 products that Africa could export at zero rate to China and promised its assistance in several other areas.[289]

The Chinese diplomacy would meet the imperative management of the dependence of China on commodities of all kinds to support its growth, which materials are to be imported from abroad. Therefore, China does not hesitate to "bring the package to prevent asphyxiation in this situation of dependency and vulnerability." It is in this sense that Africa, a land well endowed with raw materials, becomes the priority field of Chinese diplomatic initiatives with principles that are all tailored to the expectations of African states.[290]

And to reassure his interlocutors, Beijing has consistently emphasized his particularity as emerging power more generous and flexible that does not exploit the resources of others in search of economic gain or mix business with politics. The heart of the «five principles» governing relations between China and African states revolves around the mutual respect for sovereignty and territorial integrity of the non-aggression, non-interference in internal affairs, of equality and mutual benefit, peaceful coexistence[291], all under the «concept of specificity values, opposed to the universalism of Western principles.»[292]

Faced with such a charming Chinese discourse, the African Heads of State, many of whom do not favorably welcome criticism from the West, respond with a favorable response.

All the reasons mentioned above, compete in the signature between the Congolese government and a consortium of Chinese Convention of collaboration on the development of a mining project and an infrastructure project in the DRC which we would like to point out as the major articulation here:

I.1. Preliminaries

Signed on April 22, 2008 by the Congolese state on one hand and the Consortium of Chinese enterprises made up of China Railway Group Ltd and Sinohydro Corporation on the other hand, the collaboration agreement was subject to a first amendment which endorsed the entrance of China Mettalurgical Group Corporation.

289 Cfr. Rigobert Minani Bihuzo, "The China-Africa Cooperation and the debate on Chinese contracts in the DRC," in *Issues in China-DRC on mining agreement. Analysis of the Chinese contract by Congo experts*, Kinshasa, CEPAS Publishing, 2010, p. 23-38; Germain Ngoie Tshibambe and Constant Kabika Etobo , "The Sino-African relations: between hope and controversy," *Congo-Africa*, No. 417 (September 2007), p. 599-619; Comp. Antoine Kernen, "Chinese Strategies in Africa: oil to plastic bowls," *Africa Policy*, No. 105 (March 2007), p. 163

290 Germain Ngoie Tshibambe and Constant Kabika Etobo, *art. cit.* ; Boubacar Diallo Badiane, "China woke up will it one day awaken Africa? "*Pambazuka News*, No. 186, April 18, 2011

291 Read Serge Michel and Michel Beuret *The Chinafrica*. *Beijing to conquer the black continent*, new expanded edition, Paris, Fayard / Plural, 2010, p. 47; Comp. Eric Nguyen, The China-Africa relations. The Middle Kingdom to conquer the continent, Levallois-Perret, Studyrama Perspectives, 2009, p. 21 and 28; Adama Gaye, *China-Africa*: *The Dragon and the Ostrich*, Paris, L'Harmattan, 2006, p. 244; Henri Mova Sakanyi, "China in Africa: Grammar of geopolitical shift" in *Dounia*, No. 3 (September 2010), p. 91-123

292 Valerie Niquet, "The African strategy of China", in *Foreign Policy*, No. 2 (2006), p. 363-364.

On 11 September 2008 a second amendment was signed in which the parties agreed and accepted the withdrawal of China Mettalurgical Group Corporation and the accession of Zhejiang Huayou Cobalt Ltd. And September 17, 2008 a memorandum of understanding was signed which led to the creation of the Gecamines[293] group and the Consortium of Chinese firms of a joint-venture called «SICOMINES»[294].

In this convention, called the "Contract of the Century", with funding of $ 9 billion, the consortium of Chinese companies invested an $ 3.2 billion in a mining project with a confirmed reservation of 10 million tonnes of copper and 670,000 tonnes of cobalt and U.S. $ 6 billion in public infrastructure projects (railways, roads, hospitals, schools, social housing, hotels and residential buildings, etc..).

But discovering the MOU from their offices in Washington, IMF economists lack the choke. "There is no way to cancel $ 12 billion debt if Kinshasa réemprunte 9000000000", carried away a representative of the institution. Since then, Chinese and Congolese have revised downward their copy, of 6 billion USD.[295]

Following demands made by the IMF[296] to the Congolese government for signing a new three-year program under the Poverty Poverty Reduction and Growth Facility, a third amendment was brought to the Sino-Congolese Convention, reducing the proposed financing of 9 to 6 billion U.S. dollars, including $ 3 billion for the mining project and 3 billion for infrastructure projects.

The study of the contents of this agreement requires prior research to attempt to determine its legal nature, given the controversy that surround it.

I.2. Legal nature of the Sino-Congolese Convention of 2008

In his speech to the plenary of the National Assembly of 12 May 2008, the Congolese Minister of Infrastructure, Public Works and Reconstruction referred the matter to section 213 paragraph 2 of the Constitution of 18 February 2006 to justify his tenure at the conclusion of this agreement. This constitutional provision provides the opportunity for the Government to conclude certain international agreements not subject to ratification after deliberation by the Council of Ministers and to inform the National Assembly and Senate. These are the "simplified agreements" that are bilateral or multilateral agreements signed by states following a shortened procedure[297].

But the Convention has not been concluded between two states, but between a state - in this case the DRC - and a group of Chinese private enterprises, which would exclude the legal regime in that Article. Laurent Okitonembo too speaks of a contract of a particular nature, which the parties are on the one hand, a State subject of international law, and other private foreign companies on the other[298]. Paraphrasing Robert Eric, he calls it a contract

293 Cfr Art. 1.4 of the Convention

294 The Consortium is composed of five Chinese companies below: China Railway Group Ltd., China Railway Sino-Congo Mining Ltd., China Railway Resources Development Ltd., Sinohydro Corporation Ltd and Sinohydro Harbour Co. Ltd.

295 Philip Partridge, "DRC: Is there a pilot? , "In *http://www.jeuneafrique.com*, February 8, 2011.

296 Read Thierry Vircoulon, "Autopsy of an international controversy, the Sino-Congolese partnership under fire from critics," *in Modern Times*, No. 657 (January-March 2010).

297 Patrick Daillier and Alain Pellet, *International public law*, quoted by Laurent Okitonembo Wetshongunda, "Critical Considerations on the nature and scope of the collaboration agreement signed by the Democratic Republic of Congo and a group of Chinese companies," *Issues of Convention in DRC-China Mining. Op. ci*t., 39-66

298 Laurent Okitonembo Wetshongunda, *art. cit.*

of state (state contract), which is defined as a mixed international agreement binding on the one hand, a legal person under public law, state or parastatal entity, and other from an individual, private person or entity[299]. This concept has been invented by the doctrine to account for the development of a contractual practice to govern the relationship between a party state and a private party and it was developed specifically with regard to investment contracts, including oil investments, between states and oil dealers in 1950-1960.

I.3. Contents of the Sino-Congolese Convention

In addition to the Preamble, the partnership Convention signed on April 22, 2008 consists of 27 articles divided into 9 points respectively on the subject, the mining project, the infrastructure project, the repayment of investments, commitments and guarantees of DRC, the guarantees of the Group of Chinese companies, the periodic consultation of parties, superior force, dispute settlement and the final provisions.
The Agreement is for:

- The provision of funding by the Group of Chinese companies to invest in a joint-project venture in mining and a project to build infrastructure;- The creation of a joint venture between Gecamines mining and a consortium of five Chinese companies. This joint venture will be responsible for delivering the mining project and to support the repayment of investment in mining and infrastructure;
- The transfer by Gecamines to the joint venture of Dikuluwe deposits, West Mashamba, D Junction, Dima Cuvette, Cuvette Mashamba and Syncline Dikuluwe Colline D containing about 10,616,070 tons of which 6,813,070 tons of certain copper resources, 626,619 tons of cobalt and other valuable minerals to be determined[300];
- The execution of a project to build infrastructure for the DRC.

Furthermore, the Parties agree that for the realization of investments they make for Mining Projects and Infrastructure, the group of Chinese companies shall resort to Congolese companies for all supplies and services they will be able to satisfy (art. 11.2), they nevertheless agree that both for their supply abroad for benefits that Congolese companies cannot meet, the Group of companies China gives priority to the Chinese market provided that the prices offered by the latter are competitive..t

These provisions confirm *mutatis mutandis* the allegations made by Eric Nguyen, who writes: "Chinese aid is linked; these are Chinese companies who build these infrastructures. The Exim Bank [main credit reporting agency] shall tender exclusively for Chinese companies, so we consider that 70% of aid would be spent on Beijing Chinese goods and services. "[301]

I.4. Appreciation

Upon the conclusion of the collaboration agreement in 2008, its content has continued to raise concerns and doubts both on the part of the general population and researchers in particular. Several experts made comments relevant and constructive criticism at times, sometimes tinted alarmist and pessimistic, others have preferred to sacrifice the scientific debate in favor of partisan interests and politicians.

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[299] Eric Robert, *Law Course operations and international economic contracts*, Free University of Brussels, 1998-1999, p. 169
[300] Art. 4 of the Convention.
[301] Eric Nguyen, *Op.cit*, P. 85

According to Laurent Okitonembo Wetshongunda, the Sino-Congolese Convention cooperation is more leonine than any other mining agreements and it leaves to reveal the resignation or inability of the DRC to manage her own reconstruction ([302]). In the same direction, David Mutamba Dibwe underscores that this contract has elements of doubt and anxiety in some places, but it contains one major advantage: the construction of infrastructure[303].

Moreover, in a new report released in March 8, 2011 ([304]), the British Global Witness NGO criticizes «opacity» in the agreement signed between the DRC and the group of Chinese companies as part of the country's reconstruction. It says that it took time and it too interviewed many people to come to its conclusions.

According to Daniel Balint-Kurti of Global Witness, three important questions remain unanswered in this contract:

- What are the exact infrastructures that Congo will receive from the Chinese side?
- How will the recovered minerals be given to the Chinese side?
- How will the Congo ensure the benefit clause of 17% for Chinese side?

Reacting to the publication of this report, Valery Mukassa, chief of staff at the Department of Mines, explained that the contract between the DRC and the consortium of Chinese companies had been defended in Parliament and has been endorsed by elected Congolese representatives. She also indicated that the pricing of minerals is in relation to their course at a time well defined but there are parameters that allow parties to take an average that rule the various contractual clauses.

It is in these allegations that have probably helped Thierry Bangui see in the convention "a laudable example worthy inspiring other African governments."[305]

Leaving aside the debate about the leonine or not the agreement under review, we limit ourselves to appreciate the position of the Congolese state in the distribution of capital of the joint venture. Indeed, under Article 3.4 of the Convention, the Chinese Joint Venture is granted 68% of the capital share of the SICOMINES, DRC merely 32%. In addition, the DRC gives the Chinese side of the defenses and exorbitant[306] tax benefits and too well-crafted guarantees.

Such precautions, Wenceslas Busane believes, have been inspired by concerns that the agreements with the government may eventually be called into question following an unexpected change of regime or government[307]. But for our part, we remember an expensive lesson of Language Philosophy, we are tempted to call the concessions made by the Congolese of a pragmatic self-destruction, the latter of defending one thing and it's opposite.

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302 Laurent Okitonembo Wetshongunda, art. cit.

303 David Mutamba Dibwe, "A Critical Look at the Sino-Congolese Convention relating to the Mining Code and practices in the mining sector," in *Issues in China-DRC mining agreement*. *Op. cit*., P. 67 to 84.

304 Read "Global Witness criticizes the opacity of the Chinese contract", *http://radiookapi.net/economie/2011/03/10/kinshasa-global-witness-denonce-l%E2%80%99opacite-du-contrat-chinois/*, in Accessed March 13, 2011.

305 Thierry Bangui, *China, a new development partner of Africa. Towards the end of European privileges on the black continent,* Paris, Harmattan, 2009, 43

306 Art. 14.2 of the Collaboration Agreement.

307 Wenceslas Busane, "The legal framework of Sino-Congolese program", in Dounia, No. 3 (September 2010), p. 124-133

Indeed, there is little that the same government had made from *the review of mining contracts*, its watchword, some mining companies blamed "a great disproportion, unexplained and unjustified in the distribution of shares, the arbitrary fixing of shares feasibility study without the benefit of exorbitant customs benefits, etc.. "[308].

On tax exemptions, it should be noted that Law No. 007/2002 of 11 July 2002 [new] Mining Code was already designed to be more attractive, in that it has substantially revised and replaced the value taxes on exports of mining products. This tax, replaced by the mining royalties, increased to include non-ferrous metals from 10% to 2%[309]. As the legislature had it excluded explicitly granting exemptions, considering the reform brought about as a benefit to mining companies.

All things considered, the Congolese risk losing its soul, has just sought to keep its place of eternal fall, as a footballer specialized to score goals against its own camp.

This table is kept frozen or rather suffer some adjustments? Better still what gives us better results for mid-term review of this Sino-Congolese cooperation which is based in the cooperation agreement of 2008? Can we believe the various political speeches or politicians as to the "win-win" of this great agreement? What still remains entrusted mandate by the Congolese people to their elected officials?
It is due to these various questions that we will focus on the following pages.

II. SITE INVENTORY

Like our ancestors of the beginning of modern times who saw the arrival of the white man the rolling fire of a fascinating beyond which one could expect all the riches, many Africans tend to believe that Middle Empire is the new road from endemic underdevelopment and chronic crisis that characterizes the continent in the eyes of the world. Therefore, they can see it in China "a blessing from heaven in the desert of [their] misery."

For other Africans, who have in mind how our encounter with Europe resulted into the slave trade, colonialism and neo-colonization, there is nothing to dance on the clouds of our dreams in front of the yellow man or to invest all our hopes in the relationships we establish with him. Lucidity requires caution, to avoid the dream from becoming a nightmare, more or less imminent. In the imagination of those who think so, China remains, despite its new power and all its economic potential, a mysterious world that intrigues more than it fascinates.

II.1. Controversy about the Chinese presence in the DRC

African countries in general and the DRC in particular see China as not only an alternative to the collapse of bipolarity and to disengage from the West, but also a new'' Gulliver'' less burdensome and less demanding as to the democratic standards and just looking at the use that is made of loans it makes[310], while some researchers, like Valerie Niquet, note that China is in Africa as essentially predatory, according to the past model implemented by the colonial powers. [A] strategy (...) that allows the most questionable regimes in the region

[308] This problem has been the backdrop of our communication on 24 February 2011 at the Max Planck Institute for International Law in Heidelberg (Germany) and entitled "Rule of law and natural resource exploitation in the Democratic Republic of Congo." We have particularly deplored the breach of commitments on the part of the Congolese state and disregard of the principle of state continuity that characterizes its leaders. Therefore, as it asks whether the Convention of Sino-Congolese cooperation will resist all potential regime change.

[309] Combined reading of the Explanatory Memorandum and art. 241 of Law No. 007/2002 of 11 July 2002 on the Mining Code

[310] Germain Ngoie Tshibambe and Constant Kabika Etobo, *art. cit.*

to reconstruct an economy rent based on massive exploitation of natural resources, without real transfer of wealth or expertise to local people[311].

Other controversies are mentioned by Germain Ngoie Tshibambe and Constant Kabika Etobo regarding questionable practices encouraging the criminalization of African economies which use Chinese as they settled in Africa, which practices, first, goes to [Chinese] Enterprises, even if it makes a lose (...) while receiving [Chinese] state subsidies, thereby tending to eliminate eventually African businesses that normally operate without subsidies.

Indeed, it must be remembered, mostly for commercial reasons that China and its companies were pushed to focus on the African continent. Africa is becoming, in the words of Germain and Ngoie Tshibambe Kabika Etobo Constant, "the new frontier trade for Chinese companies."[312] China is becoming more visible in Africa, especially in trade, and says Pout and Chomtang[313]. She sees in Africa therefore not only a reservoir of raw materials, but also an outlet for its manufacturing industry, known for its low-priced products; she managed to gradually eliminate its competitors in the textiles and manufactured goods.

This intrusion is based on commercial firms to enter and Chinese communities that are becoming increasingly present in African cities in general and Congolese in particular. The Chinese colony is gradually being rolled and the number continues to grow with amazing speed; shops, restaurants, casinos, telecommunications, all sectors are now Chinese "low hands".

Is it that China has taken the African needs to round the body and finally lay the foundation for development, with dozens of infrastructure projects, especially the areas of communication and electricity. It is not disinterested, of course, and no one pays more attention to its speech about friendship, but its efforts to achieve its objectives give Africa a future inconceivable only ten years ago. Basically, it brings a continent to adrift, forgotten by everyone in the tectonics of globalization[314].

At the individual level, in the contrary, Marie-Noëlle Chomtang deplored, in a report published in December 2006, the restrictions imposed on subtle African travelers, particularly in the autonomous zone of Hong Kong. Because, she writes, if Chinese companies are gaining market and carry more and more contracts in Africa, reciprocity is not always appropriate, given the difficulties faced by African traders for entry into China[315].

Yet many testimonies go to the contrary. This is a West African diplomat who revealed: "We have no difficulty in obtaining visas; we quickly received within departments, even if it is not always easy to meet ministers. Unlike European countries, the Chinese are doing everything to make our job easier. " [316] Economic relations between China and Africa have allowed many Africans to realize their business easily[317], without having to face the many difficulties associated with obtaining a Schengen visa. Also in a documentary directed by Laurent Védrine, entitled «Beijing-Kinshasa Story», Marie-Louise Bibish Mumbu, Congolese

[311] Valerie Niquet, "The African strategy of China", in *Foreign Policy*, No. 2 (2006), p. 372-373

[312] Germain Ngoie Tshibambe and Constant Kabika Etobo, *art. cit.*

[313] Christian Edmond Bepi Pout and Marie-Noëlle Chomtang, "The Chinese Breakthrough in Africa: its geopolitical and geo-economic. Case of Gulf of Guinea, "in *Congo-Africa*, No. 429 (November 2008), p. 747-761

[314] Serge Michel and Michel Beuret, *Op.cit*, P. 386

[315] Marie-Noëlle Chomtang, *Sino-Cameroonian cooperation in light of the 6th Session of the Joint Commission: Issues and Challenges*, Yaounde, IRIC, 2006.

[316] P. Airault, "The Chinese method", in ***http://www.jeuneafrique.com/Articles/Dossier/ARTJAJA2526p026-033.xml0/chine-investissement-entreprise-politique-etrangerela-methode-chinoise.html*** 08/06/2009

[317] Thierry Vircoulon, "Chinese Strategies of survival in Kinshasa (DR Congo), in *Rethinking Independence: DR Congo 50 years later - Proceedings of the Conference of the fiftieth anniversary,* Pole Institute, 2010, p. 67-77

writer and playwright, speaks beautifully about the romantic relationships between Africa and her suitors, the West and the China[318].

II.2. Alleged monopoly of effort reserved for Chinese

In the lot of the criticisms against Chinese companies, their preference to import Chinese workers is cited, including unskilled labor[319]. Is this a way to confirm the hypothesis that the Beijing loans would be linked, or is it a lack of esteem for the work capacities of African, as revealed by the words of the Chinese businessman Jacob Wood criticizing Africans of been lazy in that «they expect to be hungry before they climb the tree and grab a mango.»[320]

We believe, for us, that like all stereotypes contain some truth, but it does not withstand analysis. What we should remove is all racist stereotypes about Chinese eager to work and lazy Africans, the Chinese who take their future in their hands and African fatalists, who rely on God or Western aid for survive. These speculations, underlines Serge Michel and Michel Beuret, does not hold water: just seeing maneuvers under the African sun to make the pick that the machines have long been in developed countries, or seeing the African women earn in a day working in the fields and at home, and to walk with their child on the back, the miles that separate from each other, to understand that the Chinese are not monopoly of the effort[321].

The reality is that political elites prevent the emergence of a middle class that could eventually threaten them. Certainly, unlike China and other emerging Asian countries where the social contract is based on improving the well-being, the legitimacy of power in Africa is based primarily on wealth management, a design that is inconsistent with any development effort[322]. It is this phenomenon that Jean-Christophe Mitterand called redistribution of power[323], while, unable to ensure the welfare of the population, these leaders eventually outsource their public duties.

II.3. Outsourcing of public office

During the 50 years since " *Cha Cha Independence* ", the Congolese political elite, like most of the politicians of the post-colonial Africa, been unable to develop its own expertise and has made that attending, reckless and cynical, to the decay of colonial infrastructure.

And to appease the wounded people, most of whom have never been able to experience the theory of the second term of comparison, the government has inherited all the ills of the Republic eventually entrust the task to China to satisfy its people. It is this phenomenon that we refer to as "outsourcing of state responsibilities to the Chinese," as did the leaders of the countries of West Africa vis-à-vis international financial institutions and Western countries[324].

Indeed, Chinese companies perform all major projects of national reconstruction: roads and railways, housing, water networks and electricity, hospitals, schools, etc..

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318 Pierre Haski, "The Chinafrica changes the game in Africa", in *http://www.rue89.com/chinatown/la-chinafrique-change-la-donne-sur-le-continent-africain,* June 17, 2008.
319 Comp. Thierry Bangui, Op. Cit. 93-94
320 Serge Michel and Michel Beuret, Op.cit., P. 62
321 Ibidem, P.119
322 Eugene Nyambal, Africa: the path of prosperity. Ten keys to escape poverty, Paris, Harmattan, 2008.
323 Jean-Christophe Mitterand, Bruised Memory, Paris, Plon, 2001, p. 113
324 See Adama Gaye, *Op. Cit*. 174-175

III. FUTURE OUTLOOK

In contrast to Western donors who do not refrain from enforcing the criteria of good governance and human rights as a prerequisite for their help, Beijing offers to countries with which it cooperates economic assistance and matching multiple unrequited "no political conditionality"[325], except the non-recognition of Taiwan. This is the principle of cooperation that is of non-interference and respect for state sovereignty, Beijing's concerns is primarily commercial.

Many Western investors have learned the hard way. This is the case of George Forrest, who, before losing two copper deposits in the DRC to the Chinese, already prognosticated in these terms: "Westerners are too timid and pose conditions. The Chinese are faster, they have big needs and will definitely boost markets. "[326]

This policy looks set to receive a favorable response from African dictators, familiar (...) with the ballot box tampering and disrespect of human rights and fundamental freedoms, but it could be in the long run a real danger to the people, especially as respect for human rights and fundamental freedoms is now a fundamental principle of international relations and which no state can derogate[327].

Never mind, China offers an alternative to African countries long plundered by the ideals and policies imposed by the West (...) as well as essentially unequal relations that have for centuries characterized the North-South cooperation. Showing a great interest in Africa, the Asian giant postulates that Africa has its place and its place in a world, where it was left for its own devices[328].

III.1. China: an alternative to Western partners?

Chinese leaders always leave a mark that the purpose of the Chinese presence is to offer what the West had failed to offer so far: the prospects of endogenous development through cooperation, which wants the happiness of all populations[329].

Yes, "China may well succeed where the West has failed, despite its hundreds of institutes of African Studies, thousands of researchers, libraries and museums devoted to art and culture of the black continent."[330]

But beyond all odds, the caution is that it is unrealistic to expect that China is changing in to what it may never be, that is- tell a donor prodigal especially lax forget to cultivate his interests[331] first to focus solely those of the Congolese. Instead, following the main lesson that bears the Asian giant, the DRC should rely primarily on its own strength because, like charity, begins at home development: the development of the Congolese nation may be that the efforts made Cohyhngolese themselves.

[325] Ibidem, P. 249
[326] Cfr Philip Perdrix, "The great leap forward" in *http://www.jeuneafrique.com*, 16/02/2009
[327] Christian Edmond Bepi Pout and Marie-Noëlle Chomtang, "The Chinese Breakthrough in Africa: its geopolitical and geo-economic. Case of Gulf of Guinea, "in *Congo-Africa*, No. 430 (December 2008), p. 835-846
[328] Ibidem
[329] Kä Mana "China-Africa. The issues of cooperation, "in *Congo-Africa*, No. 425 (May 2008), p. 391-401
[330] Serge Michel and Michel Beuret, *Op.cit*., P. 374
[331] See Adama Gaye, *Op. Cit.* 264 and 281

The question that should be asked here is whether it is possible for Congolese leaders to see the opportunities, to hear words of wisdom or feel the real challenges on the basis of the Chinese example. Or better, are they willing to correct their mistakes of the past in light of the teachings of the father of modern China (Deng Xiaoping), whose teachings substance could be adapted to realities of the Congolese?

III.1.1. Cross analysis of the Chinese leadership and Congolese

Seduced by the economic achievements of Singapore during a visit in 1978, Deng had obtained the explanation of Lee Kuan Yew, then Prime Minister of Singapore, who reassured him that China could do better given the number of thinkers that abound the country. Having learned this lesson carefully, he would later inspire to start the modernization of the People's Republic of China, whose economic growth overwhelms all the statistics fixed today.

This example points out a rather negative version of the inability of our leaders to learn lessons from what they see in their multiple and expensive travel around the world. On these occasions, regrets Adama Gaye, "they just look, with relish, successes in development but, amnesia, they forget everything once they return home.[332]» Therefore, having prerequisites based on cultures and practices diametrically opposed political leadership, the Chinese presence in the DRC may not positively influence the Congolese political elite.

In this hazard behavioral are grafted other realities whose opinion continues to blame Chinese companies established in the DRC. Indeed, when we know what the Chinese people suffer as drama and terror in a fierce economic system that wants to win the commercial battle against the West when we are so little informed about the denial of human rights and the yoke of capitalism a new class of ogres Chinese in this country requires enormous "human sacrifice" and heavy sufferings and tragedies, development with Chinese characteristics can not be regarded as a splendid role model altogether.

III.1.2. Flip side of the Chinese model

Under this title lies the fear of a possible failure of China and especially the disillusionment of its Congolese partner who had seen in their collaboration agreement the beginning of the end of a long march towards development.One facet of such failure, if we have one, it may be that China is becoming common place in Africa after having played the angel and brotherly partner, capable of all miracles. In some ways, it begins to look like other actors, with his cohorts of security guards, who stuck his projects, corruption scandals and whatever she may say, his contempt, sometimes for the local population ([333]) . Indeed, Chinese and Africans do not mix.[334] On site, the higher posts are reserved for Chinese and Africans are not paid more, or even mistreated.[335]

It is that the agreement Sino Africa is far from resembling an idyllic picture. "(...) From the perspective of declarations of intent but also some tangible achievements, the Chinese presence raises a real beam of hope for a possible surge of Africa." However, beyond

[332] Ibidem, P.95

[333] Serge Michel and Michel Beuret, *Op.cit*., P. 385; Denis Clerc, "The Chinafrica by Serge Michel, Michel Beuret and Paolo Woods (photos)", in *Economic Alternatives*, No. 271 (July 2008).

[334] See Colette Braeckman, Towards the second independence of the Congo, Brussels, Kinshasa, The Scream / Africa Editions, 2009, p. 184-185; Vircoulon Thierry, "Chinese Strategies of survival in Kinshasa ...", *art. cit.*

[335] See Asadho, *Working conditions in the Chinese company CREC are unacceptable*, Kinshasa, January 2010.

the rhetoric sulphurous served on the board of a Sino-African cooperation promised a bright future, the reality on the ground (...) corroborates some serious deficiencies. Today, authoritative voices rise to more openly grumbling attitude deemed too "predatory" Chinese companies in Africa. Moreover, the excess of runaway Chinese for the construction of technical books for the operation and the delivery of raw materials to processing plants in China is clear ([336]).

Similarly, says Stanislas Kraland, "when China gets the contracts, sometimes nature pays the price, just as, in some cases, local populations. Numerous allegations of abuse and exploitation of African workers, a need to ensure continuity of development at all costs, China could derail Africa[337] «. Is that the Chinese presence is not without creating problems. Apparently, the Congolese state believes in the "win win" of the agreement that binds the group of Chinese companies for the exploitation of raw materials. However, possession of these natural resources could ultimately keep this country in the under-development, to the prejudice of the population.

The thesis that the departure is specializing in the exploitation of its raw materials, the DRC may be exposed to what economists call "Dutch disease"[338], which is a hindrance to the development of a mining state if it confines itself to the exploitation of its raw materials, turning away other sectors that create wealth, such as agriculture.

Moreover, the facts show that the raw materials extracted from the ground and / or basement take the Congolese to China without undergoing any transformation. These exports with low value added, little job-creation which does not require the use of technology transfer can only hinder the industrialization of the DRC. It leads to the formula according to which the DRC will export its ore to China and import manufactured goods with high value, a formula decried by Wilfred Collins Wonani[339] and qualified by Moeletsi Mbeki «repetition of an old story.[340]»

In the end, "whatever perception that we can have of China and the idea that one can make of its aims in Africa, realism requires (...) we think that this country is not as the absolute answer to our problems or as the ultimate passport to tomorrow, but rather as a matter of substance from which we have (...) reflect on our present and our future.[341]

III.2. Need for *catharsis* in the management of the Congolese

We would like to address ourselves first mainly to the skills and integrity of officers, who are added to the fight against anti-values in the management of the *Res Publica*. Indeed, when Chinese experts measure the daily amount of monumental corruption that

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336 Boubacar Diallo Badiane, " China woke up will it one day awaken Africa? , "In *Pambazuka News*, No. 186, April 18, 2011

337 Stanislas Kraland, "When the Middle Kingdom is invited in Africa", in *http://www.nonfiction.fr/article-1195-quand_lempire_du_milieu_sinvite_en_afrique.htm*, June 10, 2008

338 Dutch disease (also designated under the terms Dutch disease, discomfort or Dutch, or Dutch disease) is an economic phenomenon that links natural resource exploitation and decline of local manufacturing. Inspired by the case of the Netherlands in the 1960s, the term is used by extension to describe the harmful consequences caused by a significant increase in exports of natural resources by a country. This notion is to know how to address the role of natural resources in development. Read Pierre Jacquet, "Lessons from Crisis No. 4/5 - Can we go behold the dollar? - Poor countries need to follow a new path ", *Le Monde,* 10 November 2009, Jean-Philippe Koutassila, *Dutch syndrome: Theory and Evidence in the Congo and Cameroon*, Working Paper, No. 24, nd, p. 2, Eric Nguyen, *Op.cit*, P. 100

339 Philippe Richer, *The Chinese offensive in Africa*, Paris, Karthala, 2008, p. 137

340 Jean-Christophe Servant «China to conquer the African market,» in *Le Monde Diplomatique*, May 2005, p. 6-7; Serge Michel and Michel Beuret, *Op. Cit*. 375-376

341 Kä Mana "China-Africa. The issues of cooperation, "in *Congo-Africa*, No. 425 (May 2008), p. 391-401

turns most of our African countries barrels Danaides, what confidence can they put in our ruling classes and their ability to manage our resources? If every day, the Chinese living in Africa are witnesses of our muddle, of our wanderings financial, mental imbecility of our powerlessness and our problems as crucial as those of health, education, food and infrastructure in countries as rich as the DRC, Zambia and Zimbabwe, why will they take seriously our discourse about our desire to exit the crisis asks Kä Mana.

Johnson said that in Africa's relations with China, the real problem is not China but Africa. As he recalls: "Our concerns should not be wearing on our partners, but on our very being and on the new horizon that we need to open depending on quests, ambitions, interests and intentions that should be ours in the world as it is. "

Therefore, a real *catharsis* is needed. It is not enough indeed to change partners to seek to resolve the question of the poverty of our people. Doing so would look to renew the wardrobe of a child with scabies, without submitting it to a therapy that could fight the germs of the mites that cause this condition contagious.

Applied to the Congolese state, this *treatment of the mangy child,* would like Congolese political elite has the courage to recognize its share of responsibility in the failure of various initiatives to move this country from the abyss of underdevelopment. Because, as noted by Adama Gaye, using the term "demons of Africa" in Sino-African relations in general, it is not impossible that, as in the past, one is tempted to perpetuate practice of the ostrich policy that has so often characterized the African continent, by refusing to frontally attack its own shortcomings, hoping to find solutions and/or external scapegoats.[342] Therefore move from the West to China will not, for the effect of a magic wand, propel the DRC in the locomotive of development as hoped. As long as impunity peacefully continues to reign and that the gray matter will continue to pollute national ridicule, as long as obstacles arise on the road to potential investors, the takeoff of the Congolese nation will unfortunately wait.

We therefore believe that the effective implementation of the zero tolerance policy advocated by the Head of the Congolese state is necessary and this is, primarily to control the "Ali Baba" or predators of the Republic.

III.2.1. Fight against impunity

Like many of its reports on corruption worldwide, Transparency International gives each year bad remarks on the DRC. In the report published May 24, 2011 in which the Congolese State ranks 168th out of 182.

This corruption extends to the capture of state, it not primarily for the small government, but policy makers to enact laws and regulations of the State, including foreign policy decisions (...). Indeed, some leaders guide the formation of legal norms to their advantage, influence all political decisions of the Executive and impose their interpretations to the judiciary[343]. Thus, trampling on the sense of mission that requires them to show the right path for their peoples, they have become «symbols of what not to do[344].»

[342] Cfr. Adama Gaye, *Op.cit*, P. 281

[343] Philippe Janot, "Transnational corporations, corruption, states. An ambiguous dynamic, "in *http://www.afri-ct.org/IMG/pdf/afri2005_janot.pdf;* See Adama Gaye also, *Op.cit.*, p. 190, Albert Muluma Munanga G. Tizi, "Corruption and poverty: what to do for the socio-economic recovery in DR Congo? , "In *Congo-Africa*, No. 430 (December 2008), p. 819-833

[344] Adama Gaye, *Op.cit.*, P. 282

The testimony of Thierry Vircoulon about it is even more eloquent. In a clear, but pathetic way, he recalls:

it is well known that businessmen are considered the "best prey" by officials in search of easy money. While citizens and expatriates suffer daily from a corrupt civil service, the business is even more a lucrative target (...). Accordingly, various administrations have turned into businesses outside the law and fight to earn a decent living: each administration, the army health service, is an autonomous agency of revenue generation. Corruption is not so much a phenomenon offers a demand phenomenon. Moreover, in the public service, corruption has become an accepted practice as cultural. Legal uncertainty, administrative and fiscal harassment and crime are daily problems faced by the business community in Kinshasa. For a trader, it is quite common to see his company closed its import license or challenged by the administration after importing container loads of goods (the contents of containers is then entered) or being arrested by police on fanciful grounds. It is also quite common to see his property challenged in court by a claimant who "teamed" with a magistrate[345].

Such examples highlighting practices of patronage and self-protection prevent the emergence of a genuine rule of law.

But Chinese companies are able to adapt their rules of playing in relation to the partner from the present do not ignore all the ills that plague major Congolese society and those who have been mandated to monitor the work assigned to these. It's the same message again in Thierry Vircoulon book when he indicated that facing an environment (...) very corrupt, (...) Chinese used the 'rule of the game "- corruption - by the same means as other business.[346] In terms of road infrastructure, for example, the consequence is that where Western companies are building roads designed for long life, the Chinese are building roads and less sophisticated that cracks are easily perceived the same day of the official opening. And behind this sad state lie several realities: the Chinese offer their services at an affordable cost for the Congolese, this is an open secret, but the bribes and commissions constitute the hidden part of the iceberg.

If not, how do you justify the awarding of major road works to a company that did the work of a road whose first cracks did not even wait for the first anniversary? Who has taken the National Highway No. 1 in its segment Kenge-Kikwit in Bandundu province, the quality of the road built by Sogea Satom between Kenge and Masi-Manimba far exceeds that produced by a Chinese company, connects the City of Masi-Manimba to the city of Kikwit. It will be recalled, not without regret the blunders of the locality Muluma site. Yet! It is they had been told the market.

In another register, one dedicated to the initiative for Heavily Indebted Poor Countries (HIPC), it was thought a compromise to reduce the debt of African countries which, in turn, pledged to clean up their finances and to fight against corruption. However, by their policy of no-interest loans or interest rates very low for a country like DRC which has just reached the famous completion point of HIPC, Chinese banks are accused of wanting to redebt this country.

This is the view expressed particularly by the former president of the World Bank, Paul Wolfowitz, who reminded the machine not to commit errors in Africa rose from France and the United States[347]. This same story was drawn by the Secretary of State Hillary Clinton

[345] Thierry Vircoulon, "Chinese Strategies of survival in Kinshasa ...", *art. cit*.
[346] Ibidem
[347] Pierre Haski, "First red carpet for the Chinafrica", in Liberation, November 3, 2006.

in terms of warning against the risks of new colonialism, before you criticize the fact that Chinese investments in Africa are for the elites[348].

Thus, unlike Laurent Dona Kologo that compares Africa's relations with the West to the marriage of horse and rider, where there is one who suffers and the one who wins[349], it is unfortunate that those that it has with China are more like a homosexual union, where only partner finds satisfaction, without a care of the offspring - the people here. But in all cases, people with only the leaders they deserve, the question that remains unresolved is that of the capacity or the will, of the Congolese people to raise their heads to change their fate, to punish their leaders and demand their right to national development, a right recognized by Article 58 of the Constitution of 18 February 2006. In short, as argued also Adama Gaye, "it is neither more nor less than to initiate a revolution in several dimensions.[350]» Hoping that the wind of the «Arab Spring» will eventually cross the walls of the Republic to teach people wounded, a victim of the plutocracy, snapped up the rights. Now the people who walked in the long night will end up getting up to claim their fundamental rights.

Meanwhile the new sun, should count on the mobilization of minds, as knowledge is a real boom in the sesame of modern nations.

III.2.2. Advocacy for the upgrading of science and sanitation business climate

China has demonstrated that one can, by force of political and socio-economic organization, breaking the apparent pessimism of mind, master the demands of globalization and turn the tide of poverty by creating wealth for his country. With China, we know that nothing is fixed in the positions acquired in the world as it is and that the dice are not loaded or the cards dealt eternally forever for the poor remain poor and the rich perpetually rich.

China has relied on brainpower and national forces pulse determined to build a great future in the field of intense globalization. It therefore makes scientific research his watchword, this cutting-edge research that, in the words of Gaye, became "one of the most important factors of production to achieve all viable economic development.[351]»

Indeed, natural resources are not sufficient to trigger the development of a nation. What makes the development, writes Thierry Bangui, is the man, [and therefore] his intelligence, creativity and production of diversified activities[352]. Speaking in similar terms, Jean-Baptiste Nebese recalls that «the development of a country comes from knowledge, that is to say, the mind, not necessarily material, even if they are valuable.[353]» This is also the view taken by a number of African[354] writers who have had to address this issue.

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[348] "Hillary Clinton warned African countries against the new form of colonialism" *http://www.rfi.fr/afrique/20110611-hillary-clinton-met-garde-pays-africains-contre-nouvelle-forme-colonialisme*, June 13, 2011, accessed June 14, 2011

[349] Serge Michel and Michel Beuret, *Op.cit.*, P. 165

[350] Adama Gaye, *Op.cit.*, P. 283

[351] Ibidem, P.81

[352] Thierry Bangui, *Op.cit.*, P. 269

[353] Jean-Baptiste Nebese, "Youth, education, marginalization of Africa", in *Overcoming marginalization in Africa? Acts of the XIth Days of Philosophical Canisius,* Kinshasa, Loyola Editions, 2009, p. 9-24

[354] Adrien Houngbedji, *There's only wealth of men*, Paris, Editions de l'Archipel, 2005; Martin Ekwa bis Isal, "Education and development in DR Congo, 50 years after independence," in *Congo-Africa*, No. 447 (September 2010), p. 579-592; Martin Ekwa bis Isal, "No development without school and without quality education," in *Congo-Africa* No. 427 (2008), p. 565; Martin Ekwa bis Isal, Schools Betrayed, Kinshasa, Cadicec, 2004; Mugaruka Richard M., "The Congolese universities. Fifty years after the accession of DR Congo's independence: Review and Prospects ", in *Congo, Africa*, No. 446 (June-July-August 2010), p. 467-492

We must therefore go beyond the current situation where China is building sports palaces, builds stadiums, built hospitals and tarring of roads without allowing the Congolese themselves to become masters of the same techniques for developing projects with their own, under its famous proverb which means that we teach someone to fish rather than give him fish. But as it is in Africa in general and the DRC in particular, China contradicts the spirit of this saying and merely to engage in the Congolese state "turnkey works" without concern for technology transfer.

Therefore, when considering the contribution that the brain drain [Congolese] is for some Western countries[355], it is conceivable that investment [Congolese] in the gray matter can be a great contribution to China.

Unfortunately, investment in human capital never included on the agendas of political leaders, in a nation where the profile of elected remains questionable. While the DRC is one of the few countries where access to parliamentary or presidential mandate does not require any level of education, only age and the applicant's financial capacity is sufficient.

It is here that the resultants of the argument advanced by certain writers who show respect and even think that the university would be against the development in Kinshasa Congo[356]

Academics adds the continuing influence of groups and politicians "predatory government"[357] that impinge on efforts to clean up the business climate, yet pivotal force in the process of economic development of nations.[358]

How indeed does one invest in a country where, despite the uproar and the professions of faith of its leaders, everything is an excuse to ask for bribes or ripped off investors? So how can the DRC become an attractive place for investment when you consider how many times the contracts signed were thrown in the trash because such or such official would not find his account at the top of the State officer or his protégé has found a more attractive offer in terms of commissions, we question ourselves after Gaye.[359]

CONCLUSION

The Chinafrica is a story that, finds its foundation in the fifteenth century, grew especially in the nineteenth century and even more after 1980. Since then bilateral trade between the two regions has multiplied fifty folds.

The first China-Africa summit which was held from 3 to 5 November 2006 in Beijing marked a turning point in Sino-African relations. Agreements valued at two billion U.S. dollars were signed during the summit with some African countries "in order to forge closer ties with

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355 This concern is shared by particular Kutumisa B. Kyota, "Education in Congo, fifty year after independence," in *Fifty year of independence, challenges, problems and prospects. Acts of the days of philosophical Canisius*, Kinshasa, Loyola Editions, 2010, p. 115-134; Martin Ekwa bis Isal, "No development without school and without quality education," *art. cit.*

356 Thesis defended in particular by Emile Bongeli Yeikelo ago Ato, *University against development in Congo - Kinshasa,* Paris, Harmattan, 2009

357 Thierry Vircoulon, "Chinese Strategies of survival in Kinshasa, Democratic Republic of Congo,*" art. cit.*

358 Let us recall the comments of the Ambassador of Switzerland in the DRC, Linus von Castelmur, during a press briefing in Kinshasa July 27, 2011 in anticipation of the Swiss national holiday: "*The real development of a country will not come from the assistance it receives from other countries but the economic interest in itself by investors. But several obstacles discourage investment in the DRC, "*Radio Okapi, Kinshasa, edition of July 27, 2011. The same regret had been expressed in similar terms by the Ambassador of the Kingdom of Belgium July 19, 2011 and that of France 3 June 2011 on the same radio waves.

359 Cfr. Adama Gaye, *Op.cit.*, P. 129

esource-rich continent."[360]

In doing so, "China has (...) made the key task of having restored in Africa a true value, both in the eyes of its citizens abroad. The West was never always so interested in Africa since China is a party to its conquest. "[361] This is also the view of Jean-Raphael Chaponnière which states that «the dramatic rise of China has stopped the process of marginalization of Africa in world trade (...)»[362], although we would caution refrains from any exaggerated optimism, international relations are primarily of interest relationships that may change as circumstances change.[363]

Hence the need for stepping back from the African countries, the scramble for Africa have proven that this continent was worth something, the ball is in the hands of African leaders. They now have the means of their ambition: never a donor had advanced such sums, unconditionally, without supervision. Will they measure up, to use these funds for the development of their country rather than to double the size of their housing stock in the West, questions Serge Michel and Michel Beuret.

It should therefore eliminate all internal blocks which, more harmful, primarily revolves around the mismanagement, the lack of thought leadership and could pave the way for national economic recovery.

Thus in the particular context of economic relations that bind to its new partners, including China, the Congolese government should ensure in particular add value locally and by requiring the processing of raw materials harvested or grown on site before export. Such an approach would contribute to the emergence of a local industry and thus job creation.

Finally, remember that these pages can, at most, shake the coconut. The efforts made by this reflection should be continued and extended so that the largest Asian dragons do not crush its Congolese partner.

360 "Africa will it be Chinese? "*Congo-Africa*, No. 417 (September 2007), p. 580-581

361 Serge Michel and Michel Beuret, *Op. Cit.* 386-387; F. Menou, "China does succeed this great leap in Africa? , "In *http://heureuxquicommeulysse.nankita.fr/news/la-chinafrique*, July 8, 2008

362 Jean-Raphael Chaponnière, Chinese aid to Africa: origins, methods and challenges, *The Political Economy* No. 038 - April 2008

363 See Christian Edmond Bepi Pout and Marie-Noëlle Chomtang, "The Chinese Breakthrough in Africa: its geopolitical and geo-economic. Case of Gulf of Guinea, "in *Congo-Africa*, No. 430 (December 2008), p. 835-846

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THE ACCESSION OF THE DRC TO OHADA: TOWARDS NATIONAL PROSPERITY BY THE UNIFICATION OF LAW?

By BALINGENE KAHOMBO*

INTRODUCTION

The Organization for the Harmonization of Business Law (OHADA) is to achieve the objectives established by the Treaty on the Harmonization of Business Law in Africa[364], adopted at Port Louis (Mauritius), October 17, 1993. It is an integration organization which aims to create an environment conducive for economic development of Member States by conducting their legal integration through the technique of uniformization or unification of the law.

The unification of law is to provide States parties with common legal rules. In the OHADA law, these rules are codified through legal instruments referred to as "uniform acts". This technique is different and goes beyond that of harmonization of law, to which reference is unfortunately the OHADA Treaty. Harmonize, is simply reducing differences in legislation. But, in the form, these laws can be developed by States Parties in different terms. Such African practice in the field of judicial cooperation, including with respect to a limited number of criminal offenses of international concern.[365]

In doing so, the jurisdiction of OHADA is limited to the unification of business law. Enter the field of business law[366], all rules relating to company law and the legal status of merchants, debt recovery, to collateral and enforcement procedures in the plan of reorganization of enterprises and the liquidation court, the arbitration law, labor law, accounting law, the law of the sale and transport, and any other matter that the Council of Ministers decided to legally incoprorate[367].

OHADA law continues to generate excitement among African states. Yet, originally, the most affected States are member countries of the Franc Zone, that is to say, the area consists of countries using the CFA[368] franc as the single currency. This area is the result of changes in the former French colonial empire and is characterized by its homogeneity in economic and cultural aspects. Very quickly, the fourteen founding[369] members were joined by Guinea Bissau and Guinea Conakry. Sao Tome and Principe, Ghana and Madagascar have announced their interest in joining OHADA.

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364 Infra "OHADA Treaty."

365 BALINGENE KAHOMBO, "The criminal judicial cooperation based on treaties of ECCAS, COMESA and SADC," *African Library for Legal Studies*, vol.5, August 2010, p. 9-13.

366 Article 2 of the OHADA Treaty.

367 In this regard, by Article 2 of the OHADA Treaty imposes three conditions: the decision may be taken only if at least two thirds of member states are represented and must be taken unanimously by the States Parties present and voting, it must meet the intent of the OHADA Treaty.

368 Literally, African Financial Community.

369 These are: Benin, Burkina Faso, Cameroon, Comoros, Congo, Ivory Coast, Gabon, Equatorial Guinea, Mali, Niger, Central African Republic, Senegal, Chad and Togo.

It is in this euphoria of official announcements that the accession of the Democratic Republic of Congo (DRC) was clearly seen in 2002 at the Inter-Congolese[370] Dialogue. In this regard, the OHADA law is sometimes presented as an opportunity to modernize the Congolese business law, sometimes as an indispensable tool for national economic takeoff. However, both sides will appear divided on the issue: proponents of the accession of the DRC to OHADA and the camp of its opponents. The former consider that this adhesion is essential for the enhancement of national business climate, so as to cause the benefit of the country, a massive influx of foreign capital. However, the latter argue that the attraction of foreign investments may be otherwise achieved, simply by changing the Congolese law in force, without compromising the country's sovereignty.

Politically, the camp of membership already seems to prevail. The process has reached its completion point, since the enactment of the Act authorizing the accession of the DRC to OHADA[371] onFebruary 11, 2010. Only two final stages remain: first, the Presidential Order to the membership of the DRC to OHADA and second, the deposit of instruments that reflect the materiality, to Senegal, the Depositary. In any event, an objective analysis deserves to be made on the bases and the possible implications of this membership, so we may better understand the legal and real issues.

The materials consist of the analysis, national, political speeches, many laws on the reform of Congolese law business and the judgment of the Supreme Court of Justice (SCJ) on the conformity of DRC membership to OHADA vis-a-vis the Constitution of 18 February 2006. At the community level, there are the legal instruments of OHADA. But in addition, the novelleté of this organization requires confronting the logic of African integration, without which it seems, unfortunately, lie. Accordingly, it is doubtful that this organization has the ambition to contribute to the achievement of African unity, even though this unit is the anchor of the constitutionality of the Act of Accession of the DRC.

Two points are well developed: the foundations of the accession of the DRC to OHADA

(I) and its implications plausible (II).

I. FOUNDATIONS OF THE ACCESSION OF THE DRC OHADA

A distinction must be made between the political motivation of the accession of the DRC to OHADA and its legal basis. Political debates have stalled mainly on finding a national economic openness to foreign investors (I.1). The issue of Pan-Africanism there occupied a place of lesser importance, while the LSB, declaring the OHADA Treaty with the Constitution, said, without giving reasons, that this organization contributes to the achievement of African Unity (I.2).

I.1. Congolese politics of economic openness to foreign investors

The measures taken to open the Congolese business sector to foreign investors (I.1.2) are based on a few major things that need to be reviewed (I.1.1).

[370] MASSAMBA MAKELA, *Terms of Accession of the Democratic Republic of Congo to the OHADA Treaty*, vol.1, final report, Kinshasa, February 4, 2005, p.8.

[371] Law No. 10/002 of 11 February 2010 authorizing the accession of the Democratic Republic of Congo to the Treaty of 17 October 1993 on the harmonization of business law in Africa.

I.1.1. Findings

The formalization of this policy for part of double observations.

The first is that the Congolese legal texts, in the field of business, are characterized by a legendary antiquity. Most of them date to the Congo Independent State (CIS), colonization, the first (1960-1965) and the Second Republic (1965-1997). They are obsolete. Indeed, these texts were developed in response to situations of predation risk of the national economy.

Before independence, according to the General Act of Berlin, the regime in the Congo Basin was the open-door[372]: free enterprise, free competition, free trade and equal treatment for nationals of all fourteen Powers who took part in the International Conference of Berlin (Germany), held from 15 November 1884 to February 26, 1885. After independence, companies and businessmen who have acquired large parts of economic exploitation in the Congo could deprive the young state of economic independence. That's why legislators who have succeeded have tried, with difficulty, to lock access to the field of business in Congo, devoting a kind of economic self-sufficiency and strong protection of the local market against foreign competition.

Restrictions so imposed include those related to the course of trade by foreigners, both individuals and corporations. In this case, the particular Act No. 73-009 of trade forbidden to practice their trade import, export and transit[373], considered a domain reserved for nationals, unless, upon opening a blocked account in a bank Congolese, as security[374], they were allowed to do so by order of President of the Republic[375]. In any event, small business were prohibited[376].

Moreover, as traders, foreigners are required to have a bank account to another Congolese with the order of 50 million Congolese francs for their registration with the registrar of trade[377]. Although the formation of a joint stock company limited liability company (LLC), the type of society suited to large business, is subject to prior authorization by order of President of the Republic.

At some point, these prohibitions and restrictions have appeared politically inadequate, so that the state had to make Zairianization, payment of fair compensation, as follows:

Is transferred to state ownership of agricultural enterprises, agribusiness, property, quarries, brick factories and large commercial units determined by the State, which belong either to individuals or legal entities, or companies Zairean whose capital is owned in part or in whole by foreigners[378].

All this led to disorder in the business sector and the teacher Lukombe Nghenda denounced as symbolic of the "entropy of the Congolese legislation on the course of trade by

372 See G. BANZA MALELA MAKUTA, *Legal Issues in the issues of the Congolese crisis: origins to the present days (1860-2006)*, Kinshasa, Ed PUC, 2011; O. NDESHYO RURIHOSE, "The historical context of international and national integration effort in Zaire," *Annals of the Faculty of Law*, vol. IV-VII, Kinshasa, University Press of Kinshasa, 1984, pp.1-43.

373 Art. 1 of Law No. 73-009 on particular trade of 5 January 1973.

374 The amount of this bond has been set for the first time, to 25,000 zaires, by decree No. 73-292 of September 26, 1973.

375 Article 2 and 3 of the Law on special trade.

376 Article 4 of the Decree Law No. 90-046 of 8 August 1990 regulating small businesses.

377 Art. 2 of the Decree Law No. 66-260 of 21 April 1966 subordinating financial guarantees to the registration in the foreign trade, foreign corporations and certain Congolese companies.

378 Art.1 of the Decree Law No. 74-019 of 11 January 1774 relating to the transfer of state ownership of some public companies.

foreigners."[379] It should be added the non-regulation of the commercial lease and ignorance of land to individuals. Such disorder autarkic, aggravated by neglect and domestic justice, can only scare away foreign investors. The ensuing result is certain: the social and economic stagnation due to insufficient exploitation of the potential business that represents the country and hence the increasing impoverishment of the population increases.

Hence the second observation, Is that, ironically, the state now requires the return of foreign investors to regain its economic takeoff. How can it be achieved?

I.1.2. Measures taken

Two categories of measures were taken. First, it is the enactment of national legislation reformed, modern and attractive. Thus, since 2001, there has been inflation of new regulations in the field of business in the Congo: An Act to establish commercial courts[380], the Investment Code[381], the Mining Code[382], Forest Code[383], Labour Code[384], Laws on the reform of public enterprises[385], etc.

Secondly, it is the accession of the DRC to OHADA. The process began in 2002. In 2003, the President of the Republic wrote to the International Monetary Fund (IMF) to express its willingness to enter into exchanges with the formal act of accession[386]. This initiative was supported by the Federation of Congolese Enterprises (FEC) as follows:

To ensure the development and economic prosperity of the DRC, it is imperative that the state and the private sector engage in an objective and constructive partnership to improve the institutional environment for business and strengthen public governance. To meet the socio-economic challenges facing us, they must be accompanied by an adaptation of our business law and rehabilitation of our judicial system. Improving the business climate and investment requires the government to take bold and concrete decisions along the lines of: consolidating peace and curbing physical insecurity, legal and judicial reform, restore the authority of the State by the establishment of an administrative and regulatory framework attractive, clear, competitive and applicable to all[387].

However, 12 November 2009, the bill authorizing the accession of the DRC to OHADA was rejected by the Senate. Of 86 senators present, 53 of them voted against the bill, seven voted in favor and 26 abstained[388]. Faced with this failure the President of the Republic came to give a slogan to Parliament, December 7, 2009, on the occasion of his speech on the state of the nation, as follows:

379 LUKOMBE NGHENDA, *Congolese law societies*, Volume 1, PUC, Kinshasa, 1999, p.221.
380 Law No. 002/2001 of 3 July 2001 on the establishment, organization and functioning of commercial courts. Also, read useful J.M. TASOKI MANZELE and D. LUABA NKUNA, "The institution of the Commercial Court in the Congolese legal system: legal, organization, jurisdiction and procedure," *Annals of the Faculty of Law,* University Press of Kinshasa in December 2007, pp.355-374.
381 Law No. 004/2002 of 21 February 2002 Investment Code.
382 Law No. 007/2002 of 11 July 2002 on the Mining Code.
383 Law No. 011/2002 of 29 August 2002 Forest Code.
384 Law No. 015/2002 of 16 October 2002 promulgating the Labour Code.
385 Law No. 08/007 of 7 July 2008 laying down general provisions relating to the transformation of public enterprises; Law No. 08/008 of 7 July 2008 laying down general provisions concerning the divestiture of portfolio companies; Law No. 08 / 009 of 7 July 2008 laying down general provisions applicable to public institutions and Law No. 08/010 of 7 July 2008 laying down rules on the organization and management of the portfolio of the State.
386 MASSAMBA MAKELA, *op.cit*., P.8.
387 See Memorandum of the Federation of Congolese Enterprises addressed the senators, members of the Foreign Relations Committee. Kinshasa, 26 October 2009.
388 On the outcome of the vote, see http://www.congoplanete.com/article.jsp?id=45262452

Our strategy for growth and poverty reduction is assigned to the private sector the driving force in creating wealth and jobs. Obviously it is difficult to play this role, which calls into question the whole strategy. Private initiative is restricted or discouraged by the business climate. We urgently need to change this state of affairs. So I decided to make improving the business climate a priority; one of those over whom should be considered the effectiveness of the Government, tested the cohesion of the government majority and evaluated the quality of our administration and our judicial system. The Government, I want to say that we can not, in this as in many others, go through study by study, expert advice by expert advice, which often is only excuse to doing nothing. The reasons for the low ranking of our country in the reference directory "Doing Business" are known. The solution to get a better rating is the same. It is transparency, simplification and flexibility. The Government has already identified a dozen steps in this direction. However, I wish we were going further and faster. So I assign complementary objectives to achieve mandatory by the end of March 2010. **This is a priority of our country's accession to OHADA,** which was essential to reassure the private sector of legal certainty which is paramount concern,.I hope that a happier outcome to this matter, which is struggling to obtain legislative sanction, can be found at the very next opening of Parliament[389].

Therefore, the OHADA file returned to the table of Parliament, meeting in extraordinary session. It was adopted into Law No. 10/002 of 11 February 2010 authorizing the accession of the DRC to the OHADA Treaty, following an emergency procedure. Is this membership compatible with the Constitution of 18 February 2006? In any case, nothing is less certain when one seeks to establish the nature of international organizations that may be considered as contributing to the promotion of African Unity, as defined in section 217 of the Constitution.

I.2. Alleged involvement of OHADA to the promotion of African Unity

Promotion of African Unity is at the heart of the constitutionality of the Act of Accession of the DRC to the OHADA Treaty. In its judgment of 5 February 2010 R.Const.112/TSR, the LSB found there is no clause unconstitutional. But it is there that a constitutional apparent (I.2.1), because in reality, the legal nature of OHADA led to think about the unconstitutionality of the Act of Accession of the DRC (I.2.2).

I.2.1. Apparent constitutionality of the accession of the DRC in the OHADA Judgment of 5 February 2010 the Supreme Court of Justice

For the first time in its history, the LSB, serving as the transitional[390] constitutional court, has been consulted and has expressed an opinion on the compliance status of an international treaty with the Constitution[391]. Theoretically, the Judgment of 5 February 2010 is therefore undeniable progress on the path of constitutionalism Congolese.

This application of December 31, 2009 by the President of the Republic submitted pursuant to section 216 of the Constitution[392], the OHADA folder to the LSB to give sound advice on

389 J. KABILA KABANGE, *Speeches on the state of the nation*, Kinshasa, December 7, 2009.

390 BALINGENE KAHOMBO, "The Supreme Court of Justice, Constitutional transient Court *'http://www.la-constitution-en-afrique.org/*, February 2, 2011.

391 M. WETSH'OKONDA KOSO SENGA, "The judgment of the Supreme Court of Justice No. R.CONST.112/TSR of 5 February 2010 on OHADA" *http://www.la-constitution-en-afrique . org* /, 04 April 2010. The author notes sadly that other solemn treaties, such as the Constitutive Law of the African Union and the Rome Statute of the International Criminal Court, could not undergo this constitutional review.

392 It provides: "If the Constitutional Court consulted by the President of the Republic, the Prime Minister, President of the National Assembly or the President of the Senate, by a tenth of the members or one tenth of the senators, states that treaty or international

the possible contradiction to the Constitution of certain provisions of the OHADA Treaty. The legal relevance of this consultation is justified by the sanction attached to the outcome of the assessment of constitutionality. Indeed, in case of unconstitutionality, the treaty may be ratified or approved only if prior to revise the Constitution. The problem was size and very much deserved to be seriously examined.

Unfortunately, without any reason, the LSB has reserved the presidential petition begging the real one. It has nothing to show that its judgment can be persuasive and set a precedent. Worse, most of this stop consists of a half-page, where compliance of the OHADA Treaty to the Constitution is declared with disconcerting brevity:

By application received on January 7, 2010 in the Registry of the Supreme Court of Justice, the President of the Republic, acting under section 69, paragraph 2, and 216 of the Constitution, applied to that court for the purpose of obtaining their informed opinions on the possible contradiction to the Constitution of the 63 articles of the Treaty of 17 October 1993 on the harmonization of business law in Africa (OHADA), including Articles 16 and 20 relating to the referral, the competence and scope of decisions of the judicial body of OHADA and Articles 5, 6, 9 and 10 on the skills of the Council of Ministers of OHADA and the entry into force of the uniform acts and of Article 54 excluding any reserve the Treaty.

Examination of the above provisions, the Supreme Court of Justice found that it is the transfer of jurisdiction clauses and limitation of sovereignty of member states in favor of OHADA, which can be adopted under the Section 217 of the Constitution which states that: "Democratic Republic of Congo may conclude treaties or agreements of association or community with a partial abandonment of sovereignty in order to promote African unity."

With regard to other provisions of the Treaty, it stated that they require no special comment;

It follows that the aforesaid Treaty contains no provision contrary to the Constitution and its ratification does not require prior revision thereof.

Accordingly, this judgment lends itself to criticism. But its merit is to exist, having responded to political concern and constitutionally have located the root of the problem around section 217 of the Constitution. Detailed exegesis of this article can lead to a conclusion opposite to that of the LSB: the unconstitutionality of the OHADA Treaty and, consequently, of the Act of Accession of the DRC.

I.2.2. Unconstitutionality of the accession of the DRC to OHADA for violation of Article 217 of the Constitution

For its relevance to the analysis, Section 217 of the Constitution must be recalled: Democratic Republic of Congo may conclude treaties or agreements of association or community with a **partial abandonment of sovereignty** in order to **promote African unity**.

Historically, this provision was introduced in the Congolese legal system, for the first time, by section 69 of the Constitution of 24 June 1967. Now, it is constantly repeated by the settler[393], sometimes in slightly different terms. Basically, it reflects the policy of opening to

agreement contains a clause contrary to the Constitution, the ratification or approval may occur after the revision of the Constitution."

393 Art. 77 of Law No. 74-020 of 15 August 1974 and art. 108 of Law No. 078-010 of 15 February 1978 amending the Constitution of 24 June 1967 art. 108 of the Law concerning the constitutional provisions for the transition period; art. 122 of Law No. 93-001 of 2 April 1993 Harmonized Constitutional Law on the transition period; art. 115 of the Constitutional Law of Transition 9 April 1994,

pan-Africanism, as defined by President Mobutu when he came to power, on 24 November 1965. This policy supports the African vocation of the DRC, his devotion to the political, economic and social conditions in Africa.

It follows that section 217 of the Constitution can be interpreted correctly only if it forms part of its history. The LSB has not included unfortunately. On the contrary, it added to the Constitution of expressions that are not listed in Article 217 and without specifying their legal meaning. Indeed, she noted, the Treaty of Port Louis has "clauses for **transfer of jurisdiction** and **limitation of sovereignty** of member states in favor of OHADA, which can be adopted under section 217 of the Constitution. " However, this paper invokes rather the notion of "**partial abandonment of sovereignty**," which is really not the same thing.

Indeed, the partial abandonment of sovereignty implies the transfer of skills. There is transfer of skills when the State lacks standing to ask a legal act in a particular area, since there voluntarily gave up the benefit of the organization. By contrast, the state sovereignty is limited when it is deprived of its right to act freely in a specific area of competence, which is, moreover, regulated by international law. Of both sides, there is more reserved area, that is to say exclusive national jurisdiction[394], where according to case law[395] and doctrine of the internationalists[396], the state would enjoy the full freedom of decision.

But the biggest problem lies in the legal nature of the OHADA Treaty. In any case, section 217 is clear. The partial abandonment of sovereignty of the DRC in favor of an international organization of simple cooperation (association) or integration (community) can only take place if it is part of the dynamic construction of Pan-African African Unity.

Does OHADA contribute to the promotion of African Unity? Affirmative answer would be to accept two other claims: first, the OHADA is an African organization, and secondly, it is fundamentally connected to the system of African integration. However, it is none of that.

First, **OHADA is not an exclusively African organization**. Certainly, its Constitution is it open to accession by any State member of the Organization of African Unity (OAU)[397], commuted to African Union (AU) by the Constitutive Act of 11 July 2000. But, since **any non-African** can be invited to accede, by agreement between the signatory[398] States, the territorial vocation of OHADA overflows, unquestionably, the borders of Africa. We can find no similar provision in any other existing treaties establishing international organizations. The status of African state is a conclusive criterion for membership.

This is not surprising since the opening of OHADA to non-African rather confirms its colonial origin. It is the product of the former French colonial empire, which became independent countries, grouped in the Franc Zone, led by France[399], have shared a single currency, the CFA franc, even as the fight against colonialism, neo-colonialism, injustice in economic relations and international legal and underdevelopment are the heart of the objectives of each pan-African organization.

Art. 195 of the Transitional Constitution of April 4, 2003.

394 P.C. ULIMUBENSHI, *except for the reserved area in the proceedings of the International Court. Contribution to the study of exceptions in the law and procedure of the International Court*, PhD in Law, University of Geneva, 2003, p.32.

395 See PCIJ, *Nationality Decrees in Tunis and Morocco*, Series B, No. 4, Advisory Opinion of 7 February 1923, p.23.

396 J. COMBACAU and S. SUR, *Public International Law*, Paris, Montchrestien, 2006, p.263.

397 Art. 53 of the OHADA Treaty.

398 *Ibidem*

399 See A. MOULOUL, *Understanding the Organization for the Harmonization of Business Law*, 2nd ed., Brochure, pp.15-19.

Secondly, **OHADA is not formally part of the system of African integration**, although its Constitution refers to the objective of achieving the African Economic Community (AEC).It should be objected that this is a *legal camouflage*, causing serious confusion on the legal status of OHADA.

The truth is that the Abuja Treaty of 3 June 1993 establishing the AEC has codified the system of African integration following a three-tiered pyramid model. The pyramid of African integration includes African states at the base, the regional economic communities (RECs) and sub-regional (S / RECs) in the center, the African Union (AU) and the AEC, which forms an integral[400] part at the top.

By definition, RECs are *international organizations of African integration, designated as such by the AU*, working within the five **African regions[401]**. They are a regional feature *and general skills in all areas of cooperation and integration*. Both the Final Act of Lagos[402] as the Abuja[403] Treaty foresaw the strengthening of the RECs and their creation in areas where they did not yet exist. In contrast, S / RECs are integration organizations at a sub-regional, that is to say, those whose skills are territorially limited to African sub regions. According to the Abuja Treaty[404] is meant by sub-region, «at least three States of one or more regions.»

OHADA is neither a REC nor S / RECs. It differs from these by three main features. First, we have just seen, OHADA is an organization with a continental or extracontinental. Then it has a non-African. Finally, OHADA has no general competence in the field of integration. It is an organization specialized jurisdiction, namely the unification of business law. As such, it embraces therefore a specific area of competence of the AU and thus makes it unfair competition, since the AU is the only continental organization holds the Pan-African legitimacy in all areas of integration: policy legal, economic, social and cultural.

For all these reasons, OHADA can contribute to the achievement of African unity. On the contrary, it seems more like a real Trojan horse of European origin, which may weaken or even destroy this goal. It is an instrument of conquest and occupation of Africa's foreign affairs. Therefore, it can not be linked to the types of international organizations under Article 217 of the Constitution. Therefore, one conclusion is inescapable: the unconstitutionality of the accession of the DRC to OHADA in the absence of prior constitutional revision.

We can no doubt be objected to this argument differently: what about the ratification of the Rome Statute of the International Criminal Court (ICC) and other charters of non-African organizations including the DRC is a member? All these ratifications are they unconstitutional? No, this objection does not hold water. The first reason is that, technically, it is settled law that the assessment of constitutionality is made in relation to the constitutional text in force when the act in question has been raised or considered[405]. The second reason is that, in the patent case of the ICC, there was no partial abandonment of sovereignty, but only a conferral of powers limitation of state sovereignty. National courts are competent for repression of the

[400] Read O. NDESHYO RURIHOSE, *The legacy of the OAU to the AU: the continuing quest for African Unity*, Kinshasa, African academic Editions, 2010, pp.433-449.

[401] See Decision Assembly/UA.Dec.112 (VII) on the moratorium on the recognition of Regional Economic Communities, adopted by the Conference of the Union during its 7th Ordinary Session held in Banjul, Gambia, from 1 to 2 July 2006. Under this Decision, the African Union has eight regional economic communities, namely: ECCAS, COMESA, SADC, East African Community (EAC), the Intergovernmental Authority on Development (IGAD), the Economic Community of West African States (ECOWAS), the Community of Sahel-Saharan States (CEN-SAD) and the Arab Maghreb Union (AMU).

[402] Point II, B, 1, a).

[403] Art. 6, paragraph 2, a).

[404] Article 1, e).

[405] MABA NGA MABANGA MONGA, *The Congolese Constitutional Litigation*, Kinshasa, African academic Editions, 1999, p.68.

most serious international crimes, subject, in case of inaction or incapacity of the principle of complementarity of the ICC.

In doing so, despite the violation of Article 217 of the Constitution, we can try to sketch the plausible implications of the accession of the DRC to OHADA.

II. PLAUSIBLE IMPLICATIONS OF ACCESSION OF THE DRC OHADA

The implications of the accession of the DRC to OHADA can be analyzed in two dimensions: the connection of the DRC to a new legal system specialized in the business field (II.1) and the unlikely national prosperity which can result to the above (II.2).

II.1. Connection of the DRC to a new legal system specialized in business

Legal system by means of all positive law, agencies that creates judicial institutions that are charged with administering justice, to ensure its application. As with any system[406], these elements form a whole, organized and interacting, experiencing the influences of internal and external environment.

This system operates a vast transfer of state powers to OHADA. For example, in the legislative field, national parliaments are looted for their powers to legislate in areas governed by the Uniform Acts. Moreover, on appeal in cassation, now the Joint Court of Justice and Arbitration (CCJA) is only competent in the field of business.

The legal system of OHADA is well buttressed on two community pillars: first, institutions (II.1.1) and, secondly, the legal instruments that constitute the Community law applicable by the Organization and in Member States (II.1.2).

II.1.1. Intelligence community institutions of OHADA

OHADA has four institutions[407]. This is the Assembly of Heads of State and Government, the Council of Ministers of Justice and Finance, the Permanent Secretariat, the Regional School of Magistracy (ERSUMA) and the Common Court of Justice and Arbitration (CCJA).

Assembly of Heads of State and Government had not been foreseen by the original Treaty of OHADA (Treaty of Port Louis). The Quebec Summit of 17 October 2008 has remedied this situation by providing this Conference as the supreme organ of OHADA[408]. It is chaired by the Head of State or Government whose country holds the Presidency of the Council of Ministers[409]. It has jurisdiction in all matters relating to the Treaty. Like other international organizations, it meets on the initiative of its Chairman or one of two thirds of Member States. The Conference is validly held if two thirds of States Parties which are represented. Its decisions are taken by consensus or, failing that, an absolute majority of States present[410]. The Council of Ministers consists of Ministers of Justice and Finance Ministers[411]. They meet at least once a year, convened by the President, at his initiative or at the request of one third of the States Parties[412]. Its main role is to adopt and modify the uniform acts unanimously

[406] Ph. BRAILLARD, *Systems Theory and International Relations*, Brussels, Bruylant, 1977, p.53.
[407] Cf. A. MOULOUL, *op.cit.*, pp.28-44.
[408] Art. 3 of the Revised Treaty OHADA.
[409] Art. 27, paragraph 1, of the same revised Treaty.
[410] *Ibidem*.
[411] Art. 27, paragraph 2, of the same revised Treaty.
[412] Art. 28 OHADA Treaty.

after consulting the CCJA[413].

The Permanent Secretary (based in Yaoundé) is appointed by the Council of Ministers. His term lasts four years, renewable once. It was him who is responsible for directing the Permanent Secretariat. The main role of this body is to prepare uniform acts to be presented to Cabinet, together with Member States. In addition, he coordinates the activities and works of the organization, establishes the annual program of harmonization of business law and is responsible for publishing the Official Gazette of OHADA.

The Regional School of Magistracy (ERSUMA) focuses, in turn, on training (judges and court officers), development and research in business law[414].

The Joint Court of Justice and Arbitration (CCJA), headquartered in Abidjan, is a real Supreme Court common to the States Parties. It is composed of nine judges[415]. However, the Council of Ministers may, taking into account service needs and financial possibilities, set a higher number of judges[416]. Judges are elected for seven-year non-renewable terms from among nationals of States Parties[417]. They are made by the Council of Ministers based on a list prepared by them.

The powers of the Court are:

1) The Court is consulted to give its opinion on draft uniform acts prepared by the Secretariat prior to submission to Cabinet for deliberation and adoption[418];
2) It provides advisory opinions on the interpretation and application of the Treaty, regulations and the Uniform Acts. It can be accessed by any State Party, by the Council of Ministers or by the national courts before trial and appellate litigation under the OHADA law[419];
3) The Court may seizure by way of judicial review. This remedy is available only for national decisions rendered by an appellate court decisions or non-appealable. The dispute must be on a matter concerning the application of the Uniform Acts or regulations issued by the OHADA. In this case, by evocation, the Court rules on the merits[420]. It can be made either by a party to proceedings before a national court or by reference to a national court of cassation[421];
4) It organizes and controls the arbitration proceedings. To do this, it appoints or confirms arbitrators to be responsible for the file and checks the draft awards submitted to it by the referee before signing them. It may propose changes to it to form when deemed necessary. The awards have the final authority of *res judicata* in the territory of each State Party, as well as the decisions of the courts of the State, as such, they are subject to enforcement under an enforcement order that the Court alone has jurisdiction to make[422].

In short, the Joint Court of Justice and Arbitration has the powers of courts, both advisory and litigation, and arbitration skills. It thus provides an essential guarantee of uniform application of OHADA law by all Member States.

[413] Idem, art. 6 of the same Treaty.
[414] Art. 41 Revised Treaty OHADA.
[415] Idem, art. 31, paragraph 1.
[416] Idem, art. 31, paragraph 2.
[417] Idem, art. 31, paragraph 3.
[418] Art. 6 OHADA Treaty.
[419] Idem, art. 14, paragraph 2.
[420] Idem, art. 14, paragraph 3, 4 and 5.
[421] Idem, art. 15.
[422] *Idem*, art. 25.

II.1.2. Community legal instruments of the OHADA

Apart from the Treaty on the Harmonization of Business Law in Africa, other legal instruments are the OHADA uniform acts and regulations. Article 4 of the Revised Treaty adds decisions. This allows to conclude that the tripartite classification as follows: **Decision settlement uniform act**. This classification is radically different from that known in European Community Law: **Decision Directive-regulation**, recommendation notice[423].

The regulations are based on Article 4 of the OHADA Treaty. This has, hitherto, two regulations. These are the Rules of Procedure of the Joint Court of Justice and Arbitration and the Arbitration Rules of the Common Court of Justice and Arbitration.

Regarding the Rules of Procedure of the Joint Court of Justice and Arbitration, it includes four titles. The first section is headed *"the organization of the Court"* and contains provisions relating to judicial tenure, status and duration of their function[424]. Article 9 states that the Court usually sits as a bench, but may occasionally sit in chambers of three or five judges. Finally, the functioning of the Court is found in sections 19 to 22.

The second title is devoted to litigation. It contains, among other things, the rules of written[425] and oral[426] proceedings. There are, also, the provisions relating to enforcement[427] and extraordinary remedies[428].

The advisory procedure is described under title 3. Thus, the procedural rules concerning actions brought by the States Parties or the Council of Ministers for the interpretation of legal instruments of OHADA are set out in Articles 53 to 58. Title 4, meanwhile, contains the final provisions.

Regarding the Arbitration Rules of the Common Court of Justice and Arbitration, it establishes that the Court has the powers of administration of arbitrations that are linked to the successful completion of arbitral proceedings and the review of sentences[429]. As such, its decisions are not judicial, because they do not have the authority of r*es judicata* and have no recourse (case of decisions on editorial changes of an award or decision on the costs of arbitration). As for its judicial powers, they are conferred by section 25 of the OHADA Treaty. The Court does not decide the dispute itself, it appoints referees and keeps track of the arbitration[430]. The procedure may be conducted before a single arbitrator or three of them.

The Regulation therefore sets the rules of arbitration. This includes determining, among other things, procedural rules[431], the law governing the substance[432], the confidentiality of the proceedings[433] and the proceedings challenging the validity of the sentence[434].

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423 Art. 249 of the Treaty establishing the European Community, as amended by the Treaty of Lisbon of 17 December 2007.
424 Art. 1.
425 Art. 27 and s.
426 Art. 34 and s.
427 Art. 46.
428 Art. 47.
429 Art. 1.1.
430 Art. 2.2.
431 Art. 16.
432 Art. 17.
433 Art. 14.
434 Art. 29.

When, under an arbitration clause or arbitration, the dispute is submitted to arbitration, the decision authority of *res judicata* and may be enforced, following an enforcement order[435].

Moreover, the common rules adopted by OHADA uniform acts are qualified. Their projects are prepared by the Permanent Secretariat, which provides States Parties. They have a period of 90 days to provide comments to the Permanent Secretariat. Under Article 7, paragraph 2, of the Revised Treaty, this period may be extended by a period equivalent to the circumstances and nature of the text to be adopted at the behest of the Permanent Secretariat. At the expiration of the deadline, the Permanent Secretariat shall prepare a report which he joined from States Parties and the proposed uniform act. The set is transmitted to the CCJA for advice. It has 60 days to issue its opinion. After this deadline, the Permanent Secretary prepares the final draft Uniform Act which provides the agenda of the forthcoming Council of Ministers.

To adopt a uniform act, at least two thirds of member states must be present or represented, and the act is validly adopted **unanimously** by the States present and able to vote.

It follows from this provision that, firstly, the abstention of a State shall not preclude the adoption of an act, because only the negative vote gets in the way, and, secondly, each State has a similar prerogative to **veto power** to oppose the adoption of an act by a negative vote.
Once adopted, the act is published by the Permanent Secretariat in the Official Gazette of OHADA within 60 days of the adoption. Uniform Acts are applicable in the States Parties, except specifically as it may be specified in a deed, 90 days from the date of their publication in the Official Gazette of OHADA. The uniform act must also be published in the Official Gazette of each Member State; this publication can also be achieved by any other appropriate means[436].

It is important to note that the Uniform Acts are directly applicable and binding in States parties, notwithstanding any contrary provision of law, before or after[437]. This has two important principles specific to Community law: the principle of immediate and **direct application** of the uniform acts and the **principle of primacy** over national laws of member states.

For the immediate applicability, community norms automatically acquire *"the status of positive law in the legal order of States."*[438] They create rights and duties for individuals who may in turn rely directly before the national or community, in support of their demands[439]. In case of conflict with national law, the rule of law of OHADA prevails[440].

In its opinion No. 002/99/EP of 13 October 1999, the CCJA was to reaffirm the superiority of the uniform law over national law[441].

In this case, the Republic of Mali was preparing a draft law on housing. To ensure compliance of the project, a request for an opinion was filed in the CCJA. Article 39 of the Uniform Act organizing simplified recovery procedures and enforcement procedures provided that the debtor can not force the creditor to accept in part payment of a debt. However, the second paragraph of section relaxed the rule insofar as it allows, in certain circumstances, considering among others the debtor's circumstances, be waived. The question was whether

435 Art. 1.2 Regulation and art. 25 OHADA Treaty.
436 Art. 9 of the Revised Treaty OHADA.
437 Art. 10 of the OHADA Treaty.
438 G. ISAAC and M. BLANQUET, *General law of the European Union*, Paris, Dalloz, 2006, p.261.
439 G. ISAAC, *General Community law*, Paris, Armand Colin, 1998, p.171.
440 F. M. Sawadogo and L. M. IBRIGA, "The community enforcement UEMOA and OHADA by the national court," *Juriscope,* 2004, pp.13-14.
441 www.training.itcilo.it/Lawrav/courses/2004/A1-50626_web/.../OHADA.doc, accessed July 11, 2011.

a provision of the bill, adding to the conditions for granting the period thanks to debtor, in the case of financing for housing, could be compatible with Article 39 of the Uniform Act. The Court opined that since Article 10 of the OHADA Treaty, which affirms the binding and the superiority of the uniform acts of the national rights, and the Act itself, which allows no derogation, available, Bill could not be maintained without going against the uniform law.

The Council of Ministers has already adopted eight Uniform Acts: Uniform Act on General Commercial Law[442], Uniform Act on commercial companies and economic interest group[443], Uniform Act Organizing Securities[444], Uniform Act organizing simplified procedures collection and enforcement procedures[445], Uniform Act organizing collective proceedings for wiping off debts[446], Uniform Act on Arbitration Law[447], Uniform Act organizing and harmonization of business accounting[448], Uniform Act relating to contracts of carriage of goods by road[449].

We must admit that the uniform law for OHADA member countries has expanded rapidly since the entry into force of the OHADA Treaty, September 18, 1995. Other areas of law should be reached shortly. Indeed, the Council of Ministers of 22 and 23 March 2001 was favorable to the harmonization of the following: the competition law, banking law, the right of intellectual property and the right of civil societies, the right of cooperative and mutual societies, contract law and the law of evidence[450]. It should be noted that a uniform act on the labor law is in preparation[451]. This will likely be the next step in the standardization of business law for States Parties.

II.2. Improbable national prosperity by joining the DRC to OHADA: challenges to overcome

OHADA is pursuing the objective of ensuring legal and judicial[452] adoption of common legal rules, simple, modern and appropriate to the situation of the economies of member states, as well as the implementation of appropriate legal procedures and encouraging the use of arbitration to settle contract disputes[453]. Therefore, it would be silly to say that joining OHADA, by itself, sufficient to involve the state of national prosperity for a new adherent. At least, arguably its legal tools and legal mechanisms are an important factor of economic development.

For the DRC, many challenges remain. First, we must give effect to the commencement of OHADA law against it (II.2.1). We must then explore the unpredictable risk of the implementation of this right for nationals and how it can be avoided (II.2.2).

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442 *Uniform Law on general commercial law,* adopted on 17 April 1997 (J.O. of OHADA, No. 1, October 1, 1997).
443 *Uniform Law on commercial companies and economic interest group*, adopted on 17 April 1997 (J.O. of OHADA, 2, 1 October 1997).
444 *Uniform Law Organizing Securities*, adopted on 17 April 1997 (J.O. of OHADA, No. 3, October 1, 1997).
445 *Uniform Law organizing simplified recovery procedures and enforcement measures*, adopted on 10 April 1998 (J.O. of OHADA, No. 6, 1 July 1998).
446 *Uniform Law organizing collective proceedings for wiping off debts*, adopted on 10 April 1998 (J.O. of OHADA, No. 7, 1 July 1998).
447 *Uniform Law on Arbitration Law,* adopted on 11 March 1999 (J.O. of OHADA, No. 8, May 15, 1999)
448 *Uniform Law organizing and harmonization of business accounting*, adopted on 22 February 2000 (J.O. of OHADA, No. 10, November 20, 2000).
449 *Uniform Law relating to contract Laws of carriage of goods by road*, adopted March 22, 2003.
450 www.training.itcilo.it/actrav/courses/2004/A1-50626_web/.../**OHADA**.doc , *op.cit.*
451 Ibidem.
452 P. Meyer, "The legal and judicial security in the OHADA area", paper presented at the conference in Niamey for the legal and judicial security in the UEMOA, held from March 17 to 24, 2006.
453 Art. 1 OHADA Treaty.

II.2.1. Terms of the effectiveness of the entry into force of the OHADA law with respect to the DRC

The first challenge for the coming into force of the OHADA law in respect of the DRC is the filing by it, of its instruments of accession. But for the file, it is a must first of all that the President of the Republic has asked the main act: the order admitting the DRC to OHADA. One and the other are not acts that the Congolese Government intends to materialize in an automatic manner. He was rather subject to two basic conditions: sufficient extension of OHADA law across the country and the training of the judiciary, beginning precisely by the magistrates[454].

April 24, 2010, the National Commission OHADA has been installed[455] and chaired by Professor Roger Masamba. It is at the national level, the transmission belt between the Congolese government and community institutions. It is also through them that the Government may achieve its extension and training in OHADA. Work has already begun, but it is very selective and discriminatory, and far from over.

The other challenge is technical. The implementation of the OHADA law can only take place after a period of six months from the date of deposit of instruments of accession. This period is important because it should allow market players to adapt to the new legal framework for business. For example, any joint stock company with limited liability, which is the equivalent of the company in the OHADA[456] law, will have to undergo statutory changes, particularly regarding the amount of capital in the creation, the OHADA law fixed imperative to ten million CFA francs at least[457].

In any event, the OHADA law sets out national judicial insecurity.

II.2.2. Unpredictable risk of OHADA law: judicial insecurity against national

It has already been shown that OHADA is designed as a tool for promoting foreign investment. It is an institution serving the capitalist era of globalization. It is intended only for secondary domestic purposes.

When we talk about judicial security, we can assume that this is one that must be afforded to foreigners, mainly non-African. In reality, this is the translation of the relationship between the depressed and the holder of important economic assets. If a dispute arises between them, it is rather in a position of strength. Why?

First, we said, by transferring the jurisdiction of the Supreme CCJA only, all national courts become tampered with judicial mechanism to control community which reassures foreign investors against possible abuses of national judges. But, if the dispute is to undergo a further appeal, the imbalance appears. The capitalist will have easier access to justice rather than to weak economy.

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[454] Luzolo Mbambi LESSA, *Opening speech of the International Symposium of Kinshasa*, under the theme: "The OHADA law, the notary and securing investment in Africa" held in Kinshasa from 20 to 21 April 2011.

[455] See *speeches by His Excellency the Deputy Prime Minister, Minister of Posts, Telephones and Telecommunications at the official launching ceremony of the National Commission OHADA, "Organization for the Harmonization of African Business Law"*, Kinshasa, April 24 2010, 7p.

[456] KOLONGELE EBERANDE, "Power and democracy in societies rights in Congolese capital, and compared (OHADA, French and American)," *Annals of the Faculty of Law*, Special Issue, Human Rights, commemorating the 59th anniversary of the Universal Declaration of Human Rights, University Press of Kinshasa in December 2007, p.378.

[457] Art.387, paragraph 1, of the Uniform Law on commercial companies and economic interest group.

Indeed, the CCJA is located in Abidjan. This remoteness is a disadvantage for any economically weak deterrent. It can experience financial difficulties to move itself at the headquarters of the Community Court. It can also, *a fortiori*, be unable, for the same reasons, to have a Council of its choice. Thus the rights of defense are breached. And, in principle, instead of incurring the risk of enormous expenditures, the economic weakness will tend to negotiate arbitration or to accept a settlement agreement following the pacifist adage: "Better a bad arrangement than a good trial. " Thus, judicial security for foreign investors may have the corresponding legal insecurity for nationals.

Secondly, the CCJA presents the risk of rotting court records. How will nine justices be able to process, alone, of cassation, excluding other possible remedies, from more than fifteen Member States? Hence, it is again difficult for one who does not have sufficient financial resources to support long and costly court proceedings.

Thus, the risk of a two-tiered justice and discriminatory which represent CCJA, are in real operational difficulties[458], whose solution is urgent. The creation of secondary offices and the proliferation of mobile courts can contribute, however slightly, to end and so that the community justice gets closer to trial.

CONCLUSION

OHADA is there, available to businessmen. Soon it becomes familiar to the Congolese people, judges and to the rest of court personnel. Will it have the impact that politicians expect of it? Nothing is sure. The future can be full of illusions or, alternatively, reserve the skeptics real surprises, if the DRC is able to begin the new era of massification of investments, secure for all, in the field of business. It could well trigger its economic and social development, beneficial to the construction of African Unity, given its geographical and political heart of Africa.

[458] See N. AKA, "The judicial practice at the time of the reorganization of justice" in *News and challenges of the corporate legal function*, Proceedings of the 1st African Congress of corporate lawyers, held from June 25 to 28, 2008 in Douala (Cameroon), publications of the African Centre for Law and Development, COJA, 2008, pp.66-68.

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