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VOLUME 14

Foreword

The articles contained in this volume of the African Law Study Library fall under the same theme as those published in volume 11, all developed within the framework of the Seminar on the Rule of Law in the Democratic Republic of Congo held in November 2011 at the University of Kinshasa. This seminar was in itself a part of a big training and research program aimed at creating synergy among Congolese lawyers with a view to sharing experiences on certain issues relating to the promotion of the rule of law and regional integration with their colleagues from other African universities.

Four scientific contributions tackling different issues, but all converging towards a common theme, are presented here below.

Dealing with taxation and incidental taxation in the Congolese Forest Code in respect to the new state structure, the article by Camille Ngoma Khuabi discusses the management of forest resources during the era of decentralization desired by the Congolese Constituent power since 2006.

Indeed, from the text, decentralization can only succeed if sufficient resources, including those from logging, are availed to the local authorities so as to provide an appropriate level of basic services to the people. On the one hand, the author touches on authorities involved in the collection of this revenue, their skills and management mechanisms, on the other hand, on obstacles to the implementation of decentralization of forest taxation before formulating some suggestions.

On her part, Déborah Nzege Kota devotes her thinking to the Congolese mining sector and to Act n°007/2002 of 20th July 2002. The author mainly seeks to find out whether, and under what conditions, innovations brought about by the abovementioned Act are in a position to meet the expectations of the Congolese people.

In another respect, Djuma Bilali Lokema addresses the matter of armed activities on the territory of Congo: new application (Democratic Republic of Congo vs. Rwanda) which he presents not like a classic observation of an order issued by an international court, but rather as a reflection both on judicial mode of settlement of international disputes and multiplicity of available channels in the event where one of them leads to an impasse.

Lastly, in the same breadth, Balingene Kahombo reviews the project for the creation of a Pan-African Criminal Court, designed by the African Union as a mechanism of protection of human rights and as a tool for defense of peace and public order of the Pan-African community.

While conveying our congratulation to the participants for their commitment and for their scientific contributions, we wish to remind our readers that the opinions expressed in the articles published herein are those of the authors and are not necessarily ours or those of Konrad Adenauer Foundation.

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

TAXATION AND INCIDENTAL TAXATION IN THE FOREST CODE: RELEVANT AUTHORITIES, MANAGEMENT METHODS, PROBLEMS OF THE NEW STATE STRUCTURE IN RELATION TO THEIR POWERS

By **Camille NGOMA KHUABI***

INTRODUCTION

The Democratic Republic of Congo is one of those countries within the Congo Basin which realized the most bold desire of her people, of living under the « federal » form of the state in respect to, first the powers devolved to provinces thereby becoming the second centre of political power and thereafter to wide powers conferred to decentralized territorial entities through the Constitution of 18th February 2006 which had been stifled several decades earlier. Indeed in the DRC just like in several African countries, decentralization was for long seen as the means to improving efficiency which was often low through, public intervention for the development of local authorities. Once approved on paper, it was subsequently shown that, decentralization can only succeed if resources are made available to the local authorities to provide an appropriate level of public services to the people[1].

Indeed, since the advent of somewhat shy decentralization in the DRC through subsequent laws[2] and despite the reforms undertaken over the last years[3], real resources for the DTE, whose mobilization does not depend on central public authorities, still remain very low. In this country, over and above the fact that local resources still remain unstable and are concentrated for the benefit of urban centres, these resources represent only less than 1% of the GDP and their share in the entire public revenue varies between 2% as is the case in many other French speaking countries[4]. Besides, financial transfers from the State will still remain a fundamental source of revenue for the decentralized territorial entities for a significant period, and in this regard, the success of the decentralization will therefore largely depend on the quality of intergovernmental transfer systems put in place.

In the DRC, the Forest Code is the instrument which, for some years constitutes a means for the State to get funds it can longer mobilize following the fall of prices of some raw materials on the international markets. It appears that this is one of the challenges of the recent reforms in forest taxation in several countries of the Congo Basin[5]. Indeed throughout this region,

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1 Clémence Vergne, *Décentralisation fiscale en Afrique Francophone : Note sur les transferts Intergouvernementaux*, septembre 2009, p 1.

2 It first pertains to the Act N° 82-006 of 25th February 1982 on Territorial, Political and Administrative Organization of the Republic of Zaïre, and the Decree-Law 081 on Territorial and Administrative Organization of the Democratic Republic of Congo.

3 It mainly pertains to organic laws N°08/012 of 31st July 2008 on Fundamental principles relating to Free Administration of Provinces and that of N°08/016 of 7th October 2008 on Composition, Organization and Functioning of Decentralized Territorial Entities and their relationships with the State and the Provinces.

4 *Idem,* p1.

5 Alain KARSENTY, « Enjeux des réformes récentes de la fiscalité forestière dans le bassin du Congo », in, BOIS ET FORÊTS DES TROPIQUES. Bassin du Congo. Fiscalité, 2004, N° 281 (3) pp. 51-60.

forest ecosystems and their products generally form the basis of means of subsistence for the most disadvantaged communities. Governments and forest companies were often criticized due to the fact that use of these resources do not contribute to the development of areas situated within or at the periphery of the forest concession and, in some cases, encourage destruction of biodiversity and other essential functions of forests. With a view to alleviate poverty, some governments are now adopting measures which decentralize decision making authority on forest resources with policies and systems which are redirecting income taxes, by-products from logging, towards the populations and local communities and other riparian settlements. The effects and impacts of these initiatives give rise to an ever increasing attention, and the DRC appears to be adopting this approach since the last reforms undertaken on decentralization and forest legislation[6]. The authorities involved in collection of revenue, their powers and their management skills need to be clarified on the one hand; and on the other hand, in a context of decentralization, only the quality of transfer of resources to DTE can enable them to attain the expected level of development, besides the level of application of laws which organize the transfer of jurisdiction need to be clarified as well. Such is the object of this study. It presents classification of forests, their tax regime and the issue pertaining to the new state structure (I); analyzing obstacles to the implementation of decentralization of forest taxation (II) and making proposals and recommendations for a decentralized, adapted and equitable forest taxation (III).

I. CLASSIFICATION OF FORESTS, THEIR TAX REGIME AND THE ISSUE PERTAINING TO THE NEW STATE STRUCTURE

The Forest Code of 2002 brought a significant number of innovations in the field of forest management in the DRC. Indeed, not only did the code put an end to the system of multiplicity of forest levies and to counters which characterized the Congolese forest regime under the Decree of April 1949; but it has to be noted that this instrument introduced innovations on classification of forests, their tax regime and the issue relating to the contribution of the forest sector in the fight against poverty. Through its provisions on "Local Community Forests", the clause relating to the social aspect of the specifications associated to industrial forest concessions and to the reassignment of 40% of adjudication proceeds to decentralized local entities, the Forest Code marked a significant advancement towards the recognition of the rights of the local communities on forest management on which they traditionally depend for their livelihood.

Besides, we present herein after classification of forests and the situation of the forest surface area, structure for the administration of forest taxation, classification of taxes and the management body of each one of them, the laws which regulate them, and the appropriation of forest revenue among the legal entities.

I.1. Classification of forests and forest surface area situation in the DRC

In the Democratic Republic of Congo, classification of forests[7] is done by the Forest Code. Article 10 provides that forest field include classified forests, protected forests and permanent production forests.

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[6] Read mainly, The Ministerial Order 002/CAB/MIN/AFF.INTER.&FIN/99 on modalities of collection and distribution of taxes, common interest revenues and taxes transferred to decentralized administrative entities, common interest administrative revenues and tax revenues transferred by the State to the entities in Article 6, and the new Forest Code of 2002 specifically in article 122.

[7] On forest classification and the current situation of territorial allocation, read forest atlas of the Democratic Republic of Congo (version 1.0) : Summary Document, edition 2009, pp 13-31 available online.

Classified forests are often called «protected areas » and are forests which are assigned to a special vocation, mainly environmental and are subjected to a restrictive legal regime as pertains to the right of use and logging[8]. They fall under the public domain of the state (article 12) and are under the responsibility of the minister in charge of forests pertaining to their management (article 24), but the minister can delegate, through an order, the total or partial management of classified forests to public legal persons or recognized public utility companies, with the aim of protecting them, to market them and carry out therein research works or other public interest activities (article 25).

Protected forests fall under the private domain of the state (article 20). Their management fall under the department and administration in charge of forests. These are forests which, although not being subject to a deed of classification, are subjected to a less restrictive legal regime as pertains to user and logging charges in such a manner that they are susceptible to be granted by way of a contract whose period cannot exceed twenty five years (article 21).

Permanent production forests refer to two types of forests: on one hand, they include all forests which are already subject to allocation as a forest concession and on the other hand all other forests which, although they have not been allocated, are already subject to public enquiry procedure to be allocated thereafter (article 23). This second category refers to forests which are meant to be put on sale.

This classification could bring about discontent and become a source of tension between states and local communities «natural owners of land », which the Forest Code granted a recognition of «local community rights » on forests on which they traditionally depend on their livelihood. Article 22 of this code provides that: « *a local community can, on request, obtain as forest concession a part or full protected forests regularly owned by virtue of customs* ». The correct application of this provision should mainly entail the creation of *Local community forests*. In the thinking of the legislator, it pertained to making the local communities to participate in sustainable management of forests with a view to materializing its vision for the contribution of the forest sector in the fight against poverty in the rural areas. It is in this same thinking that we need to place the principle of retrocession by 40% to the decentralized administrative entities decided by the legislation of 2002.

Despite these provisions, the accountability of the local communities in the management of forests is not yet effective, and the sharing of profits for logging is still pending. As pertains to the first aspect of accountability of local communities, it was indeed noted that: (i) statutory regulations, in particular the decree on modalities of granting concessions to local communities, have not yet been published, (ii) procedures for management of forests by local communities have not been developed, (iii) the staff of the ministry in charge of forests and NGO, including local authorities, do not have the skills required to support the development of community forestry[9]. Only the procedure of negotiation, on equitable bases specifications had just been fixed by the Decree n°023/CAB/MIN/ECN-T/28/JEB/10 of 7th June 2010 fixing the model of agreement constituting the social clause of contract specifications pertaining to the contract for forest concession.

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[8] Are further classified, the necessary forests for the protection of slopes against erosion ; protection of water sources and courses ; preservation of biological diversity ; soil conservation ; public health and improvement of human health, etc. according to the article of the forest code, classified forests must represent 15% of the national forests.

[9] Identification and assessment of needs in Capacity building for environmental management in the Democratic Republic of Congo (Summary of interim thematic reports : Biodiversity, Desertification, Deforestation and Climatic Change), Consultation Report, *Kinshasa, July 2007, p 17 ;* World Bank/WWF Alliance, Status of the implementation of forest legislation in Africa, DRAFT REPORT, prepared by Trade Assurance Services (SGS), Natural Resource Monitoring Services (NRMS), Sustainable Forestry Program, Geneva1, Swiss, 30 October 2002, p82.

The problem which actually implies the delay noted in the implementation of provisions relating to the involvement of local communities in forest management and share of profits therefore arises in terms of "how to do it". In other terms, it refers to the lack of appropriate tools in the implementation of community forestry[10].

Consequently, the contribution of the forest sector to the fight against poverty in rural areas still remains insignificant. It is also certain that with the re-emergence of the forest sector and particularly wood industry (formal and informal), if these provisions are not implemented, forest resources shall be exposed to a non-sustainable logging and lead to their degradation, at the same time the transfers due to decentralized territorial entities shall not be effective. The administration of forest taxation should work towards achievement of the reforms decided.

What is the situation of the forest surface area under use currently?

Table I: Areas of the forest tracks and conversion 2010[11]

N°	COMPANY	N° TITLE	TERRITORY	PROVINCE	SURFACE AREA	
					Administrative	SIG
	APC/TEMVO	007/87	Lukula	Bas-Congo	25 664	24 617
	BEGO CONGO	021/05	Isangi	Orientale	63.250	37.942
	CFT	012/03	Bomongo/kungu	Equateur	250.00	442.219
	CFT	013/03	Bolomba	Equateur	70.000	144.640
	CFT	014/03	Lisala	Equateur	100.000	144.866
	CFT	015/03	Yahuma/isangi	Orientale	200.000	288.413
	CFT	036/04	Ubundu	Orientale	79.300	146.551
	Comp. des bois	018/95	Oshwe	Bandundu	120.000	48.081
	ENRA	006/92	Mambasa	Orientale	52.192	60.182
	ENRA	020/05	Mambasa	Orientale	28.800	39.369
	FORABOLA	005/05	Tshela/lukula	Bas- Congo	19.264	15.450
	FORABOLA	006/05	Tshela/sekebanza	Bas- Congo	24.576	14.157
	FORABOLA	009/03	Boende	Equateur	190.700	388.678
	FORABOLA	009/05	Tshela/seke- anza	Bas- Congo	62.232	88.612
	FORABOLA	010/03	Yahuma/isangi	Orientale	205.000	256.073
	FORABOLA	011/03	Basoko	Orientale	250.000	315.858
	ITB	001/04	Ingende/bikoro	Equateur	214.700	233.809
	ITB	002/01	Oshwe	Bandundu	147.000	127.719
	ITB	002/04	Basoko	Orientale	224.1402	21.546

[10] Idem, p 17

[11] Data available on http://www.mecnt.cd/index.php?option=com_content&view=category&id=30:foret&layout=blog&Itemid=300057 ; http://www.mecnt.cd/images/DOWN/sf2010.pdf

	ITB	030/05	Bikoro	Equateur	80.064	80.031
	La forestière	002/92	Banalia	Orientale	151.800	181.920
	La forestière	002/93	Bafwasende	Orientale	84.740	78.408
	La forestière	003/92	Banalia	Orientale	140.224	147.447
	La forestière/lac	024/05	Kutu/inongo	Bandundu	179.300	185.171
	Mson NBK sce	041/05	Mushie	Bandundu	64.464	79.730
	Mson NBK sce	042/05	Demba	Kasai occ.	72.600	13.925
	Mega bois	088/03	Bolomba	Equateur	121.216	135.462
	MOTEMA	036/03	Ingende	Equateur	250.000	179.669
	MOTEMA	037/03	Ingende	Equateur	250.000	207.974
	ONATRA	004/91	Oshwe	Bandundu	74.023	121.214
	RIBA Congo	046/04	Kwamouth	Bandundu	48.256	37.367
	SAFBOIS	034/04	Isangi	Orientale	84.700	73.278
	SAFBOIS	091/03	Isangi	Orientale	250.000	243.408
	SAFO	001/95	Bongandanga	Equateur	242.952	329.022
	SCIBOIS	093/03	Lukolela/bikoro	Equateur	229.400	234.862
	SEDAF	001/98	Yahuma	Orientale	248.300	252.034
	SEDAF	002/98	Bongandanga	Equateur	200.533	207.978
	SEDAF	003/98	Yahuma	Orientale	219.200	212.157
	SEFOCO	008/93	Ingende/bolomba	Equateur	224.000	416.833
	SEFOCO	028/98	Bolomba	Equateur	189.738	241.538
	SICOBOIS	032/04	Lisala	Equateur	109.320	92.971
	SICOBOIS	033/04	Lisala	Equateur	158.130	165.396
	SICOBOIS	042/04	Lisala	Equateur	127.300	125.940
	SIFORCO	002/89	Aketi	Orientale	293.000	299.919
	SIFORCO	007/95	Djolu	Equateur	292.486	291.665
	SIFORCO	018/00	Bolobo	Bandundu	160.000	194.636
	SIFORCO	025/04	Bumba	Equateur	230.340	277.863
	SIFORCO	026/04	Bongandanga	Equateur	249.050	212.868
	SIFORCO	027/04	Bongandanga/djolu	Equateur	181.980	221.176
	SIFORCO	028/04	Basoko	Orientale	114.180	162.936
	SIFORCO	029/04	Basoko/aketi	Orientale	192.950	217.796
	SIFORCO	030 /04	Basoko/aketi	Orientale	213.740	209.711
	SODEFOR	018/03	Ubundu	Orientale	190.000	257.219
	SODEFOR	019/03	Kutu	Bandundu	38.000	46.411

	SODEFOR	020/03	Basoko	Orientale	181.000	216.522
	SODEFOR	021/03	Kutu	Bandundu	83.600	200.144
	SODEFOR	022/03	Oshwe	Bandundu	130.000	120.281
	SODEFOR	023/03	Lisala	Equateur	170.000	181.726
	SODEFOR	024/03	Oshwe	Bandundu	46.000	36.084
	SODEFOR	025/03	Bumba	Equateur	168.000	239.394
	SODEFOR	026/03	Lukolela/inongo	Equateur/ bdd	160.350	186.477
	SODEFOR	027/03	Bikoro	Equateur	86.000	196.011
	SODEFOR	028/03	Oshwe	Bandundu	130.000	238.896
	SODEFOR	029/03	oshwe	Bandundu	148.000	298.276
	SODEFOR	030/03	Oshwe	Bandundu	220.000	234.895
	SODEFOR	031/03	Oshwe	Bandundu	107.500	194.346
	SODEFOR	032/03	Inongo	Bandundu	113.900	222.574
	SODEFOR	064/00	Oshwe	Bandundu	157.000	173.921
	SOEXFORCO	045/04	Ingende	Equateur	229.476	195.564
	SOFORMA	002/03	Opala	Orientale	200.000	275.025
	SOFORMA	003/03	Basoko	Orientale	200.000	261.041
	SOFORMA	005/03	Lukolela	Equateur	96.000	183.773
	SOFORMA	006/03	Befale/boende	Equateur	175.000	248.998
	SOFORMA	007/03	Bolomba	Equateur	60.000	109.334
	SOFORMA	008/03	Bumba/lisala	Equateur	150.000	152.363
	SOFORMA	033/03	Monkoto	Equateur	115.000	201.564
	TALA TINA	003/04	Kwamouth	Bandundu	28.500	42.554
	TRANS M	033/05	Bafwasende/banalia	Orientale	250.000	275.058
	TRANS M	034/05	Befale	Equateur	250.000	276.761
	TRANS M	035/05	Bumba	Equateur	246.000	205.636
TOTAL					**12.184.130**	**14.941.935**

I.2. Administration of forest taxation and tax regime of forests in the DRC

I.2.1. Administration of forest taxation

In the Democratic Republic of Congo, administration of forest taxation is composed of 5 companies and public services in charge of payment of tens of levies in line with their field of activities as presented here below. It comprises of companies and public services hereinafter: Directorate of Forest Management and Hunting (Ministry of Environment, Preservation of Wildlife and Tourism); Replenishment Fund for Forest Capital (Ministry of Environment, Preservation of Wildlife and Tourism); Congolese Control Office (CCO) (Ministry of Trade), Customs and Excise taxes office (Ministry of National Treasury) ; Central Bank of Congo

(CBC). The DGRAD is only in charge of centralizing all revenue from the state to the Central Bank.

I.2.2. Forest tax regime and classification of taxes

The 2002 code formulates an imperative tax principle in matters pertaining to forests: that of *non-exemption of taxes and levies*. According to this principle, «*No logger, no exporter nor processor of forest products can, regardless of the tax regime he is subjected to, be exempted from paying fees, taxes and levies provided by this law or its application measures*[12] ». This forest taxation which is henceforth compulsory is constructed around Para fiscal levies and annual forest taxes. Besides, the place of the tax regime applicable in the DRC consists of the provisions of Articles 120 to 125 of the Forest Code, which often combine with several application measures to determine the rate applicable to each tax[13].

In these enactments, there is need to associate the Act n° 04/015 of 16th July 2004 fixing the classification of deeds generating administrative, judicial, property and shareholding incomes, as it was amended and completed by the provisions of the Act n° 05/008 of 31st March 2005 fixing the classification of deeds generating administrative, judicial, property and shareholding income as well as their modalities of payment, which brought together modalities for payment of administrative, judicial, property and shareholding income as well as classification of deeds generating this income. What is the scope of these taxes to date?

According to a study by the forest sector of FEC[14], industrial forest loggers were subjected to about 171 taxes. The Forest Code of 2002 put an end to this multiplicity of forest levies and taxes as well as those over the counter taxes. Article 121 of this code indeed determines the classification of some forest taxes and levies. It in fact pertains to consolidation of several taxes having been instituted by presidential orders and implementing laws or orders issued by concerned ministers. These taxes were reduced to 5. It pertains to the following levies and taxes: Tax on forest area conceded ; logging tax ; export tax ; deforestation and reforestation tax.

With this new reform, the tax on forest area has become the main source of forest income in the DRC. It is paid by the holders of forest titles known as « Letter of intention or guarantee for supply of forest biomass », and collected by the Directorate of Forest Management and Hunting of the ministry in charge of forests. In the light of instability of the national currency, this tax increased from 100 Z/100ha i.e. 0.47$/ha (Order n°10 of 06/04/1993) to 5NZ/ha, i.e. 0.147$US per 100ha of the concession granted in the Supply Guarantee (decree n°042 of 07/02/1994) to attain the rate of 0.20 Ff[15]/ha in 2005[16]. (Inter-ministerial order N° 005/CAB/

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[12] Art 120 of the Act N°011/2002 of 29th August 2002 of the Forest Code, *Official Gazette of the Democratic Republic of Congo*, Kinshasa, 31st August 2002.

[13] It pertains to the enactments hereinafter : N° 005/CAB/MIN/ENV/2005 et n°107/CAB/MIN/FINANCES/2005 of 25th July 2005 fixing the rates for fees, taxes and levies to be collected at the initiative of the Ministry of Environment, Conservation of Wildlife ; N° 006/CAB/MIN/ENV/2005 et n°108/CAB/MIN/FINANCES/2005 of 25th July 2005 on fixing the rates for fees and taxes on institutions classified as dangerous, unhealthy and uncomfortable to be collected at the initiative of the Ministry of Environment, Wildlife and Tourism Conservation ; N° 003/CAB/MIN/ECN-EF/2006 and n° 099/CAB/MIN/FINANCES/2006 of 13th June 2006 on fixing the rates for fees, taxes and levies to be collected on wildlife, at the initiative of the Ministry of Environment , Conservation of nature, water and forests, etc.

[14] Joël Kiyulu and Augustin Mpoyi Mbunga, Strengthening of voices for better choices: Improvement of forest governance. Improvement mechanisms of forest governance in the Democratic Republic of Congo, *National report of legal and socio-economic studies, European Union, UICN, 2007, pp 26-27.*

[15] Tax Franc fiscal equivalent to 1 USD

[16] On the development of theses taxes, read Elie Kabongo Tshikala, *Forest fiscal regime and expenditures of the State in favor of the forest sector in the Democratic Republic of Congo.* A report prepared for the FAO programme on financing of sustainable

MIN/ENV/2005 and N° 107/CAB/MIN/FINANCES/2005 of 25th July 2005), 0.30 Ff/ha in 2006 and 50 Ff/ha in 2007[17]. Its value is estimated to be close to a million USD per year since the year 2007, in respect to the total forest area held by the loggers[18] and as demonstrated by the table above. Moreover, the code organized modalities for sharing profits from logging between different entities[19].

I.2.3. Survival of other taxes?

Besides taxes organized by the Forest Coder, Mr. Elie KABONGO[20] affirms that there are several other forms of taxes not defined by the state, but which are paid to decentralized entities and to urban coordination which are ramifications of forest administration. On the one hand it pertains to, timber licenses issued by small scale loggers known as *Scieurs de long* whose forest surface does not exceed 50 ha per year, and permits for purchase and sale of firewood and charcoal and on the other hand, a tax known as *Royaliste* which is paid in cash or in kind to the traditional chiefs known as riparian «land chiefs» allocated for logging by the state.

This tax varies from a motorized boat to a hunting gun up to a socio-economic structure such as a bridge, village dispensary and school among others. This brings to the fore the manifestation of a long latent contradiction between land law and customary vision on the concept of land ownership.

However, careful reading of Article 89 of the Forest Code brings out the understanding that it is not a new form of tax, but rather an obligation on loggers in reference to the social clause to enter into specific, agreements with the riparian communities during the forest concession contract. Besides, the issue of contradiction between land law and customary vision which prevailed in the past, as advanced by Mr. Elie Kabongo does not seem to be true currently, by what the Forest Code of 2002 resolves, which is imposing an obligation upon loggers to negotiate with the riparian communities on social clauses which accommodate rights (interests) of the latter. The survival of this contradiction is in fact maintained by loggers who do not seem to comply with the new legislation in force, to the detriment of riparian communities[21].

Timber licenses issued to small scale loggers known as *Scieurs de long* whose surfaces areas does not exceed 50 ha per year, and purchase and sale licenses of fire wood and charcoal can,

management of forests. Official document : FSFM/WP/07, FAO, 2004, pp

17 Sébastien MALELE MBALA, « Fiscal decentralization and redistribution of financial benefits emanating from the forests in the Democratic Republic of Congo », *Workshop on governance and decentralization in Africa, 8-11 April 2008, Durban, South Africa,* p. 5, in WWW

18 Idem, p. 5

19 See infra, pp 15-16.

20 Elie Kabongo, op. cit. p 15

21 In its circular note N° 005/CAB/MIN/ECN-T/15/JEB of 15th August 2011, to the attention of forest companies holding forest titles deemed convertible and civil society of the environment sector working in the DRC, The Minister for Environment was regretting the fact that out of the 80 loggers whose forest titles were validated, only less than a third signed the agreements on the social clause with riparian communities. He reminded the loggers from then henceforth, they should grant more interest to the negotiation of agreements on the social clause while waiting for the preparation and filing of drafts of detailed management plans at the latest before the end of December 2011. In this process of negotiation and signing of agreements on social clauses, the companies must involve territorial administrators, technicians and MECT officers at provincial and local levels. Moreover, the withdrawal of forest concessions contracts is henceforth conditioned by presentation of proof of payment of 10% of the total cost of socio-economic and cultural infrastructures agreed with the local community and/or indigenous people in conformity with Article 11 of the order 023 fixing the model of agreement constituting the social clause of the specifications for forest concession contract (read the whole of the letter on the website of the Ministry of Environment, Conservation of Nature and Tourism).

on the other hand, be deduced from the combined interpretation of Articles of 54 and 121, 2° and 4° of the Forest Code of 2002. It is only to be regretted that such taxes are currently collected by people who do not have capacity. For instance *scieurs de long*, Mr. Elie showed that the volume of wood taken annually by this category of loggers are, in respect of this request, 2 to 3 times higher than those taken by the formal forest sector [22] ; FAO goes further in awarding about 90% of the total production (FAO,2001)[23].

Fire wood and wood charcoal constitute what is called forest wood products. In other countries, the players involved in commercial exploitation of these forest products are subject to a specific regime which fixes operating and marketing conditions to which they are subjected[24]. In the Democratic Republic of Congo, the new Forest Code has not resolved the problem. Prior to this, the tax on non-wood products established by the Order n°42 of 07/02/1994 continues to apply on purchase of firewood and wood charcoal as well as harvest and export of medicinal plants. The sector of production and marketing of charcoal and firewood is indeed a significant activity specifically in the context of energy crisis in the DRC, and so in the face of the silence of the new law, the former practices are applied! A law regulating this sector should be established. It would fix its tax regime and would determine the share of income from this activity.

I.2.4. Determination of tax base, logging control and the process of collection of forest taxes in the Democratic Republic of Congo

Generally, the process for determining forest tax basis is done through two methods: index related method and declaratory method. The latter is the most used method in the Democratic Republic of Congo. Indeed, this system leaves the logger, during the quarterly declaration, the freedom to determine the taxable elements. The tax is therefore calculated by the Department of Tax collection on the basis of declaration provided by the logger, which is deemed exact and sincere. The information and tax rates are published through ministerial orders and availed to the departments for collection of revenue. The tax rates are decided by the Ministry in charge of forests upon recommendation from a permanent inter-ministerial commission made up of Government experts and those of Forestry-Profession and Federation of Congolese Companies (FCC). The decisions of this commission are taken through consensus before being given in form of orders by the Minister in-charge of forests. Thereafter there is the stage of tax calculation and that of its payment.

Indeed, in conformity with the terms of the ordinances and several orders on fixing forest taxes, public departments and companies in charge of the collection calculate the taxes on the basis of volumes cut in the forest and declared by the loggers. The assessment of wood products and classification of wood in terms of quality are done by the loggers themselves. The central administration, Decentralized entities (Provincial and District Co-ordinations and territorial supervisors) have a control and supervision mechanism for logging which has not been put in place for long due to lack of finances. Only some management tools such as quarterly declaration forms and logging books continue serving as the link between those who intervene in the collection of revenue and generation of primary data. It is therefore

[22] Eli KABONGO, op. cit, p. 15.

[23] World Bank/WWF Alliance, op. cit, p 84.

[24] In Burkina Faso these players are governed by the Decree n°98-036/PRESS/PM/MEE/MCIA on regulation and exploitation and marketing of wood forest products. According to Article 4 of this Decree, the dealers of this sector are divided into 4 categories which are: loggers, transporters, wholesale traders and retail traders. (S. Jean Pierre SAWADOGO et Georges YONI, *Etude sur la fiscalité forestière dans un contexte de la communalisation intégrale du Burkina Faso*, Rapport provisoire, UICN, DGCN, PASE, octobre 2009, p11).

clear that the system for determination of the tax base and calculation of its rate present serious weakness and cannot enable the state to calculate tax rates relating to the volume of wood presented by the loggers. Moreover, lack of supervision and the weakness of the supervision mechanisms surely lead to tax evasion. It is in this context that the DRC is attempting for some time, to put in place an efficient control system to cure this situation[25].

On the other hand the collection process appears rather simple but too long for a tax payer who wants to pay tax[26].

The data for income from the forest sector over the last three years (2009-2011) is presented in tables II and III below.

[25] Since 2010, the DRC is in a process of putting in place a national system of wood traceability, Verification of legal origin and legal production, Inspection of wood products for export. Inspection and marketing program of wood was created by the ministry of environment. Entrusted to the SGS, the objective of this program to improve governance of the forest sector by contributing to the socio-economic development of the country; Implement a forest information and management system (SIGEF); To ensure inspection of production and marketing of logs and sawmill products; To secure collection of forest taxes. The constraints for the implementation of an inspection system were indeed, highlighted by SGS in the following terms: The big majority of exports is realized in the sawmill products, loaded in very huge trucks. No physical inspection at the time of loading; No practical possibility of inspecting goods loaded in road or border inspection points. Any inspection system is established in accordance with the determined rules. In the context of East DRC, these rules are not followed, or are not precise and adaptable: « Artisanal » licenses; Definition of « Sawn wood » ; Distribution of powers and incomes within the framework of decentralization ; Export procedures ; Big number of staff imposed by the territorial limits, enclosing ; Security conditions not allowing establishment of inspections points everywhere ; Very strong resistance to the changes expected by individuals and facilities taking advantage of the current situation ; The controllers themselves should placed in the conditions of remuneration, settlement, and sufficient authority so as not to be tempted by corrupt people. (SGS, Inspection and marketing of wood in the DRC: Application at the Eastern part of Congo, International workshop on cross-border flow of wood in the Great lakes region in the context of FLEGT action plan, 22-24 November 2010, pp 16-18)

[26] On the collection procession, read KABONGO, op. cit. pp

Table II: Forest income collected by the Treasury at the initiative of the Ministry of Environment, Wildlife Conservation and Tourism between 2009 and 2010[27]

Budgetary code	Income generating act	Realization during the financial year 2009 (12 months)		Realization during the financial year 2010 (12 month)	
		CDF	USD[2]	CDF	USD[2]
741531	Forest surface area tax[28]				
7415321	Logging tax	150 000 000,00	256 410,26	317 817 787,00	334 545,04
7415322	Deforestation tax	506 656 334,90	866 079,21	710 423 028,00	747 813,71
7415323	Reafforestation tax	470 085 004,00	803 564,11	773 114 023,00	813 804,24
7415324	Tax on permit for hand cutting of timber	48 380 409,30	82 701,55	524 770 149,00	552 389,63
7145522	License for use of forest resources (1)	25 111 961,00	42 926,43	8 822 327,00	9 286,66
7422613	Plant health certificate	1 117 091689,00	1 909 558,44	32 213 106,00	33 908,53

(1) Export on non-wood products

(2) In 2009, 1$ USD = 585 FC; in 2010, 1$ USD = 950 FC

[27] Data available online on http://www.mecnt.cd/images/DOWN/recettesftpmecnt.pdf. On Changes on forest tax revenues between1996-2000, read World Bank/WWF Alliance, op. cit, p 82.

[28] According to the ministry of Environment, lack of figures in relation to surface area tax on forest concessions concerning 2009 and 2010 financial years is due to the fact that during the period considered, the Congolese Government had granted to those who are liable for the tax an extension of payment of this tax due to the impacts of the international financial crisis in the wood sector. It appears according to the same source that the revenues due for 2010 financial year were payable in 2011 (see http://www.mecnt.cd/images/DOWN/recettesftpmecnt.pdf).

Table III: Forest income collected by the Treasury in the first trimester of 2011

Income generating act	January CDF	February CDF	March CDF	Trimester 1 Total CDF	January USD	February USD	March USD	Trimester 1 total USD
Tax on profits	0,00	0,00			0,00	0,00		
Tax on movable property	0,00	0,00	0,00	**0,00**	0,00	0,00	0,00	0,00
Tax on turnover	44.599.586,92	70.673.562,82	47.603.148,12	**162.876.297,86**	46.404,73	73.534,04	49.529,86	169.468,63
Tax on remuneration	221.824.047,06	220.957.617,40	206.301.297,37	**649.082.961,83**	230.802,25	229.900,76	214.651,23	675.354,24
Tax penalties	3.740.981,24	8.690.762,38	14.903.841,86	**27.335.585,48**	3.892,40	9.042,52	15.507,07	28.441,98
Sub-total	**270.164.615,22**	**300.321.942,60**	**294.131.794,90**	**864.618.352,72**	**281.099,38**	**312.477,31**	**306.036,62**	**899.613,31**
Logging license	9.258.467,13	2.567.577,08	4.116.599,40	**15.942.643,61**	9.633,20	2.671,50	4.283,22	16.587,91
Forest surface area tax	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Tax on manual logging license	0,00	23.904.031,25	11.601.912,00	**35.505.943,25**	0,00	24.871,53	12.071,49	36.943,03
Deforestation tax	0,00	0,00	0,00	0,00	0,00	0,00	0,00	0,00
Reafforestaion tax	71.919.528,98	70.537.935,09	142.339.729,67	**284.797.193,74**	74.830,43	73.392,92	148.100,85	296.324,21
Transactional fines	24.687.564,00	55.658,00	0,00	**24.743.222,00**	25.686,78	57,91	0,00	25.744,69
Sub-total	**105.865.560,11**	**97.065.201,42**	**158.058.241,07**	**360.989.002,60**	**110.150,41**	**100.993,86**	**164.455,56**	**375.599,84**
Total	**376.030.175,33**	**397.387.144,02**	**452.190.035,97**	**1.225.607.355,32**	**391.249,79**	**413.471,17**	**470.492,18**	**1.275.213,15**

Official conversion rate in 2011: *US$ 1.00 = CDF 961.10*
Source: Ministry of Environment, available on http://www.mecnt.cd/images/DOWN/recettesftpmecnt.pdf

I.3. The new state structure and the problem of decentralization of forest taxation

I.3.1. The new context of decentralization in the DRC and its basic principles

Decentralization is a mode of organization of a unitary state that consists of transferring decision making powers to organs other than simple agents of the central government that are, not subject to the bureaucracy and who are often elected by the concerned citizens[29].

Indeed, after several decades of devolved management, the constitution of 18th February 2006 opted for decentralization as a mode of management of local affairs in the Democratic Republic of Congo. The flow of strongly centralized powers, with a predominance of powers in Kinshasa, did not encourage the emergence of local management capacities for proximity and development of local economies. Financial difficulties of the State over the last years seriously affected the normal operations of all devolved services of the state hence the creation of impetus and development centers at the grassroot level was a response to the bankruptcy of the state. Besides, the constitution put in place two levels for the exercise of the powers of the state: central power and the province within which the decentralized territorial entities[30] whose scope should be clarified

I.3.2. Types of Decentralized Territorial Entities in the DRC

The new constitution clearly fixed in its Article 3 that the categories of DTE are Town, Commune, Sector and Chieftaincy. Province is not mentioned among the DTE for political reasons. Indeed, the Constituent assembly of 2006 opted for political regionalism making the province a political and administrative component of the territory of the Republic with a legal personality, within which the DTE must move, which, fall under administrative decentralization determined by an organic law. The province in its capacity as a political entity falls under regionalism as defined by the constitution, while the DTE fall under series of laws on decentralization. Despite the nuances well explained by several authors[31] on the question of decentralization, we count the province as among the tiers of decentralization, mainly due to its major role in the transfer of forest taxation resources to its DTE.

I.3.3. Transfer of powers to the province and to the DTE

A. Powers transferred to provinces

The constitution of 18th February 2006 determines two levels for the exercise of political power which are the State at the national level and the province which becomes a real political institution. In Articles 201 to 205 of this constitution, it determines the allocation powers between the central government and the provinces and leads to distinguishing them into three groups: Exclusive powers of the State (36 powers), competing powers of the central power and provinces (25 powers) and exclusive powers of provinces (29 powers).

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[29] G.VEDEL, *Administrative law*, 7th ed., PUF, Paris, 1980, p813.

[30] *Law n°08/012 of 31 July 2008 pertaining to fundamental principles in relation to the free administration of provinces, Expression of motifs.*

[31] On the issue of constitutional regionalism and its difference in relation to decentralization, read in detail Paulin PUNGA KUMAKINGA, the relationship between the communes and provinces. Legal and financial autonomy of the commune of Mont Ngafula in Kinshasa, in KONRAD ADENAUER STIFTUNG African Law Library, Vol. V, August 2010, pp

Article 203 enumerates the issues pertaining to competing powers between the central power and the provinces. At sub-article 19 it talks about regulation on energy, agricultural and forestry, animal keeping, animal and plant food products. Article 204 on the other hand mentions matters falling under exclusive powers of provinces. Article 20 grants provinces the power to develop agricultural and forest programs and ensure their implementation in conformity to national planning (…). It therefore clearly appears that the transfer of powers for forest management was first organized by the constitution, thereafter by the law on free administration of provinces. This law fixes legislative powers of provincial assemblies and administrative powers of the provincial government. It also provides in Articles 35 and 36 the powers devolved to the provinces. It in fact pertains to powers on all matters mentioned in Article 204 of the constitution. In Article 35, sub-articles 1 to 11respectively talk about territorial management plan and provincial planning. Article 36 sub-article7 mentions among other things, water and forest regimes, while paragraphs 8 and 13 respectively tackle regulation on energy, agricultural and forestry, animal keeping, food stuffs from animal and plant products, environmental protection , natural sites, landscapes and preservation of sites.

Despite these formally transferred powers, a study carried out by the Ministry of Decentralization and Territorial planning in March 2010, showed that for the moment, materialization for transfer of powers is only first observed at the provincial assembly levels which develop the decrees (comparable to transfer of powers under which exclusive matters of provinces fall) and exercise their power of control on the executive of the province and its services, thereafter at the provincial executive level which implements certain investments from the capital collected[32].

According to the same study, transfer of several sector-based powers to provinces and to DTE still remains to be achieved, similarly in terms of its translation in terms of property, human resources and tax and budgetary resources. It appears that the exercise of certain legislative, executive and administrative powers remain embedded by the continued existence of previous enactments in the matter. However, reflections are going on in several sectors, namely health, agriculture as well as in primary, secondary and tertiary education. The analysis drawn must be able to determine the new duties and functions of ministries concerned and lead to clear proposals susceptible of rationalizing the structures and their human and material means. At the end of the process, production of a strategic plan is expected from each ministry, sanctioned by a legal framework, as well as sector-based operational plans by province, through enactments by the provincial assemblies.

B. Powers transferred to the DTE

The organic law n°08/016 of 7th October 2008 on composition, organization and functioning of decentralized territorial entities and their relationship with the State and the provinces, provide the scope of powers of these decentralized territorial entities and their relationship with the provinces, and enabled determination powers allocated respectively to Town (Article 11), Commune (Article 50) and Sector and Chieftaincy (Article 73).

These powers were classified in five categories, among them local governance ; economy of proximity including public market, agriculture, animal keeping and small scale fish farming, small and medium industries, micro-credit, small scale businesses, basic local infrastructures, local road network, public landfills, etc.

[32] Democratic Republic of Congo, DSCRP Magazine for the DR-Congo, Thematic note. Decentralization, Kinshasa, Memling Hotel, 8-9 march 2010, p. 4

The DTE can also deal with matters subjected to them by a higher authority, which can either be the State, or the province. Lastly, within the framework of devolution, the central government or the province entrust to the DTE the task on implementation on the basis of delegation of powers. This, for example, is the case regarding services for marital status and population.

I.3.4. Transfer of resources to the DTE: foundations

Budgetary mechanisms of DTE have always been strongly centralized leaving little financial and management autonomy at sector, town and province levels. Financial benefits from revenue collected at the provincial level have always been insignificant. The percentage for retrocession of tax revenue from the state towards the provinces used to experience some weaknesses such as public expenditure which were only limited to payment of salaries of state officers. The constitution of 2006 was innovative by granting financial decentralization to provinces and financial autonomy to DTE. If the former, financial decentralization presents itself as being the constitutionally recognized power for provinces to withhold at source the share of national revenue allocated to them; the latter, financial autonomy, is a complementary process which gives efficiency to decentralization. It is both a consequence of decentralization and the pre-requisite without which, territorial decentralization remains only a hollow term.

In this regard, several reasons do justify therefore the transfer of resources to the DTE. First it pertains to balancing the budgets of local authorities and to reduce excessive disparities of resources between local authorities; second it pertains to internalizing the external effects and finally, to improve the performance of local authorities concerning internal management and deduction of own resources[33]. In the Democratic Republic of Congo, these transfers of two kinds are realized between central power and provinces on the one hand, and between the latter and DTE on the other hand. It pertains to transfer of 40% of national revenue withheld and National Equalization Fund[34]. Within the framework of this study, we limit ourselves to analyzing transfers arising from the forest code and its application.

I.3.5. Distribution of forest resources between organs in respect to the current structure of the state in the Democratic Republic of Congo

The Forest Code organizes the transfer arising from logging in Article 122; it determines the modalities of allocation of each tax according to portion for each entity. But, despite very clear provisions, there are still problems as pertains to the practical mechanism of its operation. The distribution of forest resources between different organs and entities involved in the management of forest taxation is presented in the table below.

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[33] Clémence vergne *op. cit*. pp. 2-3

[34] On the transfer of 40% of national resources and those from the nation equalization fund, read mainly : De Gaulle MABIALA NKANGU, « National revenues : distribution between provinces in accordance with the Constitution of the Republic of Congo promulgated on 18th February 2006 », in *African Law Study Library,* Vol. V, August 2010, pp 101-109 ; Jean Salem Israël Marcel KAPYA KABESA, Concerning the allocation of national revenues receipt between the central government and provinces in the Democratic Republic of Congo: modalities and constraints 21-27

Table IV. Distribution of forest resources between the players: Treasury, National Forest

Fund and Decentralized Territorial Entities

Tax	Treasury %	FFN %	DTE %
Surface area tax	60	0	40
Re-afforestation tax	0	100	0
Permit for wood harvesting	0	100	0
Logging tax	50	50	0
De-forestation tax	50	50	0
Operation tax	100	0	0
Tax on PFNL	100	0	0

Mechanism of distribution of the RSF between different entities: Retrocession or withholding at source?

The analysis of transfer of resources demonstrate that two types of revenue go to provinces and DTE: those organized by articles 121 and 122 of the Forest Code which concern RSF and those provided by Article 175 of the constitution, which relate to all other national revenues which are realized by provinces and the DTEs. Indeed, the Forest Code of 2002 distributed according to the modalities hereinafter: 60% to the Treasury and 40% to the DTEs according to a principle of retrocession. These 40% should be distributed at a ratio of 25% for the province and 15% for the DTE concerned. The 2006 constitution rather talks of withholding at source to a tune of 40% for national revenues, leaving the need for application laws to state the modalities of distribution between the province and its DTEs.

The organic law N°08/016 of 7th October 2008 on composition, organization and operations of the decentralized territorial entities and their relationships with the state and provinces sets the framework for the distribution of national revenue. Article 115 provides that:

> « *Decentralized territorial entities are entitled to 40% of the national revenue allocated to provinces* ». Article 116 states that: « *Distribution of resources between decentralized territorial entities is based on the criteria of production capacity, surface area and population*[35] ».

It is regrettable to note that despite the constitutional provisions and its implementing legislation, during the entire parliamentary term, the transfer of resources is carried out on arbitrary bases. Several sources indicate that the rate of retrocession rose from 6% to 7% in 2007 (based on the basis of the first six months), to 10.5% in 2008 (World Bank 2010:22), unavailable in 2009, in 15.7% in 2010 (figure based on an estimate of expenditure for the provincial staff), and to 7.8% in the budget for 2011 approved in November 2010[36]. Here

[35] Article 6 of the Inter-ministerial order 002/CAB/MIN/AFF.INTER.&FIN/99 of 20th May 1999 on modalities of payment, common interest revenues and taxes transferred to DAE was organizing this distribution in the following terms : « common interest administrative revenues are distributed in total between categories of decentralized administrative entities of a province at 40% for the province, 20% for towns and 40% for territories

[36] Pierre Englebert, Uncertain Decentralization, and proximity despotism in the Democratic Republic of Congo, Paper prepared for DRC-Provinces-Decentralization Project of Musée Royal de Tervuren, (section Histoire du Temps Présent), Belgium, First version, March 2011, pp 6-7.

it relates to centralizing tendencies which are unfortunately in contrast with the practice before decentralization which had its retrocession rate at around 20%. Even the National Equalization Fund meant to regulate the imbalances between provinces has not yet been created. It is in this context that difficulties arise in the implementation of forest taxation.

II. OBSTACLES IN THE IMPLEMENTATION OF DECENTRALIZATION OF FOREST TAXATION

The obstacles to the implementation of decentralization of forest taxation are to be understood in the general context of difficulties in relation to inter-governmental transfers, i.e. general decentralization of tax. Indeed, the DRC is part of French speaking countries where the inter-governmental transfers are weaker. According to the available data, transfers to local authorities represent only between 1 and 3% of the national state expenditure. Despite the provisions of the 2006 constitution, the criteria for allocation of these transfers still remain very controversial and hardly transparent. This section presents economic, political, legal and technical obstacles to the implementation of more efficient tax transfers in the DRC.

II.1. Weak and unstable public resources

The DRC is part of the least developed countries and consequently has a very low per capita GDP. Thus, due to a fragile situation relating to public finances, inter-governmental transfers are often weak and irregular. The last characteristic of irregularity of payments is a source of management and planning difficulties for local authorities. The instability largely originates from the economic structure of the country often based on the exploitation of vulnerable primary products. The relative weakness and instability in the rate of national revenue partly explains the weakness and irregularity of the transfers from the state to the local authorities in this country. The State cannot indeed decentralize financial resources it does not have. Nevertheless, other factors slow down the implementation of financial transfers in this country.

II.2. Lack of commitment and credibility of the State

Article 175 of constitution provides that 40% of national tax revenue shall be distributed to provinces and 50% to the Central government. The remaining 10% shall be deposited in the Equalization Fund meant to cure economic inequalities between provinces. Guided by past experience and influenced by political weight of some provinces, the constituent assembly deemed it necessary to state that the proportion of national revenue allocated to the provinces should be deducted at source. In the spirit of the constituent assembly, it meant to curb against seeing these resources pass through Kinshasa and thereafter depend on the good will of the central government to retrocede these resources. This provision is still clouded in suspicion which characterised the constituent process. The atmosphere did not change much judging on the heated debates which opposed, the representatives of the provinces and the central government on the question of applicability of this provision for the fiscal year during the month of June 2007[37].

[37] Although technical, the debate on « retrocession » is important due to its financial, economic and political implications. Led by leaders from the richest provinces (Bas Congo, Katanga, Kasaï), a common front of provincial authorities was constituted to claim for retrocession, from the 2007 budget year, tax revenues allocated to provinces by the constitution. Lire Michel Liégeois, « La décentralisation en RD Congo, enjeux et défis », in *Les Rapports du GRIP*, 2008/1, p.11.

On this requirement, the government responded that it was impossible to apply the retrocession without accomplishing a certain number of prerequisites, namely a legal framework on decentralization and adoption of applicable measures. Similarly, two studies carried by the European Commission and the World Bank had identified legislative prerequisites for a successful decentralization in its financial dimension[38]. Beyond this constitutional prerequisite, the government alleged that immediate application and without correcting the rule of 40% would lead to aberrations and colossal inequalities between provinces[39].

Currently, legislative issues seem to be partly resolved, but the central government does not always respect its commitments and endeavors to keep the essential part of public resources and attempt to preserve a strict control on the share it wants to allocate to provinces. Moreover, the transfer of resources, by provinces to DTE is not generally based on rules which can guarantee a viable projection. The Act N° 080/016 of 7th October 2008 on composition and operations of Decentralized Territorial Entities and their relationships with the State and provinces provides in Article 116 that: « *The distribution of resources between decentralized territorial entities is in line with production, surface area and population criteria* », but, the amount of transfers is often determined in an ad hoc manner. If the inclusion of the principle of sharing of resources in the Constitution is useful and so as to appear credible and stable and less dependent on the discretionary power of the central government, nothing guarantees this will effectively be respected, as demonstrated here above. It is would be necessary to envisage avenue for redress in courts so as to be able to compel the state to honor its commitments vis-à-vis local authorities.

II.3. Complex and inaccurate legal framework

The DRC like all other African French speaking countries is characterized by a very heavy legislation. This profusion of sometimes vague enactments complicates the implementation of decentralization and introduced slow and significant delays between the enactment of the laws and their practical application. Beside, even if the constitution provided the framework for financial transfers to provinces since 2006, it needed a waiting period of two years for the enactment of free administration of provinces and on the DTEs. Moreover, the latter does not contain provisions sufficiently clear on the powers of DTEs in issues pertaining to management of forest resources.

II.4. Lack of information for local authorities

We note lack of significant communication between the central administration, provinces and local authorities. It is necessary to say that no provision of the Forest Code devotes explicitly the right to public information in general and to local communities in particular.

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[38] Democratic Republic of Congo – European Community, *Document de stratégie pays et Programme Indicatif national du 10ème FED* 2008-2013, p. 101.

[39] It is true that in the DRC, the provincial town of Kinshasa contributes 38% of the national budget 38%, Bas Congo 33.42% and Katanga 19.53% and that without correction the implementation of the 40% rule would therefore have the consequence of concentrating more than 80% of the allocated resources to three provinces, all the others required the remaining 20%, some receiving 1%. If we restrict ourselves to literal interpretation of the constitution, the disparities of revenues between the provinces will such that the poorest entities will be unable to meet operations costs of provincial bodies, while the richest will have significant financial means. The equalization fund which is 10% of the national revenue will also be unable to correct such big disproportions. But the solution to these difficulties does not lie in the « confiscation » of resources originating from national revenues. A more practical legal network should state other more acceptable mechanisms for transfer of powers and resources to provinces and to DTE so as to avoid tensions between the central government and provinces and between the latter and DTE.

Thus, local authorities do not always receive the amounts due to them in terms of shared taxation and transfers, which constrains the preparation of their budget. In other countries, information relating to the transfer of state budget is communicated to the communes for the preparation of their budget at least two months before this vote, i.e. before 31st October. But this information is not always communicated at the right time and the communes therefore do not have all the necessary data to the preparation of the initial budget before the beginning of the financial year or even before 31st March, the legal deadline for its adoption. Thus, in French speaking countries, the tax chain remains under the direction of decentralized services and central administration. But, tax departments of the State are less encouraged to collect taxes where the biggest proportion must go to the local authorities. It would be necessary to provide a framework of consultation between the State and local authorities to debate on the questions touching on local finances. The creation of National Committees for Local Finances (CNFL) in the WAEMU countries, within the framework of Local Finance Observatory and with the support of the Partnership for Municipal Development (PDM), is an interesting development in the regard[40].

II.5. Poor allocation of responsibilities between levels of government

Lack of clear definition of the responsibilities of local authorities hinders the correct definition of the level of income required. In matters pertaining to forests, we have already seen that no provision of the organic law N°08/015 of 7th October 2008 on composition, organization and operations of DTEs and their relationships with the State and provinces, do grant the DTE the power[41] in matters pertaining to forest management. The Act N° 08/012 of 31st July 2008 on fundamental principles in relation to free administration of provinces limits the powers transferred to the latter. However, the law provides that powers thus transferred are either exclusive or be exercised in a competing manner by the State and the said provinces. This vague situation generally makes the assessment of the needs of the provinces and the local authorities delicate. Moreover, forest management falls in this confusion of competing powers between the State and provinces. DTEs are totally excluded there from. This can therefore explain the control of forest resources by the Central government despite several reforms in this sector.

II.6. Lack of assessment of public policies

Lack of a culture of assessment for public policies does not allow correct measurement of the cost of transfer of powers. Generally, the DRC like most French speaking countries has not put in place a rigorous plan for the implementation of decentralization policies. Besides, few countries have an assessment of costs from different services to the population, and few among them lead to a reflection on the distribution of the costs between different players (State, local authorities). Decentralization was often done blindly since states do not have numbered elements for calculating financial transfers[42]. In the same light, it would be necessary to evaluate the potential of receipts from different taxes and levies collected at the local level to target in a better way the transfers so that they correspond to the needs

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40 Clémence Vergne op. cit. pp 9-10

41 The Act on DTE talks of powers of each organ of the DTE, and not their powers as it was explicitly indicated in the law on provinces.

42 Thematic note on decentralization presented by the Ministry of Decentralization in March 2010 unfortunately did not focus its attention on this question. The study was restricted to acknowledging that weaknesses arising from resources mainly due to transfer irregularities, insufficiency of budgetary resources of the central government, slowness of transfer of resources corresponding to powers transferred indeed constitute one of the main weaknesses of the current process of decentralization. Document already cited, p. 8.

and to the potential of the local authorities. Practically, information in this matter is almost non-existent. Consequently, transfers cannot correspond to the needs and to the potential of the local authorities and different mechanisms are neither harmonized nor integrated. We cannot develop a coherent system of transfers if we do not know what the objectives of the latter are[43].

II.7. Technical difficulties

Lack of a culture of assessment of public policies goes hand in hand with lack of statistical information enabling the definition of rules of distribution of transfers between local authorities. It is not in doubt that the DRC is in the same situation as Senegal, where financial division of the Directorate of local authorities does not have any tool (school infrastructure maps, health infrastructure maps, data bases for urban audits…) enabling it to collect the necessary elements in the rationalization of modalities for Decentralization Endowment Fund (Republic of Senegal, 2003).

II.8. Constraints related to the accessibility of funds

The principle of the fund unit, which is characteristic of French speaking countries, consists of centralizing the collection and circulation of funds of the local authorities within the Treasury. The control of public funds by the Treasury is not the origin of major difficulties as long as the local authorities can utilize their funds according to the volume and the time lines desired so as to be able to implement their budget and abide by their commitments in respect to suppliers and services providers for local services. But, in practice, three obstacles can hamper the accessibility of local funds lodged with the Treasury: writing time limits, lack of transparency and liquidity tensions.

II.8.1. Writing time limits

Complex accounting procedures can delay the imputation of the available funds of local authorities in the Treasury accounts. This time limit can also be extended if there is need to wait for the accounts of the entire territorial unit (department, region) to be audited so that each local authority of this entity sees its free funds deducted.

II.8.2. Lack of transparency

It can occur that the general treasury carries collection of direct taxes (often in case of arrears) from a tax payer whose activity is established in the local authority given. The normal procedure therefore involves that a part of a liquidated amount be appropriated to the said local authority. However so as to accelerate the procedure and to minimize collection costs, it is frequent that the State and the tax payer "negotiate" a compensation which tends to diminish effectively the amount paid as compared to the liquidated amount, which lowers as much the resource ceded back to this local authority. In the extent where the local authorities are neither associated with the negotiations with the tax payer, nor informed of the amount ordered, collected and deducted, this practice can be a source of contests and confusion. The more the conditions are opaque, the more there are frequent contestations of the local authorities on the position of their balance at the Treasury.

[43] Clémence Vergne, *op.cit. p. 10*

II.8.3. Liquidity tensions in Central Governments

The difficulties – or rather crisis - of liquidity for States are the main constraint hampering the accessibility of funds for the local authorities. This results into delays in the transfer of funds belonging to the local authorities. How do such tensions manifest themselves at the local authorities' level? A possible indicator is the positive sign of balances of the local authorities on the joint account in the Treasury. Indeed, in the majority of the cases, the local authorities have difficulties to cover the operating expenses. Consequently a positive balance at the Treasury represents more blocked funds than a concern on the part of the local authorities to respect a rate of consumption of regular appropriations .

II.9. Specific difficulties towards decentralized forest taxation

In the DRC, a principle was established whereby; the Congolese state became the exclusive owner of land under the Act of 20th July on the general regime of properties and securities. By virtue of this law, all other persons either natural or legal can only hold a right of enjoyment on land known as «land concession». The land is thus categorized into public land on the one hand and private land on the other hand. Public land is that land allocated for public use or service. All the other land falls under private domain of the State. In forestry, the new Forest Code of 2002 also affirms proprietary right of the Congolese state on all forests. It categorizes forests into *classified forests; protected forests and permanent production forest* as aforementioned. These three categories constitute what we call «*State forest land* » ; which includes on the one hand public forest land and, private forest land on the other hand. For the same reasons as State's public land, public forest lands cannot also be allocated. It is only forests under private land of the state which can be allocated.

Combined reading of articles 23, 24 and 25 of the Forest Code gives a better understanding that, the DTEs not only have no power on forest management, but also, do not have their own forest property, this belonging to and falling exclusively under the powers of the central government, except in cases of express delegation. The problem as it appears, really presents the difficulty there is to be able to realize decentralization of forest taxation. On the other hand, when a part of forests will be transferred to DTEs as their own property, forest taxes to be collected on products from these forests would be paid in part or in full, in the local budgets, in conformity with the provisions of the Forest Code. Currently, the difficulty of DTEs to be in a position to access these resources arises partly from this legal lacuna. Assimilating the RSF resources to national resources does not promote fiscal decentralization in forestry. Some corrections need to be done therein.

III. PROPOSALS AND RECOMMENDATIONS FOR A DECENTRALIZED, ADAPTED AND EQUITABLE FOREST TAXATION

On the basis of analysis done through the previous developments, many pitfalls were identified pertaining to putting in place a decentralized taxation system in general, and in relation to forests in particular, which is equitable, profitable and favorable to good management of forest resources. Besides, the following proposals for fiscal reform can be done *« in order to build an equitable and adapted forest taxation which would enable each major player involved in participatory forest management to play his role fully for the promotion of a sustainable management of planned forests within the DRC ».*

The proposals shall be organized around three points:

- Legal materials for reform
- Content of the basic enactment
- Content of regulation

III.1. Legal materials for reform on decentralized taxation

According to Mr. Abel Léon KALAMBAYI WA KABONGO[44], the Forest Code refers to numerous enforcement measures in form of orders, decrees and ordinances. Currently these legal materials are very many and so scattered that it is even hard to account for all of them[45]. Thus, forest taxation should be contained in a set of texts as few as possible which is coherent and respecting the hierarchy of legal standards. We will therefore have tax rules which are easy to read, interpret, disseminate and amend if need be. It is also possible to propose basic enactment and regulations for this basic enactment.

Basic enactment, according to the nature and importance of its prescriptions, could be either a law or a decree. In all cases, the basic enactment for decentralized forest taxation must be based on the Forest Code law, the legal framework on environment, land law and laws on decentralization which must include explicit provisions which transfer forest management to the DTEs.

Regulations (decrees, orders and circulars) shall develop, each, one or specific aspects prescribed by the basic enactment. Some of these regulations shall also appeal to the provisions of law organizing MECN and other ministries involved directly or indirectly in the management of forest resources (ministries in charge of agriculture, animal keeping and trade) or financial resources of the State and local authorities (ministry in charge of finance).

III.2. Content of the basic enactment on decentralized forest taxation

Building upon laws and enactments for transfers aforementioned and in application of these enactments, the basic enactment shall contain essential elements of decentralized forest taxation. These elements are:

- The main principles or objectives of forest taxation ;
- Different permits and authorizations required for exploitation of forests products in the DRC ;
- Nature, number and rates of forest taxes and the possibility of taxation differential ;
- Key for the distribution of forest income between different players in the exploitation of forest products ;
- Distribution of roles between players in the management of forests within DTES and the necessary collaboration of public and private players in the management of forest taxation.

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[44] Abel Léon KALAMBAYI WA KABONGO, *La politique forestière de la RDC : l'agenda prioritaire et le code forestier*, (sd).

[45] According to the same author, between 2003 and 2006, 9 enactments on application measures were taken. 2003 : Ministerial order on the transaction procedure in forestry ; Ministerial order fixing protected forest fuels ; Ministerial order on wearing forest uniforms and insignias ; Ministerial order in relation to the forest hammer ; Inter-ministerial order in relation to economic measures for the development of the wood sector.
2006 : Ministerial order fixing procedures for development, approval and implementation of working plans for forest concessions for timber production ; Ministerial order on composition, organization and operations of forest provincial advisory boards ; Ministerial order in relation to logging ; Ministerial order on organization and operations of forest registry.

III.2.1. Main principles or objectives of forest taxation

On the basis of fundamental options for national forest policy, the State should define the goals to achieve in the domain of forest taxation. The essential part of these objectives, which are of budgetary, economic, environmental and social nature can be summarized in some points: Protect environment through a judicious taxation of traditional energies; Have substantial financial resource for public budgets (State and local authorities); Distributing fairly and equitably forest incomes between all the players of the sector, namely the State, local authorities and loggers and traders of forest products.

III.2.2. Different permits and licenses required for exploitation and marketing of forest resources in the DRC

In the Democratic Republic of Congo, the new Forest Code did not resolve the problem of exploitation and marketing of wood charcoal. Besides, there is still disorder in this sector. Firewood and wood charcoal constitute what we call forest wood products. In other countries, the players concerned with commercial exploitation of these forest products are subject to a specific regime which fixes the conditions for exploitation, marketing and the tax regime to which they are subjected. A specific enactment is expected so as to formalize this sector.

III.2.3. Forest taxes and levies

Granting of each license or approval is subject to prior payment of a levy. In the DRC, several structures falling under the ministry of environment are involved in forest management: the National Forest Fund, Directorate of Forest Management and Hunting, Funds for the rehabilitation of forest cover. All these structures each manage a tax; which makes it difficult to transfer all these taxes to the DTEs. Therefore it is possible to create a duplication of these powers. So as to channel in a better way the resources and to avoid duplication, there is need to put in place a single structure, Forest Planning Fund (FAF) whose objective will be promotion of sustainable management of forest resources. The rates or the amounts of taxes to be collected by this FAF as well as their distribution must be fixed by a regulation.

III.2.4. Possibility of taxation differential

Rates and tariffs for forest taxes and levies as well as fees for the funds can vary according to administrative regions in consideration of their respective potential in forest products.

III.2.5. Key for distribution of forest incomes between different players in exploitation of forest products

Incomes generated by forests are currently classified among national incomes, which complicates their transfer to the DTEs. The distribution of forest taxation revenue between the State and decentralized territorial entities should preferably lie on the principle of shared responsibility if the DTEs had their own forest property[46]. The incomes would arise in this

[46] To ensure respective transfer of human resources, fiscal and budgetary resources and finally public and private land of the state, the thematic note on decentralization prepared by the ministry of decentralization provides for the transfers powers and resources following a progressive approach. Besides, the following actions are planned : (i) transfer of human resources within the framework of public function reforms ; (ii) promotion of local public function ; (iii) availing additional human resources within the framework of a new partnership between the Central government and provinces ; (iv) transfer of financial resources on the basis of an efficient

case from permits and approvals. The incomes generated within the framework of the State's forest land are mainly meant for the national budget; incomes generated by the use of land owned by the DTEs would, as a priority, be appropriated to the latter[47]. Similarly, proceeds from fines, penalties and other forfeitures arising there from *(Government land and DTEs land)* are distributed between local authorities (40%) where offence, forest administration (30%) and indicators (30%) have been deducted. The forest administration share is distributed between policeman (15%) and the rest of the members of staff (15%). When the spatial coverage of a forest (planned or not) extends over the territory of several communes, the tax income drawn from this forest is distributed according to the origin of the forest product or in default according to a key to be determined jointly by the concerned communes with the technical support of forest departments[48].

III.2.6. Allocation of roles between players in the management of forest taxation

The State fixes the basic rules of forest taxation as well as the rates of taxes applicable in its forest land and in the forest land owned by the DTEs. In their forest land, DTEs shall be required to issue permits and licenses for exploitation and marketing of forest products. The Chairmen of chieftaincy council can, through partnership agreements, entrust the issuance of permits and licenses as well as the collection of taxes to forest departments. The provinces shall, through decrees and upon deliberation from chieftaincy of sector councils, fix the rates and tariffs for forest taxes applicable on their respective territories, if the basic enactment grants them the possibility.

Tax receipts are paid into the DTEs accounts opened with the Treasury. In managed forests, FAF revenues are collected by DTEs agents and managed by DTE structures. In forests which are not managed, revenue is collected by forest departments, on a partnership agreement with Sectors and Chieftaincies, and shall be managed by a joint body, made up of representatives from the sectors and chieftaincies, loggers and traders in forest services.

III.3. Contents of regulations in the basic enactment on forest taxation

Regulations (other decrees, orders and circulars) shall be taken, if necessary, to apply the rules fixed by the basic enactment. The objective of these regulations will be precisely, to fix the rates and tariffs of different taxes and levies. If the enactments fix rates which can be changed by the DTEs, provincial decrees and DTE regulations shall carry out such changes. Once such developments have been done, a real need for capacity building for the communes in forest taxation management will start being felt. Besides, each DTE should have a financial officer capable of managing not only the budget of the commune but also be the provincial contact person with all departments supporting the DTE in the collection of local tax revenues (taxes, duties and levies)[49]. Concerning forest management precisely, the sector

system ensuring accountability and transparency of financial flows ; (v) assessment of resources and transfer of some parts to provinces and to DTE as well as the necessary means to rehabilitate them. (Read the cited document, p. 10).

47 In Burkina Faso for example, 98% of forest revenues of CAF transferred to local authorities return to the latter and 2 % to the Region. Nevertheless, the Local authorities can, for a partnership with the forest departments in charge of collection of taxes in their forest fields, granting a discount to these services so as to improve forest management in general and the level of revenue in particular. The discount must ensue from an objective contract between two parties; its amount cannot exceed 15% of the revenue collected. Lire, S. Jean Pierre SAWADOGO et Georges YONI, *op cit*, p. 76.

48 Idem*, pp 76-77.*

49 In this sense the study of the ministry of decentralization provides for a direction of capacity building in its strategic framework for implementation of decentralization. The document explains it in these terms: A national program for capacity building shall be put in place and implemented. It will mainly be beneficial to elected leaders, provincial officers and DTE, the staff for some ministerial departments and civil society organizations. It shall entail : (i) putting in place an arrangement for technical support and advice

and chieftaincy counsel in charge of environmental issues should be trained to not only be able to fully play his or her role in the municipal council but also to represent efficiently the entity beyond the council. In countries which have experienced decentralization of forest taxation like Burkina Faso, some mistrust has been noted between mayors and their councilors on the one hand and loggers and traders of forest products on the other hand, and even between some mayors and forest departments. It is obvious that the transfer of powers in the field of forest management including forest taxation will only be effective and will attain the set goals if efforts are channeled from either side to put in place a climate of mutual trust and a spirit of collaboration between the different players concerned.

CONCLUSION

The Forest Code of 2002 organized in Article 122 the distribution of revenues arising from forest taxes and levies according to a principle of retrocession and fixed the distribution of these revenues between the province and the DTE concerned[50], in turn the constitution retain the principle of withholding at source on all national revenues, which include tax on forest surface area, the law on DTE dealt with the question of the key for distribution between provinces and DTE. But during the entire first term, several pitfalls hampered the process. Besides, tax decentralization generally and forestry in particular, was reduced to mere devolution. We cannot qualify the experience to a real participatory decentralized management, to the extent where the State and to a certain extent, the provinces have remained the main centers for decision making and the DTE excluded from the process. Besides, on the basis of equity in the share of incomes, the DTE and therefore village communities still remain second level citizens, the central government and the provinces still remain the main beneficiaries, contrary to what had been provided for by the reform. In the field of forest taxation, from the analysis done, it follows that a multiplicity of players intervenes in the management of forest taxation. Similarly, nearly ten years after the establishment of the RSF retrocession principle in the DTE and five years after that of withholding at source, big uncertainties are still in place as pertains to practical modalities for its implementation. The weaknesses of its effective implementation arise from several other factors which were not correctly assessed before the transfer of powers and resources to provinces and to DTE.

So as to ensure participatory and sustainable forest resources and to improve local governance, the Congolese state should mainly associate village communities and decentralized local authorities to a better distribution of forest returns in order to ensure a real endogenous development. The strict application of the forest code, its implementation measures and all other enactments on the distribution of forest returns would be well indicated in this direction, but the biggest challenge remains that of making the central government and the provinces to agree on the functionality of the measures enacted. To this effect, there is need: (i) to create a consultation and collaboration framework between the provinces, DTE and rural communities so as to make them participate better in decision making, with a view to restore a real local governance; (ii) to promote active participation of decentralized entities in the process, through rapid and effective transfer of wealth and powers for management of forest resources and the benefits there under. The DRC can not be able to realize the goal proclaimed by the rule of law by systematic violation of the law it puts in place. The transfer of resources arising from forest taxation remains one of these challenges.

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adapted according to the capacities of each category of players of decentralization ; (ii) capacity building and decentralization of institutions for specialized training ; (iii) adoption and implementation of initial and continuous training plans for different institutional targets ; (iv) distribution of training manuals and capitalization of experiences. Read the cited document p. 10.

[50] Article 122 provides for fairly little sharing between the provinces and DTE which is fixed at 25% and 15% coming back respectively to the provinces and DTE. The sharing should rather cover the 40% once retrocessed/on lent

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CONGOLESE MINING SECTOR UNDER THE ACT OF 20TH JULY 2002: REVIEWS AND PROSPECTS

By **Déborah Nzege Kota***

INTRODUCTION

The Democratic Republic of Congo is one the countries with immense mineral resources such as diamond, copper, cobalt, gold, coltan, uranium,...to such an extent that she is known real geological scandal, where these reserves still remain invaluable and almost untapped.

Armed conflicts which broke out mainly in the Eastern part of the country since 1996 also led to a disastrous, chaotic situation which was favorable to proliferation of illegal and uncontrolled practices in the mining sector; practices which, however, have consequences on the environment of the country and its people on the one hand, and on mining production on the other, which dropped significantly with regard to economic indices on the DRC since the end of 1980s.

Indeed, it follows from the objective analysis of all summary data on mining activities available to date that the laws promulgated after independence of the DRC i.e. since 1967 had not attracted investments but rather had a negative impact on mining production of the country, on public finances and that mining, fiscal, customs and foreign exchange regimes they had organized were not providing incentives »[51]

Reasonably, Mr André Philippe Futa, then, Minister of Finance and Trade, attributed the poor performance of the mining sector which was contributing very little to the economic development of the DRC to anarchy in the sector.[52] Indeed, the Congolese mining sector did not benefit from the opportunities offered by the international market, mainly the high demand and the increase in prices.

It is in this context that the Congolese Government adopted the Act n°007/2002 of 20th July 2002 on mining code and constituted a national commission in 2007 at the end of elections held in the month of December 2006 to carry out a review of the mining contracts.

This law certainly contains many innovations ; on the fiscal and customs level mainly, some analysts like Professor James OTTO places the fiscal and customs regime instituted by the mining code 2002 in position three in Africa and in position two at the global level in relation to the benefits granted to investors.

Unfortunately, in 10 years of implementation, the mining code is struggling to inspire new dynamics in the Congolese mining sector. To believe the experts, the mistake would hold, essentially not only for lack of knowledge on the code in professional circles, but also on its dubious application at the Government level and in particular at the level of administration of mines.

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[51] Grounds of the Law n°007/2002 of 11 July 2002 pertaining to mining code

[52] Low performance of the mining sector in DRC, http : //www.afriquecentrale.info/centrale

In fact, the mining code promulgated on 11th July 2002 continues to be at the centre of all the controversies which still riddle the mining sector. The regime of improvisation is domiciled in this sector. The Government which was supposed to be the model in respect of the provisions of the code, imposes fees or taxes, reorganizes procedures in tapping or export of the products often in total defiance of the code.

In this regard, a total of 4542 mining titles were granted to 642 companies on the entire national territory; the concessions covered by these titles represent 33% of the country's surface area but unfortunate report is that the regions concerned have remained poor and enclosed despite their resources.[53]

This explains the need to know, through this study, if the innovations brought by the Act n°007/2002 of 20th July 2002 on mining code are in a position to meet the expectations of the Congolese people and under what conditions?

I. STATUS REPORT OF THE MINING SECTOR IN THE DRC

I.1. General Report

The DRC has gone through two periods of deadly wars which arose from belligerent strategies for predation of minerals as a means of enrichment and control of the national territory.

Indeed, during the first war, repeated invasions from Rwanda and Uganda which supported the local rebellion had the objective of taking control of the mineral wealth of the country, a principal means of having access to power in the Great Lakes region.[54]

Pertaining to mineral production and its contribution in the creation of national wealth, we would entirely say that, industrial mining production collapsed with the bankruptcy of GECAMINES (which used to produce close to 70% of export revenues for the DRC for over 20 years); currently, we can see a proliferation of mining operators in Katanga on mining concessions belonging to or having belonged to GECAMINES. Other public or semi-public operators such as MIBA, OKIMO and others experience serious problems related to poor management, dilapidated state of the tools of production and poor policy for payment of dividends by the State.

The mining sector is one of the main sectors that can contribute in short term to the economic growth of the country. The sector-based study of the World Bank entitled «good governance in the mining sector as a factor of growth », published in 2008 estimated that the mining sector would contribute 5 Billion USD to the GDP (that is about 50% of the GDP) and 730 million USD of tax revenue between 2013- 2017.[55]

However, the mining sector is facing a number of challenges. In 2002, in the context of negative economic growth, the mining sector contributed 30.33% of the GDP, manufacturing industry 8%, transport and telecommunication 21.2% and trade 9.1%, in 2007, with a growth rate estimated at 6.3%, the contribution of the mining sector fell to 6% because it was very

[53] Gaps in the mining sector Congo (RDC), http://www. afriquecentrale.info/centrale
[54] MAZALTO, M., « Réforme minière, enjeux de gouvernance et perspectives de reconstruction », in *Afrique Contemporaine,* n°227, p.57
[55] Democratic Republic of Congo : Support project of the mining sector : promines, p.1

affected by the slowness of structural reforms.[56] While towards 1970s, at the time when the mining sector used to contribute nearly 70% of the Gross Domestic Product (GDP), with an annual production of GECAMINES of 400 000 tons, the mining towns of Kolwezi, Likasi and Lubumbashi were marked by the quality of life of their residents and the extreme variety of administrative and commercial activities.

Quite a big number of national and international reports highlighted the high level of fraud (large quantities of mineral ores and precious substances are mined informally and leave the country illegally), corruption and other practices of poor social and environmental management which demonstrate serious lack of understanding, or even defiance of the right of the Congolese people to benefit from the national natural wealth and the necessity to protect environment, ecosystems and arable land of the DRC.

I.2. Description of the mining sector

The 2.3 million Km2 of the national territory is full of more than 1100 different mineral substances.[57] Four main regions namely: Katanga, the two Kassaï regions, North-Eastern Congo and Kivu-Maniema contain majority of the mineral resources known. Other provinces also have mineral resources and/or mineral potential and a big part of these are yet to be explored.

Mineral resources per province

PROVINCE	MINERALS
Bandundu	Diamond, gold, oil
Bas Congo	Bauxite, pyroschist, calcium, vanadium, diamond, gold
Equateur	Iron, Copper and related minerals, gold, diamond
Orientale	Gold, diamond, iron
Kassaï Oriental	Diamond, iron, siver, nickel, tin
Kassai Occidental	Diamond, gold, manganese, chromium, tin
Katanga	Copper and related minerals, cobalt, manganese, calcium, uranium, charcoal
Nord Kivu	Gold, niobium, tantalite, cassiterite, beryl, Or, niobium, tantalite, cassiterite, beryl, tungsten, monzonite
Sud Kivu	Gold, niobium, tantalite, cassiterite, sapphire
Maniema	Tin, diamond, cassiterite, coltan

Source *: World Bank document of May 2008*

[56] Speech by Philippe FUTA Minister for National Treasury and Trade during the 5th day of mining days of the DR Congo
[57] Democratic Republic of Congo, good governance in the mining sector as growth factor in World Bank¸department of hydrocarbons, extractive industries and chemical products, AFCC2 African Region, May 2008, p.15

The copper belt of Katanga Province contains copper, cobalt, zinc and uranium mineral resources of international scale. From the beginning of mineral exploitation around 1990 until 2003, a total of 18 million metric tons of cupriferous metal were produced[58]

Katanga Province has a substantial reserve on non-ferrous metal. The resources identified in the copper belt are estimated to be 70 million metric tons of copper, 5 million metric tons of cobalt (the cobalt reserve being the highest in world) and 6 million metric tons of zinc (representing 3% of world reserves)[59]

In the two Kassaï provinces, diamonds are mined from alluvial and detrital deposits and from kimberlite chimneys. Only a small quantity of diamond extracts is classified in the category of gems. Pertaining to carats, it is important to note that the DRC has the highest number of diamond deposits in the world. Nearly 150 million carats representing 25% of the total world reserves known. The potential of discovering new diamond deposits is not known, but the United States Geological Survey estimates that 500 million carats could be discovered in the DRC [60]

Big gold deposits have been mined in the districts of Kilo and Moto, both situated in the Ituri region in the Eastern Province. Gold is also mined in Kivu and Maniema provinces, which have world class deposits.

There is need to indicate that the geological context of gold in North-east Congo is largely similar to other Precambrian regions rich in gold in the world. The great sedimentary basin of Congo, in this particular case, the central basin, has hardly been drilled for its oil potential. Moreover, some researches done on the shores of Lake Kivu proved that, the methane layer at the bottom of the lake, would be used for electricity production.

I.3. Innovations brought by the Act n° 007/2002 of 20th July 2002 on mining code

From the onset, it is important to say that the current mining code appears like an instrument coming to make up for the insufficiencies of the former code. It encourages consumption, treatment and processing of substances in the country, it grants equal import credit to third parties from the mining tax paid on products sold to an entity or to a local processing company.

We also need to point out that the new code is supported by the mining regulation instituted by the decree n°038/2003 of 26th March 2003 on mining regulation in conformity with the Act n°007/2002 of 20th July 2002 on mining code in articles 9(a), 326 and 334.

- The mining code introduced several innovations with a view to taking into account demands of international mining industry, concerns of the investors and national community interests just but to mention a few :
- The repeal of the conventional mining regime in favor of mining regime of common law, which subjects all operators to the same conditions ;
- The limitation on the role of the State essentially to the regulation and promotion of the sector ;
- The introduction of clear conditions and objectives of guarantee procedure, renewal

[58] Idem
[59] Report on mining exports from Katanga taken from the official data on exports of the Congolese Control Office.
[60] Democratic Republic of Congo, good governance in the mining sector as a factor of growth in the World Bank Document : Department of hydrocarbons, extractive industries and chemical products, AFCC2, Africa Region ; May 2008, p.16

and expiry of mining rights thus guaranteeing swiftness and transparency in the processing applications for mining rights and quarries by a public department with a legal status known as mining register;
- The institution of fiscal, customs and foreign exchange regime specific to the mining sector, a regime which is not only exhaustive and exclusive but also competitive and attractive ;
- The total exemption of access rights for exportation of products from mining covered by a mining title,
- The application of preferential rates for imports of goods meant for mining and drawdown of contribution rates related to mining activity ;
- The institution of mining sureties so as to secure mortgage creditors ;
- The guarantee for the holders of mining rights or quarries to freely transfer the profile of their activities to foreign countries ;
- The insertion of environmental provisions enabling reduction of negative effects of the mining activity on environment;
- The introduction of provisions governing mining rejects and small mines.

We also note the institution of mining tax as granted by Article 242 of the code where:
- 60% is to the Central government ;
- 25% is to the province ;
- 15% to the Town or to the Province concerned by the mining activity.

These innovations introduced by the State to the investors and local populations were aimed at:
- Making the mining sector attractive through improvement of conditions for acquisition, renewal of mining rights and their transfers with the consequence of increasing and diversifying mining production ;
- Improving the socio-economic well-being of the local populations ;
- Improving infrastructure ;
- Reducing the freezing of mining concessions ;
- Repealing the conventional regime ;
- Improving knowledge of the sub-soil.

II. IMPLEMENTATION OF THE NEW MINING CODE OF 2002 TO 2012: WHAT APPRAISAL?

The assessment for the years following adoption of a new mining law and reshaping of institutions illustrate that, lack of a policy which takes into account national specificities, any attempt of renewing the practices seems doomed to fail.

Thus, the 2003-2006 period is characterized by multiple infringements to the mining law by Congolese authorities. In Katanga and in Kassaï, big mining contracts are signed with multinationals.[61] The commitments taken, developed in form of economic partnerships, grant the biggest part of mineral and movable resources held by state companies to private investors.

Lack of transparency is worrying. Once the content of the agreements are revealed, big financial imbalances are noticed. In about sixty big contracts, the supreme Congolese state,

[61] MAZALTO, M., *op.cit*, p.59

gave in the biggest part of benefits to multinational companies. These contracts referred to as Lenin contracts or one-sided contracts signed to the detriment of the Congolese nation, should be recognized by the Congolese Government and by donors and investors. T

According to the Director General of the Mining Register, the influx of foreign investors does not always correspond to the expected economic recovery. The report is that out of the 4542 mining titles granted to 642 companies since 2002, for an area which covers a third of the surface area of the country i.e. 33% of the surface area of the country, only ten exploration licenses were converted into mining licenses.[62]

The mining is made possible thanks to sub-contracting strategies, or even illegal recourse to hand illegal miners which constitute a very low labor cost and in the absence of control mechanisms and therefore transparency; such practices continue to prosper at the expense of local populations.

In principle, the application of the mining code should be accompanied by the establishment of a validation commission for mining rights which has not worked within the standards and was unable at its dissolution to develop any project. The code also provided for delimitation of deposits to subject to tender. Unfortunately, the protected areas were granted as mining sites.

II.1. Regulation of the sector by informal rules

The institutions charged with the responsibility of managing the mining sector do not function properly, due to informal rules which constitute the bottleneck[63]which means that, the rules of operations of the institutions can certainly be formally codified, but those informally enacted by customs and bad habits sometimes create inertia, and Professor Kabuya Coordinator of the Technical Committee for Monitoring and Evaluation of Reforms (CTR) explains that, mineral resources can weaken institutions of a country through corruption and looting of the resources, mineral proceeds can lead to armed conflicts and provide the means to engage in these conflicts.

II.2. Reading on the taxation of the mining sector

From the onset, there is need to state that the tax system provided in the mining code promotes investments thanks to multiple exemptions. However when we analyze the tax and customs aspects of the code, we note tax exemption of this sector in customs while subsequent efforts for rationalization of our customs systems mainly to imports enabled adoption of an appropriate pricing to stimulate investments in all sectors.

Since the March 2003 tariff reform, capital equipment are no longer taxed at a rate of 5% of customs duty and 3% of tax on the turnover for import; while imports exempted legally, nevertheless pay administrative tax of 5%; not withstanding that, the single rate of 2% withheld at the research phase and 5% at the mining phase for imports mainly on equipments in the mining sector does not seem to take into account the balance of interests.

The abolition of access fees, substituted for mining tax whose rate appears underestimated not taking into account the periods of increase in value of mining products on the international

[62] Gaps in the mining code Congo (RDC), http : //www.afriquecentrale.info/centrale

[63] « Problems of exploitation of mineral and natural resources in the DRC », *Observer Group Newspaper Thursday, March 01, 2012*

markets especially when we know due to almost systematic under valuation of real export values, the base of this tax is reduced further.

In summary, the tax and customs regime of the mining code has traces of a taxation which is much more conventional than sovereign because it has seeds of conflict which reduce the sphere of fiscal sovereignty of the State. With the institution Value Added Tax (VAT) which provides for abolition of all exemptions and reductions of taxes on turnover we can imagine that an important sector like mining is excluded from the scope of VAT, because the mining code provides for an intangibility period of 10 years.

II.3. Place of small scale mining sector

Among the companies exploiting mineral resources of the DRC many continue to maintain ambiguous relationships with artisanal miners. For decades, in the provinces of Kivu and Kassaï, artisanal mining sector has developed in a very informal and anarchical manner.

Very recently in Katanga, we note that majority of mining companies who mine without holding special license have more or less formal recourse to labor from diggers to reduce their production costs and we note a difficult co-existence between those who have mining titles and artisanal miners[64] . But the mining law recognizes the existence of miners and in this regard the law provides for the creation of perimeters known as «artisanal » in which the Congolese nationals who have attained the age of majority with a mining card are empowered to work. Several provisions of the code are on good practices and security standards which would be a guarantee to this category of miners.

In practice, the Government preferred to give priority to issuance of concessions to foreign private investors, areas which henceforth represent more than 27% of the national territory; with the new code, formal allocation of mining areas reserved for hand miners was alluded to but not implemented. By themselves, the miners are investing in abandoned sites or untapped by the industrial sector.[65]

It is important to emphasize that hand miners supported and secured by State departments hardly exists in the DRC. It is rather preferable to talk of informal activity of diggers.

The artisanal sector is also godsend for some politico-administrative authorities, who tap into all players in the chain, from production to export. Thus, in the eastern Kassaï for example, artisanal miners do not have access to the sites due to restrictions from these authorities.

Artisanal mining in the provinces of Kassaï, Kivu and Katanga is at 92% of officially registered diamonds, 8300 tons of cassiterite (or 3% of the world's production) 8000 kg of gold (or 65% of the total production of the DRC) and 80 % of copper and cobalt officially exported from Katanga fills a proeinvest Caz project (a UE-ACP partnership program). A study on capacity building of intermediary organizations of extractors and miners in the mining sector in the DRC estimates that up to 80% to 90% of mining production of some minerals originates from artisanal mining.

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64 As was indicated by the Minister of Mines during the General Assembly on mines held in 2008

65 MAZALTO, M., *Op.cit.,* p.65.

II.4. Mining fraud

A massive and systematic violation of the law by operators has been observed. It focuses on one of the typical frauds reported by the mining registry which is the use of research license while the deposits are known and the operator is instead doing the mining.

We also note the financial frailty of some companies found within the Congolese territory. To get a search permit or a license for search of quarry products, each company is required to provide a financial capacity certificate to take an undertaking as an investor. But, several mining companies provide these guarantees without having the necessary means for their commitment. Another remark is that some mining operators enter into an agreement with commercial banks during payment of their taxes, in such a way that the banks prepare integral payment documents for amounts which are given to operators for control purposes but in reality only a modest part of the revenues received is paid at the treasury.

Another aspect of fraud consists of militarization of mining sites. Indeed, since 1996, Walikale territory has become a real sanctuary for uncontrolled armed groups composed of both the Democratic Forces for Liberation of Rwanda (FDLR) and local splinter groups, Mayi Mayi who are often in close collaboration.

In these conditions, National Armed Forces of Congo (FARDC) deployed in Walikale were not only supposed to hunt down and kick out these uncontrolled irregular forces, but also secure the people and their property. Unfortunately, rather than being part of the solution, these armed forces became an integral part of the problem by getting involved in mining, illegal collection of taxes on barriers they had erected themselves under pretext that they are securing transporters routes and in marketing mineral products.

Brigades were sent to Walikale to fight the FDLR and their allies got involved in trafficking minerals or in collaboration with traders who seek their protection through money or a share of their business.[66] Some high ranked officers of the army even have private wells for artisanal mining. They are represented on the mining sites by officers who do not take orders from anybody and communicate directly with their bosses through mobile phones. The existence of a mafia led to the minerals from the Eastern part of the DRC being referred to as «blood diamond»[67]

The question which arises is that knowing how these military officers accustomed to easy money from minerals extracted from their zones of surveillance are going to let go this juicy sector because even when they are transferred elsewhere, they still remain in this business through intermediaries? What constraining measures will be imposed upon these hardliners who have continued with artisanal mining over the last six months while mining activities in this zone were suspended through an order issued by the minister in charge of mines?

During a mission carried out by the Senate in the provinces of North and South Kivu, Maniema and Eastern Province, the bitter report is generally that, there is lack of equipment and qualified staff required to ensure preparation of production and marketing data, besides 80% of exports escape state control; They find their way into the markets of neighboring countries, leading to loss of big revenue for the Congolese Treasury.[68]

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[66] Mining sector of North Kivu :Status report for the reopening of activities, Consultation table of the mining sector Goma 16th April 2011 p.14

[67] Idem

[68] Senate : Report by the Commission of enquiry on the mining sector, September 2009 p.46

II.5. Extraversion for processing of mining products

During the general assembly of miners held in Kinshasa on 12th March 2008, the Minister for National Treasury deplored the fact that nearly all the production declared is exported either in crude or semi crude state. The DRC does not therefore get any benefit from these exports since processing is done elsewhere. It is however important to state that since the lifting of the suspension for mining activities in Eastern Congo, the Minister for Mining gave a moratorium time limit of six months to all accredited counters for the staniferrous sector and their by-products to install processing units for mineral products before their export.[69]

This approach is very encouraging and should be extended to the entire national territory. This effort of pushing mining operators to move from artisanal mining to industrial mining could in the end add value to mineral products from Eastern Congo on the international market. Thus, there would be the florescence of PMI with the consequence of creating jobs. But in a context of chronic energy deficit, we are wondering how such units of production will be operational. The solution would be recourse to electricity generators but the cost of fuel is on the rise. If there is therefore need to assess this cost, we wonder if the local mining operators will be in a position to afford these charges.

The Government's desire to move from artisanal mining to industrial mining illustrates total ignorance that such a wish is impossible for several mining zones and in this case that of Walikale, which is remote and enclosed due to lack of road infrastructure but also living in darkness since time immemorial. The time limit of six months given by the Minister for Mining is almost reckless since it is impossible during this time to industrialize this sector.

These difficulties of moving from artisanal mining to industrial one breed confusion between dealers having a mining title and the digger when their work methods remain the same. Indeed, lack of basic infrastructure, mining by companies with a mining title remain artisanal, showing a valid mining title signed by a competent authority does not seem to impress the diggers especially when this title covers a disputed area as is often the case.[70]

II.6. American law « *Dodd Franck* »: instrument of strengthening the mining law

Originally, the first initiative for policing mineral trade is from the UNO. Different resolutions in relation to illicit mining of natural resources in the DRC were passed by the United Nations Security Council since the beginning of 2000s. In 2008, the Council passed the resolution 1856 enjoining all states to take the necessary measures to stop illegal trade in the DRC.[71]

Unfortunately, this system of identification and international sanctions against dealers and companies in business relations with armed groups proved not very inefficient since on the one hand the sanctions committee pursues a restrictive policy and on the other hand, there is lack of political will from the states. Thus, the American law Dodd Franck wants all minerals from the DRC and from its neighbors to be certified to avoid blood minerals.

This law came into force on 1st January 2012. Miners in Eastern Congo are asking industrial dealers to continue buying their products before the coming into force of this law. These

[69] Minister of Mining, letter n°CAB.MIN/MINES/01/0241/201, Kinshasa, 14th March 2011
[70] Mining sector North Kivu, *op.cit* , p.17
[71] Behind the problem of mineral conflict, government of Congo, http://www.bamanisajean.unblog.fr

miners think that it would be more prudent to stay with these minerals before coming into force of the law since these minerals often take time to arrive at their destination which risks infringing this law.

In our case, this law is not bad, on the one hand it is a way of protecting civilian populations against any acts of violence as a result of wars, and on the other hand fight against illicit trafficking of minerals since the government cannot easily have control over mineral trade in conflict areas and from an economic point of view the state will not get any benefit from mining taking place in these areas.

III. FUTURE PROSPECTS

III.1. Proposals at the international level

Unable to establish legal mining for minerals in the Democratic Republic of Congo, especially in the conflict areas of Eastern part, some international players are seeking to prevent the flow of minerals from these conflict areas into the raw materials market. This is done with the aim of putting in place a traceability and certification mechanism between the mines and the point of export and to encourage importers to only buy certified minerals. This mechanism should curb against fraudulent mining so as to have legal mining and consequently lead to the development of mining areas.

In terms of traceability and certification of the supply chain, International Tin Research Institute, the German Federal Bureau of Geological Science and Natural Resources and the United Nations with their business centers constructed in the two Kivus, launched their projects whose implementation lies on the Congolese administration in charge of this sector.[72]

The initiative of the International Tin Research launched in 2009 in its first phase had the objective of verifying the legality of exports in the Kivus. The second which started in June 2010, was aimed at testing a certification system specifically in the two pilot sites of Bisie in North Kivu and Nyabilwe in South Kivu. This system consisted of weighing, packaging and labeling mineral cargo before leaving the mining site, and recording different points of passage so as to trace the supply chain.

Resolution 1906 of 2009 by the UN Security Council recommends the creation of business centres in North and South Kivu with a view to centralize production and in this regard, facilitate its control and certification by the administration. Normally the existence of this resolution should create fear on the part of those who come to loot mineral resources in the Democratic Republic of Congo particularly in the two Kivus where we indeed note the relevance of semblance of armed conflicts.. The real problem is looting of natural resources from this area.

It is certainly true that proceeds from revenues generated by departments in charge of supervising the matter do not attain the level expected since the country as a whole and her people remain very poor. Why is emphasis put in the East while other parts of the country also have their mineral resources? In our humble opinion we think that it is in this

[72] It pertains to provincial division of mines, mining registry, public service assistance and support for (SAESSCAM) and Evaluation and Expertise Center.

area where investors focus their attention. At least if at the international level ways are put in place so as to fight against abusive use of Congolese minerals, this should call upon the international community to act, since these products are sold at the international level.[73]

We also need to state that, in order to correct weaknesses in this sector, the World Bank is funding PROMINES project to a tune of 92 million dollars. It is for building the capacity of the main institutions in management of the mining sector, improving the conditions so as to increase investments in the sector and revenue from mining and to help in raising socio-economic benefits from artisanal and industrial mining, a factor and a source of growth in the DRC, the mines can considerably help in reducing poverty.

III.2. Proposals at the national level

A real problem of governance arises in the management of this sector, and this would translate into lack of reliability of institutions in charge of managing the Congolese mining sector. Other requirements to do with good governance can be underlined mainly as:

- ✓ Adoption of a standard contract applicable to all mining transaction ;
- ✓ Establishment of a national mining map to identify all sites and industrial and artisanal activities exercised there in ;
- ✓ Stop funding of armed groups so as to avoid illegal mining. It is important to state at this point that the role of the army not only continues to be a serious problem for the mining sector but also for other sectors of the Congolese economy. Allegations made by non-governmental organizations and the United Nations indicated that high ranking members of the Congolese armed forces are directly involved in trafficking and counterfeiting artisanal mining production.
- ✓ Contribution of the State to the share capital: one of the key principles of good governance in the mining sector is the net and precise distinction between the role of the State as a regulator of the sector and a potential shareholder in the joint ventures. But, the State's share must be enlarged rather than the weak share of 5% reserved for it in the mining code according to Article 71(d) which provides that «granting of mining license is subordinate to the transfer of 5% of the share capital to the State » ;
- ✓ Identification and maximization of revenue require the Government to come up with and put in place an integrated governance strategy which put into account individual powers of departments in charge of administration of mines, financial controls, OCC and the Central Bank of Congo ;
- ✓ Eradicate fraud which is a real curse in this sector since more than 80% of exports are illegal and uncontrolled ;
- ✓ Create processing facilities for mining products to enable the DRC to get benefits in terms of value addition ;
- ✓ Create gem-cutting workshops for diamonds in Kinshasa or in mining sites ;
- ✓ Supervise artisanal mining sector ;
- ✓ Create a mining fund for perpetuation of the sector and sustainable development.

CONCLUSION

The love for money brought about by mining and marketing of precious substances becomes a very big stake to the extent of attracting massive influx of regular and irregular miners.

[73] As was stated by an Officer of the Mining Registry on 30th March 2010.

Unfortunately in the ranks of miners there are internal and external social and professional categories in the country, driven by one preoccupation of becoming rich instantly, and therefore getting involved in fraudulent mining of the resources, coupled with acts of violence and violations of collective and individual rights and freedoms.

The promulgation of the Mining Code in July 2002 gave rise to a lot of hopes for the recovery of huge mineral resources of our country. Nine years later, these hopes are not certainly lost even if they have not been sufficiently realized.

Several strategies are implemented so as to ward off what appears paradoxical between the scandal of mineral resources and endemic poverty which seem to be the result. This is why in 2008 there was a general assembly of miners organized to debate on this issue.

However, it has generally been acknowledged that thanks to the Mining Code, there has been an increase of activity in this mining sector, financial controls like DGRAD, DGI reported greater revenues than the previous period. However, we cannot ignore certain realities which characterize this sector and which constitute a slow down on the development of the Congolese people and are an impediment to fighting poverty.

IN THE MATTER OF ARMED ACTIVITIES ON THE TERRITORY OF CONGO: NEW APPLICATION (DEMOCRATIC REPUBLIC OF CONGO- VS- RWANDA)

By **P. DJUMA BILALI LOKEMA***

INTRODUCTION

Looking into the *matter of armed activities on the territory of Congo (Democratic Republic of Congo vs Rwanda)* beams a special light on a dispute which has left a bitter taste among the Congolese people and which has left the feeling of an unaccomplished work, as it is true that the DRC has embarked on a spiral of judicial victories[74] that the recent defeat in the matter of Diallo[75] would not tone down the pain.

Beyond the feelings, it is particularly interesting to navigate the twists and turns of this matter which proclaims *urbi et orbi*, (to the city and to the world) and can be in a sensational manner, the inter-state consensual character of justice which does not adapt well with the unilateral referral to a court of law, without the consent of the defendant.

However the hard questionings, for the Congolese people are « what next? ». Should we leave with impunity a State triggered against Congo through armed aggression in defiance of the United Nations Charter, the OAU then now the African Union, and all international standards for the reason that it will get protection from the big powers, without getting compensation for the damages it will has caused?

The law that would abandon the victims without punishing the person responsible and compensating for the losses they would have suffered is no longer the preserve of the city in the contemporary society. The development of international humanitarian law is very clear in this regard.

Getting into the details of the matter of *armed activities* amounts to not only revisiting the judicial mode of settlement of disputes but also exploring the multiplicity of ways open in the event where one of them led to an impasse, following a positivist analysis based on a critical approach.

These remarks do not fall within the framework of classic commentary of a court order. We find a balance between traditional elements and special aspects, which distance themselves

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74 For the Congolese people, we shall keep the victory against Belgium in the matter of *Arrest warrant of 11th April 2000,* as well as the crashing victory against Uganda in the matter of *armed activities on the territory of Congo, Rec. 2005.* The two matters a special significance. Crowning against the former colonial power, for the first matter, and success against an aggressor which the United Nations Security Council was unable or did not want to condemn the illegal act.

75 In this matter, the DRC escaped a significant pecuniary condemnation which would have seriously compromised and for several years Congolese public finance. See ICJ, order of 30th November 2010 in relation the matter of *Ahmadou Sadio Diallo* (Republic of Gunea vs Democratic Republic of Congo), *Rec. 2010.*

from the pre-determined sphere from the point of view of form, which the author wants to emphasize.

It is therefore important to extend the jurisdiction of the ICJ to understand the dispute presented to it by the DRC, after presenting the facts of this matter, before envisaging possible solutions which would finally and permanently settle the dispute between the Rwandese and Congolese neighbors within the Great Lakes region.

I. FACTUAL DATA

The facts of the matter of *Armed activities on the territory of Congo* («new application 2002 ») (Democratic Republic of Congo vs Rwanda) find their roots in the refusal by Rwandan and Ugandan troops, who had militarily supported Laurent-Désiré Kabila and his *Alliance Démocratique pour la Libération du Congo* (AFDL)[76] (*Democratic Alliance for Liberation of Congo)* to overthrow the regime of the Zaïrean dictator Mobutu Sese Seko, precisely on 17th May 1997[77], to leave the territory of the Democratic Republic of Congo

A number of observers dwell exclusively on the 1998 aggression and keep a guilty silence for the act of the same nature perpetrated by the habitual aggressors in 1996. The justification for this seems to be found in the fact that the 1996 war is analyzed as an incidental in the revolution. The endorsement of the Rwandese and Ugandan offensive against the Zairean army by the former companion of Che Guevara arms, Laurent-Désiré Kabila, does not transform, from a legal point of view, the nature of belligerent action. In fact, the initiators of the Geneva conventions of 12th August 1949 and their additional protocols of 8th June 1977, classified in the typology of armed conflicts that of an international character.

At the absence of a decision from the Court on the substance of the matter crystallizing the facts deemed *ne variatur*, there is need to state that the Democratic Republic of Congo presented evidence of the origin of the conflict with Rwanda, mainly in diplomatic conferences in Libreville, Lusaka, Victoria Falls and Sirte, and especially in a document entitled *The White Paper,* published by the Congolese Minister for human rights. The same facts are found spread out in some resolutions of the United Nations Security Council devoted on armed conflict in the Democratic Republic of Congo[78]. If we consider that Congo reprimands and pursues Rwanda and Uganda for similar facts, the order issued by the International Court of Justice in the dispute between Kampala and Kinshasa can clarify this issue further[79].

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[76] Read with keen interest the works of Martens, Ludo, *Kabila and Congolese revolution, Pan-africanism or neocolonialism?*, Anvers, EPO, 2002, pp. 412 et ss.

[77] Voy. N'gbanda Nzambo, *organized crimes in Central Africa. Revelations on the Rwandese and western networks*, Paris, Duboiris, 2004, p.456 ; this is how they killed the industry *: the last days of Marshal Mobutu*, Paris, Edition Gideppe, p. 447 ; Vunduawe Te Pemako, In the shadow of the leopard. *The truths of the Mobutu Sese Seko regime,* Brussels, Edition Zaïre Libre, 2000, p. 484.

[78] See particularly the Resolution 1341 (2001) of 22nd February 2001, in which the Security Council « demands in point 2,once more that Uganda and Rwandese forces, as well all other foreign forces withdraw from the territory of the Democratic Republic of Congo, in accordance with Paragraph 4 of its Resolution 1304 (2000) and with the Lusaka cease-fire agreement, and calls upon these forces to take without any undue delay the necessary measures to accelerate their withdrawal ; in point 9, the Council condemns the massacres and atrocities committed on the territory of the Democratic Republic of Congo and once more demands that all parties concerned immediately stop these human rights and international humanitarian law violations », Resolutions 1323 (2000) of 13th October 2000, 1304 (2000) of 16th June 2000, 1234 (1999) of 9th April 1999, etc.

[79] ICJ, order of 19th December 2005 in relation to the matter of *Armed activities on the territory of Congo* (Democratic Republic of Congo vs Uganda), *Rec. 2005*, notwithstanding the authority in relation to the subject matter judged between the parties, The Court condemned Uganda for the accusations made against her.

In her application instituting proceedings, the Democratic Republic of Congo, in supporting points of claim other than the main infringement[80], namely armed aggression in violation of conventional and customary provisions, asks the Court to « rule and order that :

a) Rwanda has violated and continues to violate the United Nations Charter (article 2, paragraph 3 and 4) by violating human rights which constitute the goal pursued by the United Nations in terms of maintenance of international peace and security, similarly articles 3 and 4 of the AU Charter ;
b) Rwanda violated the international human rights charter as well as principle instruments of human rights on protection mainly the Convention on Elimination of all forms of Discrimination against Women, International Convention on the Elimination of forms of Racial Discrimination, Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment, Convention on Prevention and Punishment of the Crime of Genocide of 9th December 1948, WHO constitution and status of UNESCO ;
c) By bringing down in Kindu, on 10th October 1998,a Boeing 727, a property of Congo Airlines, and therefore causing the death of forty civilians, Rwanda also violated the United Nations Charter, the Convention in Relation to International Civil Aviation of 7th December 1944 signed in Chicago, the Hague Convention of 16th December 1970 on Punishment for Illegal Capture of Aircrafts and the Montreal Convention of 23rd September 1971 on Punishment of Illegal Acts directed against Civil Aviation Security ;
d) By killing, massacring, violating, slaughtering, crucifying, Rwanda rendered herself guilty of genocide of more than 3 500 000 Congolese nationals, in addition to the victims of recent massacre in the town of Kisangani, and violated the sacred right to life in the Universal Declaration of Human Rights and in the International Convention on Civil and Political Rights, the Convention on Prevention and Punishment of Genocide, and other relevant international legal instruments »[81].

It is not enough to present the facts so as to obtain a judgment as to the substance, according to the Pretorian maxim of *da mihi factum*, *dabo tibi jus* even though referral to the court before which the matte is brought, must be regular in the respect of the procedure, without raising the least contestation on the admissibility of the application.

Rwanda and Congo, past regional partners[82], economically and politically, parted ways the day after the assassination of Rwandese and Burundian heads of state Juvénal Habyarimana, and Cyprien Ntaryamira respectively, on 6th April 1994 and genocide and counter genocide which followed these assassinations[83].

Without taking a plunge in the abyss of the first aggression by Rwanda[84], Uganda and

[80] According to the Resolution 3314(XXIX), aggression is mainly defined as « use of armed force by a state against the territorial integrity, political independence or any other manner incompatible with the objectives of the United Nations Charter ». It enumerates seven series of acts which fit into the category of acts of aggression and leaves at the same time for the United Nations Security Council the option of naming other acts of aggressions beyond those mentioned in the said Resolution.

[81] ICJ, *Rec. 2006*, par. 11, pp.14-15.

[82] It is important to remember excellent relations between Kinshasa and Kigali under the reign of Presidents Mobutu Sese Seko (D.R. Congo ex-Zaïre) and Juvénal Habyarimana (Rwanda), strongly supported by France.

[83] Pourtier, Roland, «Central Africa in turmoil. Stakes of war and peace in Congo and the neighboring countries » in *Hérodote*, n°111, 4th trimester 2003, p. 11.

[84] In an interview with the private television channel Congolese "CKTV" on July 10, 2011, the former President of the lower House of the Zairian Parliament, Anzuluni Mbembe confirmed our words. One can only regret that the Congolese political actors do not record major events they witness in the performance of their duties. The same feeling is found

Burundi against the DRC, the dispute following the armed aggression by Kigali and its aftermath is the main feature of this study.

In spite of several diplomatic meetings[85] and several United Nations Security Council Resolutions[86] and a big number of international agreements[87], the presence of Rwandese military still continues unabated. Immeasurable and unquantifiable damages caused by the military action of Rwanda in the DRC can be seen both on the people[88], wildlife[89] as well as on natural resources[90].

Like Uganda, co-perpetrator of armed aggression against Congo, the International Court of Justice established in an uncontestable manner and, in the presence of the parties concerned her responsibility in damages caused to the DRC in unequivocal terms : « After examination of the file and bearing in mind the internationally illegal acts which Uganda was found liable (illegal use of force, violation of sovereignty and territorial integrity, military intervention, occupation of Ituri, violation of international law in relation to human rights and international humanitarian law, looting and mining of natural resources of the DRC), the Court considers that these acts are prejudicial to the DRC, as well as to people present on her territory. After establishing that this prejudice was caused to the DRC by Uganda, the Court declares that the latter is supposed to suffer the consequence of compensating for the said loss »[91] Kinshasa has never stopped accusing her neighbor Rwanda of aggression, even recently following the pseudo-rebellion led by Laurent Nkundabatware[92].

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in the reading of the last letter dated May 11, 1997 that Marshal Mobutu had sent to his French counterpart Jacques Chirac. He wrote, "the United States were my allies, remember the Angolan episode. I reserve the right to publish in the next few days my memories. Then, the world will finally know hitherto unsuspected truths. Voy. Vunduawe Te Pemako, op. cit., annex 12. Sad reality for a cognitive interest to see the death of the man with the leopard skin without the promised writings. Could the estate offer to the nation such materials, assuming that his writing had begun, to be done posthumously?

85 Victoria Falls, Gaborone, Lusaka, and Pretoria.

86 See Resolutions 1234, 1258, 1273, 1279, 1291, 1304, 1316, 1323, 1341.

87 Sirte Agreement of 18th April 1999, Lusaka Agreement of 10th July 1999, Pretoria Agreement of 30th July 2002 and Luanda Agreement of 6th September 2002. On the Sirte Agreement, read Bula-Bula Sayeman, « Sirte Agreement of 18th April 1999 for settlement of disputes in the Great Lakes region: reading notes », *African Review of International and comparative law*, vol. 11, n°3, pp. 418-436.

88 For American NGO International Rescue Committee (United States of America), cited by Bula-Bula, Sayeman, *International Humanitarian Law*, Louvain-La-Neuve, Academia-Bruylant, 2010, p. 222, Mortality Study Eastern Democratic Republic of Congo… « Of the 1.7 million excess deaths, 200,000 were attributable to acts of violence », www.theirc.org/mortality.htm. Assessment done in 2000. It is likely that armed aggression caused, according to this NGO, in 2007 more than 5 million deaths, equivalent to a tenth of the deaths during the second world war of 1940-1945. Congolese internationalist is developing further this thinking on the number of people dead following the military adventure of the Rwandese-Ugandan-Burundian coalition. « It is difficult to understand that more than 5 million Congolese people perished in the armed aggression of 2nd August 1998 against their country without African and non-African players co-perpetrators and accomplices come to her assistance at the time when the Council created TPIR for atrocities which caused between 500.000 and 1.000.000 deaths in Rwanda? » Bula-Bula, S., *op. cit.*, p. 32. During the recent defense of doctorate thesis in law at the University of Kinshasa on Friday the 22nd July 2011, the doctorate student, assistant lecturer Bokolombe Batuli Yaseme, in a study on « *a legal dualism ordered for the prevention and punishment of serious violations of humanitarian international law in Congolese domestic law* » gave a figure of six million deaths, as presented by International Rescue Committee.

89 See, Department of human rights, the white paper. The war of aggression in the Democratic Republic of the Congo three years of massacres and genocide "behind closed doors', special issue, 2001, pp. 9-17. The white paper, volume 1, volume 2.

90 See the reports of Group of experts of the United Nations on illegal mining of natural resources and forms of wealth in the DRC, (S/2001/357) (S/2001/1072) .

91 ICJ, order of 19th December 2005, Matter of armed activities on the territory of Congo (D.C. Congo vs. Uganda), Rec. 2005, par. 259, p. 257.

92 After the 2006 elections, a rebellion broke out in the eastern part of the DRC precisely in Kivu. The dissident general who is also dethroned from his rank, Nkundabatware leads rebels whose claims and links with Kigali were undoubtedly receiving support from the latter.

What was the procedure in this matter before envisaging contestation of the jurisdiction of the Hague- based Court by the defendant state.

II. PROCEDURE FOLLOWED

Following the above described facts, the government of the Democratic Republic of Congo filed at the court registry of ICJ, on 23rd June 1999, an application instituting proceedings against Burundi, Uganda and Rwanda pertaining to disputes relating to « armed acts of aggression perpetrated [by these states] on the territory of the [DRC] in flagrant violation of the United Nations and the AU Charters[93]. The same day, the Congolese application was communicated to the respondent states but also to member states of the statute establishing the Court.

At the initial stages, the President of the International Court of Justice took the order of 22nd October 1999, in agreement with the parties, fixing the deadlines for depositing documents of written procedure which would be on the jurisdiction of the Court and the admissibility of the application. There is need to specify that before this order, Rwandese government official had informed the Court that it did not have jurisdiction to hear the matter. Furthermore the application filed by the DRC would not be admissible. Consequently, before any substantial procedure, it would be necessary that Court touches separately on the questions of jurisdiction and admissibility. The Court had set 21st April 2000 as the date for filing of the statement of the DRC case. Rwanda had filed her statement of the case within the time limit given but the DRC obtained an extension[94] of the time limit to 23rd January 2001 to file her counter-statement of the case.

Having withdrawn her claim on 15th January 2001, with the acceptance of Burundi and Rwanda respectively on 19th and 22nd January 2001, the President of the ICJ gave an order on 30th January 2001 noting the withdrawal of the matter and ordered that it be removed from the roll[95].

It is important to state that the two parties not having a judge of their nationality in the composition of the Court, the DRC appointed Professor Mavungu Mvumbi-di-Ngoma as an *ad hoc* judge while Rwanda had chosen the South-African Christopher John Robert Dugard. The two *ad hoc* judges also sat in the new matter.

In spite of the withdrawal, the DRC came back with a new application against Rwanda without renewing the same procedural action against Burundi. It is not absurd to remember that the matter between the DRC and Uganda followed its normal course up to the end on 19th December 2005[96] settling finally the substance of the dispute, the issue of extent of payment of damages to be awarded to the DRC remaining in suspense. Following the new application filed by the DRC, the ICJ gave on 10th July 2002, an order indicating the provisional measures. In this matter the Court declared explicitly that « it did not have in this particular case the *prima facie* jurisdiction necessary to indicate the provisional measures

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93 See mainly Press communiqué 2001/2 of 1st February 2001, matter of *armed activities on the territory of Congo*, www.ici-cij.org.

94 It is through a letter date 6th October 2000 that the DRC sought for four months extension to file her counter-statement. See the order dated 19th October 200 in relation to the matter *Armed activities on the territory of Congo* (D.R. Congo vs. Rwanda), *Rec. 2000*, pp. 179 et 180.

95 See, order of 30th January 2001 in the matter of *Armed activities on the territory of the Congo* (D.R Congo vs. Rwanda), *Rec. 2001*.

96 Read the order of 19th December 2005 in the matter of *Armed activities on the territory of the Congo* (D.R Congo vs. Uganda)), ICJ, *Rec. 2005*.

prayed for by the DRC»[97]. At the same time this Court did not grant the prayer by Rwanda seeking to have the matter be removed from the roll[98].

Having proposed on 4th September 2002 and in application of Article 31[99] of ICJ regulation, to follow the procedure provided in paragraphs 2[100] and 3[101] of Article 79 of the Court regulations, the soundness of the Rwandese concern was perceived by the President of the ICJ. It is on the basis of this that the President of the Court delivered on 18th September 2002, an order stating that procedure documents shall be on jurisdiction and admissibility. The same order fixed on 20th January 2003 and 20th May 2003 the deadline for filing the statement of the case and counter-statement[102]. The two parties, the respondent and the applicant respected these time limits without asking for any extension.

In application of Articles 43[103] of the Regulations and Paragraph 1 of Article 63[104] of the statute establishing the ICJ, notification of this matter was done to all member states of the Convention on the Elimination of all forms of Discrimination against Women, the constitution of the WHO, the constitution of UNESCO, the Montreal Convention on Civil Aviation and the Vienna Convention on Law of Treaties[105].

Beyond the notification done to member states of the abovementioned different conventions, another one was done, in conformity with Paragraph 3 of article 69[106] of the Regulations and with paragraph 3 of article 34[107] of the ICJ statute, to the Secretary General of the United Nations for the Convention on the Elimination of all Forms of Discrimination against

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97 ICJ, ordonnance for the indication of provisional measures of July 10, 2002 in the case of *armed activities on the territory of the Congo* (D.R Congo vs. Rwanda) *Rec. 2002*.

98 *Ibid*

99 According to this provision «In any matter submitted to the Court, The President shall get information from the parties on issues of procedure. To this end, he shall summon representatives of the parties as early as possible after their appointment, then at every time a need arises».

100 The stipulation states that «Notwithstanding the provisions of paragraph 1 above, after filing the application and after consulting the parties during a meeting with the President, the Court can decide to rule separately on the issue of jurisdiction and admissibility.»

101 According to paragraph 3 of Article 79 above «When the Court makes a decision on these issues, the parties shall have any procedure documents in relation to jurisdiction and admissibility within the time limits fixed by the Court and in the order it determines, notwithstanding the provisions of Article 45, paragraph 1.».

102 See the order of 18th September 2002, ICJ, in the matter of *armed activities on the territory of Congo* (D.R Congo vs. Rwanda), *Rec. 2002*.

103 By virtue of Article 43 of the Regulation «1. When the interpretation of a convention in which states other than the parties in the dispute participated can be at issue within the meaning of Article 63, paragraph 1, of the statute, the Court examines what instructions to give to the Court Clerk on the matter.
2. When the interpretation of a convention in which a public international organization participated can be at issue in a matter brought before Court, the Court shall examine the issue to know whether the Court Clerk shall notify this organization. Any public international organization thus notified by the Court Clerk can present its observations on special provisions of the convention whose interpretation is in issue in the said matter.
3. If a public international organization judges concerning the presentation of observations by virtue of paragraph 2 of this article, the procedure to be followed is the one which appears on paragraph 2 of Article 69 of this Regulation. »

104 In accordance with paragraph 1 of article 63 « 1. When it pertains to interpretation of a convention in which states other than the parties in dispute, the Court Clerk notifies them without any delay».

105 Read ICJ order of 3rd February 2006 in relation to the matter of *armed activities on the territory of Congo* (DRC vs. Rwanda), *Rec. 2006,* para.7.

106 It stipulates that « In the case provided in Article 34, paragraph 3 of the Statute, the Court Clerk on court instructions or if it is not sitting, from the President, proceeds as it is prescribed in the said paragraph. The Court or, if it is not sitting, the President can fix, from the day when the Court Clerk communicated the written procedure and after consulting with the highest ranking official of the public international organization concerned, a time limit within which the organization shall present to the Court written observations. These observations shall be communicated to the parties and can be debated upon by them and by the representative of the said organization during the oral procedure».

107 According to this provision of the Statute« When an interpretation of the constituting instrument of a public international organization adopted by virtue of this instrument is questioned in a matter brought before the Court, the Court Clerk shall notify this organization on the same and communicate all the written procedure ».

Women, to the Director General of WHO for the constitution of WHO, Director General of UNESCO concerning constituting instrument of UNESCO, to the Secretary General of Civil Aviation Organization in relation to the Montréal Convention. The information was brought to the attention of these different recipients with the aim of getting possible written remarks. In this particular case, none of these authorities gave written observations by virtue of paragraph 3 of Article 69[108] of the Regulations.

The Court held public hearings on the jurisdiction of the ICJ and on admissibility of the application by the DRC between 4th and 8th July 2005.

III. CONTESTATION OF THE JURISDICTION OF THE COURT

The issue of jurisdiction is subject to discussions on a number of cases brought before the ICJ[109]while discussions on referral to the Court are extremely rare if not non-existent, the States taking care to file pleadings in the form and within the time limits required by the court rules.

Different from compulsory jurisdiction of domestic courts, that of international courts follows consensus. The state must have expressly recognized and accepted the international court in this regard.
In the absence of unequivocal acceptance of the jurisdiction of the international court, this remains without jurisdiction regardless of the favorable origin which would arise as to the substance[110] for the applicant.

Making a referral to the ICJ, the DRC invokes a certain number of conventional clauses attributing jurisdiction to the world court as well as the *forum prorogatum*, in the absence of an explicit acceptance of the said jurisdiction by Rwanda. This is obviously being contested by the defendant.

III.1. Invocation of the jurisdiction of the ICJ by the applicant on conventional basis

III.1.1. Lack of acceptance of compulsory jurisdiction of the Court by the Rwandese defendant

If theoretically the jurisdiction of the ICJ can be established either by a declaration of acceptance of compulsory jurisdiction[111] of the Court, either by a jurisdiction clause[112] or an arbitration clause[113], or by implementation of the theory of *forum prorogatum*[114], or by a compromise of judicial regulation[115], or finally by the application article 66 of the Vienna

[108] Supra note 33
[109] We shall consult on the precedents of the ICJ jurisprudence mainly in the matter of *Détroit de Corfou* (United Kingdom vs. Albania), *Rec. 1948, Ambatielos* (jurisdiction) (Grèce vs. Royaume-Uni), *Rec. 1952, Military and paramilitary activities in Nicaragua vs United States of America, Rec. 1984, Armed activities on the territory of Congo* (D.R Congo vs Rwanda), *Rec. 2006*
[110] In the matter which concern us, the ICJ through its order on indication of provisional measures on 10th July 2002, refused the DRC, anticipated the possibility of a favorable decision in Congo.
[111] See the matter of *Armed activities on the territory of Congo* (D.R Congo vs. Uganda), *Rec. 2005.*
[112] See the matter in relation to *Questions of interpretation and application of the Montreal Convention of 1971 arising from the air incident of Lockerbie* (Libya vs. United Kingdom), (Libya vs. USA), Preliminary exceptions, *Rec. 1998*
[113] Read the matter of *Military and paramilitary activities in Nacaragua vs USA, Rec.1984*
[114] In the matter of *Application of the Convention for the Prevention and Punishment of Crime of Genocide*, order of 8th April 1993, *Rec. 1993.*
[115] ICJ, in the matter of *Du projet Gabcikovo-Nagymaros, Rec. 1997.*

Convention on Law of Treaties on *jus cogens*[116].

Having recognized the jurisdiction of the ICJ through her declaration of acceptance of compulsory jurisdiction on 8th February 1989, the DRC abstained from sitting on the jurisdiction of the Court in respect to Rwanda on the same base, Kigali having never accepted the jurisdiction of the ICJ in her regard.

This is how the DRC expects to base the jurisdiction of the Court in respect to Rwanda on a a certain number of arbitration clauses inserted in international conventions, namely : article 22 of the Convention on Racial Discrimination, paragraph 1 of article 29 of the Convention on the Elimination of all forms of Discrimination against Women; Article IX of the Convention on Genocide ; Article 75 of the Constitution of WHO; paragraph 2 of article XIV of the instituting instrument of UNESCO and article 9 of the Convention on Diplomatic Privileges and Immunities ; paragraph 1 of article 30 of the Convention against Torture ; paragraph 1 of article 14 of the Montreal Convention on International Civil Aviation Security. It also supports that article 66 of the Vienna Convention on the Law of Treaties provides for the jurisdiction of the Court to settle disputes arising from violation of imperative standards (*jus cogens*) of human rights , as reflected in a certain number of international instruments[117].

III.1.2. Jurisdiction clause and the question of existence of lifting of reserves

It is good to note that from the point of view of semantics the Court in this particular case alludes to arbitration clauses to the difference of the title of this point. We understand by jurisdiction clause, a conventional provision which expressly confers jurisdiction to an international court, either the International Court of Justice, or International Tribunal on the Law of the Sea, or African Court for Human and Peoples' Right, to settle the disputes which will arise from the application or interpretation of the said convention.

As for the arbitration clause[118], it is practically identical to the jurisdiction clause with the difference that the former confers jurisdiction to an arbitration court. Nevertheless a certain doctrine[119] considers that the two expressions are equivalent.

Without providing justification, the ICJ uses the term of arbitration clauses, certainly to emphasize the cumulative existence of clauses granting jurisdiction directly to the Hague-based Court and those granting jurisdiction after the failure or impossibility for the parties to organize the arbitration procedure.

After preliminary examination, the Court rejected, as a basis of jurisdiction, the arbitration clauses contained in the Convention against Torture as well as the one inserted in the Vienna Convention on Diplomatic Privileges and Immunities for obvious reasons. On the first convention, Rwanda announced it was not party to it. By virtue of *pacta sunt servanda* principle, it is difficult to see a treaty binding a third party state. The relativity of the effects

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[116] Application of this form of recognition of ICJ jurisdiction has not yet been done.

[117] ICJ, the matter of *armed activities on the territory of Congo, Rec. 2006*, par. 15, pp. 16-17.

[118] For Dreyfus, Simone, *Droit des relations internationales. Eléments de droit international public*, 4ème édition, Paris, Cujas, 1992, p. 197, the expression « *arbitration clause* » « means the provisions of a treaty which provides for recourse to arbitration. It is sometimes also used, in a more inappropriate manner, to mean any provisions which provide for referral to an international, arbitration or judicial court. It is appropriate in the second case to talk of « *court clause* ».

[119] Voir Kdhir, Moncef, *Dictionnaire juridique de la Cour internationale de Justice*, 2ème édition, Bruxelles, Bruylant, 2000, pp. 59-60.

of the treaty is definitely opposed to it[120]. The Court did not find it necessary to sustain this convention[121]. The jurisdiction of the Hague-based Court had the same verdict for the Convention on Diplomatic Privileges and Immunities, the DRC having not abstained, in her last developments[122], from founding the jurisdiction of the Court on the last basis[123].

III.1.3. Grounds for the Court jurisdiction on the basis of the Convention on Genocide

Invoking the crime of genocide, the DRC supports, rightly so, that Rwanda violated Article II and III of the Convention on Genocide[124]-[125] and base the jurisdiction of the Court on Article IX of the said convention which stipulates «The disputes between the contracting parties in relation to interpretation, application or performance of this convention , including those in relation to liability of a state in genocide or one of acts enumerated in Article III, shall be submitted to the International Court of Justice, upon the application by a party in the dispute ».

The two states being parties to the Convention on Genocide of 1948[126], Rwanda renounces the application of Article IX abovementioned by invoking the reservation she had formulated at the time of her membership to the abovementioned convention. The reservation by Rwanda excludes the jurisdiction of the Court in unequivocal terms « The Republic of Rwanda does not consider herself to be bound by Article IX of the said convention [on prevention and punishment of the crime of genocide][127] »[128]. The DRC contests the validity of this Rwandese reservation, on the one hand her withdrawal both by the Rwandese Decree-law of 15th February 1995 and by the declaration done on 17th March 2005 by the Rwandese Minister for Justice during the 61st session of the United Nations Commission on Human Rights[129], and the other hand by condemning that the said reservation is in contradiction with the principle of *jus cogens*.

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[120] The convention being a *res inter alios acta, alii nec prodesse nec nocere*, but the convention of the Rome Statute of the International Criminal Court reverses a solidified rule of law for people by membership to the United Nations.

[121] *Armed activities…., loc. cit.*, par. 16, p. 17.

[122] In the matter of *Arrest warrant of 11th April 2000*, the fact for the DRC not to pursue her developments on the universal jurisdiction led the Court to set aside the issue of its order of 14th February 2002, CIJ, *Rec. 2002*, par. 43.

[123] *Armed activities…, loc. cit.*, par. 17, p. 17

[124] Serious accusations of genocide made by the DRC against Rwanda enjoy a solid and a documented base. The DRC herself demonstrated it in her official publications, *White Paper I and White Paper II*, similar accusations were made by international organizations, in this particular case, United Nations Security Council, as well as several non-governmental organizations, humanitarian and human rights organizations, working in the region. The fact that no court has been set up yet, as to the substance, on Rwandese culpability would not deny the reality of the facts,.

[125] Article II of the convention on genocide prohibits accomplishment of one of any acts hereinafter committed with the intention of destroying, all or part of national, ethnic, racial or religious group such as :
Murder of members of the group ;
Serious bodily or mental harm to members of the group ;
Deliberately inflicting on the group living conditions calculated to bring about its physical destruction in whole or in part ;
Imposing measures intended to stop births within the group ;
a) Forcibly transferring children of the group to another group ».
On its part, Article III provides that :
« The following acts shall be punished :
a) Genocide ;
b) Agreement with a view to commit genocide ;
c) Direct or public incitement to commit genocide ;
d) Attempt to commit genocide ;
e) Complicity in genocide.»

[126] The DRC became a member of the convention on genocide on 31st May 1962 and Rwanda on 16th April 1975.

[127] The square brackets were added by the author.

[128] ICJ, in the matter of Armed activities ….., loc.cit., par. 38, pp. 24-25.

[129] *Ibid*, par. 29, p. 22.

As the principal judicial organ of the United Nations, the Court examined the arguments of the two parties. The DRC which distinguishes between municipal law and international law claims that by adopting the Decree-Law 014/01 of 15th February 1995, the transition government of Rwanda with an enlarged base « should have removed all reservations issued by Rwanda pertaining to membership, approval and ratification of international instruments in relation to human rights. »[130]. In other words, the DRC considers that the simple fact that a legal deed was validated in an internal legal order appears fully sufficient to produce effects at the international level, even in the conventional field. Regardless of the monism variant, such a conception does not exist in international law. The DRC is pushing to paroxysm her version of monism when she denies the notification done to the repository of a multilateral treaty, the capacity of triggering legal effects in the international order. Whether it pertains to withdrawal of a reservation, or any other action linked to a multilateral convention such as ratification, approval or membership. It supports, responding to the Rwandese argument of failure to issue a notification on the withdrawal of the reservation to the repository, that « lack of notification of withdrawal of the reservation to the United Nations Secretary General would not be opposed to the third party states since Rwanda expressed her intention to lift the said reservation in a legislative enactment, namely the Decree-law of 15th February 1995 ».[131]

The Congolese version of monism advances that « Failure to give a notification of this Decree-law to the United Nations Secretary General does not have relevance in this particular case to the extent where it is not the notification deed to the international body which gives its force « to an administrative act of internal law, but rather its promulgation or/its publication by a national competent authority »[132].

Replying to the Congolese argument, Rwanda submitted that the Arusha Peace Accord of 4th August 1993, an internal agreement signed between the Government of the Republic of Rwanda and Rwandese Patriotic Front, « does not create a commitment for Rwanda in respect to another state nor to the international community as a whole »[133]. « Article 15 of the memorandum of understanding on several issues and final provisions dated 3rd August 1993, does not mention explicitly the convention on genocide and does not state if the reservations targeted include both those concerning the jurisdiction of the Court and those relating to the provisions on the substance »[134].

Pertaining to the Decree-law 014/01 of 15th February 1995, Rwanda supports, on the one hand, her deciduous character in respect of the domestic law on the fact that step taken by the executive, the said Decree-law was not approved by Parliament during the session which had immediately followed its adoption »[135]. It is certainly true that a domestic act is a fact in respect to international law, as supported by the DRC,[136], the situation appears different for an action supposed to sanction the commitment of the State, in a certain way, in the conventional field, simply for lack of notification to the repository.

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[130] CIJ, affaire des *Activités armées …..*, *loc.cit*., par. 30, p. 22.
[131] *Ibid*, par. 32.
[132] *Ibid*
[133] *Ibid*, par. 34, p.23.
[134] Ibid. Rwanda advanced that, « by virtue of constitutional instruments in force on her territory…, Parliament… was supposed to approve a decree of this nature during the session immediately following the adoption of the said decree», Ibid, par. 35, p.24.
[135] Ibid.
[136] See Article 4 of Draft articles if the CDI on the responsibility of the State.

Revisiting the Arusha Peace Accord of 3rd August 1993, a domestic agreement signed between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, « does not create a commitment for Rwanda in respect to another state nor the international community as a whole »[137]. Article 15 of the memorandum of understanding on various questions and final provisions, dated 3rd August 1993, does not mention explicitly the convention on genocide and does not state if the reservations targeted include both those relating to procedural provisions, including the provisions concerning the jurisdiction of the Court, and those in relation to provisions on substance »[138].

Pertaining to the Decree-law 014/01 of 15th February 1995, Rwanda supports, on the one hand, her deciduous character in respect of the domestic law on the fact that taken by the executive, the said Decree-law was not approved by Parliament during the session which had immediately followed its adoption[139]. It is certainly true that a domestic act is a fact in respect to international law, as supported by Congo, the situation appears different for an action supposed to sanction the commitment of the State, in a certain way, in the conventional field, simply for lack of notification to the repository. Rwanda hangs on strongly to this argument since she claims that she «had never notified the United Nations Secretary General on the withdrawal of her reservation to Article IX of the convention on genocide, neither taken any measure attempting to withdraw the reservation, and only an official measure taken at the international level constitute a final expression of a state's position concerning obligations which it has by virtue of treaty »[140].

Concerning the declaration done on 17th March 2005 by the Rwandese Minister of Justice, Rwanda supports that it gives the indication of the "intention of her government to lift, « one day or another » unspecified « reservations » from unspecified « conventions » concerning human rights"[141]. Rwanda adds that this declaration by the Minister for Justice is not that of a Minister for Foreign Affairs or of a head of government who «is automatically vested with the power to commit the state concerned on international issues »[142]. And finally, Rwanda stated, the fact that the said declaration was done three years after introduction of the matter before the Court, « would not have an impact on the issue of jurisdiction, « an issue which must be decided in accordance with reference to the situation in place at the date of filing the application »[143].

Without losing track in the discussion on the validity as well as the range of the Rwandese Decree-law abovementioned in the domestic legal order and its effects in the international sphere[144], the Court states that « it is a rule of international law, derived from the principle of legal security and well established in the practice, that, safe for a contrary convention, the withdrawal by a contracting party of a reservation to a multilateral treaty only takes effect in respect to other contracting states when the latter have received a notification of the same.

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[137] Armed activities…, op. cit., par. 34, pp.23-24.

[138] *Ibid*. Rwanda advanced that, « by virtue of constitutional instruments in force on her territory…, Parliament… was supposed to approve a decree of this nature during the session immediately following the adoption of the said decree», *Ibid*, par. 35, p.24.

[139] *Ibid*

[140] *Ibid*, par. 36, p. 24.

[141] *Ibid*, par. 37

[142] *Ibid*

[143] *Ibid*

[144] The Court reminds that it is « necessary… to clearly distinguish between the declaration taken in the local legal order of a state to withdrawal a reservation to a treaty and the implementation of this decision in the international legal order by competent national authorities, which can only be made operational by a notification for withdrawal of the said reservation to other member states to the treaty concerned ». *Ibid*, par. 41, p. 25.

This rule finds its expression in article 22, paragraph 3, *litera a)* of the Vienna Convention on the Law of Treaties »[145]. And the Court concludes on the necessity of a notification received at the international level so that the Rwandese Decree-law produces effects which the DRC tends to attach to her[146].

To the Rwandese reply according to which the declaration done by her Minister of Justice did not have any legal effect due to the fact that it is not emanating from a Minister of Foreign Affairs or from a head of government « who is automatically vested with powers to commit the state concerned for issues of international relations[147], the Court, in conformity to its constant and abundant jurisdiction[148], replied clearly. It stated that « it is a rule of international law well founded that the Head of the State, the head of government and the Minister for Foreign Affairs are deemed to represent the State solely by the exercise of their duties, including for accomplishment on behalf of the said state unilateral actions having the value of international commitment »[149]. The said customary rule finds its basis in paragraph 2 of article 7 of the Vienna Convention on the Law of Treaties[150]. However, the terms of the Court largely overwhelm the strict scope of classic practice.

The main judicial organ of the United Nations also observes the recent practice of States « … it is increasingly becoming frequent, in modern international relations, that other people representing a state in determined fields are authorized by this state to commit it, by their declarations, in matters falling under their powers. The same can apply to holders of technical ministerial portfolios exercising, in external relations, powers in their jurisdiction, even those other government officials »[151].

However, after noting that « issues relating to protection of human rights which were subject to the said declaration fall under the jurisdiction of a Minister of Justice »[152], the Court rejected the Rwandese argument. It nevertheless refused to consider the abovementioned declaration of a withdrawal already decided on the Rwandese reservation to Article IX of the Convention on Genocide or any unilateral commitment having legal effects on the said withdrawal due to « the generality of the terms contained in the declaration by the Rwandese minister»[153]. The Court sees therein « a very general declaration of intention »[154].

Responding to the Rwandese claim according to which the declaration of her minister for justice would not have any impact on the issue of the Court's jurisdiction in this matter,

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[145] According to Article 22, Paragraph 3, line a : « A moins que le traité n'en dispose ou qu'il n'en soit convenu autrement : a) le retrait d'une réserve ne prend effet à l'égard d'un autre Etat contractant que lorsque cet Etat en a reçu notification ». De son coté, le paragraphe 4 de l'article 23 renchérit « le retrait d'une réserve ou d'une objection à une réserve doit être formulé par écrit ». Voy. la convention de Vienne du 23 mai 1969, consultez Dupuy Pierre – Marie, les grands textes du droit international public, Paris, Dalloz, 2002, pp. 251-252

[146] *Ibid*, par. 42 and 43, p. 26.

[147] *Ibid*, par. 46, p. 27.

[148] Voy. Affaire des *Essais nucléaires* (Australie c. France), CIJ, *Recueil 1974*, par 49-51 , p p.269-270; *Application de la convention pour la prévention et la répression du crime de génocide* (Bosnie – Herzégovine c. Yougoslavie), exceptions préliminaires, CIJ, *Recueil 1996* (II), par 44, p.622; *Mandat d'arrêt du 11 avril 2000* (République démocratique du Congo c. Belgique), arrêt du 14 février 2001, CIJ, *Recueil 2002*, par. 53, pp. 21-22; aussi, *Statut juridique du Groënland oriental* (Danemark c. Norvège), 1933, CPJI *série A/B n° 53*, p.71.

[149] Armed activities …, Loc. cit., para. 46, p.27.

[150] *Ibid*. according to the earlier cited stipulations « by virtue of their functions and without having to give full powers are considered as representatives of their State : *a)* Heads of State, heads of governments and ministers of foreign affairs for all actions relating to the conclusion of a treaty ».

[151] Ibid.

[152] *Ibid*, par. 48, pp. 27-28.

[153] Armed activities …, Loc. cit., par. 52, p. 29.

[154] *Ibid*.

since it had been made three years after the introduction of the suit[155], the ICJ, without denying that « its jurisdiction must be…evaluated at the time of filing the document instituting the proceedings »[156] stated that it shall not sanction a procedural mistake which the applicant would easily have rectified. It however emphasized that « if the declaration by the Rwandese had, during the proceedings, led, in any manner, to the withdrawal of the Rwandese reservation to Article IX of the Convention on Genocide, the DRC would have, on her own initiative, cured a procedural mistake affecting her initial application by filing a new one »[157].

III.1.4. Establishment of the jurisdiction of the ICJ based on the Convention on Racial Discrimination

The DRC most probably believed that possible lack of jurisdiction of the Court in respect to the Convention on Genocide could certainly be supplemented by Article 22 of the Convention on Racial Discrimination. This provision provides that « Any dispute between two or several states touching on the interpretation or application of this convention, which will not have been resolved through negotiation or by the procedural means provided by the said convention, shall be brought, on application by any party to the dispute, before the International Court of Justice, so that it can make a ruling on its subject, unless the parties to the dispute agree on another mode of settlement ».

Basing on the definition of discrimination given by Article 1 of this convention[158], the DRC affirms that Rwanda committed several acts of racial discrimination, which makes the global Court competent to exercise its jurisdiction.

Being party to the convention on discrimination since her membership on 21st April 1976, the DRC stumbles on the Rwandese reservation issued during the day when Rwanda became a member on 16th April 1975. The original applicant, had not raised any protest nor objection to the reservation by Rwanda, fighting this reservation by arguing that it is incompatible with the object of the treaty, then, that it must be considered as being contrary to *jus cogens*, finally that it is hit with a lapse or obsolete character due to « the commitment granted by the Rwandese fundamental law «to lift all reservations which Rwanda issued at the time of her membership to … international instruments » in relation to human rights »[159].

The Congolese contestation against the Rwandese reservation would have had a meaning if Kinshasa had expressed at the right time i.e. at the time when it was issued, it would have been, in this case, that the provision containing the reservation and the objection be deemed unwritten between the two states according to point 3 of Article 21[160] of the Vienna Convention on Law of Treaties.

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[155] *Ibid*, par. 54, p. 29.

[156] The court reminds of her constant jurisdiction: Application of the convention for the prevention and repression of crimes of genocide (Bosnia-Herzegovina vs. Yugoslavia), preliminary exceptions, ICJ, Rec. 1996 (II), par. 26, p. 613 ; Warrant of arrest of 11 April 2000 (Democratic Republic of Congo vs. Belgium), Act of 14th February 2002, ICJ, Rec. 2002, par. 26, p. 12. Ibid.

[157] *Ibid.*

[158] According to this Article « racial discrimination » targets « any distinction, exclusion, restriction or preference founded on race, colour, creed or national or ethnic origin, which has the objective or effect of destroying or compromising the recognition, enjoyment or exercise, in conditions of equality, human rights and fundamental freedoms in political, economic, social and cultural fields or in any other field of public life ».

[159] *Activités armées…., loc. cit*, par. 71-74, pp. 33-34.

[160] It stipulates that « When a state which formulated an objection to a reservation did not oppose the coming into force of the treaty itself and the state author of the reservation, the provisions on which the reservation is based does not apply between the two states, in the extent provided by the reservation ».

Responding to the Congolese allegation of expiry of the Rwandese reservation on the grounds of its withdrawal, the Court, according its own terms, « without prejudice to *mutatis mutandis* applicability to the Convention on Racial Discrimination of its reasoning and conclusions »[161] developed in respect to the Convention on Genocide, emphasize its attention on concrete modalities for the withdrawal of the reservation concerning the Convention on Racial Discrimination. According to the wording of paragraph 3 of article 20 of the Convention on Racial Discrimination « reservations can be withdrawn at any time through notification addressed to the Secretary General. The notification shall take effect at the date of its receipt »

To the Court's knowledge, no withdrawal of the Rwandese reservation was notified to the repository[162]. Therefore the Congolese argument does not hold.

As pertains to the issue of incompatibility of the Kigali reservation with the object of the Convention on Racial Discrimination, the Court replied on the basis of paragraph 2 of Article 20 of the said convention « a reservation shall be considered as falling under [this category] if at least two thirds of the member states to the convention raise objections ». Given that this number of objections was not attained, it is clear that a reservation is not compatible with the object and goal of this treaty.

Concerning the DRC allegation that the Rwandese reservation to the Convention on Racial Discrimination would be without legal effect on the grounds that the prohibition of racial discrimination would be a peremptory norm of the general international law, on the one hand, and that, on the other hand such a reservation would be in conflict with peremptory norm, the ICJ objected. The global Court set aside the Congolese claim by referring to previous developments which lead to paragraphs 64 to 69[163]. It nailed Congo to the wall on clear terms« the fact that a dispute lies on the non-adherence to a peremptory norm of the general international law would not suffice to find the jurisdiction of the Court to acknowledge it, and there is no peremptory norm which would impose upon states to consent to the said convention for the settlement of disputes relating the Convention on Racial Discrimination »[164]

III.1.5. The ICJ jurisdiction on the basis of Convention on Discrimination against Women and other conventions

In an extraordinary intellectual effort, the DRC intends to find a basis for the jurisdiction of the ICJ in the first paragraph of Article[165] of the Convention on the Elimination of all forms of Discrimination against Women, Article 75[166] of the Constitution of WHO, paragraph 2 of Article XIV[167] of the Constitution of UNESCO, on paragraph 1of Article 14[168] of the Montreal

[161] *Activités armées…., loc. cit.*, par. 75, p. 34.
[162] *Activités armées…., loc. cit.*, par. 75, p. 34.
[163] *Ibid*, par. 68, p. 35.
[164] *Ibid*, par. 70.
[165] « Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.»
[166] «Any question or dispute concerning the interpretation or application of this constitution, which will not have been settled by negotiation or by the Health Assembly, shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.»
[167] «Any question or dispute concerning the interpretation of this Constitution shall be referred for determination to the International Court of Justice or to an arbitral tribunal, as the General Conference may determine under its Rules of Procedure..»
[168] «Any dispute between contracting states concerning interpretation or application of this convention which cannot be resolved through negotiation shall, at the request of one of them, be submitted to arbitration, if within six from

Convention on Civil Aviation and, finally, in Article 66[169] of the Vienna Convention on Law of Treaties.

Curiously, while Rwanda, up to now an expert in issuance of reservations in relation to jurisdiction of the International Court of Justice, had not formulated any at the time of her membership to these different conventions, the DRC was unable to find the jurisdiction of the main judicial organ of the United Nations. Several reasons justify this position, sometimes the precedent conditions provided had not been fulfilled touching either on the organization of the negotiations[170], or on the constitution of an arbitration court[171], or even adherence to the time limit of six months or to a certain procedure[172], sometimes there is no dispute[173]. The Court rejected for good the last basis of jurisdiction presented by the DRC, and was like a requiem « the Court lastly deems it necessary to remind the parties that the mere fact that *erga omnes* rights and obligations or peremptory rules of the general international law *(jus cogens)* would be an issue in a dispute would not constitute in itself an exception to the principle according to which its jurisdiction lies always on the consent of the parties »[174].

A hardened fighter, the DRC throws her last cap on *forum prorogatum*. Will it be favorable to her?

III.2. The doctrine of *Le forum prorogatum*

Supporting the doctrine of *forum prorogatum*, the DRC submitted that the acceptance of the jurisdiction of the Court does not «only arise from express declaration, but also from any act concluding, in particular the behavior the defendant state subsequently after the referral to the Court »[175]. Undeniably the analysis of Congo is in conformity with the international law in the conditions stated by the international court. Congo's point of view is well received by the Sierra Leonean judge Abdul A. Koroma. This judge, without having to rely on any African solidarity footprint of subjectivism, underlines the importance of *forum prorogatum*[176]. He

the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.»

169 «Any party to a dispute concerning the application or interpretation of Articles 53 or 64 can, through a request, submit it to the decision of the International Court of Justice, unless the parties decide jointly to submit the dispute to arbitration ».

170 The issue is touching on the Convention on Discrimination against Women, WHO constitution and the Montreal Convention on Civil Aviation. The Court stated that « the evidence presented to the Court does not establish to its satisfaction that the DRC in fact sought to start negotiations in relation to interpretation or application of the convention », *Armed activities…, loc. cit.,* par. 91, 99 and 117, pp. 41, 43 and 49..

171 *Ibid*, « The Court probably added that the DRC did not provide more evidence of her attempts to undertake an arbitration procedure with Rwanda by virtue of 29 of the convention. The Court would in this regard entertain the Congolese argument according to which the impossibility of starting or pursuing negotiations with Rwanda do not allow a situation there would referral for arbitration; pertaining to a condition formally provided by Article 29 of the convention on discrimination against women, lack of an agreement between the parties on organization for arbitration cannot indeed be presumed. The existence of such a disagreement can only lead to a proposal for arbitration done by the applicant and remained without reply from the defendant or followed by an expression of his/her intention not to accept it »

172 Procedure provided the Constitution of UNESCO and the Montreal Convention on Civil Aviation. *Armed activities…., loc. cit.*, par. 108 and 117, pp. 46 and 49.

173 The observation concerns the constitution of the WHO and the Constitution of UNESCO. On « the opinion of the Court, the DRC did not demonstrate the existence of the question on which Rwanda would have opinions different from hers or from a dispute which would oppose it to this state, concerning the interpretation or application of the Constitution of WHO ». *Armed activities…, loc. cit.*, par. 99 et 107, pp. 43 and 45.

174 *Ibid*, par. 125, p. 52.

175 *Ibid,* par. 19, p. 18.

176 Koroma, G. , Abdul, dissenting opinion attached to the order of 3rd February 2006 in the matter of *Activités armées sur le territoire du Congo* (New Application 2002) (DRC v. Rwanda), CIJ, *Rec. 2006*, par. 25, p.62.

bases his argument on the position of the *ad hoc* Lauterpacht expressed in his personal opinion in the matter of *Application of the convention for the Prevention and Punishment of Crime of Genocide* between Bosnia-Herzegovina and Serbia and Montenegro. According to the English international lawyer « if a State, State A, files a suit against another State, State B, on the basis of inexistent or defective jurisdiction, the *forum prorogatum* consists of the possibility for State B to cure this defect by adopting a behavior constituting acceptance of the Court's jurisdiction »[177].

On the Congolese claim, ICJ affirms that « the attitude of the defendant state must nevertheless be looked as an unequivocal manifestation » of the desire of this state to accept voluntarily and unquestionably »the jurisdiction of the Court »[178], that in this particular case, the « Court will be restricted to showing that Rwanda objected to its jurisdiction at all levels of procedure and repeatedly and explicitly »[179]. The Court concludes that Rwanda's attitude cannot therefore be looked at as an «unequivocal manifestation » of the desire of this state to accept « voluntarily and unquestionably » the jurisdiction of the Court…to be deeply known to the extent where even the aim of her participation in the procedure was to contest this jurisdiction »[180].

Perfectly in disagreement with the order of 3rd February 2006, the judge wrongly castigated, the world court « nevertheless I believe that the seriousness of the issue and the nature of allegation brought before the Court are such that the latter would have been authorized to make a ruling»[181]. The same attitude in respect to Rwanda appears understandable but similar reasoning leaves at the discretion of Rwanda, the latitude to enter a sort of« voluntary appearance », which remains subjective to the extent where Kigali is aware of the seriousness of the grievances brought against her and the possible consequences of the existence of such a breach. « Nothing in law prevented Rwanda from expressing her consent and also enable the Court to examine the allegations which Rwanda had violated her obligations on the Convention on Genocide ».[182]

The DRC finds in one of the conclusions reached by the Court in its order indicating provisional measures of 10th July 2002 on the existence of the Court's jurisdiction. The giant of Central Africa considers that « lack of jurisdiction shows that the court would not be in a position to grant the prayer of Rwanda to have the matter expunged from the roll »[183].

Confusing substance to jurisdiction, the DRC expresses the « conviction that by rejecting the Rwandese application for striking off of the application on the basis of substance, the Court could not miss the view that crimes of the nature perpetrated by the defendant would not

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[177] Lauterpacht, Elihu, opinion dissidente jointe à l'ordonnance de la CIJ du 13 septembre 1993 sur les mesures conservatoires dans l'affaire de l'Application de la convention pour la prévention et la répression du crime de génocide, Rec. 1993, par. 24, p. 416, cité par le juge Koroma, op. cit., p.62.

[178] ICJ, activities armed..., loc .cit, by. 21, p. 18, see. also case of Corfu (United Kingdom v. Albania) preliminary objection, judgment, 1948, I.C.J. Reports 1947-1948, p. 27; Implementation of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), measures conservatories, order of 13 September 1993, I.C.J. Reports 1993, paras. 34, p..)342; Rights of minorities in Upper Silesia (minority schools), case n ° 12,1928, P.C.I.J. series A, no. 15, p. 24.

[179] ICJ activities armed..., op. cit., para 22, p. 19, see also armed activities on the territory of the Congo (new application: 2002)(DR Congo vs. Rwanda), provisional measures, order of 10 July 2002, ICJ, reports 2002, pp.234 and 238.

[180] *Ibid*. V. also Anglo-Iranian Oil Co. (United Kingdom vs. Iran), preliminary objection, judgment, ICJ, reports 1952, p.113 - 114

[181] Koroma, G., Abdul, *op.cit*, p.62.

[182] *Ibid*.

[183] Armed activities…,*op.cit*, par. 23, p. 19.

go unpunished »[184]. It would not be in vain to hammer that the jurisdiction of the court does not lie in the gravity of the crimes which the defendant could have perpetrated but in the consent of the State in the exercise of its jurisdiction.

Without dwelling on the defendant's reply[185], the opinion of the Hague-based Court is unequivocal « the fact that, in its order of 10th July 2002, the Court had arrived at lack of jurisdiction would therefore not be equivalent to an acknowledgement of its jurisdiction »[186]. And the Court in giving justification for this opinion said « on the contrary, the Court showed right away serious doubts as pertains to its jurisdiction to hear the application by the DRC since, in the same order, it justified its refusal to indicate the provisional measures through lack of *prima facie* jurisdiction. By not granting the request made by Rwanda to strike off the matter from the roll, the Court simply reserved itself the right to examine earlier, subsequently and completely the issue of its jurisdiction »[187].

After the rejection of these bases of jurisdiction, the DRC was expecting that the arbitration clauses[188], indicated herein above, would serve as a basis for the jurisdiction of the ICJ. The court examined these clauses one after the other without identifying any that could serve as the foundation of its jurisdiction. What therefore happens to the dispute existing between the two parties?

IV. REPERCUSSIONS OF THE LEGAL PROCEEDINGS

The order of 3rd February 2006 having been on the jurisdiction and admissibility of the Congolese application did not throw away the substance of the matter. The dispute still persists. The Court is clear on this issue « …The Court indicated several times that there is a fundamental distinction between the issue of acceptance of jurisdiction of the Court by the States and the conformity of their actions with international law. Whether they accepted or not the jurisdiction of the Court, the States are indeed required to be in conformity with their obligations by virtue of the United Nations Charter and other rules of international law, including international humanitarian law, be responsible for actions contrary to international law which could be attributed to them »[189]. The current attempts to restore relations observed between Kigali and Kinshasa leave the dispute between the two states intact particularly as the Congolese and Rwandese authorities seem to want to practice the ostrich principle of burying their heads in the sand. Fire is smoldering, there is need to extinguish it.

During a joint press conference, held in Goma in North Kivu in the Democratic Republic of Congo on 6th August 2009, the current Rwandese President with his Congolese counterpart declared, talking about relationships between the two countries that «we need to close

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184 *Ibid*

185 According to the defendant, « the idea for the Court to conclude, in an order of this nature, that there clear lack of jurisdiction, while also having concluded on *prime facie* lack of basis for jurisdiction, cannot shore up the argument of the State seeking to establish the jurisdiction of the Court…the mere absence of clear incapacity does not confer to the Court jurisdiction; The Court shall only be able to hear a matter when it has jurisdiction over it». *Ibid*, par. 24, p. 19

186 *Ibid*, par. 25, p. 20.

187 Ibid, pp. 20-21.

188 As a reminder, it pertains to Article IX of the Convention on Genocide; Article 22 of the Convention on Racial Discrimination; paragraph 1 of Article 29 of the Convention on Discrimination against Women; article 75 of the Constitution of WHO; paragraph 2 of Article XIV of the Constitution of UNESCO; paragraph 1 of article 14 of the Montreal Convention and Article 66 of the Vienna Convention on the Law of Treaties. *Ibid*, par. 27, p. 21

189 *Ibid*, par. 127, pp. 52-53.

books on the past»[190]. If the Congolese government lacked the courage to speak up, it is regrettable to emphasize that we can't close books on six million deaths, immeasurable losses, illegal exploitation of natural resources, massacres and violent acts, serious crimes against international humanitarian law, that are otherwise indefeasible.

In reality, Rwanda-Congo relations are still marked by a stench of badly ended conflict. The governments in place in the two capitals are less concerned with the absorption of the problem than media coverage for their so called reconciliation efforts.

The Congolese Government thinks that it is planting a bomb under a mass of rocks without deactivating with the hope that it will not explode. It will be reminded of disputes as famous as the Belgium-Zairian or Congolese dispute that none of them is at the level of Spaark-Tshombe agreements of 6th February 1965 which it will appear was resolved by the Rabat accords of 1989[191], thanks to personal involvement of the then King of Morocco, Hassan II.

From human rights point of view, the Belgian monarch Léopold II entered into the books of history not only for having received a gigantic territory in Central Africa to the detriment of the big powers[192] of the time but also for having committed, through the intervention of his officers, the worst human rights violations, with mainly the red rubber episode[193]. The unresolved disputes like that of colonization of China, mainly the invasion of Manchuria, and the Korean Peninsula by Japan poison relations between Japan and China on the one hand, Japan and Korea on the other. The dispute between France and Algeria on colonization and also on the independence war called the Algerian war resolved by Evian accords of 1962; the dispute between Russia and Japan on Kuril Archipelago; thorny dispute between Great Britain and Zimbabwe on Lancaster House accords, the dispute on Falkland islands between London and Buenos Aires, inflame bilateral relations between the States concerned. Kinshasa and Kigali seem to proclaim reconciliation on the remains of six million Congolese people and on other serious material losses without Rwanda acknowledging responsibility, *proprio mutu* or without a judicial proceeding taking charge, and further more without providing a guarantee this will not be repeated. The silence of the current government on the issue does not bind subsequent governments who would be able to revisit the matter.

Ruled inadmissible, the Congolese suit is not devoid of any basis. The facts retained against Rwanda have an incontrovertible material existence although the « presumption of innocence » would be applicable to her[194], given that only, a final judgment can reverse the said presumption. What prospects are available for the Congolese State?

In this regard, the good faith shown by the Rwandese authorities could be verified by setting up an arbitration court , without excluding a diplomatic solution and without setting aside

[190] Press conference broadcasted on Radio and Télévision Nationales Congolaises (RTNC), the same day.

[191] Useful indications of the Belgian position on this issue can be drawn from the study by Lejeune, Christian, « Belgian-Congolese financial dispute », *Revue belge de droit international,* 1969-2, pp. 533-564.

[192] Lire Ndaywel, Isidore, *Histoire générale du Congo* , Louvain, Duculot, 1998, p.312 ainsi que la contestation de cette occupation par d'autres Etats

[193] *Ibid*, pp.339 et ss. Lire aussi Hochschild, Adam, *Les fantômes de Léopold II. Un holocauste oublié*, Paris, Belfond, 1999, p.439, *Les fantômes de Léopold II : la terreur coloniale dans l'Etat du Congo*, Paris, Tallandier, 2007, p. 617 ; Vangroenwegh, Daniel, *Du sang sur les lianes. Léopold II et son Congo*, Bruxelles, Eden, 2010, p. 452.

[194] The presumption of innocence proclaimed by the international conventions in relation to human rights as well as the constitution of the DRC does not however prevent, in procedural law, detention pending trial on the basis of Article 27 of the Congolese Criminal Procedure Code if there are serious indications of guilt. The jurisprudence of the Supreme Court of Justice of the DRC underlines the « absolute necessity of serious indications of guilt ». CSJ, 9. 9 ; 1980, RP 278, mentioned by Katuala Kaba Kashala, *Code judiciaire zaïrois annoté*, Kinshasa, Edition Asyst s.p.r.l., 1995, p.157

individual criminal responsibility of the perpetrators involved in the commission of the acts the DRC attributes to Rwanda.

IV.1. Preeminence of the arbitration procedure

Having suffered failure at the legal level due to lack of acceptance of the jurisdiction of the Court by Rwanda, the DRC is not completely disarmed. The Congolese government, if it is determined to see Rwandese authorities held accountable for their military in Congo, can propose to the latter the organization an arbitration procedure.

Without failing to recognize the merits of a judicial procedure, States attach great importance[195] to an arbitral process which absolutely obeys state sovereignty. The latter is perfectly opposed to unilateral referral to the arbitration organ without the consent of the two parties in dispute.

Failing to acknowledge the jurisdiction of the ICJ, Rwanda could eventually consent to the establishment of an arbitration court given that she appears to show an interest in smoothening out the differences between the two states.

In this case, the offending questions between the two states can conventionally be subjected to an arbitration court. Some people basing on the dichotomy between political dispute, not susceptible to justiciability, and legal dispute susceptible to a judicial settlement, support that the first category can be subject to an arbitration process[196]. Nguyen and alii emphatically reject this sense by affirming that «no inter-state conflict is exclusively legal or political »[197]. The jurisprudence of the ICJ goes in the same meaning[198].

Rwanda's mistrust for permanent courts[199] could be dispelled by the establishment of an arbitration court. The same disaffection for international courts did not stop her from appointing and *ad hoc*[200] judge.

IV.2. Individual responsibility for perpetrators of serious international crimes

It was stated earlier in this document that the serious crimes committed by the Rwandese military in the Democratic Republic of Congo, are in such manner that even if international accountability for Rwanda seems to be getting stuck in the mud, there is still the possibility of bringing criminal proceedings against the Rwandese military commanders.

There is no need to emphasize that since Article 227 of the Versailles treaty[201], senior officers of the state[202] are liable for crimes they committed during the time of war. Punishment

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[195] Nguyen Quoc Dinh, Daillier Patrick, Pellet Alain, *Droit international public*, 7ème édition, Paris, L.G.D.J., p. 864.

[196] *Ibid.*

[197] *Ibid.*

[198] ICJ opinion on the legal consequences of the construction of a wall of security in the occupied Palestinian territory, [2004] ECR

[199] It is not absurd to point out that Rwanda has not ratified the Rome Convention of 17 July 1998 on the Statute of the International Criminal Court. The countless reservations Kigali concerning the referral to the ICJ may illustrate this. See ICJ, case concerning armed activities on the territory of Congo, ECR 2006, para. 28-79, pp.21 - 35.

[200] In the matter under examination, Kigali appointed a South-African Christopher John Robert Dugard as *ad hoc* judge; which shows the desire of the Rwandese state to be part of the Court's decision.

[201] This abovementioned conventional provision was unable to be implemented following the refusal by Netherlands to extradite the German Emperor Guillaume II.

[202] We will follow with interest the history of international criminal courts, since the London Accord of 8th August 1945 on

is conceivable both in Congolese courts and before the International Criminal Court or, possibly, before an *ad hoc* international tribunal for Congo.

Concerning this last court, beyond the push by human rights NGOs who collected signatures from several petitioners with a view to obtain from the Security Council the creation of this tribunal, Congo officially, through her permanent representative to the United Nations, Ambassador Ileka, referred the matter to the Security Council. On 13th February 2003, the abovementioned Congolese representative wrote a request seeking for the establishment of an international criminal tribunal for Congo, on the same model of the one for Ex-Yugoslavia and Rwanda[203]. The Congolese request remains a dead letter to date.

IV.2.1. Repressive powers of Congolese courts

We should not lose the spirit that, despite establishment of a permanent international criminal court, national courts play an important part of the repressive tool by virtue of the principle of complimentarity and subsidiarity. In this regard, crimes committed in the Democratic Republic of Congo are of key interest for justice of this country. One would legitimately contest impartiality, efficiency and proper functioning of the Congolese Judicial organs. One could also argue that the ICJ did not receive the DRC argument on the non-exhaustion of the local remedies[204] contrary to Guinea. The main judicial organ of the United Nations considered that the DRC did not provide proof that internal remedies exist and are available and efficient against expulsion[205]. However, without venturing on the scope of perfection or imperfection of justice of this state, the fact remains that the issue of jurisdiction is of public order in domestic law and can be raised at any level of the procedure, including for the first time in appeal. Consequently, it is timely to establish jurisdiction before angling on impartiality and efficiency.

Applying the principle of territorial jurisdiction, Article 2 of the Congolese Penal Code Book 1 provides that « Any offense committed on the territory of the Republic shall be punished according to the law », while leaving a hole for crimes perpetrated in foreign countries[206]. The

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the Statute of the International criminal military tribunal of Nuremberg and Tokyo, in charge of trying major criminals of the Nazi and Nippon wars respectively. Concerning senior Japanese military officers, according to Emmanuel Decaux, cited by Dupuy, Pierre –Marie, the Japanese Emperor Hiro Hito would have escaped justice for political reasons related to the exclusive desire of Général Macarthur to spare him. See Dupuy, Pierre-Marie, « Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes », *R.G.D.I.P.*,T. 103/1999/2, p.290,

[203] Professeur Bula-Bula, Sayeman, *op. cit.*, p. 226, reports that the Congolese Ambassador to the United Nations on 13th February 2003 wrote to the Security Council requesting for the creation of an *ad hoc* international criminal tribunal for Congo « capable of pursuing and punishing perpetrators of several massacres committed on the territory of the Democratic Republic of Congo. Failure to set up such a tribunal, the Council could opt for a special tribunal copied on the model of Sierra Leone or the one in preparation in Cambodia ».

[204] The idea of exhausting the internal remedies is undergoing a real drop both in conventional practice and jurisprudence. From a conventional point of view, the reading of the following provisions is a proof of the same. According to point c) of paragraph 1 of Article 41 of International Covenant on civil and political rights of 1966 « The Committee can only hear a matter submitted to it after ensuring that all available internal remedies have been used and exhausted, in accordance with generally recognized principles. This rule does not apply in cases where the procedures for remedies exceed reasonable time limits ». On its part, the African Charter on Human and People's Rights in Article 50 has almost similar provision that « The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.».

[205] ICJ, in the matter of *Ahmadou Sadio Diallo*, *Rec.* 2010, par. 47 and 48, the Court's position would be accepted with difficulty by Congolese legal practitioners who know how to « push » a listless « judge », civil or criminal to deliver his judgment with a reasonable time limit. The situation is totally different for a commercial judge who generally demonstrates unparallel spectacular diligence.

[206] On its part, the first paragraph of Article 3 of the penal code aforementioned emphasizes that « Any person who, outside the territory of the Republic of Congo, is guilty of an offense for which the Congolese law provides for a

principle proclaimed by the abovementioned legal provision is implemented in a universal manner. Serious international crimes orchestrated in the territorial sphere of the DRC do not escape this provision.

If the ordinary Congolese penal code does not contain any specific provision concerning serious crimes of international law, while we were expected to have such an insertion; the reality of the Congolese justifies this state of affairs. By virtue of the monism in force, the law of nations only being an asset of the domestic law, it is not necessary, save for an express provision that international standards be subject to a legislative insertion. The Congolese constitution takes precedent over all treaties and international agreements, ratified and published regularly in the official gazette on local laws. Those due to be tried can mainly take advantage of the protection accorded by multilateral conventions relating to human rights.

Concerning serious incriminations by the law of the nation, the Congolese legislator deserted his duty to integrate in the military justice code, in title V, articles 161 and other relevant articles, special provisions on crimes of genocide, crimes against humanity as well as war crimes. The crime of aggression does not appear in this provision.

Reversing a major procedural rule which generally confers priority to ordinary courts, the Congolese law n°024-2002 of 18th November 2002 on the Code of Military Justice decrees in Article 161 states that « In case of indivisibility or relatedness of offenses with crimes of genocide, war crimes or crimes against humanity, only military courts have jurisdiction » Accusing Rwanda of crimes of genocide[207], crimes against humanity[208], war crimes[209] and crimes of aggression, offenses perpetrated by Rwandese soldiers having worked in the DRC, the justice system of this state can therefore pursue and sentence individually the Rwandese soldiers. In relation to war crimes, the code of military justice makes a distinction between war crimes punished by death sentence[210] and those sanctioned by life imprisonment[211]. The

criminal servitude of more than two months, can pursued and judged in the Democratic Republic of Congo, except for application of legal provisions on extradition.»

[207] Article 164 defines this offense and determines the sentence applicable to it i.e. death sentence. According to this legal provision, « By genocide, we mean one of the acts hereinafter committed in the intention of destroying, all or part, a national, political, racial, ethnic or religious group mainly:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group. .

[208] See Articles 165 and the following of the Code of Ministry Justice. Paragraph 1er of Article 165 defines crimes against humanity as being « serious violations of international humanitarian law committed against any civilian populations before or during war » while the second paragraph of the same article states that crimes against humanity are not necessarily related to state of war and can be committed not only against populations of different nationality but also within a population of the same state . Article 166 enumerates 18 acts which constitute crimes against humanity among them torture or other inhuman treatments, including biological experiments ;

[209] According to Article 174 of the Code of military justice, crime of war means, « any offense against the laws of the Republic committed during war and which are not justified by laws and customs of war ».

[210] Death sentence is still applicable in the Democratic Republic of Congo. It is certainly true that since the moratorium decreed on 10th December 1999 by President Laurent-Désiré Kabila and confirmed on 20th March 2001 by the current President Joseph Kabila before the United Nations Human Rights Commission, this sentence is no longer applicable to people sentenced. A Bill, which was a commendable initiative of a national member of parliament, law Professor André Mbata, attempting to abolish the death sentence was rejected, after debates, by the lower chamber of the Congolese Parliament on 25th November 2010. Although an abolitionist, the author estimates that the circumstances and changes in criminality in the DRC are currently not in favor of the abolition of the capital sentence. Although specialists in criminal are endeavoring to turn to mockery the intimidating effect of criminal sentences, the Congolese imagination is very sensitive to the application of exemplary sentences with a view to discourage criminal activities which proliferate in the country.

[211] Unfortunate expression castigated by elder Bayona. For the latter, the «…idea of colonial name, colonial authority used

difficulty will not appear concerning the place for the commission of the offenses. Nobody denies that the offenses were committed in the DRC.

However, the issue of official capacity is swept away by the provisions of the abovementioned code of military justice which underlines in Article 163 that « immunity attached to the official capacity of a person does not exonerate him from being pursued for war crimes or crimes against humanity ». The objection can only apply to Rwandese high ranking officials. In this regard, we will definitely face the jurisprudence of the International Court of Justice mainly in the matter of *Mandat d'arrêt of 11th April 2000*. It is not in vain to remember that in this last matter, the Hague-based Court reaffirmed that « former heads of state and current heads of state, former heads of government and current heads of governments, former ministers of foreign affairs and current ministers of foreign affairs enjoy total immunity against criminal prosecution by local courts ».[212] The exception is not appearance before international criminal courts[213]. Practice provides several cases for illustration[214].

The pitfall which is in particular hard to circumvent is to draw up the extradition Rwandese officers residing in the territory of their state. We particularly remember the matter of Laurent Nkundabatware[215]. Legally, we shall be confronted with the absence of an extradition treaty between the two states. The issue is qualified in doctrine since authors support the possibility of extradition even in the absence of a specific agreement.

The difficulty develops further when there is a requirement to extradite nationals by their national state. It is not common for the hypothesis of reversal of a principle well anchored in procedural law to the effect that « we don't extradite our own nationals ». Claire Mitchell argues that « Many States, but by no means all, have a constitutional restriction on the extradition of their own nationals »[216] However states like Great Britain and the United States generally extradite their nationals to be tried abroad[217]. It is often recommended that, in the absence of extradition, the state called upon, tries its own nationals by virtue of the principle of « *aut dedere aut judicare* ».

Convinced of the desire of Rwanda not to extradite her citizens because Kigali, in the absence of hypothetical change of regime, shall not sent to the gallows soldiers who had obeyed her policy of aggression towards Congo. We can strongly bet that Rwanda will not even attempt to try in their courts soldiers who distinguished themselves in the battle field in Congo, not only through their bravity but also through several violent acts, with the aim of rendering irrelevant the intervention of the International Criminal Court.

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to find it normal to sentence colonial subjects who had committed offense, to servitude, slavery. The indirect proof comes from the fact that before independence, a European was never sentenced to servitude because he was a free man which sentenced to payment of a fine ». Bayona ba-Meya, « La terminologie juridique à l'épreuve de la pratique légale judiciaire et sociale au Zaïre » in *Revue de la Faculté de Droit* de l'Université protestante au Congo, *Le droit aux prises avec les réalités socio-culturelles*, Actes des journées scientifiques du 25 au 26 avril 1997, numéro spécial, 1998, p. 11. We need to congratulate the project for the review of the penal code because it censured the expression.

[212] ICJ, in the matter of *Mandat d'arrêt du 11 avril 2000*, *Rec. 2002*, par. 28

[213] *Ibid*,

[214] See the Prosecutor pronouncements against Slobodan Milosevic before the International Criminal Tribunal for Ex-Yugoslavia, Prosecutor against Charles Taylor before the Special Court for Sierra Leone, Prosecutor against Jean Pierre Bemba Gombo before the International Criminal Court, Prosecutor against Al-Bashir, Prosecutor against Muammar Gaddafi.

[215] Several observers, including the author had expressed doubts which appeared justified, on the unlikely extradition of the leader of CNDP by the Rwandese authorities to Kinshasa due to his links with the regime in Kigali.

[216] Mitchelle, Claire, « Aut Dedere, Aut Judicare,The Extradite or Prosecute Clause in International Law » in *International Law, 2009* n°2, p. 68.

[217] See Nyabirungu Mwene Songa, *Traité de droit pénal congolais*, Kinshasa, D.E.S., 2001, p. 138.

As has been underscored previously, the Congolese justice system, despite the proclamation by the Code of military justice, of the irrelevance of the official capacity of the person to be tried[218], shall not overcome the obstacle of immunities provided by the municipal law for certain categories of people.

Personal lack of jurisdiction for Congolese courts in respect to high ranking officials of Rwanda, secures the jurisdiction of international court proceedings, in this particular case the international criminal court.

IV.2.2. Jurisdiction of the International Criminal Court

The establishment of an International Criminal Court is the outcome of a very long process[219]. If the creation of the court constitutes a reason for satisfaction, the lack of ratification of the convention on its statute, although nothing in international law forces a state which signed an international agreement to ratify it[220], by some states[221] as well as the American practice of bilateral agreements for immunity to American citizens seriously undermine the fight undertaken against impunity.

In the case under examination, the International Criminal Court would present a credible alternative to Congolese and Rwandese justice systems. On the obstacles of immunity which the courts in the DRC would face, the Court shall respond by effective implementation of Article 27 which sounds death knell to blanket immunity in accordance with the current international law. It is not in vain to remind the jurisprudence of the ICJ which maintains the rule of immunity for high ranking state officials before foreign courts with the exception of international courts.[222] To the apathy or inoperability of the Kigali Judge, the criminal jurisdiction of the Hague-based court would turn to the principle of subsidiarity without opposing it with the principle of *non bis in idem*.

Without contest, the crimes which the DRC is claiming against Rwanda lie under the material jurisdiction of the International Court of Justice, as stated by Article 5 and other articles of the Rome convention of 17th July 1998. In addition to war crimes, crimes of genocide and crimes against humanity as abovementioned, it is important to mention the crimes of aggression.

While the definition of the Resolution 3314 (XXIX) of 14th December 1974 adopted through consensus by the United Nations General Assembly[223] seemed to be weakened by the fact that the Rome convention had expressly given prerogative to the next review meeting for state parties to define the crime of aggression[224]. The review adopted nearly in its entirety

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[218] See article 19

[219] On the history of the International Criminal Court, read mainly Bassiouni, Cherif, *Introduction au droit pénal international*, Brussels, Bruylant, 2002, pp. 183-228.

[220] Despite this statement which shows the national legal status, it would be unscrupulous not to complete it by stating that a state signed an international convention is subjected to certain obligations mainly to subject the agreement thus signed to its competent authorities for ratification, the state must do nothing which would realize the object and goal of the treaty whose ratification is under waiting. We will fruitfully read Dreyfus, Simone, *op. cit.*, p.137.

[221] States like United States of America, China, Russia, Israel are not parties to the Rome convention on the International Criminal Court statute. See www.icc-cpi.int. Observers dread the absence of Washington from the International Criminal Court and do not hesitate to predict the end of this judicial institution just the League of Nations.

[222] ICJ, in the matter of warrant of arrest of 11 April 2000, para. 58

[223] From this resolution, agression means, inter alia, "the use of armed force by a State against the sovereignty, territorial integrity, political independence of another State, or in any other manner inconsistent with the goals of the United Nations"

[224] See article 5 (2) of the Rome Statute.

the abovementioned resolution which seemed to be rejected by integrating some minor elements.

Meeting in Kampala in Uganda from 7th to 11th July 2010, the state parties, during the review conference, resolved that « we talk of 'crime of aggression' as planning, preparation, launching or execution by a person effectively in a position to control or direct a political or military action of a state, an act of aggression which, by its nature, seriousness or extent, constitute a clear violation of the United Nations Charter ».

The amendment done on the Rome Statute contains major complication of two scales concerning punishment for crimes of aggression. The first difficulty lies on the fact that exclusion of *ratione personae* jurisdiction of the Court for a non-party state when the crime of aggression is committed by its nationals or in its territory. Up to the time this paper was being written, Kigali is yet to ratify the Rome convention, it is therefore impossible for the Court to pursue Rwandese nationals who are guilty of aggression in the DRC.

The pitfall constituted by the United Nations Security Council would appear insurmountable. Indeed, the abovementioned amendment is subordinate to the instruction of crime of aggression to the prior qualification of the Security Council. We could see here a clear desire to prohibit the International Criminal Court to pursue the crime of aggression when we know that during its operations, the Security Council always abstained from qualifying as aggression the corresponding acts. The Council remained faithful to its reasoning in situations which necessitate no prior analysis whatsoever in the laboratory like in Southern Africa[225], Kuwait[226], Democratic Republic of Congo[227], and Middle East[228].

If an obvious difficult can arise from pursuits against crime of aggression, the jurisdiction of the Court remains intact for other offenses which fall under the jurisdiction of the Court. The Rwandese nationals are liable for trial due to the place of commission of the offense. From a territorial point of view, the Court has jurisdiction to hear serious crimes mentioned above which would be perpetrated on the territory of another state party.

Having ratified the Rome Convention on 11th April 2002, the instrument of ratification of the DRC gave a boost to the entry into force the Rome Statute. Congo is among the first countries to have offered this new court the opportunity to function effectively by referring it crimes committed on her soil by her citizens. Moreover Congo has the special character of being the state whose nationals are the first prisoners of the Hague-based criminal court. A certain fear is founded to see the perpetrators of serious violations of humanitarian international law in the Democratic Republic of Congo escaping t*emporis* jurisdiction of the Hague-based criminal court. The ICC having temporary jurisdiction to hear crimes committed before 1st July 2002; to this date most of the crimes which Congo deplores had already been perpetrated and crystallized.

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[225] See offensive actions by South Africa against Angola, Namibia, Zimbabwe ; read Cassesse, Antonio, « Article 51 », in Cot, Jean-Pierre et Pellet, Alain, *La charte des Nations Unies article par article*, 2ème édition, Paris, Bruxelles, Unesco, 1985, pp. 775-781.

[226] Read Resolution 668 and following of the UN Security Council.

[227] Worse is the situation experienced in Congo where two armies of Rwanda and Uganda attacked Kisangani in North-west Congo twice without the Council seeing the clear proof of real aggression.

[228] Actions of the Hebrew State against the Head office of OLP in Tunis, against the Iraqi reactor « Osirak », in Golan, against a pharmaceutical factory in Sudan, were not qualified as aggression by the political organ of the United Nations. Read Cassesse, Antonio, *op. cit.*, p.782, Sicilianos- Linos, Alexandre, « Le contrôle par le Conseil de sécurité des actes de légitime défense» in *Le chapitre VII de la Charte des Nations Unies* , Actes du colloque de la SFDI à Rennes, (2,3 et 4 juin 1994), Paris, Pedone, 1995, p.59 ; Corten, Olivier, Duboisson, François, « Opération « Liberté immuable » une extension abusive du concept de légitime défense », R.G.D.I.P., 2002/1, pp. 51-77.

The discussion will be of value to determine if it pertains to instantaneous offenses or continuous offenses. For the former, the Court's action will be paralyzed but not for the latter. Beyond this hypothesis which underlines the necessity as well as the relevance of the constitution of an *ad hoc* court for Congo, only the crime of aggression would fall under *temporis* jurisdiction of the Court. At the time the Rome Statute came into force , Kigali's armed aggression against DRC had not yet ceased. Congolese and Rwandese authorities signed on 30th July 2002 the Pretoria Protocol providing for the withdrawal of Rwandese troops.

Legally speaking, the Rwandese aggression having been prolonged under the form of occupation, only came to an end on the day for the withdrawal of the last Rwandese soldier. However, the question of punishment for this offense poses a problem due to the fact that Rwanda is, up to today, a third party state to the Rome Convention of 17th July 1998 on the International Criminal Court Statute, but also almost insurmountable conditions to the judicial action to be taken. It has been said that it will be practically impossible to pursue a state or individuals for crimes of aggression due to intervention of the Security Council, a political organ par excellence, where legal considerations do not take precedent. Under these conditions, can we seriously think of reparation for the loss suffered by the DRC?

IV. 3. The delicate question of reparation for war damages

Reparation for war losses does not escape the logic behind settlement of international disputes. The ICJ had, since the matter of *Concessions Mavrommatis in Palestine*, defined dispute as being « a disagreement on a point of law or fact, a contradiction, an opposition of legal theses or interests between two people »[229]. Agreeing with its predecessor, ICJ reaffirmed that it is « a disagreement on a point of law or fact, a conflict, an opposition of legal theses or interests between parties »[230].

Dispute persisting between Kinshasa and Kigali, is a little absurd to seek for resolution of the same in accordance with the modes of settlement of international disputes, going by the meaning of Chapter VI and in particular Article 33 of the United Nations Charter[231].

It is in vain to administer the proof that lack of reparation for war losses caused by Rwanda to the DRC would be susceptible of threatening peace and international security in the Great Lakes region. Diplomatic efforts undertaken upto now would consolidate the fragile « peace » existing between the two neighbours is the annoying issues, especially those of reparation for war damages, were to find a negotiated solution.

Just like any international dispute, the dispute for reparation of war damages can be resolved in accordance with political and diplomatic methods as well as judicial methods. In the absence of political and diplomatic negotiations which would determine the nature and extent of compensations, the judicial, legal or arbitration way appears to the most suitable.

As demonstrated here above, the damage suffered by the DRC due to the Rwandese aggression is immeasurable. The illegal international act covers both *jus ad bellum* and *jus in*

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[229] CPJI, Act of 20 August 1924 relating to concession case of *Mavrommatis in Palestinia, Série A*, n°2, p.11

[230] ICJ, *East Timor case*, Judgment of 30 June 1995, *Rec. 1995*, par. 22, p. 90

[231] Article 33 (1) of the United Nations Charter states that « parties in dispute and of whom prolongation is susceptible to threatening the maintenance of peace and international security must find a solution to the dispute through negotiation, investigation, mediation, conciliation, arbitration, legal settlement, recourse to organization or regional agreements or by any other peaceful means of their choice ».

bello. The former in respect to conditions for triggering the war in violation of prohibition for use of force, as proclaimed by Article 2§4 of the UN Charter. As for *jus in bello*, it encompasses several violations of international humanitarian law committed by Rwandese troops operating in the DRC. The Congolese state was both a direct and an indirect victim through civilians.

The consequences of Rwandese aggression will be remembered for a long time by salary cuts to which employees of the Congolese Government were subjected as a contribution to the war effort and other related problems. It would be fastidious to assess properly the damages caused to Congo in her double face as a victim. As underscored by one author « … if civilians suffered losses and damages, it would be hard to record vehicles taken to Rwanda…, villas and buildings destroyed and demolished or all private property looted, physical mistreatment and tortures suffered… On the other hand, it is perfectly easy to count and possibly assess factories and other facilities destroyed and demolished during the entire period of foreign expedition ».[232] Concerning the direct loss, the same author underscores « For the benefit of the Congolese state, there is need to take into consideration losses through aggression to her national sovereignty and its territorial integrity, the loss suffered collectively by the loss of her nationals who died due to war and massacres…, public companies destroyed or demolished, banks looted, stored products taken away, serious and destruction impacts on environment and nature, as well as illegal tapping and witnessed looting of natural resources»[233].

Facing these clear losses which are only waiting for a formal procedure to be crystallized, only one credible alternative is presented to the parties, particularly on the Congolese side : reparation. It would therefore be in vain to turn to abundant rhetoric since it is unanimously admitted in doctrine[234] just like in jurisprudence, otherwise in the practice of states, according the proclamation of the ICJ that « It is a principle of international law, or rather a general conception of law, that any violation of a commitment contains the obligation to make reparations»[235].

A question not addressed by both the ICJ order of 13th February 2006 and by the resumption of bilateral relations between Kinshasa and Kigali, is the dispute on reparation for war damages. Its final resolution depends on the desire and will of the Congolese Government. The lethargy of the latter on this point would have very serious consequences on the future relations between Congo and Rwanda as well as the whole of the Great Lakes region.

CONCLUSION

Without relying solely on the voluntary approach of the Rwanda attempting to accept *proprio mutu* to resolve the dispute which still remains between the two countries, there is need for the Government of the Democratic Republic of Congo to persist in claiming for reparation for war damages. The losses suffered by Congo can find solution within the framework of an arbitration procedure or in the implementation of diplomatic processes. Often, « in circumstances of armed conflicts, these issues are resolved by treaties or peace

[232] Mampuya, Auguste, « Responsibility and reparations in the great lakes conflict in Congo-Zaïre », current review, *General review of the International Public law*, 2004-3, p. 697

[233] *Ibid*

[234] Keen reading on the works of Pierre, *Les réparations de guerre en droit international. La responsabilité internationale à l'épreuve de la guerre*, Bruxelles, Bruylant, Paris, LGDJ, 2002, 904 p.

[235] CPJI, case relating to Chorzow factory, Judgment of 13th September 1928 (fond), série A, n°13, p. 29

agreements or by specific agreements when coming out of the conflict »[236]. It is therefore surprising that no agreement whatsoever was signed between the belligerents at the end of the hostilities by providing the responsibility of the aggressors[237]. The United Nations can strongly support Congo as was the case in the conflict between Iraq and Kuwait.

Opportunity is offered to governments in Kinshasa and Kigali to finally commit their people towards peace and progress, by courageously resolving any dispute susceptible of poisoning future diplomatic and economic relations between states within the region.

[236] Mampuya, A. op. cit., p.690
[237] Mampuya, A. *op. cit.*, p. 690.

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THE PROJECT FOR THE CREATION OF A PAN-AFRICAN CRIMINAL COURT

By **BALINGENE KAHOMBO***

INTRODUCTION

The creation of a Pan-African Criminal Court is a recent development, whose origin goes back to 2006. The African Union (AU) considers criminal justice as a mechanism for protection of human rights and a tool for defense of peace and pan-African public community order[238].

This relation between justice and peace is a universal doctrine[239]. In reality, it pertains to imposing, through criminal justice, sanction and supremacy of the law on brutal and cynical force of men with two main objectives. First, prevent forgetfulness: any peace must be founded on the right of the victims to know the truth and obtain redress. Thereafter, there is need to avoid the feeling of impunity, because, according to the remark made by the Prosecutor Robert Jackson, during the first hearing of the Nuremberg case (Germany), in 1945: « the crimes we are seeking to condemn and punish were premeditated, perverse and devastating and that civilisation cannot tolerate that they be ignored because we would not survive if they were repeated ».

What is the future of the Pan-African Criminal Court, and what place will it occupy in the judicial system of the AU?

The novelty of the project requires it to review the main determining factors i.e. the reasons why the AU since 2006 has embarked on the path towards the establishment of an effective criminal court at the continental level. Two aspects must thus be distinguished: the political origins of the project (I) and promotion of Pan-African criminal justice (II).

I. POLITICAL ORIGINS OF THE PROJECT

It all started from three cases in particular: the cases concerning Hissène Habré, Rose Kabuye and Omar Al Bashir, who are, all, high ranking African political personalities. Hissène Habré was the President of the Republic Chad from 1982 to 1990, before being overthrown

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238 The author tacked this question, for the first time, in 2009. Cf. BALINGENE KAHOMBO, « The African Union has shown its commitment for protection of human and people's rights. Concerning the matters of Hissène Habré, Rose Kabuye and Omar Al Bashir », communication presented during the celebration of the Africa day at the Free University of Kinshasa, on 25th May 2009, 16p. Read also NDESHYO RURIHOSE (O.) (dir.), *Manuel de droit communautaire africain. Tome I. Introduction générale : objet, sources, caractéristiques et domaines*, Kinshasa, éd. Etat et Société, collection Bibliothèques des Facultés de droit des Universités congolaises, 2011, pp.476-493.

239 Cf. VINCK (P.) et al., *Living with fear. A population-based survey on attitudes about peace, justice, and social reconstruction in Eastern Democratic Republic of Congo*, University of California, Berkeley's Human Rights Center and Tulane University's Payson Center for International Development, New York–based International Center for Transitional Justice, Report, august 2008, pp.1-6; NYABIRUNGU Mwene SONGA, « La possible contribution du droit pénal à la paix, à la justice et au travail », in *Philosophie africaine: paix-justice-travail*, actes de la 10ème semaine philosophique de Kinshasa, du 30 novembre au 6 décembre 1986, Kinshasa, Facultés catholiques de Kinshasa, 1988, pp.141-158.

by Idriss Déby. Since then he lives in exile in Dakar, Senegal. Rose Kabuye was the Chief of Protocol of the Rwandese President Paul Kagame, while Omar Al Bashir is the Head of State and the President of the Republic of Sudan, since 1989. These three African personalities are being pursued in a framework which totally escapes the capacity of the AU. They are being accused of having committed serious human rights and/or humanitarian international law violations. The first two were accused in Belgium and France respectively, while the Sudanese President is under an international warrant of arrest issued by the International Criminal Court (ICC) on 4th March 2009.

Seized with these matters, the African Union conference upto the Malabo Summit (Equitorial Guinea), held between 23rd June to 31st July 2011, came up with twenty decisions[240], spread out in the following manner: eight concerning the trial of Hissène Habré, six concerning abusive use of the principle of universal jurisdiction and six others concerning the indictment of Omar Al Bashir by the ICC.

From all these decisions, it is clear that the AU disapproves trials against high ranking African personalities outside Africa. Before analysing this Pan-African policy position (I.2), it is important to first explain, how the referral to the AU is supposed to be done (I.1)

I.1. Political and judicial series and the referral to the African Union

The three judicial matters, involving high ranking African personalities, poisoned relations between Africa and the rest of the world, including the UNO. We can give a brief overview of these matters, in a chronological order from when they started, until the time when referral of the same was made to the AU. It pertains, first, to the matter of «Hissène Habré Trial » (I.1.1) and, thereafter, the matters of Rose Kabuye and Omar Al Bashir (I.1.2).

I.1.1. The matter of Hissène Habré Trial

The indictment of Hissène Habré was put into operation, on 19th September 2005, by the investigating judge of the High Court of Brussels, Mr.Daniel Fransen[241].

Indeed, in January 2000, seven Chadian victims filed a suit against Hissène Habré, in Senegal, for acts of torture and crimes against humanity. The investigating judge of the Regional Court of Dakar indicted him for complicity of crimes against humanity, acts of torture and barbarism. He was consequently placed under house arrest.

However, on 20th March 2001, following an appeal filed by Hissène Habré's defense attempting to annul the decision of indictment by the Regional Court of Dakar, the Court of Appeal of Senegal quashed the decision of the indictment of the Court of Appeal of Dakar, pointing to the lack of jurisdiction of the Senegalese Courts to try the indictee. In supporting its decision, the Court of Appeal ruled that Senegalese courts do not have jurisdictions to hear offenses committed in foreign countries, by foreigners and against foreign victims.

Besides, lack of internal legislative or regulatory measures meant to grant, on a procedural level, Senegalese court's jurisdiction, excluded these courts from exercising universal jurisdiction, on the basis of Article 5 of the Convention against Torture and other Cruel,

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[240] All decisions can be consulted in the official website of the AU : http://www.au.int

Inhuman and degrading treatment[242], of 10th December 1984. Lastly, it indicated that, there is need to amend the Constitution of Senegal and its Criminal Procedure Code due to non-retroactivity of the criminal law to make the proceedings against Hissène Habré compatible with the Senegalese legal system.

These legal arguments were severely criticized in doctrine. Professor Abdoullah Cissé indicated that politics came into play to influence the decision of the judges in the matter of Hissène Habré, while they had sufficient legal arguments to hear it[243].

The victims, thus dismissed, raised the matter with the United Nations Committee against Torture, alleging a violation of the Convention against Torture, while the then President of Senegal, Abdoulaye Wade, declared in April 2001, that he had given Hissène Habré a month to leave the Senegalese territory. In a preliminary recommendation, the Committee against Torture asked Senegal not to allow Hissène Habré to leave the Senegalese territory. Following an express request from the Secretary General of the UN, Koffi Annan, Senegal accepted to honor the recommendation of the said Committee.

Other victims, of which some had acquired Belgian nationality, filed a suit in Belgium, in application of the Belgian law on universal jurisdiction, but amended by the Act of 5th August 2003[244]. It is following this suit that the investigating judge of the High Court of Brussels made, on his turn, the decision to indict Hissène Habré and issue an international warrant of arrest against him. On the basis of this decision, Belgium asked Senegal to extradite the indictee. He was put under arrest on 15th November 2005, while waiting a competent court to make a decision on the application for extradition.

On 25th November, the indictment chamber of the Court of Appeal of Dakar, declared that it has no jurisdiction to rule on the application of extradition of a former head of state. The ratio *decidendi* of the Court was that « the concerned party enjoyed immunity from prosecution due to his capacity as the head of state at the time when the offenses were committed »[245].

However, this opinion is debatable in respect to the status of the international law, as developed by the ICJ, in the matter relating to *Warrant of Arrest of 11 April 2000 (Democratic Republic of Congo vs. Belgium)*. In its decision of 14th February 2002, the Court mainly insisted on the fact that immunity does not mean impunity[246]; which mainly distinguishes,

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[241] Details of procedural changes of this matter are drawn from HUMAN RIGHTS WATCH, *Hissène Habré judgment. Time is going for the victims*, report n°2, January 2007, pp.5-11.

[242] Hereinafter «Convention against Torture».

[243] CISSE (A.), « Criminal responsibility of African Heads of State in office for serious international crimes », *in* DOUCET (G.) (dir.), *Terrorisme, victimes et responsabilité pénale internationale*, Paris, Calmann-Lévy, 2003, pp.247-254. It is important to also remember article 27 of the Vienna Convention on the Law of Treaties of 23rd May 1969 provides that no party can invoke the provisions of his local law as a justification for non-performance of a treaty.

[244] Voir DAVID (E.), *Code de droit international pénal*, Edition update on 1st November 2004, Bruxelles, Bruylant, 2004, pp.1384-1385. This law amends the Act of 17th April 1878 on Belgian Criminal Procedure Code. Henceforth, Article 1 of this code provides: « §1er. In accordance with international law, proceedings are excluded in respect to: heads of state, heads of governments and ministers of foreign affairs, during the period when they are exercising their duties, as well as other people whose immunity is recognized by the international law. §2. In accordance with the international law, no act of coercion relating to the exercise of the public action can be brought up during their visit, against any person having been officially invited to visit the territory of the Kingdom by Belgian authorities or by an international organization established in Belgium and with which Belgium signed an agreement for head office ».

[245] ICJ, case concerning questions relating to the obligation to prosecute or extradite (Belgium vs. Senegal), request for provisional measures, order of May 28, 2009, §26. See also http://www.hrw.org/, opinion of the Court of Appeal of Dakar on the request for extradition of Hissène Habré (excerpt), retrieved March 5, 2008.

like Pierre-Marie Dupuy[247], functional immunities from personal immunities. If the former protects the indictee against any legal proceedings for all public or official actions performed under official capacity, during and after the cessation of his functions, the latter covers only private acts, i.e. those deprived of any link with his official capacity and only protects him during the exercise of his duties, legal proceedings remaining possible in foreign countries, if these duties come to an end.

It is therefore clear that the Indictment chamber of the Court of Appeal of Dakar assimilated the crimes against the former Chadian Head of State to acts of his duties, thus approving, as Sayman Bula-Bula supports, « the thesis of perpetual immunities »[248], while the crimes in question should be considered as private acts, since they are clearly not attached to any exercise of official duties of the indictee, in the service of his country.

Drawing the consequence of this legal opinion, Senegal was required to inform Belgium, on 23rd December 2005, that the Court of Appeal of Dakar, ruling as the court of the last resort, according to the Senegalese law, had just put an end to the extradition trial. On her part Belgium decided, on the basis of Article 30 of the Convention against Torture, to refer to the ICJ[249], concerning the dispute existing henceforth between herself and Senegal in relation to « Senegal respecting her obligation to charge Mr. H. Habré […] or to extradite him to Belgium for criminal prosecution »[250], in accordance with Article 5 of this Convention.

On 27th November 2005, two days after declaration of lack of jurisdiction by the Indictment Chamber of the Court of Appeal of Dakar, the Senegalese Minister of Foreign Affairs declared: « Senegal, sensitive to the complaints made by victims seeking justice, will abstain from any action which would enable Mr. Hissène Habré not to appear before court. He considered, consequently, that it was upon the African Union Summit to show a competent court to hear this matter »[251]. This is the reason why Senegal made a referral to the African Union Conference, meeting during the 6th Ordinary Session, in Khartoum (Sudan), from 23rd to 24th January 2006.

I.1.2. Matters of Rose Kabuye and Omar Al Bashir

Mrs.Rose Kabuye was indicted within a framework of inquiry, which was led by the criminal investigation judge, Jean-Louis Bruguière, on the attack of 6th April 1994 against the plane of the former Rwandese President, Juvénal Habyarimana. With referral since 1998 by French families of members of the crew of this plane who were killed during the attack, Judge Bruguière issued, against each of the nine Rwandese personalities sued, an international warrant of arrest, and recommended to the ICTR to indict the Rwandese President, Paul Kagame, who enjoys immunity from prosecution by foreign states by virtue of being the head of state.

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246 ICJ, case concerning the warrant of arrest of 11 April 2000 (Democratic Republic of the Congo vs. Belgium), judgment of 14 February 2002, §61.

247 DUPUY (P.-M.), *Droit international public*, 8ème éd., Paris, Dalloz, 2006, p.132.

248 BULA-BULA (S.), « Senegalese jurisdiction versus Belgian universal jurisdiction judgement of November 25, 2005 of the Court of Appeal of Dakar concerning the lack of jurisdiction in the extradition of Mr. Hissène Habré », in Liber Amicorum Marcel Antoine Lihau, *Pour l'épanouissement de la pensée juridique congolaise*, Bruxelles, Bruylant et Presse de l'Université de Kinshasa, 2006, p.325.

249 See the introductory request of the government of the Kingdom of Belgium, deposited to the court clerk on the 9th February 2009.

251 HUMAN RIGHTS WATCH, *op.cit.*, p.8.

In reaction to these judicial proceedings, Rwanda cut diplomatic ties with France. In January 2009, this matter took a decisive turn when, in the execution of the international warrant of arrest issued against Rose Kabuye, Germany carried out the arrest while she was on a private visit on the German territory. Like was the case with Hissène Habré, a referral on this matter was made to the AU and made a pronouncement on the same for the first time, during its 12th ordinary session, held in Addis Ababa, from 1st to 3rd February 2009.

As for the Sudanese President, Omar Al Bashir, he was accused of crime of genocide, crimes against humanity and war crimes committed in Darfur, in the western part of Sudan. Indeed, following corroborating information touching on massive violations of human rights and international humanitarian law in Darfur, the United Nations Security Council had decided through its Resolution 1593 of 31st March 2005, to defer the situation to the Prosecutor of the Court, in application Article 13 (c) of the Rome Statute of the ICC. After the first investigations by the Prosecutor and on his application, the pre-trial chamber 1 of the Court issued, on 2nd May 2007, two international warrants of arrest, one against Ali Kushayb, head of pro-government militias, the Janjaweed, the other against Ahmed Haroun, former interior minister of Sudan[252]. It is only on 4th March 2009 when the Court issued an international warrant of arrest against Omar Al Bashir.

This is unusual since, for the first time, in the history of the international law, a sitting head of state is facing prosecution by an International Criminal Court. But, the Sudanese Government contested the jurisdiction of the Court, on the reasoning that Sudan is not a party to the Rome Statute. Mr. Ahmed Haroun further ironically attacked the credibility of the Court describing it like « a big comedy being played by wise men of the ICC, in which it is only Zionists who give the reply »[253].

The indictment of the Sudanese President is in particular a serious decision which was also referred to the AU. Like in the two previous matters, the position of the AU is clear: the disapproval of judicial proceedings outside Africa against high ranking African personalities. These are Pan-African policy positions which we need to analyze now.

I.2. Common positions taken by the African Union

To understand well the common positions of the AU, two cases must be distinguished: that of proceedings instituted by foreign countries in the application of the principle of universal jurisdiction (I.2.1) and that of the ICC (I.2.2).

I.2.1. Disapproval of abusive use of the principle of universal jurisdiction

The AU condemned the abusive use of the principle of universal jurisdiction. According to the doctrine, it pertains to a principle through which a state affirms its jurisdiction to try and judge the perpetrator of an offense « without there being any criteria for direct attachment with this offense, if it is not eventual presence of the perpetrator on its territory »[254]. In other words, the state prosecutes and judges, regardless of the place of commission of the offense, the nationality of the perpetrator or of his victim. Failure to prosecute, and if only the perpetrator of the offense is within its territory, he must, in the least extradite him to another state which makes a request for the same.

[252] MATTIOLI (D.),« Major challenges in the first case of ICC prosecutor in Darfur », Le Monitor, n°34, May-October 2007, p.1.
[253] DEIRDRE (C.), « Prosecutors announcement sends shivers in Sudan », The Monitor, n°34, May-October 2007, p.12.

The AU Conference invoked three fundamental reasons in support of its position against proceedings undertaken, on the basis of this principle, against high ranking African personalities, in particular those from Rwanda[255], namely : i) Abusive use of the principle of universal jurisdiction is action which could compromise international law, order and security; ii) the political nature and abusive use of the principle of universal jurisdiction by judges of some non-African states against African leaders is a flagrant violation of the sovereignty and territorial integrity of the states ; iii) the abuse and use of charges against African leaders have a destabilizing effect which will have a negative impact on economic, political and social development of African states and on their capacity to maintain international relations.

It is important to note that AU stigmatizes abuse of the use of the principle of universal jurisdiction, but it does not state what is composed of this abuse. It is rather trying to enumerate its consequences. Furthermore, the AU position is discriminatory, because its approach aims at protecting, not all Africans, but only leaders. Thus, we can fear, putting in place selective justice in article of faith, in fragrant contradiction with the constitution of the African Union.

Lacking basis in law, the Pan-African position finds its explanation in politics. Indeed, the African Union Conference considers that the principle of universal jurisdiction should not be an instrument forming the basis for « exercise of power by powerful states over weaker states »[256]. This idea is inspired by a Pan-African conviction that African states are victims of imperialism from powerful non-African states, among them western powers.

Besides, the AU estimated, by speaking in one voice, constitutes an appropriate collective response against this situation, before deciding that the warrants of arrests, issued in application of this principle, « should not be executed by Member states of the African Union »[257]. It requested « all members of the United Nations, in particular member states of the European Union, to impose a moratorium to the execution of these warrants until all legal and political issues are discussed in fine details between the African Union, European Union and the United Nations »[258].

Moreover, an *ad hoc* group of experts from the AU and the EU was put in place, with the mandate of « clarifying the conception that Africans and the European Union have, respectively on the principle of universal jurisdiction »[259].

On 15th April 2009, the Group delivered its report, in which it formulated 17 recommendations, addressed to member states of the AU and to those of the EU, to their respective organs and courts. One of the recommendations needs to be noted. It pertains to the obligation to respect immunities which are enjoyed by foreign state officials in accordance with the international law[260].

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[254] HENZELIN (M.), *The principle of universality in international criminal law. Right and obligation of States to try and prosecute according to the principle of universality*, Brussels, Bruylant, 2000, p.29.

[255] Read Assembly Decision AU/Dec.199 (XI) on the report relating to the abusive application of the principle of universal competence, adopted by the Union conference during the 11th ordinary session held in Sharm El-Sheikh (Egypt), from 30th June to 1st July 2008, §5, i), ii) and iii).

[257] Assembly Decision/AU/Dec.199 (XI) above, §5.iv).

[258] Idem, §8.

[259] Abovementioned decision on the implementation of the decision in relation to abusive use of the principle of universal jurisdiction, §2.

[260] See R8 of the said report.

But, the Group did not touch on another necessity, expressed by the AU: the creation of « an international regulatory body with jurisdiction to examine and/or to tackle complaints or appeals following abusive use of the principle of universal jurisdiction by different states »[261]. It limited itself in proposing that member states of the AU think about « creation of judicial «contact points» with Eurojust[262] with a view to deepen and strengthen international cooperation in criminal matters between the AU and member states of the EU »[263] and that « the AU could envisage coordinating the appointment of judicial contact points of an appropriate number of states required to represent interests of the main African regions as well as a contact point of the AU itself»[264].

For almost similar reasons, the AU also disapproved the ICC action against the Sudanese President Omar Al Bashir.

I.2.2. Disapproval of the International Criminal Court action

The AU disapproved the indictment of the Sudanese President, for the reason that it risked « compromising in a serious manner the ongoing efforts for rapid settlement of the conflict in Darfur »[265]. This is why it requested the Security Council of the United Nations to suspend the proceedings started by the ICC, in accordance with Article 16 of the Rome Statute[266]. At the same time, it requested the Commission to « convene within the shortest time possible, a meeting of African countries, parties to the Rome Statute, so as to consult on the actions of the International Criminal Court (ICC) in Africa, in particular in the light of the proceedings undertaken against African personalities and to submit recommendations bearing in mind all relevant elements »[267].

This meeting was held in Addis-Ababa, from 8th to 9th June 2009, and was attended by 25 out of 30 African states who are parties to the Rome Statute. Several hypotheses were explored. Either the African states refuse to deliver the Sudanese President to the ICC, or the UN Security Council suspends upon their request the proceedings commenced for a period of one year, or still in the extreme, they all withdraw as a block from the ICC.

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[260] See R8 of the said report.

[261] Read the decision on the report in relation to the abusive use of the principle of universal jurisdiction; see also §6 of the Assembly Decision/AU/Dec.243 (XIII) on the abusive use of the principle of universal jurisdiction, adopted by the AU Conference, during its 13th ordinary session, held in Sirte (Libya), from 1st to 3rd July 2009, §5.v). These two decisions were repeated, on this point by the Assembly Decision/AU/Dec.271 (XIV) rev.1, adopted by the AU Conference, during its 14th ordinary session, held in Addis-Ababa (Ethiopia), from 31st to 2nd February 2010, §6 ; as well as by the Assembly Decision/Dec.292 (XV) (§4), adopted by the AU Conference, during its 15th ordinary held in Kampala (Uganda), from 25th to 27th July 2010.

[262] Eurojust is an EU body instituted in 2002 so as to promote and improve coordination between judicial authorities of member states competent in criminal matters within the framework of investigations and proceedings in relation to cross-border criminality, terrorism and organized crimes in particular drug trafficking, money laundering and human trafficking. It organizes meetings between authorities in charge of investigations and proceedings from different member states on concrete matters, more strategic issues and special types of criminality. See the site http://www.eurojust.europa.eu .

[263] See recommendation n°15 of the same report.

[264] *Ibidem*.

[265] Assembly Decision/AU/Dec.221 (XII) on the application by the Prosecutor of the International Criminal Court (ICC) for indictment of the President of the Republic of Sudan, adopted by the AU Conference, during its 12th ordinary session , held in Addis-Ababa (Ethiopia), from 1st to 3rd February 2009, §2.

[266] This Article provides that: « No investigation nor proceedings can be undertaken nor carried out by virtue of the Statute twelve months following the date when the Security Council made an application in this direction to the Court in a resolution adopted by virtue of Chapter VII of the United Nations Charter,; the request can be renewed by the Council under the same conditions ».

[267] Idem, §5.

The recommendations of the meeting were submitted to the 13th Ordinary Session of the AU Summit which took place, from 1st to 3rd July 2009, in Sirte (Libya). Since the Security Council had not taken into account the Pan-African request, the AU Conference decided that « member states of the AU will not cooperate in accordance with the provisions of Article 98 of the Rome Statute of the ICC in relation to immunities in the arrest and transfer of President Omar Al Bashir of Sudan to the ICC »[268]. It also warned that « the AU and its member states reserve the right to take any decision or approach to preserve and safeguard the dignity, integrity of the continent »[269].

But, we can object that this argument of defending the continent moves the debate to a non-legal field. Legally is an African state right to refuse to execute an international warrant of arrest, issued in conformity with the international law, following a decision taken by the AU Summit?

In reality, the AU position puts the African states in a legal dilemma: either they abide by the decisions of the AU Summit or they violate them, ignoring article 23 of the Constitutive Act, by executing international warrants of arrest issued by Belgium, France and the ICC.

It is important to state that the AU is not party to the Rome Statute. It has no capacity whatsoever to prevent a state from exercising its powers established by virtue of international law, nor interfering with or obstructing proceedings undertaken within the framework of the ICC. From then on, it is clear that its official position is out rightly beyond the powers it has over its constitution. Failure to have an adequate title of jurisdiction, it fell into an illegality. Its decisions cannot exonerate African states from their obligation to cooperate in view of administration of international criminal justice.

On the other hand, these decisions have a very high degree of political and diplomatic significance. We can see the desire to obstruct the course of justice, more precisely because the caste of leaders in power is disturbed. The hyper-politization of the AU Conference confuses even, in the matter of Rose Kabuye, the principle of universal jurisdiction with the normal exercise of the passive personal jurisdiction of the French State. The claim of imperialism of powerful states over weaker states does not hold any water. The ICC is not, an institution which has turned against Africans. First, in the seven situations[270] in which it is involved in Africa, five of them were referred to it by African states[271] and two by the UN Security Council[272]. Secondly, African states group constitute majority of states parties to the Rome Statute. Lastly, since the ICC is an institution wanted by the Africans themselves, we would not understand why the AU is trying to turn its back to the ICC so early, after it came into force, on 1st July 2002, without violating its own constitution as pertains to its objective of fighting impunity.

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[268] Assembly Decision/AU/Dec.245 (XIII) on the report of the meeting of African states parties to the Rome Statute of the ICC, adopted by the AU Conference during the 13th Ordinary session, held in Sirte (Libya), from 1st to 3rd July 2009, §10. There is need to note the reservation issued by Chad. This reservation is repeated in the Assembly Decision/AU/Dec.296 (XV) (§5), adopted by the AU Conference, during the 15th Ordinary session held in Kampala (Uganda), from 25th 27th July 2010.

[269] Idem, §12.

[270] These seven situations refer to the following countries: Uganda (2003), DRC (2004), CAR (2005), Sudan (2005), Kenya (2008), Côte d'Ivoire (2011) and Libya (2011).

[271] Uganda, DRC, CAR, Kenya, Côte d'Ivoire.

[272] Sudan and Libya.

In brief, the Pan-African positions are to be condemned at international law level. The preference it is trying to grant to African judicial mechanisms, within the framework of the state, appears like an alibi which has the effect of practically sheltering high ranking African personalities from prosecutions. Very often, due to the nature of African political regimes (dictatorship and presidential regimes), the judiciary is hindered by lack of independence vis-à-vis the executive and legislature. Reasonably, we can doubt that the promotion of criminal justice at the continental level is an approach to radically change this situation.

II. PROMOTION OF PAN-AFRICAN CRIMINAL JUSTICE

The rejection of proceedings undertaken against Hissène Habré, Rose Kabuye and Omar Al Bashir outside Africa led to the AU to adopt a double attitude: on one hand, it wants from now henceforth to contribute to punishment, by member states, of international crimes committed in Africa (II.1); on the other hand, it decided to put in place a Pan-African criminal court (II.2).

II.1. Organization of punishment at the national level

The AU practice shows that it can built two main forms: on the one hand, referral of jurisdiction to a member state (2.1.1); on the hand, creation of specialized criminal courts with a mixed composition (2.1.2).

II.1.1. Referral of jurisdiction to member state

This is the situation which occurred in the matter of the *Trial of Hissène Habré*. Indeed, the AU decided to put a committee of eminent African lawyers, appointed by the sitting Chairperson, in consultation with the President of the Commission. It was required to prepare a report and make recommendations to the AU Summit on the available options for the trial of Hissène Habré, bearing in mind reference elements hereinafter: adherence to the principle of total rejection of impunity, efficiency in terms of cost, access of the presumed victims and witnesses to the trial, preference of an African mechanism, etc.[273]. The presentation of the report took place in July 2006, the effect of which the AU Summit noted « that in terms of articles 3 (h), 4 (h) and 4 (o) of the constitution of the African Union, the crimes brought against Hissène Habré are fully under the jurisdiction of the African Union »[274].

Article 3 (h) indicates that the goal of the Union is precisely to promote and protect human rights, in conformity with the African Charter on Human and People's Rights and with other relevant instruments in relation to human rights. Article 4 (o) espouses on the principle of respect of the sacrosanct nature of human life, condemnation and rejection of impunity. As to the basis drawn from Article 4(h) of the constitution of the AU establishes that its « right of intervention in a state member in case serious circumstances » also involves a judicial intervention.

However, since it does not have any competent court to exercise its jurisdiction, it decided to mandate to Senegal « to charge and try, on behalf of Africa, Hissène Habré, by a competent Senegalese Court with the guarantees of a fair trial »[275].

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[273] Sudan and Libya.

[274] Assembly Decision/AU/Dec.103 (VI) on the Trial of Hissène Habré and the African Union adopted by the AU Conference, during the 6th Ordinary session, held in Khartoum (Sudan), of 23rd to 24th January 2006, §3.

[275] It is in view of executing this mandate of the African Union that Senegal amended its Constitution of 22nd January

Similarly, in the matter of Omar Al Bashir, the AU[276] put in place, on 21st July 2008, a high level panel, composed of eminent personalities and placed under the chairmanship of the former South-African President, Thabo Mbeki. It was supposed to examine in details the situation in Darfur and make recommendations to the AU Summit on the best means to tackle, efficiently and completely, the issues of accountability and fight against impunity, on the one hand, and those of reconciliation, on the other hand. The Panel presented its report to the President of the Commission, on 8th October 2009, but represented it to the CPS on 29th October 2009, in Abuja. It is entitled: « Darfur: the quest for peace, justice and reconciliation »[277].

In this report, indeed, the Panel indicates that the solution to the armed conflict in Darfur must warn the people of Sudan and that a settlement cannot and should not be imposed from outside[278]. It emphasizes also that everybody insists on the fact that the goals to be attained in Darfur are three in number: peace, justice and reconciliation[279]. They are indivisible, interconnected, and mutually dependent, egalitarially desired and cannot be achieved separately from one another[280].

It follows from the Panel's report that it went contrary to the position expressed by the African Union Conference in this matter. Indeed, the Conference had requested the UN Security Council to postpone the charges against Omar Al Bashir for a period of one year, for the reason that the said charges presented the risk of compromising the rapid settlement of the conflict in Darfur. The rejection of AU request by the Panel consists of acknowledging that this settlement cannot occur under the rein of impunity.

Unfortunately, the AU Conference had committed Sudan, since February 2009 to charge and try, within the framework of the *Special Criminal Court on the events in Darfur (SCCED)*, instituted on 7th June 2005, the perpetrators of the much talked about international crimes, and to « benefit from the availability of qualified advocates who will be deployed by the AU and the league of Arab states »[281]. But, this solution presented the germs of its own weakness, because, in these conditions, high ranking personalities of Sudan, especially those on the hot seat of the ICC, could never be charged, tried and possibly sentenced.

Thus, the Senegalese and Sudanese experience was a failure. That is why the AU planned, in place of exclusive national courts, for the creation of mixed specialized criminal courts.

II.1.2. Attempts for the creation of mixed specialized criminal courts

To fight against impunity for crimes committed in Africa, the preference for national judicial mechanisms did not work, both in the *Trial of Hissène Habré* and in the case of

2001, on 7th August 2008, in Article 9 in relation to the principle of the retroactivity of the law. Henceforth paragraph 3 of this article is reads: «However, the provisions of the previous paragraph is not opposed to the charging, judgment and sentencing of any individual due to acts or omissions which, at the time when they were committed, were criminal in accordance to the rules of international law in relation to crimes of genocide, crimes against humanity, war crimes». Senegal also amended her criminal procedure code, after she declared ready to try Hissène Habré.

[276] It is rather the Peace and Security Council of the AU which created the said panel through its decision taken during its 142nd meeting, held at the ministerial level on 21st July 2008.

[277] Cf. Peace and Security Council, *Darfur : the Quest for peace, justice and reconciliation,* High level Group Report of the African Union on Darfur, PSC/AHG/2(CCVII), 207th Meeting in, Abuja (Nigeria), 29th October 2009.

[278] THABO MBEKI, *Speech of the Chairman of the High Level Panel on Darfur during the presentation of its report to the President of the African Union Commission*, Addis-Ababa, 8 October 2009, p.3.

[279] *Ibidem*.

[280] *Ibidem*.

[281] Assembly Decision/AU/Dec. 221 (XII) on the request by the Prosecutor of the International Criminal Court (ICC) on the indictment of the President of the Republic of Sudan, adopted by the AU Conference, during the 12th ordinary session, held in Addis Ababa (Ethiopia, from 1st to 3rd February 2009, §8.

Darfur. However, the reasons for this failure are different, although they led, everywhere, to proposals for creation of mixed specialized criminal tribunals.

In the first case, financial means were really a big problem, in spite of the unending calls made to the member states of the AU and to the assistance of the EU. According to Senegal, a very huge budget of at 30 million USD was needed to organize the trial. But, the Round Table discussion with donor countries, held in Dakar on 24th November 2010, was able to find a compromise, in terms of which the trial was at the end supposed to cost 8 600 000 Euros, or nearly 13 million USD[282]. However, the release of this amount remained a problem. In addition to the financial problem there was a double judicial contestation of the legality of Senegal to accomplish the mandate conferred upon her by the African Union.

Indeed, through an application dated 11th August 2008, a Chadian national filed a suit against Senegal in the African Court of Human and People's Rights (ACHPR), « with a view to withdraw the process […] instituted by the Republic and State of Senegal with the aim of indicting, trying and sentencing Mr. Hissène Habré […] »[283]. This matter was closed by a ruling on the lack of jurisdiction by the Pan-African Court, for the reason that Senegal did not make a declaration for acceptance of the court's jurisdiction to hear individual applications, as provided in Article 5, paragraph 3, of the protocol governing it[284].

The Defense Counsel on his part filed an application before the ECOWAS Court of Justice, for the reason f that the organization of the trial against Hissène Habré would constitute a human rights violation, mainly due to non-adherence to the principle non-retroactivity of the criminal law and the guarantee for a fair trial. The ECOWAS Court of Justice started to examine this matter, since 16th April 2010, and declared it has full jurisdiction to hear the matter[285].

In its ruling dated 18th November 2010, the Court said clearly that the mandate received by Senegal conferred upon her « […] a duty of designing and suggesting or ideal modalities for charge and trying within a strict framework of an international special *ad hoc* process as practiced in international law by all civilized nations »[286]. Otherwise, it also emphasized, any other undertaking by Senegal, beyond such a framework, would violate on the one hand, the principle of non-retroactivity of criminal law and on the other hand, that of adherence to the authority of the judged matter attached to the decisions of its own national courts[287].

In the second case, the institution of the SCCED failed. In its report dated 29th October 2009, the AU Panel indicated that « only 13 cases were presented before the SCCED […], that it pertained, at each time, to ordinary crimes and that only charges in relation to a large scale attack against civilians (the usual subject for war crimes and crimes against humanity) only led to condemnations for theft which would have taken place after the attack. Whatever reasons were invoked to justify this situation, all observers were able to note that the SCCED accomplished very little […]. The major violations in Darfur were not […] subject to any serious judicial process »[288].

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[282] AU, more than eight million euros collected for the Organization of the trial of Hissène Habré, press release number 162/2010, November 24, 2010..

[283] ACHPR, case of Michelot Yogogombaye v. Republic of Senegal, application n ° 001/2008, judgment of December 15, 2009, §1.

[284] *Idem*, §36, 37 and 46.

[285] Judgment No. ECW/NNA/ADD/02/10 of May 14, 2010.

[286] ECOWAS Court of Justice, Case of Hissein Habre vs, Republic of Senegal, judgment no ECW/NNA/JUD/06/10, November 18, 2010, §61.

[287] Idem, § 58 and 61.

[288] Peace and Security Council, Darfur : Quest for peace, justice and reconciliation op.cit., p.57.

The consequence drawn by the Panel is unequivocal: « unilateral actions of Sudan […] did win the general trust necessary for guaranteeing cooperation from the people of Darfur, whose faith in the State institutions was eroded »[289]. It is therefore clear that « […] the victims do not believe at all that the Sudanese judicial system will be used sufficiently and in a fair manner to resolve the crimes they suffered. Their serious worries, which were often translated into calls for putting in place a hybrid court, cannot be ignored »[290].

The general conclusion is that the creation of special criminal courts appeared unavoidable in Senegal and in Sudan. On the one hand, it pertains to seeking to reconcile the mandate given to Senegal to try the former Chadian President with the ruling by the ECOWAS Court of Justice issued on 18th November 2010; on the other hand, the AU would try to cure the weaknesses of the Sudanese judicial system.

The choice of putting in place hybrid or mixed courts was preferred to the creation of *ad hoc* international criminal courts, because, first, the latter became associated with slow and costly justice, following the experience with the UN *ad hoc* tribunals for Ex-Yugoslavia (ICTY)[291] and Rwanda (ICTR)[292]. Furthermore, it appeared more beneficial, more efficient and, in this particular case, more acceptable in national and regional context, to have courts operating *in situ,* but strengthened by external players[293].

By definition, a *hybrid* court is the one which brings« together national and international staff and often involves a combination of procedures in criminal justice matters at the national and international levels »[294].

However, the residual problem consisted of stating the suitable form it should assume in the two cases under examination: either *independent mixed criminal courts*, or *special hybrid chambers*, integrated in Senegalese and Sudanese judicial systems.

In the matter of *Hissène Habré Trial*, it is the plan for a special independent mixed court which seems to have carried the day, same as the result from the meeting of the AU and Senegalese experts[295], held in Addis Ababa, from 23rd to 24th 2011. On the other hand, the AU Panel recommended, in the Sudanese case, the establishment of a « Mechanism integrating justice and reconciliation for Darfur »[296], containing several choices, among them special hybrid chambers, for trying those who bear the greatest responsibility for crimes committed in Darfur. From both sides, judges and prosecutors of the hybrid courts were supposed to be appointed, in part by the AU and the host countries, in accordance with the practical modalities which would have been defined in a consensual manner.

Unfortunately, none of these hybrid courts saw the light of the day. We can presume that, in the Sudanese case, the project was handicapped by lack of follow-up by the AU and by lack of cooperation from Sudan. On the other hand, in regards to the *Hissène Habré Trial*, the failure was due to unreasoned withdrawal of Senegal, on 5th July 2011, from negotiations convened for the adoption of the status of the proposed special criminal court as well as its

289 Idem, pp.67-68.
290 *Idem*, pp.67-68.
291 Created by the Resolution S/RES/827 of 25th May 1993.
292 Created by the Resolution S/RES/955 of 8th November 1994.
293 Peace and Security Council, Darfur : Quest for peace, justice and reconciliation, op.cit., p.67.
294 *Ibidem*.
295 See http://www.justice.gov.cd, visited on April 4, 2011.
296 Peace and Security Council, Darfur: Quest for peace, justice and reconciliation, op.cit. p. 89.

subsequent decision to decline the Pan-African mandate and send Hissène Habré back to Chad[297].

This decision was taken a day after the AU Summit held in Malabo from 23rd to 1st July 2011, while it had just requested Senegal « to take up her legal responsibility in accordance with the United Nations Convention against Torture and with the said mandate and put Hissène Habré on trial » [298]. Furthermore, the Summit had just decided that « if no progress is made to try Mr. Hissène Habré by Senegal within six (6) months, the Conference will take, during its next ordinary session, in January 2012, a final decision on another option »[299].

Although Senegal rescinded her decision on 10th July 2011, upon request from the High Commission for Human Rights, we can presume that she is not in a position to execute the mandate conferred to her by the AU. It is from then on that Rwanda became a candidate to take up and execute the Pan-African mandate. During this time, a new application for extradition issued by Belgium had just been rejected by the Court of Appeal of Senegal on 11th January 2012, due to procedural defect[300]. Thus, from Brussels to Dakar, from Dakar to Kigali, through Addis Ababa, we are just witnessing a real judicial circus. Yet, the former Chadian President would long have been charged and tried if he was referred to a competent Pan-African criminal court. Unfortunately, this still remains at the level of a project.

II.2. Prospects for the creation of a Pan-African Criminal Court

The option of creating a Pan-African criminal court has already been raised by the African Union Conference (II.2.1). However its feasibility remains rather problematic (II.2.2).

II.2.1. Option of the Union Conference

Discussions on the creation of a Pan-African criminal court have been on-going for long. When the African Charter on Democracy, Elections and Good Governance provided that « perpetrators of unconstitutional change of government can be charged and tried before a competent court of the Union »[301], these discussions are no longer theoretical.

In its Assembly Decision /AU/Dec. 213 (XII) on the implementation of the decision in relation to abusive use of the principle of universal jurisdiction, the Union Conference requested « the Commission, in consultation with the African Commission on Human and People's Rights and the African Court of Human and People's Rights, to examine the consequences of the jurisdiction granted to the Court to try international crimes like genocide, crimes against humanity and war crimes and present a report on the same to the Conference in 2010 »[302].

This request was renewed in its Assembly Decision/AU/Dec. 245 (XIII) in relation to the report of the meeting for African states parties to the Rome Statute and the ICC[303]. It states

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[297] AU, *in the matter of Hissène Habré : Chad supports the victims and demands for a trial*, Press Communiqué n°75/2011, 21 July2011.

[298] Cf. AU, *Decisions of the 17th African Union Summit adopted*, Directorate of information and Communication of the Commission, 21 July 2011.

[299] *Ibidem*.

[300] According to this Senegalese Court, Belgium did not present authentic documents to support her application, but only copies. Furthermore, there is no arrest report for the indictee.

[301] Art.25.5.

[302] Assembly Decision/AU/Dec.213 (XII) on the implementation of the decision relating to abusive use of the principle of universal jurisdiction, adopted by the Union Conference, during the 12th ordinary session, held in Addis-Ababa (Ethiopia), from 1st to 3rd February 2009, §9.

[303] Assembly Decision /AU/Dec.245 (XIII) on the report of the meeting of the African states parties to the Rome Statute

that the jurisdiction of this court would complement that of courts and national processes in the fight against impunity[304]. In its Assembly Decision/AU/Dec.292 (XV), adopted in Kampala (Uganda), in July 2010, The Conference had requested the Commission « to finalize the implications of granting the African Court on Human and People's Rights the jurisdiction enabling it to try serious international crimes […] and to present a report at the next ordinary session of the Conference, planned for January 2011, through the assistance of the Executive Council »[305].

It follows that the Pan-African criminal court, whose creation is in the pipeline, will be totally an integral part of the African Court on Human and People's Rights, as it was instituted by the Protocol of 1st July 2008[306]. It will be empowered to try « international crimes such as genocide, crimes against humanity and war crimes […] ». But, this list is not limited. It will include other detrimental international crimes of public nature within Africa. In its *modus operandi*, the criminal court for the *African Court of Justice and Human Rights* would thus be situated, between national courts and the ICC. The studies in relation to its feasibility will be able to show at what degree the three levels of administration of international criminal justice would be interlinked, coordinated and harmonized.

II.2.2. Feasibility for the creation of the Pan-African Criminal Court

It is not judicious to confer on the African Court of Justice and Human Rights a permanent criminal jurisdiction to try international crimes committed in Africa. Although supported by a part of the doctrine, mainly by Professor Pacifique Manirakiza[307], this option is weakened for three main reasons.

In the first place, the functioning of the international criminal justice is already very complex. The establishment of a permanent court within the Pan-African Court would involve not only the articulation of its reports with national courts, but also with the ICC. If the court would, just like the ICC, have a complementary jurisdiction, we would not really exclude possible conflicts of jurisdiction. Such a situation risks compromising effective exercise of jurisdiction of the ICC, whose vocation falls within the framework of criminal justice which is increasing becoming universal.

Secondly, the African Court on Human and People's Rights had just been merged with the African Union Court of Justice. Together, they gave birth to the African Court of Justice and Human Rights, with a section for general matters and a human rights section[308]. The permanent jurisdiction of this Court is already enormous (settlement of inter-estate disputes, advisory jurisdiction and jurisdiction on human rights). Adding a new criminal jurisdiction to it presents a risk of heaviness. How can such a court function easily, with its two previous

of the International Criminal Court (ICC), adopted by the Union Conference, during the 13th Ordinary session, held in Sirte (Libya), from 1st to 3rd July 2009. ring the 12th ordinary session, held in Addis-Ababa (Ethiopia), from 1st to 3rd February 2009, §9.

304 *Idem*, §5.

305 Assembly Decision/AU/Dec.292 (XV) on the implementation of the decision relating to abusive use of the principle of universal jurisdiction, adopted by the Union Conference, during the 15th ordinary session, held in Kampala (Uganda), §5. We need to say here that we were unable to have access to this report. We cannot therefore confirm whether or not it has already been presented to the Union Conference.

306 Officially referred to as « Protocol on the Statute of the African Court of Justice and Human Rights », adopted by the Union Conference, during its 11th ordinary session, held in Sharm El-Sheikh (Egypt).

307 MANIRAKIZA (P.), « L'Afrique et le système de justice pénale internationale », *African Journal of Legal Studies*, vol.3, 2009, pp.50-51.

308 Protocol on the Statute of the African Court of Justice and Human Rights article17.

sections which would henceforth be superimposed with a third one, the section of criminal matters?

Lastly, international criminal justice involves necessarily very huge financial means and we can doubt that the AU, poor like its member states, has the necessary resources to allocate to the Court to guarantee good administration of a permanent criminal justice.

Definitely, in these conditions, granting permanent jurisdiction to the African Court of Justice and Human Rights risks being a real sword-thrust in water, without any impact on eradication of impunity for serious crimes in Africa. Rather than granting a permanent criminal jurisdiction, we can propose renewal of paragraph 2 of article 19 (contentious jurisdiction of the Court) of the Protocol of the former Court of Justice of the Union[309] in the new Protocol on the Statute of the African Court of Justice and Human Rights. In terms of this provision, the Union Conference could grant jurisdiction to the Court to hear other disputes than those mentioned in the first paragraph[310].

The interest attached to this option is political. First, it will enable the AU to decide to grant or not to the Pan-African Court, on case by case basis, the jurisdiction to try international crimes committed in Africa, thus leaving entirely the exercise of the jurisdiction of the ICC without hindrance. The Union would gain therein, in terms of financial projection. Each time it falls on the Union to turn to this provision, it will be able to require financial contributions for the precise effect of funding the proceedings planned. Lastly, it would gain through holding a great deal of control as pertains to timely assessment of commencement of proceedings against high ranking officials suspected to have committed international crimes, detrimental to Pan-African public order.

The materialization of this ambitious project will have the advantage of reducing, although partially, the dependency which the Union suffers in the implementation of its common policy for defense and security[311].

CONCLUSION

The African Union had better not disappoint the hopes which were placed upon it at the time of its creation, concerning the imperative desire for human rights protection, maintenance of Pan-African peace and public order. However, the practice to date does not appear reassuring. We notice, on the one hand, its inclination to protecting solidarity for African leaders against charges instituted against them outside Africa ; on the other hand, its resulting preference for strict activation of African judicial mechanisms to fight impunity. Despite all this, the former Chadian President, Hissène Habré, has not been tried by Africa. On his part, the Sudanese President, Omar Al Bashir, moves freely within Africa and African states are proving rather obedient to different decisions of the African Union, in

[309] It was governed by the Maputo Protocol (Mozambique) of 11th July 2003.

[310] This paragraph provides that the Court has jurisdiction to settle any dispute concerning the interpretation and application of the Act, the interpretation , application or validity of treaties of the Union and all subsidiary legal instruments adopted within the framework of the Union, any issue in relation to international law, any act, decisions, regulations and instructions from the organs of the Union, any questions provided in any other accord which the state parties could sign between them, or with Union and which grant jurisdiction to the Court,, the existences of any act which, if it is established, would constitute a breach of obligation towards a state party or the Union, the nature and the extend of reparation due for the breach of a commitment.

[311] BALINGENE KAHOMBO, La politique africaine commune de défense et de sécurité : fondement et cadre de mise en œuvre du pouvoir d'intervention de l'Union africaine dans les Etats membres, mémoire d'études supérieures en droit public, Université de Kinshasa, novembre 2011, pp.110-128.

spite of recurrent protests by the ICC[312]. The risk of impunity is therefore very big. And we can see at the very least the matter is turning into a crisis between these two international organizations, on the one hand, and between the African Union and the United Nations, on the other hand.

On the first aspect of this crisis, the future of the ICC does not appear seriously compromised, because African states have not withdrawn from this organization. On the contrary, they have commenced the process of creating a Pan-African criminal court, a sort of taking-up the position of the ICC at the African continental level. If this project materializes, the ICC will have lost a lot of its international legitimacy ; which would pose a problem of its survival in international legal order or articulation of its relationships with the future Pan-African criminal court, that of « fragmentation of the international law »[313] and universality of international criminal justice.

Concerning the aspect of the crisis, the African Union rose against the refusal of the UN Security Council, even if tacit, to postpone the charges against President Omar Al Bashir. This is why it ratified the proposal by South-Africa to review the Rome Statute of the ICC, in particular pertaining to the application of Article 16 of this Statute. Indeed, the proposal suggests that the United Nations General Assembly gets the power to defer investigation or charging, for a period of one year, in case where the Security Council would not have made a decision within a specific time limit[314] ; which somewhat reminds of the Resolution 377 (V) of the United Nations General Assembly, referred to as «*Uniting for maintenance of peace* »[315].

In any case, we can hope that the project for the creation of a Pan-African criminal court, which should pass through granting of a criminal jurisdiction to the African Court on Human and People's Rights', will enable African Union to realise its objective of fighting impunity in Africa.

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[312] Read Press release n° 119/2010, « on the decision of the pre-trial chamber of the ICC informing the UN Security Council and the Assembly of the state parties to the Rome Statute about the presence of president Omar Hassan al-Bashir of the Sudan in the territories of the Republic of Chad and the Republic of Kenya », Commission of the African Union, Division of communication and information, Addis-Ababa, 29 August 2010.

[313] Voir à ce sujet DUPUY (P.-M.), « Fragmentation du droit international ou des perceptions qu'on en a ? », *European University Institute*, Department of Law, Florence, le 28 janvier 2006, pp.1-12.

[314] Assembly Decision/AU/Dec.270 (XIV) Rev.1 on the report of the second meeting of state parties to the Rome Statute of the International Criminal Court, adopted by the Union Conference, during its 14th ordinary session, held in Addis Ababa (Ethiopia), from 31st to 2 February 201, §5 ; Assembly Decision/AU/Dec.296 (XV) on the implementation of the decision Assembly Decision/AU/Dec.270 (XIV) in relation to the second ministerial meeting on the Rome Statute of International Criminal Court, adopted by the Union Conference during its 15th ordinary session held in Kampala (Uganda), from 25th to 27th July 2010, §7.

[315] Resolution 377 (V) of the United Nations General Assembly, adopted on 3rd November 1955. According to this Resolution, in paragraph 1, The General Assembly «Decides that, in any case where it appears to exist a threat to peace, disruption of peace or an act of aggression and where, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security." If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request thereof. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations;». This Resolution was a project originating from the then American Secretary of State, Dean Acheson, following a paralysis of the Council through use of veto power by the Ex-URSS during examination of the situation in Korea in 1950. Also the resolution is known as Dean Acheson resolution.

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