KONRAD ADENAUER STIFTUNG
AFRICAN LAW STUDY LIBRARY

Volume 13

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Konrad Adenauer Stiftung

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

Konrad Adenauer Stiftung

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www.kas.de

ISBN: 978-9966-021-09-0

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

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FOREWORD

Volume 13 of the KAS African Law Study Library is the fourth volume published by the University of Lubumbashi, which proves the sustainable commitment of all stakeholders involved. Year after year, the circle of participants to the seminars has improved. Many doctorate students and research assistants who take part in the seminars work at the same time as lawyers, prosecutors, within the public administration of the State or in the legislature.

Indeed, the emphasis of the contributions on constitutional issues is significant for the country's economic development:

Laurent NGOY NDJIBU analyzes "The economic relations between the DRC and China: legal basis, progress made and the way forward". KAPYA KABESA Jean Salem Israel Marcel wrote on "Towards prosperity by the unification of the laws: DRC membership to OHADA (Progress achieved, legal basis, and structures ". MUFUNDJI THINAT-KARL Clément addresses the "Mining Code, instrument of prosperity for the Congolese population: Progress achieved and specific proposals for improvement ". Baudouin WIKHA TSHIBINDA writes on "Food security in the Democratic Republic of Congo, legal basis, and possible legal instruments to achieve this goal". The contributions of MUTONWA KALOMBE Jean-Marc Pacifique (The International Court of Justice and the resolution of the conflicts in the Great Lakes Region: The case of the DRC against Rwanda and Uganda) and MUMBA KAKUDJI Martial on The mandate of the MONUSCO: legal basis, areas of interventions and the way forward) deals with the international framework of this development.

To be effective, the rule of law requires resources. Each citizen who wishes to exercise their rights need material resources. For this reason, for the rule of law to function, it is essential that the economic resources of a country are beneficial to the State and to the entire population and not just for the privileged few. .

As always, each author is responsible for the contents of their contribution.

On behalf of all the authors, we wish to thank the Vice-Chancellor of the University of Lubumbashi as well as the Dean of the Faculty of Law for their unwavering support, without which the series of seminars would not have been possible

Adalbert Sango Mukalay **Hartmut Hamann** **Kalala Ilunga-Matthiesen**

INTERNATIONAL COURT OF JUSTICE AND CONFLICT RESOLUTION IN THE GREAT LAKES REGION: THE CASE OF DRC AGAINST RWANDA AND UGANDA

By **Jean-Marc Pacifique MUTONWA KALOMBE***

0. INTRODUCTION

More than a decade after serious conflicts that have torn the Democratic Republic of Congo, owing particularly to the implication of the armed forces of Rwanda and Uganda, our country is still seeking for justice and the consolidation of the true rule of law.

It is within this scope that the International Court of Justice, as the principal judicial organ of the United Nations to which the three above-mentioned States are members, was invited in the search for the consolidation of peace, then broken under the law and in this case, the international law.

However, there are two major concerns that remain to date: on the one hand, only Uganda was condemned, because of its acceptance of the jurisdiction of the Court whereas Rwanda saw the committed procedure against it not being concluded, having rejected the jurisdiction of the aforementioned Court; in addition, and if Uganda were condemned to pay heavy damages to the Congolese State, the issue of the ways of execution against official sovereignty in international law would still be raised as well as the fair reparation of all the prejudice suffered by our populations as a result of the various atrocities following all the hostilities between various belligerents.

How then do we establish the liability of the State of Rwanda where there may be peace without justice or justice without reparation?

It is thus with this intention that we intend to examine the action of the Court (its competences) in the matters concerning military activities on the territory of the DRC against Rwanda and Uganda with the objective to grasp the issues of law in order to propose some suggestions capable of, on the one hand, to expose some limits related to the action of the judge and, on the other hand, to accelerate the consolidation process of the rule of law in the Great Lakes Region.

I. The International Court of Justice.

By virtue of article 92 of the Charter « *The International Court of Justice (ICJ) shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statutes, which is based upon the Statutes of the Permanent Court of International Justice and forms an integral part of the present Charter*[1] .

* **Assistant at the University of Lubumbashi**

1 The principle behind the creation of a permanent court with general competence had been accepted as early as August 1944 at the Dumbarton Oaks Conference by experts who drew the preliminary draft of the Charter of the United Nations. Just before the opening of the San Francisco Conference, a Committee of Jurists chaired by J. BASDEVANT, proposed not to maintain the ICJ and establish a new Court. Several considerations were in favour of this solution.

Pursuant to this article, any State member to the Charter is automatically a member to the ICJ Statutes. However, the non-UN member States may subscribe following the conditions given in article 93 §.3 of the same Charter[2].

In addition, those to which the non-party States may have access at the Court are indicated in article 35 of the Statutes.

According to article 2 of the Statutes of the ICJ « *The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurists of recognized competence in international law* »

The Court is composed of fifteen members; it has its headquarters in The Hague in the Netherlands and is open throughout, except during the public holidays (article 23 §1 of the Statutes).

Whereas article 2 of the Statutes of the Court specifies that nationality does not matter to be elected a judge to this Court, article 3 stipulates that there cannot be more than one nationality and therefore article 9 of the same Statutes requires the voters to keep in mind the composition of the Court in order to achieve its universality, «*but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured* »[3].

In addition to the permanent judges of the ICJ, there are some other occasional judges, appointed as *ad hoc judges,* who may be nominated for a specific litigation and whose tenure ends as soon as the the lawsuit which justified their nomination ends (article 31 of the Statutes of the Court). In the case of the DRC against Uganda, Mr. Joe VERHOEVEN for the DRC and Mr. James L Mr. KATEKA for Uganda had been nominated as *ad hoc judges* while J.P. MAVUNGU and Mr. Christopher John Robert DUGARD were nominated in the case of DRC against Rwanda.

Indeed, the involvement of *the ad hoc judges* occurs when the Court is seized of a dispute in which either one of the litigants only has a national judge as permanent judge or none of the interested States has a national judge sitting permanently (article 31 of the Statutes of the Court).

The members of the Court are therefore not government agents subject to the instructions of their respective governments. To guarantee their independence, privileges and immunities (article 19 of the Statutes of the Court) similar to those of the diplomatic staff are granted to them. They are irremovable and should not in principle practice any other profession (articles 16 and 17 of the Statutes of the Court).

Some were political: the United Nations had decided to immediately exclude States ex-enemies of any international cooperation; However some of them were party to the Statute of the ICJ. On the other hand, other reasons were more technical: the renewal of the tenure of the ICJ judges depended on a decision of organs of the League who were no longer able to achieve because the process of dissolution of the League of Nations had begun.

[2] Note that this provision is no longer applicable, since almost all of the States have become members of the United Nations.

[3] In fact, each permanent member of the Security Council except China at certain times, always had a judge of its nationality. For the other States to comply with this provision, the general rule of fair geographical distribution was introduced in the election of judges. This rule led to the reduction in the number of European judges who were originally majority and made it difficult to strictly comply with the provisions of article 2 of the Statute which prohibits having regard to a judge's citizenship.

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers «*impartially and conscientiously*» (Article 20 of the Statutes of the court)

The judges are elected for nine years and are eligible for re-election; but in order to ensure continuity of the Court, the statute provides for renewal by one-third of the judges every three years (article 13 of the Statutes).

Election of the judges of the ICJ is, by virtue of their powers, a joint decision of the General Assembly and the Security Council[4].

Regarding the competences of the ICJ, it exercises both *a contentious function* and *an advisory function.*

- **The contentious function of the ICJ**

In this case, only the States have, under the terms of article 34, paragraph 1 of the Statutes of the Court, the right to appear before the court. However, the exclusion of the private individuals does not mean that the litigations brought before the Court never concern the private individuals. On the contrary, a lot of cases adjudicated by the ICJ relates to international responsibility, resulting from the implementation of "the *theory of diplomatic protection*" by States siding wholeheartedly with their nationals in order to defend their interests. Such is the issue in the case of Ahmadou SADIO DIALLO, (Republic of Guinea, Democratic Republic of Congo), in which the Republic of Guinea sides wholeheartedly with its national, i.e. Mr. Ahmadou SADIO DIALLO, in the dispute with the Democratic Republic of Congo.

As for the International Organizations, article 34 of the Statutes of the Court prohibits them to appear in position of the applicant or defendant before the Court. However, paragraphs 2 and 3 of article 34 provide for the possibility of collaboration between them and the Court; the organizations may request information relating to the matter under examination and they may *proprio motu,* send information to the Court.
In this context, the function of the Court « *is to settle disputes submitted to it in accordance with international law* » (article 38 §.1 of the statute).

To this end, the ICJ is competent to dispose of certain categories of disputes of some litigants. Article 36 §1 states that « *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force*».

But, it appears from this provision and the jurisprudence that the legal body does only deal with disputes which are likely to be resolved by the existing law and which are of an international law nature. And by international dispute, we mean *"a disagreement on a point if law or fact, a contradiction, an opposition of legal theses or interests between two people"*[5].

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[4] To be elected, each candidate must meet the absolute majority of votes both in the Assembly and the Security Council. This double majority is required up to the 3rd meeting of election; If it goes beyond this and there are still seats to be filled, in addition to this double majority, the Statute provides that the Assembly or the Council may request the formation of a mediation Committee composed of six members appointed jointly by the Assembly and the Council. The Commission shall propose, in accordance with certain procedures, a name for each of the seats remaining to be filled for the adoption of the Council and the Assembly,. If this procedure fails, it is up to the judges already appointed to select a candidate from among those who were voted either in the Assembly of the Council to fill the vacant seat (article 12 §. 3). This situation has never arisen..

[5] ICJ., series A, no. 2, 11 Mavrommatis concessions case, in Palestine.

By definition, as well as article 36 §2 of the Statute, it follows that the dispute to be determined must be legal, that is, within the meaning of this provision, it should be on:

- the interpretation of a treaty;
- any question of international law;
- the existence of any fact which, if established, would constitute a breach of an international obligation;
- the nature or extent of the reparation to be made for the breach is of an international obligation.

The disputes of a political nature, in other words, those which aim at changing the law, do not fall under the competence of the Court. It is so as the Court must limit its role to the interpretation of the international law *lacto sensu* and that it cannot act like a legislative body by creating new rules of international law. As explained in the adage " *Jura not novit, curia"* by virtue of which *"arisen right of the competence of the Court "*[6].

Let us note that the competence of the Court in contentious matters is bases on *the principle of voluntary jurisdiction* whereby " *the States are subject to the jurisdiction of the Court for a case only in if they consent* " (articles 36 and 40 of the Statutes) by *a compromise* or *forum prorogatum*[7] i.e. any conclusive act apart from explicit declaration contained in a preliminary formal compromise, in particular the behavior of the defendant State subsequently to seize the Court; it is, in other words, of the tacit acceptance of the competence of the Court.

However, the principle of compulsory jurisdiction is an exception to the rule. It is actually about a particular case of the States consent to the jurisdictional settlement of the disputes. This consent remains necessary but it does not relate to any new dispute. The commitment to subject oneself to the jurisdiction of the Court relates to possible disputes more or less defined in advance. The jurisdiction of the Court becomes compulsory because the agreement of the parties is contained in advance in a binding legal act together with a "*clause of option"* or an "*optional clause of compulsory jurisdiction"*[8].

- **The Advisory function of the ICJ**

The ICJ can only exercise an advisory function with regard to only International Organizations (article 96 of the Charter and chapter IV of the Statutes of the Court). Thus, according to article 96 §.2 of the Charter, may require an opinion of the ICJ, on *"all legal issues"*, not only of the General Assembly and the Security Council of the United Nations, but also all other bodies of the UN and all Specialized agencies about " *legal issues which may arise within the framework of their activity" and* which would have been authorized by the General Assembly of the UN.

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6 Advisory opinion of the ICJ of July 08, 1996, on "the legality of the threat or use of nuclear weapons. «Read including Luigi CONDORELLI, the International Court of Justice under the weight of nuclear weapons: JURIA NON NOVIT CURIA ", in review of the Red Cross, Geneva, no823, February 28, 1997, pp.9-1.

7 The first case of forum prorogatum before the ICJ was that relating to Djibouti v. France (Borrel case) case.

8 This principle often accompanied by certain reservations limiting the scope of the commitment in time and from a material point of view, is affirmed in article 36, paragraph 2 of the Statute under which "States parties to the present Statute may at any time declare that they recognize as compulsory ipso jure and without special agreement with respect to any other State accepting the same obligation.', the jurisdiction of the Court on all legal disputes concerning:
a. the interpretation of a Treaty
b. any point of international law
c. the existence of any fact which even if it were established, would constitute the breach of an international obligation
d. the nature or the extent of the reparation due to the breach is of an international obligation.

Thus for example in the case of the Opinion given by the ICJ (July 1996) on the legality of the use of nuclear weapons, it had been noted that two petitions for opinion had been addressed to the ICJ: initially, by the World Health Organization (WHO) and, then, by the General Assembly United Nations. The Court had found, in a first opinion, the incompetence of the WHO to ask this type of question and this in view of article 96 §.2 referred to above. On the other hand it undertook to respond substantively to the second opinion by the General Assembly of July 8, 1996.

Whatever the analogies between the advisory and litigation functions of the ICJ, one and the other remain distinct from their legal scope.

The advisory opinion is not a decision in disputed matter *strictly speaking;* it does not have the binding force of a judgment it is analyzed, not as a decision, but as an opinion of the Court intended to inform the body which consulted it.

In practice however, the advisory opinions are generally essential because of their moral authority. They contain one of the components of any disputed matters, i.e. the noting of the law in force.

Also, the opinions are considered on the same plane as the rulings in the jurisprudence of the Court.

II. Cases concerning armed activities on the territory of the Congo: DRC against Uganda and DRC against Rwanda

In the analysis of the cases under examination, we will limit ourselves on the general aspects of the procedure on one hand and, the issues of law raised by them on the other. This will give us the possibility to envisage some criticisms to the law

1. The *DRC* against Uganda Case on armed activities on the territory of the Congo (Democratic Republic of Congo against Uganda)

1.1. Procedural aspects

On June 23, 1999, the Democratic Republic of Congo (DRC) deposited at the Registrar's office of the Court an introductory petition of authority about a dispute relating to "acts of armed aggression perpetrated by Uganda on the territory of the DRC in obvious violation of the Charter of the United Nations and the Charter of the Organization of African Unity ". In fact, the DRC had subjected on the same date three petitions: against Burundi, Rwanda and Uganda respectively about disputes relating to "acts of armed aggression" perpetrated by these States on its territory. Cases against Burundi and Rwanda were struck off by the Court on February 1, 2001, upon the request of the DRC.. Indeed, according to article 69 of the Rules of the Court, the petitioning party may unilaterally withdraw a suit, as long as the defendant party has not made a plea. Otherwise, the petition to withdraw a suit is communicated to the defendant whose agreement is deemed secured if it did not oppose such a withdrawal within the specified time given by the Court.

But, the DRC deposited a new petition against Rwanda on 28 May 2002 accusing it of "massive, serious and obvious violations of the human rights and of the international humanitarian law".

In its ruling of February 3, 2006 the Court held "*that it did not have jurisdiction to entertain this petition*" submitted by the DRC (New petition: 2002, Democratic Republic of Congo against Rwanda, § 128), and that by having no jurisdiction to entertain the application, it could not rule on its merit. What remained of this "*legal saga*" was the Ugandan case of the Great Lakes according to the expression of Abdelwahab BIAD[9].

Before the ICJ, the DRC stated that at his accession to power in 1997 Laurent-Desired Kabila had granted to Uganda and Rwanda significant advantages in the economic and military sectors, advantages which he endeavored thereafter to reduce. For the DRC, this "new policy of independence and emancipation with regard to the two States – Rwanda and Uganda constituted the true cause of the invasion of the Congolese territory by the Ugandan armed forces in August 1998 "[10].

The DRC required of the Court to conclude that Uganda while intervening militarily on its territory made itself guilty of an act of aggression and violated the usual and conventional obligations relating to the respect of the humans right and of the international humanitarian law(IHL) in the occupied territories. In consequence of these violations of the international law, Uganda was "to cease immediately all illicit internationally deed" and to repair the damage for all the illicit types of acts which are ascribable to it.

Uganda obviously required of the judges to reject the "claims" of the DRC relating to allegations of violation of the international law, by making the point that according to the period considered, it was in DRC either with the assent of the DRC or under legitimate self-defense to fight against *anti-Ugandan rebels established in this country*[11]

Aggression and occupation of territory for the DRC; legitimate self-defense and consent to the presence of foreign forces for Uganda; the least that one can say, is that the positions of the parties seemed irreconcilable, with the image of the situation then chaotic in the Great Lakes Region and the humanitarian tragedy which had proceeded there since the genocide in Rwanda in 1994.

The establishment of the facts and the search for evidence "which is convincing in relation to the alleged facts (§ 58 of the 2005 ruling) are at the heart of the work of the Court in this case more than in any other[12].

Let us consider briefly the stages of the procedure before the ICJ in these two cases relating to the armed activities on the territory of the Congo are as follows:

- **DRC against Uganda**

- **June 23, 1999:** introductory petition of the legal proceedings of the DRC against Uganda; the competence is established in respect of paragraph 2 of article 36 of the Statutes of the Court;
- **June 19, 2000:** the DRC filed at the Court a petition indicating the provisional

[9] Abdelwahab BIAD, case concerning armed activities on the territory of the Congo, Democratic Republic of the Congo v. Uganda, (judgment of 19 December 2005), in Bulletin du CREDHO 118 No. 16 - December 2006, pp. 113-118
[10] Idem, p.113
[11] International Court of Justice reports of judgments, advisory opinions and orders, case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), of 19 December 2005
[12] Abdelwahab BIAD, *art. cit.*. p. 113

measures under the terms of article 41 of the Statutes of the Court which, after hearing the parties indicated certain provisional measures by order of the 1st July 2000; in the latter, the Court adopted provisional measures in terms almost identical to those of resolution 1304 (2000) of the Security Council; it was satisfied to recommend to the parties the observance of the relevant resolutions of the Security Council for this purpose while recalling that its Rules gave it the latitude to indicate other precautionary measures than those required by the parties.

- **December 19, 2005:** ruling of the Court[13].

▪ **DRC against Rwanda**

- **June 23, 1999:** the petition filed at the Registry of the Court, by which the Democratic Republic of Congo introduced legal proceedings against the Republic of Rwandan about a dispute relating to "acts of armed aggression perpetrated by Rwanda on the territory of the Democratic Republic of Congo in obvious violation of the Charter of the United Nations and the Charter of the Organization of African Unity";
- **October 21, 1999:** the order by which the Court, taking into account the agreement between the Parties about the procedure, as well as their views regarding the deadlines to be fixed, decided that the written pleadings first relate to the the question of the jurisdiction of the Court to entertain the application and that of the admissibility later, and fixed, April 21, 2000 and October 23, 2000 respectively, as the due dates for the filing of the statement of the case of the Rwandan Republic and the counter-statement of the Democratic Republic of Congo on these issues;
- **January 15, 2001:** the agent of the Democratic Republic of Congo, referring to paragraph 2 of article 89 of the Rules of the Court, informed the Court that the Government of the Democratic Republic of Congo wished to withdraw the suit and specified that "*it reserved the right to later file a new case on the jurisdiction of the Court* "; a copy of which it immediately send to the Government of the Republic of Rwandan, informing it that the President of the Court, acting pursuant to paragraphs 2 and 3 of article 89 of the Rules of the Court, had fixed January 23, 2001 as the due date by which Rwanda could state whether it was opposed to the withdrawal of the suit;
- **January 22, 2001:** the agent of Rwanda informed the Court that its government *accepted* the withdrawal of the suit by the Democratic Republic of Congo while the Court took note of the withdrawal by the Democratic Republic from Congo struck off the petition filed on June 23, 1999 from the order of its business ;

[13] In this case, the Democratic Republic of the Congo was was represented by H.E. Mr. Honorius KISIMBA NGOY NDALEWE, Minister of justice and Custodian of the seals of the Democratic Republic of the Congo, as head of the delegation; H.E. Mr. Jacques MASANGU-a-MWANZA, Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands, as agent; Mr. TSHIBANGU KALALA, lawyer at the bar of Kinshasa and Brussels, as co-agent and counsel; Mr. Olivier CORTEN, Professor of international law at the Université Libre de Bruxelles, Mr. Pierre KLEIN, Professor of international law, Director of centre for international law of the Université Libre de Bruxelles, Mr. Jean SALMON, Professor Emeritus at the free University of Brussels, Member of the Institute of international law and the Court of arbitration, Mr. Philippe SANDS, Q.C., Professor of law, Director of Centre for International Courts and Tribunals University London, as counsel and advocates; Mr. ILUNGA LWANZA, Deputy Head of cabinet and legal adviser in the Office of the Minister of justice and keeper of the seals, Mr. YAMBU a. NGOYI, Advisor main Vice-President of the Republic, Mr. NEERAJ MBUYA, legal adviser in the Office of the Minister of justice and keeper of the seals, Mr. Victor MUSOMPO KASONGO, Secretary of the Minister of justice and keeper of the seals, Mr. PREMATHEVAN-zi-ASANTE, First Counsellor at the Embassy of the Democratic Republic of the Congo to the Kingdom of the Netherlands, Ms Marceline MASELE, Second Counsellor, Embassy of the Democratic Republic of the Congo to the Kingdom of the Netherlands, as advisers; Me MBAMBU wa Chester, lawyer at the bar of Kinshasa, cabinet TSHIBANGU and partners, Mr. François DUBUISSON, responsible for teaching at the Université Libre de Bruxelles, Mr. KARANJIT RICARDO, of the Brussels Bar, Ms. Anne LAGERWAL, Assistant at the Université Libre de Bruxelles, Ms ANJOLIE SINGH, Assistant at the University College London, Member of the bar of the India, as assistants.

- **May 28, 2002:** new petition by the DRC against Rwanda. On this occasion, the DRC submitted to the Court a request indicating precautionary measures by virtue of article 41 of the Statutes of the Court but it declines its jurisdiction *prima facie* as by the order of September 10 2002;
- **February 3, 2006:** ruling of the Court on its competence and the admissibility of the petition: the Court ruled that it did not have jurisdiction to entertain the application by the DRC.

One can only wonder why all these excuses and delays in the conduct of the legal proceedings before the Court by the DRC.

1.2. Points of law in the case of DRC against Uganda

It should be noted that a comprehensive analysis was carried out on this aspect of the question by Abdelwahab BIAD in his article on the "*case of armed activities on the territory of the Congo, Democratic Republic of Congo against Uganda* (Ruling of December 19, 2005)"[14].

From the author's point of view, issues of the order hereinafter were called for debate: from the consent to the presence of foreign forces in DRC, the conditions of legitimate self-defense, the occupation of territory and the substitution of legal proceedings, the control exercised on the armed groups, the violations of humans rights and to the plundering and exploitation of the natural resources wealth.

It is also insightful when he confesses the difficulty of of the situation in the Great Lakes Region due to chaotic and complex conflicts (inter states wars on background of civil wars and ethnic rivalries), the multiplicity of the official and non-official actors (Uganda, RCD, Rwanda, Congolese and Ugandan rebellion groups and *Interamwé*) and of the inversions of alliances which one may imagine.

In this respect, like it was stated by judge KOROMA, this case, in view of the circumstances which surround it and of its consequences, because of the death and the sufferings of millions of people, "*is one of the most tragic and most difficult that the Court has had to deal with* "[15].

The Court said so taking into account "the complex and tragic situation which has prevailed for a long time in the Great Lakes Region" (§ 26) and the fact that "acts made by the various parties within this complex conflict in the DRC and contributed to the immense sufferings of the Congolese population".

We agree with the abovementioned author that at the end of the exercise, there is certain unspoken frustration on the part of the Court on the preventive legitimate self-defense in reaction to an attack by irregular forces[16] and especially, for our understanding, on the qualification of the conflict in international law, this being a related case, from the analysis of many, what is convenient to be referred to as "*armed aggression*".

The silence of the Court is eloquent when it came to the question of qualifying the action of Uganda as an aggression or to recognizing as mitigating circumstance the unlawful acts of this country, the inability of the DRC to ensure the security on its territory and to prevent

[14] Abdelwahab BIAD, art. cit..
[15] Statement by Mr. Judge KOROMA,. Referred to by Abdelwahab BIAD, art. cit., p. 113
[16] Ibidem

the actions of the rebel groups from Uganda and Rwandan. We may also wonder about the confusion which would immerge from the link established by the Court between occupation and use of force. If occupation indeed is always a use of force, then occupation as such, does not violate the principle of non-use of force as the Court concludes[17].

Consequently, Abdelwahab BIAD concludes that this link established by the Court could contribute to create confusion between the obligations of the States arising from the *jus ad bellum* and those concerning *the jus in bello.* We propose here to make a second reading of the views advanced by the aforementioned author in his analyses.

He goes from the assertion that interesting questions from the point of view of the *jus ad bellum* and the *jus in bello* arising from this ruling - in particular are -: use of force, right of legitimate self-defense, application of the rules of the International law on human rights and International Humanitarian Law in an occupied territory.

After the case of the military and paramilitary activities in Nicaragua (1986) and that of the legal Consequences of the construction of a wall in the occupied Palestinian territory (2004), the conclusions of the Court were particularly expected.

The Court could have said, such were the expectations of many, if the military intervention of Uganda on the territory of the DRC could be justified as self-defense as Uganda claimed it or, on the contrary, constituted an attack on the sovereignty of another State and a violation of *jus ad bellum* as the DRC affirmed it. It could have ruled if the Ugandan military presence on the territory of the DRC was an occupation within the meaning of *the jus in bello* and have determined if there had been violations of the International Law of the Humans Rights and International Humanitarian Law by the occupying power.

Analysis of the facts and at the end of the preliminary investigations of the case rises from the consequences in terms of international responsibility, on the part of Uganda; a "litany" of violations implying that the Court considers the responsibility of Uganda for unlawful acts and on repairs which the DRC has the right to obtain. The responsibility of Uganda, occupying power, for the violations of the International humanitarian law here rises from a rule of customary law given in article 3 of the Fourth Convention of The Hague respecting the laws and customs of war on land of 1907 as well as article 91 of the additional Protocol to the Conventions of Geneva of 1949.

Uganda is therefore liable for "any act of its armed forces " and for "the failure of the necessary vigilance to prevent the violations of the Humans Rights and of the international humanitarian law by other actors present on the occupied territory, and this including the rebellious groups acting on their own account " (§ 179).

Thus, application of a rule of customary law[18], the behavior of the Ugandan soldiers and officers on the territory of the DRC is attributable to Uganda, "since it is about the conduct of an organ of the State" (§ 213).

The Court draws the legal conclusions from this responsibility for internationally wrongful acts by requiring, as it has done in other cases[19], that the responsible State repairs the caused

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17 Abdelwahab BIAD, art. cit., pp. 13-14

18 Recueil CIJ 1999 (I), avis consultatif sur le Différend relatif à l'immunité de juridiction d'un rapporteur spécial de la Commission des droits de l'Homme, § 62

19 (Projet Gabcikovo-Nagymaros, Hongrie/Slovaquie, Recueil CIJ 1997, § 152 ; Avena et autres ressortissants mexicains,

damage (§ 345), and that, and that " in the event the parties could not agree on this matter, the issue of reparation due to the DRC will be settled by the Court " (§ 345).

If such is the conclusion of the Court, and happy as it may be, it cannot go without leaving a bad taste insofar as certain issues of law, unfortunately, could not be resolved as one could have expected.

III. Limits to the action of the Court and possible solutions

The judge is expected to state the legal position; that is and should be his sole mission. Yet the analysis of the way that ICJ examined the cases of the DRC against Rwanda on the one hand and, against Uganda, on the other hand, shows the possibility of structural and normative stagnations arising from the persistent gap between the inadequacy of the law which it has to state the position of and requirements of peace, security and international justice.

Amongst these stagnations are in particular the problem of referral to a court and the jurisdiction of the ICJ when is raised, with singular acuity as in the case of the DRC, issues concerning Human Rights, international humanitarian Law, International peace and security etc, in brief all that the same Court qualifies as *intransgressible rules on the one side and, mandatory rules or jus cogens* on other side. This distinction is in particular evoked in the Advisory opinion of the International Court of Justice of July 8, 1996 on the legality of the threat or the use of nuclear weapons. In this opinion, the fundamental rules of humanitarian law are qualified by the Court of *"intransgressible principles of the customary international law"* (par. 79) [14].

In the opinion of Professor Luigi CONDORELLI, this terminological innovation does not certainly shine by its clarity. Indeed, he urges, it is a doubtful that the Court wanted to indicate quite simply, as could make it believe a literal interpretation of the word, that the principles in question should not be transgressed: that it is true, indeed, for any legal standard prescribing an unspecified obligation! The solemn tone of the sentence and its turn testify that the Court intended to proclaim something of more incisive and significant, undoubtedly with an aim of bringing closer the fundamental rules thus qualified with *the jus cogens.* It would be of bringing together to *the jus cogens* and not about assimilation to this one, because the Court says openly a little further (par. 83) that it believes not to have to decide the question of whether it is imperative standards: which is in addition perfectly debatable for multiple reasons.

In his mind, therefore, "*intransgressible*" does not mean "*imperative*" but something closer, such as president BEDJAOUI suggested in paragraph 21 of his statement. Probably - but it is the personal interpretation of Professor Luigi CONDORELLI- it was about highlighting the fundamental concept which is devoted to article 1 common to the 1949 Geneva Conventions (and taken again to article 1 paragraph 1, of the first Protocol of 1977), according to which no justifying circumstance could be pleaded in order to exclude the illegal character of behavior that contradicts the principles in question.

In other words, the circumstances excluding the illegality which are present in other sectors of the international legal order (such as the consent of the victim, self-defense, the

Mexique c. Etats-Unis, Recueil CIJ 2004, § 119)

countermeasures or the state of necessity) cannot be invoked in this particular case[20].

Another concern is the notion of what may be called execution in international procedural law considering that in principle it depends on the principle of goodwill although it is extremely difficult to expect the aforementioned *bonna fide* of a State on which the victim does not have the diplomatic, political possibility, even less economic capability because of its vulnerability arising from the harmful consequences suffered because of "*the aggression*" which it is claimed to have been victim, to exert an unspecified pressure.

Indeed, under the article 94. 1. Charter of the United Nations "*Each member of the United Nations is committed to conforming to the decision of the International Court of Justice in any litigation to which it is party*" And, subparagraph 2 of this same article specifies, "*if a party with a dispute does not satisfy the obligations which fall on to it under the terms of a judgment delivered by the Court, the other party can resort to the Security Council and the latter, if it considers it necessary, can make recommendations or decide measures to be taken to execute the ruling* "

In addition, and if by chance Uganda agreed, as it was already the case, with the DRC on the concrete methods of repair, shall we hold it right and repairing if our populations, first and true victims are not, in one way or another, compensated and involved in this kind of *infra and interstates transitional restorative justice* with the aim to reconcile them with their neighbors living on the other side of the borders?

Justice would lose meaning if the direct perpetrators of various crimes decried and condemned should continue to hide behind the responsibility of the State in the name and for the account of which they acted and who then would be the only person in charge while they would go away, carrying out their cushy cleared life? These are many questions which require practical and realistic solutions.
Within the framework of this analysis we will only examine the case of the ways of implementing international law and of just compensation for the damages suffered by the victims of all these internationally unlawful acts.

IV. Issues of the international responsibility and just compensation for the damages suffered by victims

The execution of the international liability cannot elapse, like in the case of Uganda, without bringing about certain consequences of a practical and legal nature. Indeed, issues of the implementation of the liability raise from the outset issues of the identification of the eligible beneficiary of the action. But, in our view, it should also raise that of the right beneficiary of the repercussions of the sanction to be resulted from the sentencing of the perpetrator of acts recognized as being internationally wrongful.

It is in this regard that Pierre-Marie DUPUY notes that the determination of the legal consequences of the responsibility and its implementation do not only take on one practical interest, related to the statement of the only methods of the damage and, mainly of the material damage. It also relates to the fundamental theory of international liability that one cannot in any event bring back purely and simply to the allowance of *an intersubjective repair* in kind or by equivalent, the perpetrator of the wrongful act to the victim of the damage; such an amount should be significant, well beyond, the role of the responsibility under

[20] Luigi CONDORELLI, art. cit., pp. 9 - 21

general conditions for enforcement of international law, or, if one prefers, for respect of international legality[21].

This is the consequence to be drawn from the provisions of Resolution 56/83 adopted by the General Assembly of the United Nations on the classification of the right of liability for the State for internationally wrongful acts.

Indeed, it proceeds from article 30 of this text, being of the suspension and non-repetition, that "the State liable for the internationally wrongful act has the obligation:

a. to end such acts;
b. to offer assurances and suitable guarantees of non-repetition if the circumstances require it ".

In addition, article 31 of the same text gives the precision that:
"1. The responsible State is liable to completely make good the damage caused by the internationally wrongful act.
2. The damage is understood to mean any damage, material as well as moral, resulting from the internationally wrongful act by the State ".

It is in this direction that article 34 of this Resolution enumerates the various forms of integral repair of the damage caused by the internationally wrongful act. This may take the form of restitution, compensation and satisfaction, separately or jointly.

If it is thus true that negotiation between the Congolese State and Uganda led to certain methods of repair for which the methods of compensation[22] were negotiated, the question remains that of knowing if this transaction will have as incidence repair *in integrum.*

Also, could we claim that an unspecified repair had a resultant compensation of the victims to the prejudice of which atrocities of a particularly inhuman cruelty were committed?

In all manner certain measures of accompaniment falling under optics to reconcile all and sundry, then manipulated by the various parties in conflict, should not be minimized. This step could take the form of what we can name "*infra and interstates transitional restorative justice*".

Indeed, the need to think of infra and interstates transitional justice mechanisms involving the the representatives of forces among the border populations would result in restoring the confidence without which the proclaimed peace will remain hypothetical for a long time.

Another imperative would be related to the question of the prosecution and sentencing of the Ugandan and even Rwandan officials or others, then recognized guilty of massive violations of the Law on Humans Rights and of the International Humanitarian Law. But, as one can realize, this does not come under the responsibility of the International Court of Justice which can only deal with cases subjected to it, following certain formalities, by the States which are its only liable States. It consequently strongly proves essential to think of these mechanisms of transitional restorative justice suitable to accompany the resolution of this category of facts.

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21 Pierre-Marie DUPUY, op. cit., p. 490

22 It's the electrification of cities and towns of the North - East of the DRC by Uganda for a specified period.

Also, beyond the financial aspects related to the sentencing of Uganda by the Court, isn't a penal pursuit essential with acuity?

In this regard, the final word could belong to Judge TOMKA who was the only one to invoke penal consequences of this matter by advancing that Uganda remains duty bound to charge those who committed serious violations of International Humanitarian Law by virtue of the Fourth Geneva Convention and Protocol. He makes reference here to crimes against humanity and war crimes committed by different belligerents. This is true more so for the simple reason that majority of acts concerned occurred before 1st July 2002, and the International Criminal Court has no jurisdiction here.

But since we are insisting on this transitional justice, it is important at the risk of not sharing a common understanding, we state what this expression means, what are its foundations and its mechanisms and especially how to make it operational, *in concreto,* in the environment which concerns us.

According to the *Mapping* Report[23], the concept of « *transitional justice* » encompasses «the whole spectrum of several processes and mechanisms implemented by a society to try to confront massive acts of violence committed in past, with a view to establish liabilities, render justice and enable reconciliation » - even though often « the institutions are destroyed, resources exhausted, security compromised and the population traumatized and divided. » *(Paragraphs 989-990)*[24].

It is in this regard that Professor Fabrice HOURQUEBIE[25] highlights that the increase today in the number of states in crisis or coming out a crisis leads to making up the problem of « *justice in the state* » by asking questions on another point of the same: « *transitional justice* ». Since next to « *traditional-institutional* » justice, which regulates and sanctions« *day to day life* », emerges a « *transitional justice* » which regulates and sanctions the « *exceptional* ». He also states that if the first is easily identifiable , the second is less easily attachable.

There is proof for the same, from the definition retained by the United Nations in the Secretary General's Report presented before the Security Council: « [Transitional justice is] *the whole spectrum of several processes and mechanisms implemented by a society to try to confront massive acts of violence committed in past, with a view to establish liabilities, render justice and enable reconciliation* »[26].

The main objectives of transitional justice are to « promote reform dynamics and reconciliation within societies coming out armed conflicts or from a period marked by crimes committed on a large scale. They must also contribute to the prevention of new conflicts, consolidation of democracy and restoration of the rule of law, all on new consensual bases. Transitional justice also tends to give dignity to victims of human rights violations thanks to measures of justice, truth and reparations for wrongs they suffered. » [27]

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[23] United Nations Mapping Report, Transitional Justice options, DEMOCRATIC REPUBLIC OF CONGO 1993-2003, United Nations High Commissioner for Human Rights, Fiche d'information N°8

[24] Concerning transitional justice we can also usefully read MO BLEEKER (General Editor), La justice transitionnelle dans le monde francophone : Status report, Conference Paper 2/2007, Dealing with the Past-Series

[25] Fabrice HOURQUEBIE, La notion de « *justice transitionnelle* » a-t-elle un sens ? Université des sciences sociales de Toulouse

[26] R United Nations Secretary General Report before the Security Council, « *Restoring the rule of law and administration of justice during transition period in societies faced with conflict or coming out of conflict* », Doc. S/2004/616, 2 August 2004, p. 7 para. 8.

[27] Idem, para. 991

In this respect we estimate, in as much as this was raised by the Mapping Report aforementioned, that putting in place a holistic policy of transitional justice which would depend on the creation of several and additional judicial or non-judicial mechanisms appears crucial for the Democratic Republic of Congo.

We can also agree that the choice of most appropriate mechanism cannot exclusively be taken by the Government since it is important to take into account the demands of the Congolese civil society.

In this regard, we can suggest certain priority axes on which the process of transitional justice would stand concerning our country. These are:

- **Justice**: The number of violations attaining the threshold of international crimes is so high that a judicial system working at the optimum of best capacities would have the capacity to tackle such high number of cases. Those who committed these crimes are in their thousands, or perhaps in their tens of thousands, and their victims in their hundreds of thousands.

  The « decisive role » for foreigners in armed conflicts on the Congolese territory « poses a serious challenge to the implementation of some measures of the whole transitional justice … The search for the truth and establishment of certain facts, or even some responsibilities, will be difficult in some cases without the support and cooperation of third States or their nationals. The responsibility of commanders or sponsors and perpetrators will be more difficult to establish without the assistance of the authorities of the countries concerned".

  We can also agree that' « a mechanism of mixed pursuit – composed of international and national personnel – is necessary to administer justice to victims » given the lack of capacity of the existing mechanisms « and several factors which impede the independence of justice ». The modalities of operations and the exact form of such a jurisdiction « should be decided and detailed by a consultation of the players concerned, as well as the victims concerned... »[28].

- **Search for the truth**: here we would think of establishment of a truth commission, a non-judicial mechanism which can assist in determining institutional political and military and other responsibilities, in preserving evidence, identifying the perpetrators of acts of violence and recommending reparation measures and institutional reforms; and giving the victims a true platform from where they can express themselves and which is better adapted to their needs than a judicial procedure.[29].

- **Reparations:** Before a very big number of victims, a comprehensive and a creative approach is clear. But the responsibility of third countries involved in the conflict, individuals and companies, such as multinationals who were exploiting mineral resources of the DRC during the conflict, should also be condemned to pay reparations if they are found criminally liable. [30]

The right to reparation must cover all the losses suffered by the victim-(the necessity of a *restitutio in integrum)*-. The forms of possible reparations, whether material or not, are

[28] United Nations Secretary General Report before the Security Council, paras. 996, 999, 1052 and 1054
[29] Idem, para 1057, 1060 and 1061.
[30] United Nations Secretary General Report before the Security Council *op. cit.*, para 1074-1075 and 1089

as follows: restitution, compensation, rehabilitation, satisfaction and guarantees of non renewal. (*cfr supra*)- ».
Third party countries (in particular Uganda and Rwanda) whose international responsibility is assumed for serious violations of human rights and international humanitarian law have the obligation to pay reparations. *(See also the information sheet n°6 on involvement of third party countries).*

- **Reform of the justice system:** One of the purposes of the transitional justice policy is to put in place guarantees for non-recurrence of serious human rights and international humanitarian law violations committed in the past. Reforming the institutions which committed the violations or which did not play their institutional role to prevent them is often paramount towards attaining this objective. In the light of impunity which benefit those who commit human rights and international humanitarian law violations, and repetition of crimes committed in DRC, reforms of the justice and security sectors is crucial.[31]

- **Reform of the security sector:** The clearest link between transitional justice and institutional reform is found in the procedure of « *vetting* ». It pertains to a mechanism which aims at making sure that « the government officials are personally liable for flagrant violations of human rights, in particular those in the military, security services, police, intelligence services and the judiciary, shall not exercise their duties within State institutions »[32].

Vetting is a particularly important measure in cases where a number of those responsible for serious human rights violations find themselves in state institutions thanks to peace agreements. It involves a measure of preventing human rights violations by allowing a certain degree of satisfaction for the victims in as much as those presumed to have committed crimes are not pursued but are excluded from positions of power.

It pertains to a non-judicial procedure which aims at identification and removal of people responsible for human rights violations from public institutions, mainly from security forces. [33] »

As we can easily appreciate, and in respect to all limits which we alluded to concerning the action taken by the International Court of Justice, transitional justice mechanism offers real advantages as pertains to issues of jurisdiction, execution and fair reparation. Placed under international angle *sub and interstate transitional justice* should put a particular emphasis on true collaboration between states and populations involved to one degree or to another in the violation of international law and specifically human rights and international humanitarian law rules.

In conclusion

The atrocities which accompanied the conflict in the DRC had also the consequence of putting the blame of international responsibility on mainly Uganda.

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[31] United Nations Secretary General Report before the Security Council *op. cit.,* para.1126 and 1131-1132.
[32] We need to insist on the necessity of similar reforms more so because some former warlords have either, in the name of peace and reconciliation, been promoted to higher positions in the army or public administration or admitted in high political functions.
[33] United Nations Secretary General Report before the Security Council *op. cit.,* para. 1137

The International Court of Justice, one of the main organs of the United Nations was therefore called upon to intervene in the search for solution to the conflict involving different parties. If Uganda was condemned due to her committed responsibility following her military presence on the territory of the DRC due to her acceptance of the jurisdiction of the said Court, it is surprising to note that Rwanda on the other hand came out peacefully because she did not in any way accept the jurisdiction of the Court.

This fact, with some others, questions the action of the judge and even the notion of his mission. From him we are waiting for him to state the law. But if, like in the case of Rwanda, which cannot play the role expected of her, there is a thinking of seeing the theory of international responsibility being enlarged, in similar circumstances, to individuals who are material perpetrators of internationally wrongful acts.

On our case, we wanted that certain mechanisms concerning «*sub and interstate transitional reparation justice*» through which structured or non structured dynamic forces shall be applied to reconcile border populations and find reparation for several prejudices suffered by the victims for all atrocities committed as well as pursuit and condemnation of those who, individually, would be known to have committed internationally wrongful acts in respect to general international law, on the one hand and on the other hand, human rights and international humanitarian law.

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ECONOMIC RELATIONS BETWEEN THE DRC AND CHINA: LEGAL BASIS, SITUATION ANALYSIS AND THE WAY FORWARD

By **Laurent NGOY NDJIBU***

I. INTRODUCTION

This research falls under the framework of KONRAD ADENAUER STIFTING Foundation (African Law Study Library), and from among the themes retained by the organizers I have chosen : « ***economic relations between DRC and China : legal basis, situation analysis and the way forward*** »

Economic relations which fall under the scope of globalization constitutes an indispensable factor in such a manner that we can longer talk of development in all its aspects, without bearing in mind the latter. The Democratic Republic of Congo can never ignore this. But we need to observe that these economic relations cannot be achieved without challenges, more so because it is a field of pecuniary interest where each contracting party seeks to get the biggest share of the cake.

Indeed, « *after years of extremely rapid growth of its trade, China became both the 3rd largest world exporter and importer. While the weight of Sub-Saharan Africa in Chinese trade remains marginal, China overtook Germany in 2005 to become the greatest exporter to the continent which represents about 10% of the continent's imports. China mainly exports consumer goods (textile-clothing, motorcycles, etc.) and imports from Africa oil as well as different minerals and tropical products. China's emergence generally impacts on Africa on at least two fronts: on the positive side, China's growth increases the world's demand for raw materials exported from African countries; and on the negative side, African companies suffer due to competition from China, both in their domestic markets and in exports, particularly in textile and clothing industry following removal of customs quotas within the framework of Multi-Fiber Agreements* »[34].

Today DRC is opening her doors to foreign investors. Among them, China is a privileged partner. Chinese companies occupy an important position in the field of bilateral cooperation with the DRC in several sectors: mining, forestry, agro-food industries, reconstruction works, telecommunication, trade. « In a nutshell, China is today almost omnipresent in the economic landscape of Congo, which would be essential to accelerate her development and economic recovery ».[35]

But at what cost? Is economic development for spurring the well-being of people? « Bilateral agreements between China and DRC are expected to be based on friendship established on the principle of « Win-Win »[36]. This principle easily formulated, which indicates that the

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34 Cfr JEAN-RAPHAËL CHAPONNIERE, ***Trade between China and Africa Current situation, prospects and sources for analysis***, Agence Française de Développement, stateco n° 100, 2006, p. 149

35 Cfr COMMISSION JUSTICE ET PAIX, ***Les stratégies d'approvisionnement en ressources minières des pays émergents (Brésil, Inde et Chine) en Afrique***, Collection Ressources Naturelles, 2009, p.29.

36 Cfr BRAECKMAN, ***Vers la deuxième indépendance du Congo***, Bruxelles, Ed. Le Cri, 2009, p.176

two parties present must come out fully satisfied from the negotiations, remains hard to apprehend.

From the aforementioned, it is clearly indicated that for us to appreciate the importance of the notion of economic relations, we need to focus our study on the analysis of the situation problems brought about by economic relations between DRC and China so as to give real potential solutions enabling better balancing of the interests of the contracting parties. In other words, our objective is that of picking up problem situations posed by Win-Win principle so as to give adequate and sustainable solutions.

In what follows below, we shall address the notion of international economic relations, the legal basis, problem situations related to economic relations between states and potential solutions before drawing a conclusion.

II. NOTION ON INTERNATIONAL ECONOMIC RELATIONS

All relations between human beings and between institutions are not economic relations. « in contemporary societies, whether qualified as capitalists, commercial or market, a relation shall be deemed to be economic if it brings together a seller and a buyer, who exchange, mostly through currency, goods or services, a claim, a debt, or even money ».[37]

Economic relations are presented in very diverse forms (capitals, services, technologies, labor). These exchanges are developing continuously, which essentially means increase in interdependence between states.[38]

Currently, no country, regardless of its power, has economic capacities to ignore policies led by other countries: inflation or disinflation, growth or recession, are transmitted from one country to another. In a concrete manner the world economy is dependent on the dollar, euro rate, and on the price of oil. DRC cannot define her objective without considering those of her principal partners. Consequently, interdependences on commercial, financial, technological matters etc become indispensable for any country, including DRC. Several powerful countries of the world in the name of interdependence, have signed economic relations with African countries mainly among them DRC and China.

III. LEGAL BASIS OF THE ECONOMIC RELATIONS BETWEEN DRC AND CHINA

The legal basis governing economic relations between DRC and China comprises of basic enactments which are the Congolese enactments which regulate doing business in Congo and the secondary enactments, which are as a result of bilateral agreements.

1. BASIC LAWS

These include Mining Code, Investments Code, Commercial Code, Customs Code, Imports Code, Act governing stay and movement of foreigners in the mining areas, Employment Code, etc.

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[37] Cfr RENATO DI RUZZA, ***les relations économiques internationales aujourd'hui***, cours du Département d'Ergologie de l'Université de Provence, 2011

[38] Cfr MICHEL BAROT, ***les relations économiques internationales***, p. 5.

1. Commercial Code

Parliamentary regulations for commercial acts through special provisions are different from those of the civil law, which are justified by colonization which introduced in our country the dichotomy system of private law.

Indeed, it is true that the introduction of written law, with all the different branches of legal science has its origin from the Belgian colonizer, which makes our legal system to be included in the family of Romano-Germanic laws. It is characterized on one hand, by a civil code generally applicable to family relationships and those of private life of natural persons; and on the other hand, by a commercial code called upon to regulate only legal operations, carried out professionally by natural persons and economic enterprises, to mean individuals and companies.

Article 1 of the decree is limited to determining the status of the trader, while Article 2 of the same decree, on the one hand a long enumeration of legal operations which the law refers to as «***commercial acts***» whether accomplished by traders or non-traders .The commercial code does not exhaustively enumerate commercial acts, which means that courts would qualify commercial acts as acts not appearing in the list of acts deemed commercial, such as that arising from Article 2 of the 1913 Decree.

2. Investments code

« The Act n°004/2002 of 21st February 2002 on Investments Code »[39], puts in place a tax system of favors granted to investment projects and approved in accordance with the provided legal forms.

These favours pertain to customs, fiscal and parafiscal:

- Customs favours: public utility investors enjoy total exemption of import duties and taxes on machines, set of tools and new materials, initial spare parts costing below 10% of the CIF value for the said equipments;
- With exclusion of administrative fees of 5% of the CIF value, approved companies enjoy total exemption of import duties and taxes for machines, set of tools and new materials, initial spare parts below 10% of the CIF value for the said equipments ;
- Heavy machinery, second hand boats and aircrafts are accepted with total tax exemptions;
- Exemptions of export taxes and duties for investments which plan to export all or part of their finished products, decorated or semi-decorated in favorable conditions for the balance of payments.
- Total exemption of professional tax on profits;
- Exemption of land tax on areas solely related to the investment project approved;
- etc.

3. Mining code

« The Act n°007/2002 of 11th July 2002 on mining code »[40], establishes a tax derogation to the common law regime:

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[39] Cfr Les codes Larcier RDC, Tome III, droit commercial et économique, Vol.2, Droit économique, Afrique- Edition, Bruxelles, 2003, p. 364 - 369

[40] Cfr Journal officiel, Numéro spécial du 15 juillet 2002

- the holder of a mining title is exempted, from the onset, from all duties, levies and taxes on his/her regular exports pertaining to the mining project, of any nature whatsoever;
- he shall only pay, as fees and levies in remuneration for services rendered for export of tradable goods or goods for temporary export, an amount not exceeding 1% of their value ;
- all mining goods and products, appearing on a prior approved list, and imported by the holder, his affiliates or subcontractors shall be subjected to import duty at a rate of 2 % ;
- all mining goods and products, appearing on a prior approved list, and imported, from the commencement of the final export by the holder, his affiliates and subcontractors, shall be subjected to a single tax of 5% ;
- fuel and lubricants meant and exclusively related to the mining activity shall be exempted from consumption and indirect taxes ;
- exemption of land tax on buildings covered by a search or exploitation license;
- tax exemption on vehicles for transporting people and materials, handling or haulage used exclusively within the area of the mining project;
- tax on profits at a rate of 30% instead of 40 % ;
- payment of exceptional tax on remuneration for expatriates at the rate 10% instead of 22%
- etc.

4. Forestry code

« The Act n°011/2002 of 29th August 2002 on Forestry Code »[41] establishes a special tax regime compared to that of the common law and those of the investment and mining codes. This regime: « aims at promoting a ration and sustainable management of forestry resources so as to increase their contribution to economic, social and cultural development of the present generations, while preserving forestry ecosystems and forest biodiversity for the benefit of future generations ».[42]

No logger, no exporter nor processor of forest products can, regardless of the tax regime he/she is subjected to, be exempted from payment of duties, levies and fees provided by this law or its implementation measures.

The rate of taxes and fees provided by this law shall be fixed by joint ministerial decree by ministers handling forests and finance dockets in accordance with the following modalities:
- fees for the surface area granted: the surface area rate fixed by the administration is increased by the additional offer proposed by the dealer at the time of the invitation to tender;
- logging tax: the rate varies according to classes of forest tree species and areas where they are levied;
- export taxes: rates of export taxes for gross products are higher than those export taxes for processed products;
- deforestation tax: the rate corresponds to the cost of deforestation per hectare;
- deforestation tax: the rate corresponds to 10 % of the cost of deforestation per hectare.

[41] Cfr Les codes Larcier RDC, Tome VI, droit public et administratif, Vol.2, Droit administratif, Afrique- Edition, Bruxelles, 2003, p. 167 – 179.
[42] Cfr Loi n°011/2002 du 29 aout 2002 portant Code forestier, article 2.

2. SECONDARY LAWS

As aforementioned, these laws comprise of different agreements signed between China and DRC. We can state in this regard: Cooperation agreements signed on 3rd April and 7th December 2011 between the Democratic Republic of Congo and the Peoples Republic of China; memoranda of common understanding and agreements on funding of infrastructural developments of the Democratic Republic of Congo through exploitation of mineral resources which the Government signed respectively with SINOHYDRO, with 'EXIM BANK and with CREC.

As an illustration, the memorandum of understanding signed on 17th September 2007, state in its first article that : « *This memorandum of understanding is about fixing modalities of cooperation for funding infrastructural development of the first batch, in consideration, exploitation of natural resources of the Democratic Republic of Congo*. »

In this regard, for the realization of this understanding, DRC grants to the joint venture total exemption of all taxes, fees, levies, customs duties, licenses direct or indirect, domestic or import or export payable in the Democratic Republic of Congo and those related to mining activities and to infrastructural development of the Joint venture Company. To ensure the success of its mineral exploitation and infrastructural works, the Joint-venture will have the pleasure of choosing freely the supplier of materials and equipment, technology and service, employing, locally and externally, qualified personnel in accordance with the Congolese legislation on this matter.

IV. PROBLEM SITUATION POSED BY SINO-CONGOLESE CONTRACTS

Several NGOs have written on the problems posed by economic relations (mining contracts) between China and the Democratic Republic of Congo. We shall illustrate problem situations of 4 NGOs. But before reviewing the status report, it would be appropriate to say a word on mining contracts which are the bases of the problems today.

1. SINO-CONGOLESE CONTRACTS OF 17TH SEPTEMBER 2007

In 2007 when the signing of the so called « Chinese » contracts was made public by the Minister of Infrastructure, the event had the effect of a bomb. Referred to as 'massive contracts' by some, and 'contracts of the century' by others, these contracts were the first of its kind that the Chinese Government signed with an African country.

In agreement with the program of the Five Priority Works set by the President of the Republic, namely: « *water, electricity, education, health and transport, Chinese companies (China Railway Engineering Corporation (CREC) and Synohydro Corporation), are going to renovate or construct throughout the country, three thousand kilometers of tarmac roads, 3200 km of railway lines, road maintenance and cleaning infrastructure especially in Kinshasa, 31 hospitals with a bed capacity of 150, 145 health centres, four universities, fifty thousand social accommodation equivalent to 6.5 Billion USD to which a mining investment shall be added at a tune 3.25 Billion USD (amounts fixed at this stage temporarily while waiting for finalization of feasibility studies in the initial formulation of the said agreements)* »[43].

[43] Cfr www.mines-rdc.cd, **Sino-Congolese contracts of 17th September 2007**

Besides, we need to note that the Chinese party undertook to finance Gécamines without interest, to a tune of 30% of its shareholding in Socomin, to be taken into account on its dividends. It would also pay Gécamines a sum of 350 million USD as capital; similarly it would lend the latter 50 million USD in equipments, without interests, refundable on the dividends.

« The Sino-Congolese agreement »[44], provides that during the realization of mining works and infrastructure, one worker out of five shall be a Chinese. In each one of the projects, 0.5 % of the investment shall set aside for transfer of technologies and for training of Congolese personnel. One percent (1%) of the total cost of the projects should be used to finance social issues within the mining regions and three percent (3%) to cover for environmental costs. Ten to twelve percent (10 to 12 %) of the works done should be sub-contracted to Congolese companies. These contracts are referred to as « win-win » to the extent that each of the two parties benefits from them: DRC shall finance the reconstruction and modernization of her basic infrastructure, but she does not have money. China needs markets to sell her finished products and more so she does not have raw materials to finance her growth with her huge treasury surpluses which need to made profitable.

The Chinses bridging loan is a loan for 30 years at a rate of 0.25 percent given by the *the state-owned Bank, China Exim Bank.* As we can note, the time limits for repayments and the interest rates offered by China are exceptional and extremely concessional. The agreements signed with China state that China shall deliver to DRC the key in hand for the works done.

The repayment for these loans is guaranteed by the constitution of a « *joint venture* »[45], la Socomin (Congolese mining company), held at 68% by Chinese companies (CREC-Congo Railway Infrastructure Project; China Hydraulic and Hydroelectric Construction Group Corporation Group), at 32% by Chinese public company. Gécamines gives mining titles on its concessions and the Chinese companies give funding for copper, cobalt and gold mining in Katanga. The proceeds from Socomin shall be used to repay these investments as a matter of priority. Socomin shall mine about 10 million tons of crude copper from where they will get six and a half million tons of refined copper, two hundred thousand tons of cobalt, three hundred and sixty tons of gold.

If we observe as it is appropriate, we notice that these contracts are more advantageous to China than to DRC. This problem situation with the pressure of IMF and western countries pushed Congolese Government to negotiate with more than ten private companies concerning new share of proceeds from the mining sector, with the objective of granting a bigger share of the proceeds to the DRC.

The commission for review of mining contracts applied the decision of the Congolese Government dated 20th April 2007 concerning 60 mining contracts existing between Congolese public and private companies. « The commission was supposed to carefully examine the contracts and verify their impact on the recovery of public companies on national development; it was also required to make recommendations in view of possible

[44] Cfr www.mines-rdc.cd, Sino-Congolese contracts of 17th September 2007

[45] Cfr The joint-venture is an agreement between two partners from different countries and which consist in the creation or joint acquisition of a common branch on the market of a foreign partner. This cooperation is planned over a long term. The creation of a common branch involves putting together whether commercial (distribution network,), technical (production tool, licence,) or managerial, but also financial and human means from each partner in a joint spirit of cooperation. These share management, control, risks and advantages associated to this joint structure.

review of the contracts and correction of the imbalances »[46].

2. STATUS REPORT

1. Justice and Peace Commission

For this commission the argument about « win-win »,[47], is becoming indeed complicated when assessing the gains in monetary terms. Who benefits from the principle of *Win-Win* in the contracts signed between China and DRC? We cannot give a clear answer to this question because the interests are dependent on each particular case. But, it should be stressed that such a logic calls for power relations. On this point, investors are likely to benefit; of importance is what is coming out of this study conducted by Justice and peace commission: «profits brought about by exploitation of resources via multinationals are transferred to foreign countries although looking attractive theoretically; this principle of« *win-win* » does not seem to have been effectively applied ». The logic remains the same both for investors in the mining sector and in the agri-food sector. Liberal capitalism wants to be paid in proprietary rights; it is like going back to the barter trade where investors no longer calculate their worth in terms of interest rates but in terms of mining leases. If the contribution from investors can be evaluated clearly, the same cannot be said for the gains from mining, which will be spread over the years.

Besides public interests, rights and freedom of individuals are also put to test by the Chinese foreign investors. These, contrary to European contracts, are indeed not in any way «conditioned» by clauses concerning good governance, respect for human rights, budgetary rectitude etc. The bilateral relationship first gives priority to trade and avoids any form of political interference. But, not putting into consideration respect for human rights as conditional clause weakens the position of the local communities and leaves the door open to any form of violations.

2. International Monetary Fund (IMF)

The IMF was skeptical about the Sino-Congolese contracts, for this financial institution these contracts are not beneficial to the DRC if anything they are increasing the debt burden of the country. In order to resolve this discrepancy it is absolutely necessary to review the contracts.

Indeed, at least three billion USD worth of Chinese contracts signed with the Government of teh DRC are frozen, if not abandoned. The tug of war has therefore turned in favour of the IMF, despite long resistance. China is constrained, may be momentarily, to cancel a part of the 10 Million tons of copper and 600 000 tons of cobalt for which she had acquired mining rights for a consideration of 9 billion USD for infrastructural works. According IMF, DRC can only receive 10 Billion Dollars for debt relief and 500 million USD on condition that these Chinese contracts are reviewed.

At the technical level DRC, tried to show that these Chinese Contracts could be assimilated to a public debt since the contracts are covered by the mineral deposit. « *The State shall only*

[46] Cfr INTERNATIONAL PEACE INFORMATION SERVICE, Congo mining contracts : State of affairs, Envers, Belgique, 2008, p.1

[47] Cfr COMMISSION JUSTICE ET PAIX, ***Accaparement des terres en RD Congo et la protection des droits des collectivités locales***, Bruxelles, 2011, p.4

be allowed to take up the debt if the mining project, which repays the debt, fails. Everywhere in the world there are risks. Does it mean that we will not remain faithful to the contract? No. The risk is absolutely reduced. »

IMF did not want to hear all these arguments. For M. Strauss-Kahn, it could not be a question of driving a relief program for the Congolese public external debt and leave the country, at the same time incurring more debts. « According to the Washington institution, the Congolese State guaranteeing the credit from China Exim Bank, the contract must be considered like a national debt which would be added to the debt which is currently estimated at eleven billion dollars ».[48]

3. Global Witness

Although this agreement is not less transparent than a number of other mining contracts signed by the Congolese Government, the Congolese people are today finding it hard to assess the benefits their country will get due to lack of information.

There is a famous Chinese proverb which refers to taking risks and money games which we can roughly be translated as follows: «*if you have to play, decide on three things from the beginning: rules of the game, the stakes and the time when to abandon the game.*». « According to Global Witness, the rules and stakes were not clearly established ».[49]

The most crucial aspects of the agreement are as follows: pricing mode for mineral ores; infrastructures called upon to be constructed and their cost; method of calculating profits and the tax regime they are subjected to.

The documents consulted by Global Witness do not contain any information on the pricing mode of mineral ores. The agreement as it appears in its April 2008 version promises the Chinese parties an internal rate of profitability a part of the proceeds at 19% without stating which calculation method will be used. A very important detail, the agreement does not also stipulate what accounting principles will be followed. Concerning the infrastructures, although a list of projects planned and their cost was drawn in 2007, it has not been up-dated under any public form while the scope of the agreement was subjected to subsequent amendments.

In the absence of this key information, it is hard to foresee probable repercussions of the agreement. Moreover, Chinese state companies are clearly faced with a conflict of potential interests given the Chinese State shall probably be both the buyer and principal seller of the mineral ores. Thus, while it would be in the interest of Congo to sell the minerals at a maximum price, the Chinese State would have the advantage of buying at the lowest possible price.

« The April 2008 agreement remains silent on social and environmental issues, despite the inevitable impact of mining activities and development of infrastructures on the local communities. The Congolese law and international law, same as guiding principles enacted by Chinese State organs, forces Chinese companies to respect environmental laws and workers rights. Concerns have been raised that members of the civil society could be

[48] Cfr GLOBAL WITNESS, ***la Chine et le Congo : Des amis dans le besoin***, rapport sur la République démocratique du Congo, mars 2011, p.21

[49] GLOBAL WITNESS, la Chine et le Congo : Des amis dans le besoin, rapport sur la République démocratique du Congo, mars 2011,p.4

prevented from having an oversight on the Sino-Congolese agreement due to ambient political sensitivity ».[50]

4. Action Against impunity for Human Rights

The results of the research show clearly that private and public Chinese mining investments do not contribute to the improvement of governance of the mining sector in the Democratic Republic of Congo in general and in Katanga in particular. For this report lack of transparency would be at the basis of this state of things. « it is important to note that there is little information both on branches established in Katanga and on the head offices in China concerning commercial activities undertaken by these Chinese mining companies ».[51]

Moreover, the report underlines that majority of private Chinese mining companies employ a big number of local manpower, but workers rights face serious restrictions and remain victimized, in this direction, the jobs created are not stable and sustainable. Moreover, some Chinese employers do regularly obstruct State officials responsible for applying employment laws in force in the DRC. This situation desperately leaves the workers whose rights have been violated without any alternative in short term or in medium term.

« Thereafter, the research does a critical reading of the DRC-China Mining project contract »[52] In this regard, it notes significant imbalances and lack of transparency, in particular an access mechanism and disclosure of information on the realization of joint venture works which are pending. For example, the Congolese and the Chinese parties signed the addenda amending certain clauses of the initial agreement but the text itself remains secret. The research picks out lack of objective criteria for share of the share capital (Chinese Consortium 68% and the Congolese party 38% as well as tax exemptions and very high exemptions. And thus the creation of a joint-venture which departs from the rules of incorporating companies in the DRC.

In view of the aforesaid, the bigger problem of the Sino-Congolese contracts is the difficult in respecting the principle of Win-Win which in fact governs the said contracts.

Indeed, DRC blindly committed herself for the sake of safeguarding 5 promises made by President KABILA. The President had campaigned on the basis of these 5 promises, and after his election, he was supposed at any cost to keep his promises, but since the means were lacking, he did not have any other choice than to accept the Chinese offer with all possible consequences.

Thus the problem of the Sino-Congolese contracts can be summarized in these terms:

- The contracts offer more tax benefits to Chinese companies: zero taxation, while DRC has legal instruments which manage the field of exemption. And by referring to these laws, they do not necessarily grant total exemptions;
- Lack of information: if the contracts were signed for the sake of reconstruction (5 promises) and this reconstruction belongs to the Congolese population, the latter has right to information. This dissemination of information thus becomes more important,

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[50] GLOBAL WITNESS, ***China and Congo : Friends in need***, Report on the Democratic Republic of Congo, March 2011, p.6-7

[51] Cfr ACIDH, ***Chinese private and public investments in the mining sector in Katanga: good governance and human rights*** Report on the DRC 2010, p 8

[52] Cfr ACIDH, ***les Chinese private and public investments in the mining sector in Katanga : good governance and human rights*** Report on the DRC C, 2010, p 9

in the fact that according to the spirit of the memorandum, when copper and cobalt deposits do not succeed in covering the debt, it shall be paid by the Congolese State through her tax payers (population). In this regard, it should be stated that this population need to be informed everything concerning these contracts;

- The difficult in respecting the major principle of Win-Win which manages Sino-Chinese contracts. China enters in the DRC with a well quantified amount, while the repayment of the debt by the DRC is not quantified; we are speaking in terms of tons of copper and cobalt without putting into consideration possible speculations. Can we talk of the principle of Win-Win under these conditions?
- *Lack of the spirit of good governance: the efficiency of this was directly dependent on the quality pf management work and the actions of the manager*. The problem of the DRC is a problem of men and not the style of organization. There is need to urgently train men in organization techniques and in management of administrative structures of the State, capable of developing action plans for their departments in accordance with the aspirations of the population and with promotion of the rule of law, regardless of the Chinese assistance given, it shall only be useful if it is well managed in the interest of everyone.

V. PROSPECTS: WHAT WE NEED TO DO TO IMPROVE

The best solution for us would come from the strongest party of the memorandum of understanding, meaning China. The spirit of the memorandum of understanding through the principle of Win-Win is good, but China must show the concern of applying this principle to the fullest on the one hand and the other hand, Congolese leaders must forget themselves in this memorandum of understanding and not lose sight that these contracts exist for the 5 promises of the Republic not for the 5 promises of individuals.

Practically these solutions will be materialized as follows:

« For the Congolese Government »[53] , priority actions in the mining sector shall continue being underpinned by global objectives for the improvement of the business climate, harmonious coexistence between traditional and industrial modes of operations as well as development of the mineral potential of the DRC.

Improvement of the business climate in the mining sector is mainly done through the following elements hereinafter :

1. Implementation of the win-win concept in partnerships and collaboration agreements where the State is directly or indirectly a stakeholder ;
2. Putting in place a legal framework for ensuring better traceability for flow of materials and capital, at the same time better transparency in payment of several taxes, royalties and fees as well as more governance , particularly relating to the delicate question of retrocession in different contributors and decentralized entities ;
3. Finalization of public companies' restructuring and their recapitalization in the context of their transformation into business companies ;
4. Harmonious co-existence of traditional, semi-industrial and industrial modes of operation is realized through: conducting vetting of the mining sector conceded and human, technical and financial capacity building for department in charge of the Mining Code;

[53] Cfr http://mines-rdc.cd/fr/index.php?option=com_content&view=article&id=88

Development of the mineral potential of our country is realized through:

1. Erection of secured areas reserved for handicraft enterprise;
2. Conducting inventory of our mineral resources, both in the mining field not conceded;
3. Search and development of innovative processes for mineral extraction and implementation of new branches for the products;
4. Search and prospection of quarry products in our country and their mining in case of established profitability.

For global witness we need to[54] :

- Publish all contracts relating to the Sino-Congolese agreements, including other agreements;
- Publish feasibility studies of mining sites, and the synthesis of their main conclusions ;
- Ensure that the agreement gives the pricing method applied to mineral ores;
- Indicate clearly what infrastructures will be constructed, when and at what cost;
- Agree on the manner in which «internal rate of return» will be calculated and monitored;
- Eliminate loopholes in the agreement. State which taxes and fees will apply at the end of the repayment period of the investment.
- Ensure that all payments made in relation to mining and infrastructural works, as well as on production and exportation of minerals, are registered and correctly published, and verified by independent third party audits. Specifically ensure transparency in the payment of capital, including issues concerning the recipients and its mode of utilization ;
- Review the scope of the stabilization clause to ensure that it respects the duty of the Congolese Government to regulate key areas such as human rights and social and environmental policy;
- Assist in putting in place an independent supervisory body composed of Congolese Parliamentarians and civil society groups , with the support of technical experts in charge of supervising and writing public reports at regular intervals;

For ACIDH[55], we need:

- The inclusion of respect of the African Charter on Human and Peoples' Rights among the principles of the China-Africa cooperation ;
- Incorporate observer organizations to the African and Chinese agreements, and involve the civil societies in the works of the China-Africa summit, so as to ensure that the development assistance provided to African countries actually benefits the local populations ;
- To identify and evaluate real contributions of the parties in the joint-venture with a view to share the actions equitably;
- To renegotiate the mining project signed with China with a view to correct clear imbalances to the disadvantage of Gécamines ;
- To consider the rights and mining titles held by Gecamines on the concessions granted to the joint-venture as a part of the contribution in kind in the constitution of the share capital ;
- To eliminate the discriminatory regime of tax and customs duties exemptions granted to the joint-venture SECOMINES, in accordance with the provisions of the Congolese law in matters pertaining to tax and customs duties obligations taxable imposed upon

[54] Cfr GLOBAL WITNESS, ***China and Congo : Friends in need***, Report on the DRC, march 2011, p.8

[55] Cfr ACIDH, ***les investissements prives et publics chinois dans le secteur minier au Katanga : bonne gouvernance et droits de l'homme***, rapport sur la RDC, 2010, p 10-11

any mining company ;

- To publish income from mining sector with a view to guarantee efficient and responsible management of the same ;
- To seek the assistance of experts so that a clear hypothesis in terms of the time limit for repayment of the loan is known. This is possible thanks to production projections for the first and second of operations of the joint-venture contained in the mining agreement.

VI. CONCLUSION

In conclusion, after fifty years of independence, the DRC remains largely dependent on aid and remains specialized in primary products. However, the world context has deeply changed and the DRC has seriously diversified her partners and she is absolutely obliged to count on her partners to ensure her growth and development. But this should be done in a better climate.

While pursuing her development program through signing investment contracts, the DRC should have clear legislative tools to ensure efficient protection of the rights of the local populations. Measures should be agreed upon in the implementation of a monitoring and evaluation system so that the investment projects lead to the development of the area and growth of the local communities.

Founded on the principle of «win-win», the agreement for exchange of «mines against infrastructure» envisage the construction of more than 5 000 kilometers of roads as well as railway lines, over thirty hospitals, over a hundred health care centers and four universities. In consideration for this, the DRC which has 10% of the world's copper deposits shall be required to grant to China mining rights for 10 million tons of a mixture of copper and cobalt and gold. If Beijing has already released close to 3 billion dollars, DRC, stuck between calls for prudence from the West and Chinese claims, is finding it hard to honor her part of the bargain concerning the agreement. Up to now China has not even mined anything within the framework of this partnership.

China should in order to avoid the risks of corruption and non-transparency, attach the condition of putting in place good governance to her aid. The Sino-Congolese partnership could be for DRC a historic opportunity to evolve and decide on a new direction of her relations with development partners. Beyond the commotion it is arousing in the international arena, Sino-Congolese partnership calls upon the DRC on her capacity to take charge of her destiny and consider external aid as assistance and not the main kingpin of her reconstruction and development.

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TOWARDS PROSPERITY THROUGH UNIFICATION OF LAWS: DRC'S MEMBERSHIP IN THE OHADA (SITUATION ANALYSIS, LEGAL BASIS AND STRUCTURES)

By **Jean Salem Israël Marcel KAPYA KABESA***

I. INTRODUCTION

A. STATUS REPORT

Investment in Africa is currently limited due legal and judicial insecurity[56]. In this regard, the idea of unifying the African law was considered as the only solution to eliminate obstacles to development arising from judicial differences among African States[57].

Organization for Harmonization of Business Law in Africa (OHADA)[58] was signed in Port-Louis, in Mauritius, on 7th October 1993 and came into force in July 1995[59].

The objective of developing a harmonized new legal framework in the field of business law was to promote investment and economic growth. In particular, this harmonization is materialized by the adoption of laws known as «uniform Acts».

The legal framework arising from the uniform acts is therefore generally based on continental law and is, in a certain extent, inspired by the French Business Law. On the other hand, due to several substantial differences, this borrowing cannot be considered as a true transposition of the French Law.

Due to its peculiarities, the African law should today go beyond the «sterile» debate of common law against continental law. It should base its development on essential characteristics of each system. It is important to respect the African vision of law founded on practices and introduce western concepts and particularities which are similar to African

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56 Keba MBAYE, Forward of the special publication for the magazine Penant, n° 827 (2000). p.123 and others.

57 For a long time the problem of diversity of laws was a big obstacle to economic development of Africa and was not taken into account by Afrucan States. In the early years of independence, the question for harmonization of laws in Africa was raised. Professeur Anthony N. Allott emphasized that "the move towards integration or unification of laws has been a consequence of independence, of the desire to build a nation, to guide the different communities with their different laws to a common destiny".

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59 The 16 countries which became members of OHADA are Benin, Burkina Faso, Cameroon, Comoros, Republic of Congo, Côte d'Ivoire, Guinea, Equatorial Guinea, Guinea Bissau, Mali, Niger, Central African Republic, Senegal, Chad and Togo. The procedure for membership was undertaken by the Democratic Republic of Congo and São Tomé and Principe. Nigeria, Liberia and Angola are currently debating on possible membership to OHADA.

traditions. Moreover, it is necessary to succeed in creating a really African law[60] », and to guard against a fracture between different legal players so as to avoid this new African law from becoming another example of an inefficient law. The main condition is to prevent conflict so as to avoid rejection of the same.

Thus, legal environment or the Congolese legal scope is characterized by a pluralistic legal order, split in sub-systems. Nevertheless, it is established, between these differences «legalities», «normativenesses» or regulations; a «porous legality», or «inter legality», «inter normativeness» known as a dynamic process «*on which multiple networks of legal orders constantly force to transitions and encroachments*».

The objective of OHADA is to enlarge the number of members and to open membership to other African States which are not necessarily French speaking or belong to the legal tradition of the continental law.

Our concern in this dissertation consists of seizing the range of unification of the African law in respect to legal pluralism in the diversity of national economies of member states which are part of OHADA treaty.

African States are faced with the challenge of allocating legal rules which are meant for the recovery of the legal order, which brings about differences between national legislations and internationalization of the legal rules present[61].

B. POSITION OF THE PROBLEM

Constituting in itself, international, communal and common business law in Africa for each member state and the scope for regional integration, the Organization for the Harmonization of Business Law in Africa (OHADA[62] very recently underwent a revision. Anchored upon the intention of regionalizing business law through the phenomenon of « globalization of the law », a review of OHADA law was undertaken and gave rise to the Treaty of 17 October 2008[63].

This treaty has 63 articles which are divided into IX titles, the review outlined by definition is from Articles 3 to 63 translating into amendments and complements of the body of some provisions of the original treaty signed in Port-Louis[64]. It institutionalizes the organization by formulating mainly the instruments, Uniform acts and the organs for the realization of legal integration.

Globalization of trade and multiplication of business of international dimension constitute a challenge for competition policies. Competition and liberalization of trade have mainly

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[60] See also Michel ALLIOT, in Problèmes cit. has already notified on "de-westernization of legal rules" and adoption by African parliaments of a joint legal classification and concepts like main instruments necessary to pursue the objective of legal harmonization in Africa.

[61] KAPYA KABESA Jean Salem, Pluralisme juridique et filiation en droit congolais ; un exemple de la procréation médicalemenent assisté en RDC, in annales de Kolwezi, Kolwezi, 2009, pp. 30-60

[62] Organization created in Port-Louis (Mauritius) by OHADA Treaty signed on 17th October 1993 by 14 Member states of the Franc zone in this case : Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo ; thereafter the list rose to 16 with the entry of Guinea Bissau and Guinea Conakry and today to 17 with the entry of the Democratic Republic of Congo

[63] Treaty on review of the Treaty realting to Harmonization of Business Law in Africa of 17th October 2008 in Québec, Canada by 16 member states before the entry of the DRC.

[64] Art. 1 of the Quebec Treaty.

the same objective: reduce or remove obstacles and imbalances affecting markets. The general principle which must, in the eyes of some economists, guide the definition of the rules, is that of maintaining competition in the markets. This principle must be applied indistinctively to companies like States. The stake, currently, consist of adapting this principle at the international level and consequently, to build the legal framework of an emerging global society around opening of borders and transnationalization of economic practices. Contemporary liberalism with its principle of reparation between public and private places would be its way of getting overwhelmed and getting of the narrow scope of national borders in which it had been edified up to now[65].

The success of this legal revolution in Africa inevitably passes through recognition of African legal pluralism[66]. We cannot conceal that African tradition, in its full meaning, is a source of law, equivalent to state law, jurisprudence, revelation and doctrine; and after a period where they refused to recognize the role of traditional law, African countries are starting now to realize its importance within the African law in its entirety[67].

The possibility of identifying a « common core » of the African Law should be examined so as to draw therefrom common characteristics to different African traditions[68].

It is important to tackle this issue with a pluralist view: the lawyer should not only tackle the study of the African traditional law on the legal level, but he should be ready to do an interdisciplinary analysis, collaborate with specialists in other fields (sociologists, anthropologists, linguists, economists, historians) who can clarify on different aspects involved in the creation and application of the rule of law[69].

In the commercial sector, this objective can be pursued by looking for a method of analysis from the « informal » sector of trade which constitute an important element of the African economy and which is currently ignored by the OHADA law. Lastly a system for settlement of disputes should be put in place taking into consideration the low level of education in Africa and logistical difficulties for the disadvantaged populations to reach the places where justice is administered, even within the same country[70]

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65 DEBROCK Christian/Brunelle Dorval, « Globalization and normative frameworks », research book-CELM (98-02), Groupe de recherche on continental integration (GRIC), University of Québec in Montréal, September1998, p. 15.

66 The idea of African legal pluralism supposes the notion of legal pluralism defined by Jacques VANDERLINDEN in Villes africaines cit. It pertains to a situation where a person is in presence of different independent legal orders and according to his choices, directs the solution in order to have a risk of conflict concerning both competent jurisdiction and the applicable law.

67 For example, Article of the Constitution of Mozambique du 16 November 2004, entitled "Legal Pluralism" states that "The State recognizes different legal systems and settlement of disputes which coexist in the Mozambican society to the extent they do not contravene fundamental values and principles of the Constitution ". The situation here is different from Egypt and Pakistan where the constitution formulates a hierarchy between different legal orders in force within the same legal system.

68 For the methodology, we can refer to Mauro BUSSANI et Ugo MATTEI (éd.), The Common Core of European Private Law, (2003) La Haye, Kluwer, with the necessaries – and obvious - adaptations to African law and African reality. Moreover, concerning the needs and the problems of initiatives aiming at a legal integration in Europe, see Mauro BUSSANI, 'Integrative' Comparative Law Enterprises and the Inner Stratification of Legal Systems, in European Review of Private Law (2000), vol. 1, 85-99.

69 The works of Anthony N. ALLOTT, in The Unity cit. can be considered as the initial stage in this research of the "common core" of African law.

70 Constantin TOHON, the treaty cit. the search for the common core of the African law can explain the modalities of joining the integration expected.

Good articulation of these four subjects will encourage the emergence of a regulated space enabling individuals, investors, producers and consumers, to act in optimum legal conditions for creation of companies, personal investment and use of their resources.

II. MEMBERSHIP OF THE DRC TO OHADA: POSITION OF THE PROBLEM

1.1. OHADA: HISTORICAL DEVELOPMENT AND STRUCTURES71

- **1993 :** The thinking had started from April 1991 when ministers for finance of the Franc area, meeting in Ouagadougou, decided to move towards feasibility of a plan for putting in place progressively a harmonized business law, so as to rationalize and improve the legal environment for companies.
- The plan led to the signing of the treaty on harmonization of business law in Africa, on 17th October 1993 in Port-Louis (Mauritius), on the sidelines of the Francophone Summit, and came into force from 1995.
- **1996 :** The so called "N'djamena" arrangements carried out the distribution of seats and allocated to some countries the management of OHADA permanent organs so as to ensure their rapid operation : Permanent Secretariat, Presidency of the Common court of justice and arbitration and the head office of the Regional High School of the judicial authorities.
- **1998 :** The three Uniform acts (general commercial law, business commercial laws and economic interest grouping, organization of securities), adopted on 17th April 1997 by the Council of Ministers, came into force in the member states on 1st January 1998, and were subsequently followed by other acts.
- **2003 :** In October 2003, in Libreville in Gabon, the Council of Ministers of OHADA decided to put into place an independent mechanism of funding to enable institutions to effectively take up their mission.
- **2005:** The Council of Ministers adopted in Malabo in May 2005, a plan for reviewing the Treaty of Port-Louis, which can only be amended by the Heads of State and Governments of the 16 members of OHADA, which all expected to be done by 2008.
- Port-Louis Treaty of 1993 opened a new chapter of Business law in Africa: OHADA law, it confirmed the undertaking of pooling the business law of the States within the Franc area, printing in the common of the general law a shade of public and community business law. From 1993 to 2008 this law got rooted in the morals to a point of coming up with university programs with one doctrine and jurisprudence, but this inaugural phase called for a Reform Treaty of 17th October signed in Quebec. It is important to have an idea of the foregoing and this is an overview of the said Treaty[72].

1.2. OBJECTIVES OF OHADA

The objective is to develop a harmonized new legal framework in the field of business law so as to promote investment and economic growth. In particular, this harmonization is realized by the adoption of laws known as « uniform acts ». It is however useful to state that national parliament is excluded from the procedure of adopting these uniform acts.

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[71] (MFI) OHADA enabled progressive harmonization of the business law in sixteen countries in west and central Africa. Its architecture, based on the French civil law from Romano-Germanic inspiration, is rigorous in stipulating laws but flexible in their application so as finally open up, as provided by the statutes, to other countries having laws inspired by Anglo-Saxon common law.

[72] AUBIN NZAOU, L'OHADA, un nouveau visage avec le Traité de Québec de 2008,Membre-chercheur JURIS-VISION - Ecole doctorale de l'Université de Limoges- 09/12/2011

The legal framework arising from uniform acts is generally based on the continental law and is, to a certain extent, inspired on the French Business law. On the other hand, due to several substantial differences, this borrowing cannot be considered as true transposition of the French law.

1.3. OHADA INSTITUTIONS

The creation, development and respect of community and supranational legal order are granted to five (5) institutions[73] at the top we find the summit of Head of States and Governments then Council of Ministers, Permanent Secretariat, Joint Court of Justice and Arbitration and the Regional Training Center for Legal Officers. The first organ, the summit did not exist in the original law of Port-Louis of 1993, it entered into the institutional life of OHADA law in 2008.

a) Summit of Heads of States and Governments- The Supreme Organ

This Treaty provides for an institution which was not planned for in the inaugural Treaty of PORT-Louis of 1993, the Summit of Head of States and Government which is composed of Heads of States and Governments of state parties, is chaired by the Head of State or Government whose country manages the Council of ministers (Art. 27 of the revised treaty). The Treaty first uses« consensus[74] as the method of making decisions, then stipulates « absolute majority » as the mode of making decisions which appears to be incidental in respect of the fact that it relays lack of consensus in the spirit of the law. ·

b) Council of ministers

This Treaty advocates for the maintenance of Council of Ministers which is comprised of Ministers of Justice and Finance of the State parties. Before the Quebec reform, this institution was the supreme organ of the whole organization. The prominence was taken from it by the Summit of Heads of States which was not planned in the initial version of 1993. It is supposed to play the executive role due to nominal powers and decision vested upon it. To be able to adopt rules which can assume the forms of Uniform Acts or Regulations, in the same breath it can take decisions of general intent [27] or those of individual intent[75].

In matters pertaining to regulatory power, it is responsible for the regulations on the procedure of the CCJA which defines the organization, operations, procedure and ways of appeal open to States and individuals. The Chair of this council has a term of one year and it is exercised in rotation in alphabetical order. Its Chairperson is assisted in his/her duties by the Permanent Secretary, member states take up the chair following the order of membership and in this way, after all the first signatories will have finished their role play.

c) Common Court of Justice and Arbitration

The role of this court is realigned on interpretation and joint application of the Treaty, regulations taken for its application, Uniform Acts and decisions, the goal being to have a unified law. This court acting as High Court or Court of Appeal is the most original in legal and judicial integration in Africa. Its decisions are not subject to appeal by the national

[73] J. Issa-Sayegh, *Répertoire quinquennal OHADA 2000-2005*, publication récente UNIDA, p. 14.
[74] Art 27 of the revised treaty
[75] It is the case of appointment of personalities for operations pertaining to the organs of OHADA.

courts. This court is composed of nine judges; however the Council of Ministers reserves the right of amendment in line with the necessity of the service and the financial possibilities. The judges of this Court are elected for a term of seven years non-renewable[76] from all nationals of the Sate parties, who have either practiced as magistrates admitted in high judicial positions or advocates admitted to the Bar or law lecturer for at least fifteen years. The law fixes the status of the president and his/her vice-presidents[77]. A third of its members must have the status of Advocates admitted to the Bar or a law lecturer and the Court cannot be composed of nationals from the same state. With the exception of decisions applying to criminal sanctions, the Court is an appeal court for decisions delivered in appeal from member states on issues relating to Uniform Acts and regulations. At the same time, it rules also under the same conditions on decisions not susceptible to appeal given any court of the State parties in the same legal disputes, but in case of appeal it makes allusion and rules on the substance of the matter.

d) Training Center for Judicial Officers

Article 41 of the revised first paragraph reads: « training, advanced and research institution in business law is established known by the name Regional Training Center for Judicial Officers (Ecole Régionale Supérieure de Magistrature (ERSUMA) ».Its objective is to work towards improvement of the legal and judicial environment of all member states. Its action is not confined to only acquisition of skills in OHADA law; it works towards other forms of regional and sub-regional integration like WAEMU and CIMA

Moreover the basis for the creation of this institution is reaffirmed by the Act of Niamey Seminar (Niger) from 9 to 10 June 1998 which says: « *We cannot succeed in the harmonization of business law if we do not train people capable of knowing this law, make it known, understood and applied efficiently and uniformly in the entire community space of OHADA* ».

e) Permanent Secretariat

There will be a Permanent Secretariat, headed by a Director General appointed by the Council of ministers for a term of four (4) years renewable once[78]. Its organization, operations and resources and services shall be defined by council of ministers regulations. The coming into force of the Treaty is planned for sixty (60) days after filing the eighth ratification instrument.

1.4. STAKES AND MECHANISMS FOR DRC MEMBERSHIP TO OHADA : TOWARDS A NEW PUBLIC COMPANIES LAW

1.4.1. Prelude to DRC membership to OHADA

[76] Art.36. - The members of the Court are irremovable. Any member of the Court retains its mandate until the date of entry on the basis of his successor.

[77] Art.37**.-** The court elects from among its members, for a duration of three and half years non-renewable, its Chairperson and its two vice-presidents. The members of the Court whose remaining term of office is below this duration can be elected to exercises his duties until the expiry of the said term. Their terms can also be renewed in these duties if they are elected by Council of ministers to exercise a new mandate of the Court. No member of the Court can exercise political or administrative functions. The exercise of any activity listed must be authorized by the Court.

[78] Art. 41 al. 4 The institution is directed by a Director General appointed by the Council of Ministers for a term of four years renewable once

The Head of State, Joseph Kabila, set to the deadline of March 2010 for the Democratic Republic of Congo to become a member of the Treaty in relation to the Organization for Harmonization of Business Law in Africa (OHADA). The President not only talks about it in terms of « priority » for the Government but also « imperative » for the presidential majority within parliament[79].

During his presentation, Joseph Kabila was firm on the next steps: « It pertains, in priority, membership of our country to OHADA, an essential measure to reassure the private sector on major concern: legal security. I hope a happy result to this file which is about to get legislative sanction, would be found immediately after the resumption of parliamentary sittings».

At the level of benefits from this treaty, we need to emphasize that the innovations expected in the domain of company law with presidential authorizations for current management acts mainly increase of capital, name of the company... It seems necessary to first master the scope of relationship between national courts and OHADA court. According to the acquired principle, a national court has no jurisdiction on matters concerning OHADA[80].

1.4.2. From membership of DRC to OHADA

The Federation of Congolese companies[81] (FCC), the "very serious" Congolese employers say they are flattered and encouraged by the promulgation dated 11th February 2010, by the Head of State, of the Act n°10/002 on membership of the Democratic Republic of Congo to the Organization on Harmonization of Business Law in Africa (OHADA).

It is appropriate to note that the DRC is the 17th country to be a member of OHADA. A validation workshop organized on Friday 10th September in Kinshasa fixed the membership of the DRC as a member of the Organization for the Harmonization of Business Law in Africa (OHADA) not later than 1st January 2011.

On this occasion, the chairman of the national commission of OHADA in the DRC, Roger MASAMBA, reiterated the benefits of OHADA for the DRC:

«From the point of view of judicial security, (NDLR): there is the possibility after the first degree and the second degree having a possible dispute settled at the level of the Common Court of Justice and Arbitration, a kind of a supranational supreme court which secures economic operators.» All these together, according to him, constitute an important chain

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79 This expectation expressed by Joseph Kabila before members of parliament and senators meeting in Congress on 7th December, has just revived an issue which the Senate thought to have finished with it with outright rejection of these membership by the majority of senators. In deed, for the Upper House, the approach is « untimely » in the current economic situation of the country. Several senators confirmed from the upper stand of the Senate, thus restricting its speaker, Léon Kengo wa Dondo, to draw all the consequences of refusing to adopt the ratification of the treaty by senators after debates and deliberations. According to them, DRC will not benefit in any way from the Treaty. And then some senators said the treaty is of advantage only to countries with the Franc area (CEMAC, WAEMU).

80 Laurent Essolomwa ; News briefs from Brazzaville of 09.12.09

81 According to Albert Yuma who called a press conference in the headquarters of Congolese Employers Association on Friday 12th February, the promulgation of this law is the culmination of a fight led by economic operators. The national chairperson of FCC also added that Members of the FCC are happy to see the DRC becoming a member of OHADA which is going to bring management related to legal and judicial security in favor of Congolese companies." *We salute the action by the Head of State because OHADA is also going to enable flow of fresh and new capital for investors living in the DRC. The companies which are doing business in our country will be happy to work since OHADA guarantees them legal and judicial security. For the FCC, membership of the DRC to OHADA constitute an important step in the improvement of the business and investments climate in general* ", emphasized Albert Yuma

in the framework of improving the business climate; with the consequence of enhancing business in our country so that investors can come to invest.

Mr.Roger Masamba also added that this would also enable creation of wealth, employment and promotion of social and economic progress. This workshop was mainly attended by local experts from the field of justice, economy and finance.

This is essentially due to constant degradation of the investment climate which is mainly illustrated by legal and judicial insecurity.

From a legal point of view, besides the difficult of access to laws, our business laws, which is inspired by Napoleon, highlights a net delay as compared to OHADA standards. The general commercial law has its basis on laws from the colonial period (essentially the Decree of 2nd August 1913 usually referred to as the Commercial Code) totally ignoring the commercial lease and the commercial sale, mentioning business only very indirectly through another law governing business pledge (Decree of 19th January 1960 replacing that of 12th January 1920), meaning security.

Similarly, the trade register is limited to registration of business men and business companies, in the presence of a national file. Company law has also short comings : no rule on restructuring of companies, hardly no provisions governing business corporations (equivalent to limited companies) whose head office is a royal decree of 22nd June 1926 which contains three articles, the former taking care to subordinate the creation of this type of company to an authority of the executive, today presidential authority.

From a judicial point of view, the will to rehabilitate the judicial sector is clearly expressed by the leaders. But economic operators are seeking more security. Some have attempted through arbitration, but still faint-heartedly, despite a real effort of propagation to which employers organizations and any new centre for arbitration in Congo gets down. In this context, the possibility of seeking justice through a supranational court substituting national supreme courts appears to the most attractive element for economic operators.

The application of OHADA standards shall ipso facto lead to repeal of contravening provisions at the municipal level. A compliance process will be required however to meet the references to national laws that are the uniform acts, particularly with regard to enactment of penal sanctions.

III. LEGAL DIVERSITY, HARMONISATION OF LAWS: TOWARDS PROSPERITY THROUGH UNIFICATION OF LAWS.

III.1. FROM CAIRO DECLARATION TO THAT OF PARIS

In the field of justice[82] the French speaking held the highest number of meetings. The Paris conference is the fourth organized with the French speaking fraternity since the first edition, in Paris in September 1980.

[82] Law and Justice in the Core of the policy of French speaking countries (MFI) the 4th conference of Ministers of Justice of French speaking countries should be the occasion, in an international context having experienced major disruptions, to renew the Francophone doctrine in relation to justice. But also to put in place a work program in line with commitments already taken and the international approach of the Francophone. Retour sur une profonde mutation, qui remonte au Sommet de Dakar de mai 1989.

At the beginning, two priorities are defined: improve the training of magistrates with French speaking fraternity and simplify the access to justice for the citizens - mainly by facilitating non-judicial regulation » of some disputes. In parallel, Ministers from French speaking countries put emphasis on the collective necessity to able to provide documentation and legal and judicial disinformation which are indispensable to them , and call for putting in place simple and efficient mechanisms for their dissemination and use. The importance of the concept of the rule of law in political organization of French speaking countries is thus expressed, which is in itself inseparable from the idea of a strong and independent justice system[83].

III.2. LEGAL DIVERSITY [84] AND THE MIXED NATURE OF LAWS AND CULTURES«

The theme of diversity occupies henceforth a central place in the Speech of the French speaking countries summit » stated Mr. du Bois de Gaudusson. But he added, « *for French speaking fraternity as it is the case for France – the interest of one and the other not being confused at any point -, this reference is not simply tactic: it also rests on the deep conviction that it is necessary to preserve « legal-diversity », which is as important as « bio-diversity », threatened by a movement of unifying and standardization which would be the only nature to promote economic development in the world*. »

The « legal diversity » does not have the calling of proscribing any thinking on a common law. It is however in this perspective that Mrs. Mireille Delmas-Marty Lecturer in Collège de France is situated. She advocates for the adoption of « *an orderly pluralism, only capable of renouncing separation pluralism without being a member, furthermore the utopia of the legal unit in the world* ».

As Professor du Bois de Gaudusson points out: « *to a period where there is a multiplicity of legal exchanges, the process of hybridization and legal intermarrying, the interactions between legal orders are many; thus Europeanization of the law, its internalization does not leave much space in European countries for a law which would be purely national on which the State and its successors would have a certain holding* ». The phenomenon is identical to the Francophone ladder: there is no Francophone legal system; there are legal systems within the Francophonie.

«*The diversity of the law of Mauritius is more vast than simple bi-legalism. The entirety of laws governing business corporations is, for instance, translated not from the English law, but from New-Zealand law* », stated Mr. Dwarka, notary public of the Supreme Court of Mauritius.

However, the importance of western legal traditions should not mask those of endogenous laws. « *In Cameroon, it is the Muslim law, the islamized custom and specific customs of each group which settles between 80% to 95% of disputes* », estimated Professor Etienne Le Roy, anthropologist of the law and one of the French promoters of legal and judicial pluralism.

The quality of the legal environment is essential for economic development of a country. Legal security is indispensable to business development. Investors turn away from countries where their rights are not guaranteed due to unsuited legislations or due to lack of reliability

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[83] *Diversité juridique, droit et développement, 4 è conférence des ministres francophones de la justice, Paris,13 et 14 février 2008.*

[84] A reality in the heart of legal systems of the members of the Francophonie. Classic division between *common law* and *civil law* do not allow putting into account the multitude and diversity of the existing legal systems. It however illustrates a tendency of domination from the traditional western law.

on the judicial system. One of the priorities of the countries within the French speaking area in search for development is therefore to have a quality legal system.

The American legal system includes fundamental elements of such a legal system but also elements belonging to a continental law legal system. This is translated by lack of a written constitution, a civil code used in Louisiana as well as a uniform commercial code: the latter can be considered as the nearest to a code within the meaning of continental law, since it is used as reference for courts and advocates and it is since developed and updated through Restatements; moreover the same on different legal fields are largely used daily in different legal spheres and can be assimilated to the 'codes''. This constitutes the character of the American system which does not correspond to the characteristics of the classic.

III.3. CRITICAL ASSESSMENT OF THE CONFLICT BETWEEN OHADA AND THE TWO SYSTEMS (CONTINENTAL LAW AND COMMON LAW).

The first conclusion is that the conflict between OHADA as an expression of the legal system of the continental law and the *common law* may be non-existent. Indeed it is more of political question than a legal one, a sort of an apparent problem, seen only through elite lawyers rooted in old western approaches which do not take into consideration the African reality. For the African states, the big question is not "the *common law* against continental law ", but the establishment of a simple, efficient and reliable instrument to regulate commercial activities generally. Consequently, it may be the approach that must change.

CONCLUSION

Membership of the DRC in OHADA raises the issue of African legal pluralism while this raises a question of the legal unit of the law, which is not yet tackled in our legal systems.

In this manner, it appears indispensable that the policy pursued by the States to settle their disputes would be adversarial in the extent where, bilateral negotiations enable softening of the policy to the twist and turns of the reality[85] in place of hostile grounds than closing reality in the economic field, as were the operations to maintain peace in Liberia, at the Sun City negotiations with the formula 1 + 4.

In my speech given in the National University of Rwanda on decentralization in the DRC, in Rwanda and in Burundi: the challenge of effectiveness, I stated that « it would be absurd to believe that decentralization in Central Africa is a process limited to appearances, but related to economic development of countries in pursuit of modernity, to the political will of the leaders depending on the place, time, space and the people[86] ».

At the time when our country is becoming peaceful and once more on the path of economic growth, legal and judicial security remain hypothetical as mainly witnessed by: failure of the whole strata of society to adapt to our law in front of the realities of the modern world-particularly globalization of the economy-and to the needs of economic operators; which, for instance, sensitively affects our general commercial law.

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[85] KAPYA KABESA, De l'intervention sollicitée d'un Etat membre d'une organisation internationale : cas de la RDC, in Annales de Kolwezi, 2009, pp. 36-48.

[86] Speech given by KAPYA KABESA during the first regional conference on the Rule of Law in Central Africa held in Butare (Rwanda) from 1st to 4 November 2010 organized by KONRAD ADNAUER Foundation

The obsolescence of our bankruptcy law, profoundly on the sidelines in influence changes in legal thinking which favors in time the prevention of company difficulties (warning procedures) and saving companies through appropriate mechanisms (judicial settlement) while rationalizing winding up of companies beyond rescue and advocating adequate and deterring civil and criminal sanctions against unscrupulous company leaders ; organization of economic regulation structures, reforming the status of the Central Bank and independence of note-issuing authority, planned restructuring of the state portfolio and reforming the legal framework of public companies[87].

On the other hand, OHADA is putting in place a uniform legal system governing business law generally in a larger territorial space bringing together almost all African countries which share with our country the same legal and cultural heritage.

The prospect of economic integration in Africa naturally involves legal integration from which the DRC can isolate herself without offending the African prospect : through unifying of the law as much as possible, and through harmonization- if no otherwise- but in any case by rejecting legal isolation or loneliness of such or such other member state of the African union.

The adoption of the law authorizing membership (intervention of the National Assembly is necessary so as to conform to articles 191 to 195 of the transitional constitution, especially Article 192 in its first paragraph) ;possible options which the law and the spirit of Article 195 of the transitional constitution would give political reason and would simplify the legal reasoning: « The DRC can sign treaties and association or community agreements comprising partial abandonment of sovereignty with a view to achieve African Union[88] ».

Similarly, the intervention of OHADA law, up to the sphere of the criminal law can justify precautions or concessions in the name of national sovereignty (criminal law of companies : by anticipation, the OHADA Treaty reserves the right to determine criminal sanctions at the discretion of the State parties)

OHADA law is an illustration of legal diversity of African communitarianism or the freedom of business law towards democratization of commercial justice which in brief is the coexistence between African Community Law and the meeting between African law and globalization of the law especially business law and international trade law.

We therefore advocate for orderly pluralism, moderated towards temperate and gradual harmonization rooted in the rich diversity of the national legislations of the State parties or commercial communitarianism will enable and open the path for political unity of laws without mentioning the utopia of legal unity of the world.

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87 B. Martor, N. Pilkington, D. Sellers, S. Thouvenot, avec la participation de P. Ancel, B. Le Bars et R. Masamba, Le droit uniforme africain issu de l'Ohada, Paris, Editions du Jurisclasseur (Litec), 2004. ; J. Issa-Sayegh et J. Lohoues-Oble, Ohada : Harmonisation of Business law, Bruxelles, Bruylant, 2002.

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MINING CODE, INSTRUMENT OF PROSPERITY FOR THE CONGOLESE POPULATION: STATUS REPORT AND CONCRETE PROPOSALS FOR IMPROVEMENT

By **Clément MUFUNDJI THINAT-KARL***

INTRODUCTION

Generally, law is taken like an essential legal instrument, it plays a fundamental role, that of remaining the necessary underpinning of fostering human development and improving the living conditions of the community.

The prosperity of the Congolese people would be in particular, the cornerstone of any mining legislation since it would contribute to the improvement of the socio-economic situation and generally the well-being of the population of the country.

In this precise environmental context, essential living conditions for the Congolese people would be linked to its access to basic social and existential services which are mainly: food, water, electricity, education, health care, women and youth protection, housing, social and distributive justice.

But the irony which is visibly obvious confirms a popular argument that, the Democratic Republic of Congo is presented on the world scene as a country which is filthy rich but hosting a population which is miserably poor.

Indeed, from time immemorial and in many countries, the mining sector plays an important role in the national economy. Mineral resources constitute a development factor just as much as agriculture. This explains why also, they constitute one of the causes of conflicts in Africa. The Democratic Republic of Congo (DRC), a geological scandal, has 50% of the world's cobalt reserves, 10% copper, 30% diamonds, a big potential of gold, uranium, germanium, coltan, manganese deposits etc. Despite the existence of all these mineral resources, the DRC is classified among the poorest countries in the world[89].

The catastrophic economic and social situation she experiences arises mainly from poor management of these resources by political leaders since independence. These resources which were supposed to be the hallmark of her economy and factor of an integral development to the benefit of the majority of the population unfortunately were, for fifty years, a source of enrichment for a corrupt ruling class.

This study which consists of doing a severe diagnosis in terms of taking an inventory, imagining a probable projection and formulating solutions, calls for its outcome, the use of historico-genetic method coupled with exegetical method, within the framework of complementarity.

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89 MARIE MOZALTO, **l'exploitation des ressources naturelles en situation des conflits : responsabilités internationales et perspectives de solution** en RDC, CRAMA, Montréal, 2004, p 36.

This is to achieve the expected results so as to evaluate first, the content of the mining law, thereafter its applicability which is lacking in an environment where political mistrust reigns and lastly to carry out an assessment, ten years after its implementation.

It is important during this presentation that we raise a series of essential concerns classical in nature, mainly:

- Within the framework of establishing a status report, we could ask ourselves if the mining code, as it is developed, adopted and promulgated, is really an instrument of prosperity for the Congolese?
- In case of deficiencies/or poor application of the provisions of the Mining Code what can we consider to meet the aspirations of the Congolese, in relation to its purpose? I
- In terms of suggestions, a rational and efficient management of the mining sector would not constitute an impetus towards a definite economic boom?

The hypotheses in this case, have already demonstrated the concerns of Bretton Wood institutions to the national institutions to make the mining sector a priority, but the push is more forceful when it emanates from international partners. On the contrary the Head of the Congolese government is showing clear lethargy.

Similar hypotheses annihilate in most cases, the sovereignty of the DRC since increase of debts weakens her strategic and political position among other nations.
Although the mining sector demands for its exploitation fresh capital, the Congolese Government must mould strategies so that proceeds from mining contribute really to the prosperity of the Congolese people.

It is this interrogation which forces us, without wanting to repeat ourselves, to make the evolutionary approach referred to as the legal-genetic approach on the basis of documentary and experimental data.

In this article, it will be a question of presenting the main structure which is articulated on three points namely: first analyzing the provisions of the Mining Code in relation to the benefits granted to the State and to the Congolese people(I), then make a projection of our thinking in time so as to evaluate the positive effects of the Mining Code in line with its salutary duty, that relating to improving the lives of the Congolese people(II) and finally give concrete suggestions or proposals for recovery (III).

STATUS REPORT

Within the framework of analysis of some mining legislative provisions, it will be a question of first raising a certain number of articles relating to benefits, then some shortcomings found in the Mining Code and lastly the effects produced by this Mining code in the field.

A. Benefits granted by the Mining Code

The Democratic Republic of Congo initiated reforms on mining laws which led to the development, adoption and promulgation of the Act number 007/ 2002 of 11th July 2002 on Mining Code. Different from the Ordinance-Law number 81-013 of 2nd April 1981 on general legislation on mines and hydrocarbons, the new code provides for some trumps which favor development of the Congolese people and this is in line with opportunities granted to the people, as well as security provisions with a view to conserving environmental bio-system without forgetting the benefits related to the tax regime.

1. Mining Code: A favorable instrument for the prosperity of the Congolese people.

The Mining Code provides, for the benefit of the Congolese people certain benefits, namely determination of people eligible for mining and quarry rights, salutary measures to conserve environment in the mining perimeters.

a) The case of eligibility to mining and quarry rights mentioned in Chapter 1 of the Act admits in this categorization, only a Congolese natural adult person or a legal person in order of priority to mining and/or quarry rights while foreigners, although they must elect domicile in a representative in mining or quarry, they are limited to exploration/ search rights[90]. The same applies to getting mining license in small mines.[91]
b) As pertains to artisanal mining, only Congolese natural adult persons can obtain and acquire artisanal mining cards and dealer card[92] as an authorized dealer of mineral substances in order of priority that is either the natural person or a company registered under Congolese law. On the other hand, foreign buyers must have a work permit and hold entry authorization and movement in artisanal mining areas[93] on condition that they are domiciled in Congo.
c) The non-eligibility enshrined in the new Mining Code finds its basis in the framework of guaranteeing peace and security in the mining sector.[94]

2. Environmental measures on mining and quarry perimeters

The insertion of environmental provisions enabling reduction of negative effects of mining activity on environment is a way of conserving life and health of people and plants. It provides that it is:

a) The duty of the holder of mining right, before embarking on mining to carry out an environmental impact assessment (EIA). This preliminary scientific analysis is meant to ascertain possible effects of a given activity on environment as well as examine the acceptability of their level and mitigation measures which cater for the environment as a whole.[95]
a) The duty to present mitigation and rehabilitation plan (MRP). It seeks the commitment by the holder to carry out certain measures for mitigating the effect of its activity on the environment, as well as rehabilitation measures for the location where the mines are situated.[96]
b) The mining law implores upon eligible artisanal miners to respect the regulation on protection of environment, hygiene and security of the artisanal mining area[97].
c) Respect for standards on water use and environmental protection should compensate

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[90] Article 23 of the Act No. 007-2002 of 11th July 2002 point B demands that an adult natural person or legal person of a foreign nationality or any scientific body to only limit itself to rights of search.
Article 26 limits artisanal mining to only Congolese nationals. If the foreigner wants to an authorized dealer for artisanal mining of mineral substances, he must proof that he is domiciled in the Congolese territory in case of natural person, or head office or administrative office for legal persons.

[91] What is coming out of Article 104 paragraph 2 is that any foreign national must form a company under Congolese law with one or several Congolese nationals whose shareholding cannot below 25% of the share capital.

[92] Article 26 of the Mining Code.

[93] Article 122 of the Mining Code.

[94] Article27 enumerates non eligible persons.

[95] Article 1er point 19 the imposes before effective commencement of the mining, to carry out Environmental Impact Assessment (EIA).

[96] Article 1er point 40 and 41 provides for mitigation and rehabilitation plan (MRP) and environmental project management plan (EPMP).

[97] Article 111 provides for a certain number of conditions within the framework of artisanal mining.

farmers for any damage brought about by his activity.[98]

3. Benefits offered to local communities

Through certain provisions of the Mining Code, we can also count some favors for the benefit of the local community, and this is mainly:

a) Within the framework of improvement of social services rendered in favor of the local population, we could enumerate the contribution of mining operators to education, training, job creation which are reserved for the local population in the order of priority. In this regard the provincial government of Katanga imposed on each holder of mining or quarry right to cultivate a farm of maize of at least five hundred hectares and made the provision of flour to their workers a social right. Concerning the economic opportunities to the benefit of this population we can point out, within the framework of improvement of living standards, increase revenue, development of small infrastructure in the interest of the community, promotion of new economic communities, development of economic alternatives ensuring continued existence of communities after the closure of the mine. Besides, it enjoys a share of the mining production; it is the case of retrocession in favor of decentralized administrative entities of the quota of 40% of the mining fees meant exclusively for reconstruction of community interest infrastructure and that of 10% quota of surface rights for development of basic communities. The Mining Code also provides for preservation of natural resources or traditional activities.

4. Tax regime or benefits granted to investors by the Mining Code in force

As provided by the Mining Code, the tax regime applicable to miners must be beneficial to the state and to the Congolese nation.

The big lines of the tax regime for new Mining Code are going to be sought for in a large scale mining activity, small scale mining activity and in artisanal mining.

1. Large scale mining

The tax regime applicable to large scale mining can be apprehended by analyzing respectively certain fundamental principles, as well different tax and customs levies according to different stages of obtaining mining rights.

a. *Fundamental principles*

The tax regime applicable to holders of mining rights obeys a certain number of principles which are briefly examined here below:

- **Exhaustiveness** which pertains to all taxes, levies, customs duties or any other levy applicable to the holder of mining right provided for in the Mining Code[99]
- **Exclusivity**: given exhaustiveness already expressed hereinabove, the holder of a mining right is only subjected to taxes, levies and duties enumerated in the Mining Code.[100]
- **Extensibility of benefits**: the tax regime provided for in the new Mining Code does not apply only to the holder of a mining right. It also applies to affiliated companies and to

[98] Article 112 which advocates for a series of obligations of the holder of artisanal miners' card.
[99] Article 220 of the Mining Code
[100] Article 220 paragraph 1 of the Mining Code

subcontractors.[101]

- **Stability**: the regime organized in the mining code can only be amended through a parliamentary decision amending the mining code.[102]
- **intangibility** : taxes, levies and other duties applicable to holder of a mining right , according to tax standards and common law rates, shall at all times be paid following the rates which were in place at the date of promulgation of the Mining Code.

b. *Different levies according to the main stages*

- During the procedure to grant search license, the applicant is subjected to: yardage fees[103] and annual surface area fees per square.[104]
- Search and installation: the holder enjoys privileged customs regime adapted to search, construction and development periods. This privilege appears at the level of importation of materials and equipments, in line with exportation of samples and mineral oils: entry fees at reduced rate,[105]acquisition of mineral oils at a reduced rate, duty-free samples,[106]possibility of transferring goods, material and/or equipments from one mining project to another,[107]exemption of import taxes and duties on shifting equipments,[108]admission of goods, materials and equipments to temporary duty free importation.[109]
- Mining stage: during the mining stage, the holder of a mining right is subjected to privileged regime,[110] in the meantime, he enjoys some exemptions on various taxes and duties,[111] payment of certain taxes at common law rate but an aspect of each tax is excluded [112],payment of taxes at reduced rate[113] and mining fees.[114]

2. **Small scale mining**

The holder of a mining license for small mines is subjected to the same customs regime as the other holders of mining rights apart from the holder of mining license for rejects, who is subjected to a fixed charge regime[115].

3. **Regime applicable artisanal mining**

The Mining Code gave mandate for mining regulation for purposes of defining the tax and customs regime applicable to artisanal mining.[116] However, the public administration continues to apply the Order no 12/CAB. ECO-FIN-BUD/2001 MINES-HYDRO/01/2001 setting a single regime for artisanal mining activities for precious and semi-precious stones. Registered mining dealers are subjected to payment of taxes and levies in relation to their activities. They should also leave a mark of real estate infrastructures for the benefit of the

[101] Articles 119 and 223 of the Mining Code
[102] Art 220 and 276 of the Mining Code.
[103] Art37 of the Mining Code
[104] A rt 47 par.2 , 196 par 2 198 par. 2a 4 and 199 of the mining code
[105] Articles 225 et 232 of the mining code
[106] Article 226 of the mining code.
[107] Art 230 of the mining code.
[108] Art 227 of the mining code.
[109] Articles 228,229 et 231 of the mining code.
[110] Articles 225 et 232 of the mining code
[111] Articles 220 litera b 234, 235, 236, 237, 246,24 al. 2 ,259 as well as section V du chapter III of title IX of the mining code.
[112] Articles 238, 239,244 et 245 of the mining code
[113] Articles 232, 246,259 et 260 of the mining code.
[114] Articles 240 et 241 of the mining code.
[115] Articles219a 224 et 262 of the mining code.
[116] Article 261 of the mining code. And article 537 of the mining regulation.

population.[117]

In brief it pertains to an incentive regime for a tax system which is beneficial to the Treasury. But the report is not as less bitter as we thought since the applicability and the effectiveness of this law, is not realized without challenges. It was more beneficial to foreigners than to nationals, contrary to the wishes of the legislature which was expecting an emergence of Congolese middle-class, but on the contrary it is the exploitation of man by another similar to new form of slavery.

As for the implementation process of the Mining Code, over time it has sprung several surprises which we shall discuss here below.

2. Some shortcomings of the Mining Code

Just to paraphrase ERIC MONGA, a mining representative, who says that the Act no 007/2002 of 11th July 2002 on mining code and the Decree no 038\ 2003 of 26th March 2003 on mining regulation were put in place: to attract investors and call for private initiative, give procedures for granting mining and quarry rights and organize the tax, customs and foreign exchange regime. All these for the development of mineral substances from the Congolese soil and sub-soil which had formerly been frozen. He affirms in this statement that the new mining code is the expression of a compromise between the State, population and investors.[118]

The promulgation of the mining code is one thing; the application of its standard is another thing. This why it is necessary that all players of the mining sector and especially financial controls, are involved in this legislative reform so that the mining code attracts more investors and indirectly a job creating factor and resource mobilizer.

Non adherence to the legislation opened a door for all unauthorized people to carry out mining activities. Certainly for purposes of making profits, the law is transformed and causes disruptions in company's' treasury programs.

The framework of diagnosis done in the mining sector was the reason behind the concerted effort of all mining players who met in Kinshasa with a view to assess the application of the mining code, ten years after its implementation. At the end of this general assembly of the mining sector in the DRC, shortcomings of the mining sector were identified.

In February 2008, the government opened a general assembly of the mining sector in the Democratic Republic of Congo (DRC), with a view to assess the application of the mining code, ten years after its implementation.

The participants- mining experts, ministers of the central and provincial governments, delegates of the financial authorities, mining dealers- had worked for three days, on the shortcomings noticed in the implementation of the mining code « with a view to propose corrective measures » with the input of all players in the mining sector.

The minister of mines, Mr. Martin Kabwe Lulu, reminded the participants present during

[117] Article 126 imposes a certain number of obligations to registered mining dealers

[118] ERIC MONGA, big constraints to private investors in the mining sector in the DRC **in the report for the support of artisanal mining**, LUBUMBASHI, June 2004

the opening of the meeting, that the objective pursued by the review of mining contracts launched in 2007 was to enable the State-wronged in several cases- to search for « balance of benefits » between the State and private partners, from among those that did not conform to the mining code.

Out the first 60 mining contracts examined by a national commission since June 2007, «only five are in production », « six in feasibility study » and the title covering 49 other contracts is supposed to be subjected to a« deep examination », leading to renegotiation or to termination, affirmed M. Kabwe Lulu.

A total of 4 542 mining titles were granted on the whole of the national territory, and the concessions covered by these titles represent 33% of the country's surface area, he stated, deploring that the regions concerned are despite their resources « still remain poor and without consideration ».

The code also provided for« demarcation of protected areas », artisanal mining areas « vital for the local populations »and demarcation for deposits to be subjected to tendering ». But the protected areas were « bluntly granted as mining sites » and the management of the other zones is practically not regulated.

The government was expecting from this forum « recommendations and suggestions » mainly on what pertains to « the State's share in the share capital of mining companies », « allocation of powers between the minister of mines and provincial ministers » of this sector, « consideration of the interests of local populations », « freezing of concessions »,« legal security » operators and « commercialization of ores ».

The DRC holds immense natural resources, which include 34% of world's cobalt reserves and 10% of copper reserves. The experts of the sector estimate that more than 90% of the exports are illegal. Mineral resources fraud remain a curse

Experts and members of the government of the Republic of Congo (DRC) had recommended review of certain clauses of the Mining Code. « The fundamental basis of the mining code still remains valid, but a reexamination of some of its clauses is necessary so as to adapt it to the socio-political environment of the moment[119]».

The report mainly asks for « increase of the State's share in the share capital of mixed mining companies, specification for « allocation of powers between the minister of mines and provincial ministers » of this sector « consideration of the interests of the local populations », « freezing concessions » and a « relentless fight » against fraud.

According to the participants, mining fraud deprives the state big financial resources. According to some experts more than 90% of the exports are illegal or not controlled. This forum recommended for the creation of a standard specifications book defining the relationships between holders of mining rights and the populations.

A total of 4542 mining titles had been granted to 642 companies on the entire national territory. The concessions through these titles represent 33% of the total surface are of the

[119] Estimates a comprehensive report read at the end of the « general assembly » of the sector, organized from 12th ti 17th March in Kinshasa

country, according to the minister, who lamented that the regions concerned have remained poor and enclosed despite their resources[120].

3. Report on the field

The constant decry is poverty of the Congolese population, while her natural resources are capable of providing financial means to cater for the vital needs.

In their conclusions, to elucidate this worry, eminent researchers attach importance to:

- **Illegal mining of these natural resources**

  A big number are expatriates, with the complicity of some Congolese nationals, mine mineral deposits throughout this vast country, without informing competent authorities of the activities undertaken. Indirectly this production evades the Congolese State and consequently benefits individual persons. In some cases artisanal miners are just funded to mine fraudulently, in most cases, in a prohibited mining concession, uranium case of Nshikolobwe or belonging to another person, Gecamines case.

- **Human mining**

  Especially within the framework of artisanal mining, poor Congolese people, despite the fact that they work in extremely difficult conditions which are inhuman, their products are sold at extremely low prices since in this regard, the buyers are the ones who curiously evaluate and fix the price of the products. They are sometimes considered as miners without fix concession: for as soon as an influential personality is informed of the profitability of a site explored by a digger, it does not take long before these vulnerable diggers are driven away by use of arms.

- **Institutionalized fraud**

  The most frightening case is that of First Quantum, a Canadian firm which was a victim of institutionalized fraud. This company was prohibited by the Congolese Government from exercising its mining activities in Sakania since in Kolwezi according to the ontological version; some Congolese political personalities did not considerably receive company shares in the public limited company.

  Illicit trafficking of cassiterite in the eastern part of the country finds its basis in obscure arrangements from decision-makers with neighboring countries.

  Some Congolese authorities enrich themselves unjustifiably by abusing their power to monopolize several markets in the mining sector. The illustrative case is that of hiring heavy machines in the majority of the mining companies in Katanga.

- **Justification of armed conflicts and invasion wars**

  Persistence of conflicts from the *force démocratique pour la libération du RUANDA*, (FDLR) Democratic Force for Liberation of Rwanda, the Rwandese rebellion in the

[120] General Assembly of the mining sector held in Kinshasa in the month of March 2008.

eastern part of the country is a perfect example. Gold deposits in the eastern province also attract ERLA, the Ugandan rebellion.

In our opinion, lack of efficient applicability of the mining code prevents the mining instrument from procuring for the Congolese people the much expected prosperity. This statement is explained through several causes which are grouped into two categories; there those which are endogenous and others are exogenous.

a. Three causes are specific to the Congolese people, it pertains to:

- Existence of clear disorder in the mining sector which emanates principally from lack of political responsibility from the Congolese Government ;
- Enormous financial means from the commercialization of Congolese mineral ores are more beneficial to individuals than to the Congolese state. This practice is unfortunately encouraged by some Congolese authorities ;

- And lack of dedicated leadership and really related to the cause of the Congolese nation.

b. Two others are rather exogenous. It pertains to :

- Systematic schemes from big international powers which do not allow third world countries to emerge despite their natural potentiality. On the contrary they wish to make these states their eternal markets for the sale of their finished products ;
- Tantrums from financial institutions who feign to commit themselves resolutely in the take off of national economies of countries in financial crisis and in the contrary they plunge the countries in deep debts[121] ;

At the end of this point we can note that the mining code contains several sufficient guarantees so that the population finds its benefit. But the problem in relation with the applicability of the mining code shows several shortcomings. Fraud is considered among others like a real cancer which is an impediment to the take off of the mining sector in the DRC, which essentially is supposed to ensure the prosperity of the Congolese people. On the other hand Congolese leaders deserve a strong psychopathic therapy, with a specific treatment with a view to have a change of mentality and pass on into their minds the sense of citizenship of true patriots. It is only at this price that we would hope for positive socio-economic repercussions of mineral resources in favor of the Congolese population.

As the African adage says,- We live on hope. At this level, Is there a need to hope to get back on the right track?

We shall discover in what follows the results of our thinking as outlined with time.

I. *PROSPECTS*

Making a projection into future is a difficult exercise which would only be done by soothsayers. We estimate that so as to make it, we need to have a retrospective

[121] Case of structural adjustment often practiced by the World Bank or International Monetary Fund.

reading if we want to apprehend the future. We are not saying that we need to go steps backwards so as to jump better. Thus the steps backwards pertains to the historic-genetic method of which are making use.

A step backwards in socio-political history of the DRC enables us to envisage a projection into the future and better understand this vexation existing between abundance of natural resources overflowing in the country and the poverty where the Congolese people have found themselves.

a. Pre-colonial period

The copper deposits of Katanga were subject to a mining which enabled manufacturing of the famous copper crosslets, which were used currency in commercial transactions by the people living in Katanga. Moreover, local blacksmiths known as [Copper Eaters] used to manufacture using traditional ovens other copper objects such as jewels, rings which had contributed to trade progress in pre-colonial Katanga. Knives, hoes, machetes and arrow heads were also manufactured from iron ores. These objects had contributed effectively in agricultural production, hunting and therefore to the development of a subsistence economy of the population.

The mining policy, during this period essentially consisted of mining and transformation essentially consisted of natural resources on the spot to meet the vital needs of the population and trade.

b. The colonial period 1908-1960

During this period, the mining policy was gravitating around search and exploitation in the colony of mineral ores to meet industrial needs of the colonial master, Belgium. This explains the extremely extroverted character of the economy of the Belgian Congo and the absence of a mining policy.

c. After attaining independence- after 1960

A colonial type mining policy was maintained despite promulgation of the first mining legislation of the Independent Congo in 1967, which was repealed in 1981. The role of the mining industry is that of supplier of raw materials to the western industry although the Congolese government enjoyed infrastructures and big revenue it did not have tangible impact on the lives of the Congolese people.

Under mining legislations of 1967 and 1981, the mining sector did not play its role as a catalyst for economic independence. The incomes generated were systematically embezzled by political leaders to the detriment of the majority of the population.

From 1996, there was an emergence of mafia networks who maintained certain politico-military movements during the so called liberation wars, to ensure illegal and artisanal mining of natural resources, either directly or through belligerents. This situation encourages commission of international crimes with the support of some African and western governments, as well as transnational companies.

The denunciation done by civil society players both locally and internationally pushed the international community to expedite one of the commissions of inquiry whose reports exposed countries, political leaders, multinationals, economic operators Congolese and foreigners involved in looting Congolese natural resources in total violation of laws and guiding principles of the Organization for Economic Cooperation and Development (OECD).

Notwithstanding the reports by United Nations Panel of Experts on exploitation of natural resources in the DRC of 12th April 2001, 13th November 2001, 16 October 2002 and finally end of October 2003 the looting and illegal mining of natural resources of the DRC continue through the mafia networks supported by politico-administrative, military, judicial authorities and even security services and this is because of the fact that the people who had been named in the said reports have been brought before court to face charges.

To this end, we need to add some members of the biological family of big personalities of the country, local and foreign business men, private companies and multinational companies who benefit a lot from behind the scenes in these activities. Thus, Katanga Province became an eldorado of the modern times; we are witnessing a frantic rush towards the quarries of Gecamines to mine fraudulently and manually the mineral deposits rich in copper, cobalt, gold etc. in total disorder and indifference from politico-administrative authorities feigning cynicism. The full scope of the latter is to encourage criminalization of mining activities to the prejudice of the national economy, population and ecosystem.

One-sided contracts abound and small ovens for artisanal processing of mineral ores, are erected in the residential areas of the towns in Katanga without any due respect and regard to environmental standards and security.

The promulgation of the mining and investments code- which offers an incentive, reassuring and competitive legal framework capable of promoting rehabilitation and development the mining sector, did not curb this mafia mining. Miners do not pay taxes and levies to the State. Dividends generated by joint-ventures created by the State Company, Gecamines and private companies are systematically embezzled by some members of the government in collusion with the management committee of Gecamines. And this explains why workers of Gecamines have not been paid for several years and the incapacity of the company to renew its plant and equipments.

The attitude of public authorities in this dramatic situation is contrary to the spirit of Article 55 of the Constitution which provides that « all Congolese people have the right to enjoy the national resources and the State has the power to equitably distribute them and guarantee development[122]. »

Quarries and mining concessions are invaded by foreigners who visibly come for one objective, to get rich at the lowest cost, within the shortest time in this paradise and jungle which is Katanga Province to the detriment of the social well-being of the population and environment.

[122] Article 55 of the Constitution of the DRC as amended to date.

d. Artisanal Mining and exploitation of man by man

These artisanal miners armed with mattocks, pickaxes, iron bars and their hands dig wells and galleries and endeavor to extract in an artisanal manner pieces of mineral ores or heterogeneity in very primitive conditions and without any protection. The galleries without, opinions of experts, are supported with wooden trunks cut in the bush.

They work as a team and must fill the minerals in raffia bags of 50kg on behalf of the dealers who employ them like slaves. These dealers provide them with food which is poor in calories and vitamins. The minerals bag is bought by the dealers at an imposed price of 1200 Congolese Francs at most, i.e. USD 3.5per bag. A lot of miners are exploited in the quarries like young girls are sexually exploited without any protection against HIV/AIDS.

These diggers are estimated to about 60 000 per private association of artisanal miners of Katanga known as EMAK, 20 000 according to the report by human rights defenders of Katanga (ASADHO).

e. A mining mafia supported by political, administrative, military and judicial authorities

Some people, mainly experts, who work in the mining sector enjoy protection from political, administrative, military and judicial authorities and from intelligence services among them national intelligence agency, (ANR) to have access to certain facilities.

This is why it is frequent to see a lorry full of tons of minerals accompanied by armed men: police, Congolese military officers, special group of the presidential security to evade controls from different administrative services both by the State and Gecamines.

At the end of this point as pertains to prospects, it is easy to note that Congolese minerals are progressively ceasing from serving the needs of the Congolese people. It is true that before colonization, our ancestors used minerals transformed into metal for their vital needs. The mining policy, during this period essentially consisted of mining and transformation of natural resources on the spot to satisfy vitals needs of the population and trade.

There is no question about it today. During the colonial period, although minerals were under the pay of Belgium, but there was all the same positive effects in favor of the indigenous people. This was noticeable through providential interventions such as primary health care, schools and briefly putting up basic infrastructural facilities.

Today artisanal mining has become a substance activity in big towns. And mineral resources, although they benefit those in power to the detriment of the entire Congolese population, they are mined in a worrying rhythm, without these authorities realizing these resources get depleted. No concrete project to think about after mines. You will understand that the future is very bleak. Especially when we realize that we are missing a golden opportunity, because this is the time to revive, with the mining effects, the other permanent sectors such as agriculture and manufacturing industries.

This work would not be complete if we do not propose solutions in terms of suggestions. This is what we are going to discuss here below.

II. *PROPOSALS*

After examining the bitter report on the misery which overwhelm the Congolese population, the projection in the future within the framework of recovery for the prosperity of the Congolese population. This work would me meaningless if we do not provide solutions in terms of improvement.

We are going to examine solution outlines by dissociating salutary tasks according to the responsibility of Congolese partners on one hand and to international institutions on the other hand.

1. To internal partners

a. <u>To the Congolese Government</u>

The catastrophic situation in which the mining sector finds itself in the DRC is a testimony of the culture of non respect of social, economic and environmental rights guaranteed by international instruments relating to human rights, the constitution of the republic and Congolese laws, but establishing also criminal and civil responsibilities of the members of the Congolese government, individuals, as well as the social responsibility of companies which benefitting from it, to do this we need to fight criminality and impunity which reigns in the mining sector.

In a concrete manner the Congolese State must decide on*:*

1. Closing down completely the uranium quarries of SHINKOLOBWE in the application of the Decree no. 04 of 27th January 2004 on classification in prohibited zones to mining activities;
2. Prohibiting transport of minerals by road and even if very fragile to the detriment of the railway line;
3. Terminating all one-sided contractors to the detriment of the Congolese Start;
4. Closing all industries, ovens and depots whose activities do not guarantee environmental protection;
5. Withdrawing any authorization for the exercise of mining activities against companies which do not at all abide by the mining code and mining regulation;
6. Prohibiting resort to children and women services in mining;
7. Subjecting miners diligently to the provisions of the constitution and laws of the republic;
8. Elaborating the follow-up mechanism for the process with a view to allocate receipts from renegotiation to the integral development program;
9. Respecting legal texts and regulations governing the management of public finances
10. Applying transparency and good governance;
11. Improving working conditions in the quarries and in the mines in accordance with the employment code ;
12. Ending the policy of tax and levies exemption which denies the Treasury much needed revenue ;

13. Holders of mining and quarries titles would only be Congolese nationals who can come together and form cooperatives with funding from the Congolese State
14. Investing more in agriculture and animal keeping which are essentially multiplier sectors of revenue which do not raise a lot of difficulties for recovery.

b. <u>To the parliament</u>

1. To play its traditional role of questioning and auditing the management of public property;
2. Impose sanctions against offenders.

c. <u>To political parties</u>

1. To get involved in the process and to play their role of checking the government;
2. To denounce conflict of interests which characterize mining contracts and other abuses in the management of public property;
3. To supervise effective application of the mining legislation and terms of reference for the renegotiation and/or termination of mining contracts;
4. Exploit renewable resources like agriculture, animal keeping and fishing;
5. To review the mining code which would be profitable to the Congolese people;
6. To create a market for artisanal mining and prohibit access of foreigners on the site.

2. To international partners

It pertains to solutions advocated for within the framework of a legal, bilateral and multilateral cooperation.

To put an end to illicit trafficking of mineral substances from the DRC through neighbors and other states, there is need to create a permanent consultation framework with foreign partners. We should come up with general security measures like the Kimberley principle which consist of certifying all mineral ores. This control of minerals by Interpol would limit fraud and commercialization of blood minerals. And indirectly it would contribute to cleaning the mining sector within the frame work of traceability and fluidity of Congolese minerals.

3. Skills to be preserved or to be consolidated for the benefit of the local populations

An observation period of ten years was provided for by the legislator to assess implicative effects of the Mining Code in force. After the lapse of this time, several shortcomings have been identified as affirmed by the summary report of the « general assembly » on the sector held from 12th to 17th March in Kinshasa. Despite these shortcomings we wish that some skills here below are consolidated. They include:

- Artisanal mining which will not be thought and dedicated in line with the benefit of the Congolese people but simply in respect with the quality of the site.

- Artisanal mining regulation and its reservation to only Congolese natural persons not companies
- Rights of the local communities are not particularly affirmed,
- Relative protection of land and settlements occupied by the populations is standing out.
- Prohibit formally renouncing powers of State Sovereignty in mining contracts mainly the jurisdictions of the courts
- Indicate clearly the responsibility of companies on human rights
- Supporting and financing small scale mining.
- A tax regime which would preserve State interests**.**
- Insist on the processing of mining products in the DRC so as to create employment for the nationals; Consult the local communities and each holder of customary rights each time their settlements, agriculture, animals keeping, fishing and their cultural interests are affected by the contract and mining.

At the end of this point relating to proposals to be made so that the Congolese people find happiness from the mineral resources, we have enumerated several suggestions. It appears certain that there are deceptions on the part of the Congolese elites as regards their seriousness on addressing these issues. While on the field, the Congolese leaders are preaching unconsciousness on the heavy responsibility upon them, lack of seriousness in their political commitments and poor governance of the public property.

Considering the proposals we have just listed here above, there is need to note that responsibility lies mainly on internal political players who are not concerned with the wellbeing of the population. It is like in a jungle where everyone is in a hurry to get his share when the opportunity allows him to manage State funds.- It is today or never-.

Political duties have become a source of becoming rich, regardless of any republican ethics such as as patriotism. International financial institutions, although they have a duty of supporting countries in financial difficulty, the support they give goes to the Congolese government which must promote Congolese growth and development through the culture of good governance of Public finance.

It is through voluntary sacrifices from Congolese politicians which would break decisively with the financial hold-up and allocate really receipts from the sale of mineral substances that the mining code can truly be an instrument of prosperity.

CONCLUSION

What conclusion can we draw at the end of this work whose subject appears both relevant and interesting?

Moreso it is a burning question but especially its relevance which aroused a special interest .In this direction it touches on the collective consciousness which does not cease in raising this concern relating to prosperity of the Congolese population from her mineral resources. If the mining code is the indispensable and essential instrument, but the political will and consciousness take precedence over the law. It is the general report drawn after going through the mining code in terms of location and state. It appears from this inventory that the mining industry is for some years, the target of a critic supported in several countries due to poor improvement of social and economic conditions of the countries rich in mineral

resources, but environmental and social impacts brought about as well as the institutions which support it, were invited to redirect their practices so as to conform better with the emerging values which affect the purchasing power and social equity. Several proposals were developed by corporative and institutional players with the objective of promoting the translation of the mining industry towards sustainable development. There is need to support the thesis of » curse of resources» which would pursue countries rich in mineral resources. According to this these, abundance in mineral resources would have a negative impact on the economic growth of countries rich in natural resources. Several studies also showed that countries rich in mineral resources experience a slow economic growth, in comparison with countries which do not have this wealth of mineral resources[123].

But the Congolese must oversee strict application legal instruments both international and Congolese so as to avoid the vague desire for irresponsibility promoting increase in inequalities of revenue, abandoning agricultural activity and problems related to public health.

The mining code would only be a true instrument of prosperity if the mineral wealth ceases from benefitting a small group of individuals precisely decision makers to the detriment of the Congolese nation which is the beneficiary of the same and dismantles mafia networks specialized in fraud of mineral substances. But this would only be possible on condition that we manage to put order in the mining sector, thereafter set up locally processing industries and lastly put in place a responsible leadership and convinced to pervade republican values at the top of public institutions.

[123] Auty, 1993, Sachs et Wamer, 2001, The thesis » malédiction des ressources» (Curse of Resources) pp 643 et 648

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MANDATE OF MONUSCO: LEGAL BASIS, AREAS OF INTERVENTION AND THE WAYFORWARD

By **Martial MUMBA KAKUDJUI***

I. INTRODUCTION

It is universally known that international relations and even public international law history teaches that since time immemorial nations had realized the necessity of being able to join their efforts to resolve some common problems affecting the world.[124]It essentially pertained to safeguarding peace and security between States and solutions sought in international conferences specifically convened to resolve crises. These conferences led to the creation of the Society of Nations. This, through its operations, presented weaknesses which led its failure. It is mainly due to the fact that its organs did not have a decision making power in this direction that decisions were unanimously taken instead by the majority; the sanctions which were taken, were the prerogative of all member states and whose execution was not certain. The notion of war was never regulated meaning that war was authorized. We had to wait for BRIAND-KELLOG PACT in 1928 to declare war unauthorized by the law.[125] It is following these weaknesses that a series of conferences were organized to come up with an organization which would be more efficient than the previous one. The most important of these conferences is that of San Francisco which culminated into writing the United Nations Charter, which gave birth on 24th October 1945 to the United Nations Organization.[126] This world's organization is of capital importance and has the objective of safeguarding international peace and security as well as friendship and cooperation between nations.

It is certainly within this framework of maintenance of international peace and security that the UNO intervened in the DRC under the current name. At the time, it used to be called United Nations Observation Mission in Congo. But following strong criticism from everywhere and from among Congolese nationals, the United Nations Security Council decided to replace the word Observation with Organization. This how it came to be called the United Nations Organization Mission in Congo (UNOMCO) with the objectives of: bringing peace in the DRC, holding the first free, democratic and transparent elections, putting in place State institutions etc. Having noted that most objectives entrusted to UNOMCO had been attained, the Security Council, once more decided to reconfigure the mandate of the mission and change its name. Thus it came to be called henceforth, the Organization of United Nations Mission for Stabilization of Congo (UNOMSCO) with the objectives of : protection of civilians, stabilization and consolidation of peace in the DRC, we need to note here that these objectives constitute an addition to the former ones, among many others that had been realized.

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[124] MULUMBENI G., International Public Law Course : International organizations, L1 Droit, UNILU, Inédit, 2004-2005.

[125] KATAMBWE MALIPO, International Security Law, L2 Law, option public law, UNILU, Inédit, 2005-2006.

[126] MICHEL HEURTEAUX, UNO, éd. Milan, France, 1995, pp. 6-7

The difference which would exist between the two concepts is summarized in these terms:

- Through its Resolution of 1925, the Security Council wanted to recognize that DRC had realized alot of progress since the creation UNOMCO, ten years ago and that it was time that the Mission got adapted to these realities.
  But the Council also admitted that there was a lot to be done to ensure protection of civilians. However, the Council also acknowledged that this protection is closely related to the consolidation of peace and stabilization which are essential for permanent protection of those who at a high risk. [127] In brief, the difference between the two concepts would consist in the fact that UNOMCO has realized many of the goals entrusted to it such as holding of the first free, democratic and transparent elections, putting in place Republic institutions,… and that it was now time to reconfigure the mandate of the mission within the framework of protection of civilians, stabilization and consolidation of peace in the DRC.
- The field of intervention which was formerly, the whole national territory of the country, becomes more and more directed towards the east and to the Eastern province concerning peace and security besides other interventions elsewhere.
  In respect to the abovementioned; it is important to examine why UNOMSCO is in the DRC. And well, this question deserves to be asked since this mission was put in place to realize the objectives assigned to it by the United Nations through its Security Council; but up to this day, could we affirm or deny the realization of these objectives and dare issue a value judgment.

I. UNITED NATIONS MISSION FOR STABILIZATION OF THE DEMOCRATIC REPUBLIC OF CONGO.

A. CREATION AND MANDATE OF UNOMSCO

On 28th May 2010, the UN Security Council authorized adoption of the Resolution 1925 for transformation, from 1st July 2010, of the United Nations Mission in the Democratic Republic of Congo (UNOMCO) to United Nations Mission for Stabilization in the DRC (UNOMSCO)

And thus, this transformation corresponds to the first phase of the withdrawal of international peace keepers in the DRC, since the number of solders had been reduced by 2000 and the remaining peace keepers were concentrated mainly in the eastern part of the country to carry out military operations in place in Kivu and Eastern provinces. The two civil components of the mission, i.e, component of the rule of law and protection and the component of stabilization and consolidation of peace, however pursue their activities in the entire country.

The idea of UNOMSCO draws its sources from the reports of the Secretary General and Resolutions of the Security Council.

In the Resolution 1856 (2008), the UN Security Council asks the Secretary General to present recommendations on the progressive transfer of responsibilities concerning consolidation of democratic institutions and the rule of law in the western part of the DRC so as to be able to concentrate her efforts in the east.

[127] KISHIBA F., International Public Law Course II : International Organizations, 1st Bachelor of Laws, UNILU, 2010 – 2011, op.cit., Inédit.

It pertains to the first mention of the Council concerning a possible reconfiguration of the UNO mission in the DRC. In his report dated 27th March 2009 (S/2009/160), the UNO Secretary General informs to the Council that a multidisciplinary Technical Assessment Mission (TAM) visited the DRC from to 23rd February to 6th March 2009. This mission established that the deployment of UNOMCO forces on small operation bases is limiting the efficiency of military interventions of the mission.[128]

It therefore recommended that the military arrangement be consolidated and reorganized to enable more mobile and robust presence in the main threatened regions.[129] The TAM also concluded that even if UNOMCO succeeded in protecting many civilians, its capacities are put to a severe test on the field. Moreover, change of direction and preparation for the reduction of the number of solders will require a constant commitment from Congolese authorities.

In this regard, it suggested that the Security Sector Reform (SSR) should constitute an absolute priority since without deep transformation of the army and the police and a restoration of the judicial system, the prospects of sustainable peace and stability will be reduced significantly, even after the end of armed confrontation.

The submissions of this assessment mission served as the basis of development of a global strategy for the UNO system in the DRC.

On 24th November 2009, permanent members of the UNO Security met with the Congolese President Joseph Kabila, SADC Ambassadors in Kinshasa and representatives of UNOMCO. During this meeting, President Kabila denied rumours that he would have asked for immediate withdrawal of the UNOMCO and rather wished for a schedule for a progressive withdrawal of the mission troops based on the changes of the security situation in the country.

The President's request stated that this withdrawal preferably starts from 30th June 2010. In his report of 4th December 2009 (S/2009/623), the UNO Secretary General informed the Security Council that UNOMCO and the government of the country had started developing an Integrated Strategy Framework (ISF) which will fix the responsibilities concerning the highly critical tasks for consolidation of peace in the country. He also stated the the ISF will encompass the UN strategy concerning protection of civilians and a multidimensional strategy to tackle the question Democratic Forces for the liberation of Rwanda (FDLR), the Lord's Resistance Army (LRA) and other armed groups present in the DRC.[130]

It shall also include in consideration a plan for operating the SSR, an outline for the support strategy of the UNO to security and stabilization, a support plan for local elections and a roadmap for the implementation of the comprehensive strategy for fight against sexual violence in the DRC.

In the same report, Mr. Ban Ki-Moon underscored that UNOMCO had already deployed in December 2009 more than 98% of its military component and 91% of its civilian component

[128] Secretary General Report (S/2009/160), of 27th March 2009, presented before the Security Council concerning reconfiguration of the UNO mission in the DRC and information concerning a multidisciplinary Technical Assessment Mission (TAM)..

[129] KISHIBA F., International Public Law II : International Organizations 1st Bachelor of Laws, UNILU, 2010 – 2011, Inédit

[130] Secretary General Report (S/2009/623) of 4th December 2009 on information of an integrated Strategic Framework and Resolutions of the Security Council..

in the eastern part of the country since« with the exception of Kivu and some pockets situated in the Eastern Province, the DRC is now a peaceful country and is ready [ ] to undertake a new decisive phase of reconstruction and recovery.»

On 23rd December 2009, in the Resolution 1906, the Security Council « asks the Secretary General to carry out a strategic assessment » so as to determine « the modalities for reconfiguration of the mandate of the mission, in particular the essential tasks which it is supposed to perform before envisaging a progressive withdrawal without provoking a resurgence of instability ».

The UNO Secretary General replied to this request in his report of 30th March 2010 (S/2010/164) where he announced the conclusions of his strategic assessment of the situation in the DRC. Thus, significant progress had been accomplished during the past year, the most important being the end of the civil war, success of the transition process, which restored territorial integrity of the country, and improvement of relations between the country and its neighbors in the east. Consequently, a big part of the western regions of the DRC once again became relatively stable. However, the Secretary General believed that local conflicts risk becoming worse rapidly if the authorities did not intervene in time and efficiently to defuse them. He also thought that socio-economic difficulties of people in the urban areas still threatened stability, mainly in Kinshasa.

On the other hand, the year 2009 offered an exceptional opportunity to intervene against armed groups present in the eastern part of the country. The presence of FDLR and LRA however continue to pose significant challenges whose extent is humanitarian needs, serious human rights violations, illegal exploitation of natural resources and community tensions. The Secretary General added that the country also continue to face significant challenges at the national level concerning consolidation of peace. These difficulties are, among other, due to poor means which the state institutions have, in particular to enforce the law and ensure security.

The other main obstacles are the slowness of socio-economic recovery, corruption and impunity.

The Secretary General also considers that UNOMCO has accomplished several of the main tasks which had been entrusted to it, but a big number of them are still being implemented. He also stated that the ISF defines four strategic key objectives pursued by the United Nations in the DRC, i.e. intervene at the level of the conflicts in place, stabilize the areas affected by the conflict, consolidate peace in all regions of the DRC, and ensure viability of development activities..

Moreover, he informed the Security Council that consultations undertaken between UNOMCO and the Government concerning the umbrella project are still being pursued, and that other adjustments will be done to the text in such a way that it puts into account views of the government.

In this direction, the Secretary General sent, from 22nd February to 5th March 2010, a new Technical Assessment Mission (TAM) to the DRC so as to determine, in close collaboration with the government and the participating countries, the modalities of reconfiguration of the UNOMCO mandate.

The Report of 30th March 2010 also announced the conclusion of the new TAM in the DRC aimed at determining the modalities for reconfiguration of the UNOMCO mandate.

Concerning the military aspect of the mission, the TAM concluded that the maintenance of deployment of all additional means authorized in the Resolution 1843 (2008), including those for which commitment must still be received, was essential, particularly due to military operations ongoing in the two Kivus and in the Eastern Province, and the obligation to protect civilians. Concerning police forces, the TAM concluded that UNOMCO should continue in developing intervention capacities for the Congolese police in case of crisis, on enlargement of the territory on which the state exercises its authority, on support to police reforms. The TAM also recommended that most high priority be immediately granted for joint development and implementation, by United Nations bodies, of a Multi-years support program for justice.

The mission also noted that the existence of professional security forces was indispensable to ensure protection of civilians and to guarantee that security forces do not commit serious human rights violations.

It formulated several recommendations aimed at enhancing the activities of UNOMCO in matters of disarmament, demobilization, repatriation , resettlement and reintegration of armed foreign groups (DDRRR) and support those of the government on matters of disarmament, demobilization and reintegration of members of armed Congolese groups (DDR). To face problems caused by limitation of resources in the field of civilian protection, the assessment mission proposed, among others, to build capacities of the mission in analyzing, early warning and decision making. According to the assessment mission, UNOMCO should continue assisting the government to offering civilian populations in danger a safe environment in the eastern part of the country.

In the west, it should continue in helping to build capacities of national institutions and concentrate on consolidation of peace.

In conformity with Resolution 1906 (2009), the TAM helped in determining essential tasks the UNOMCO is required to discharge before envisaging a progressive withdrawal which would not cause resurgence of instability. According to the mission, the first priority must be to neutralize the threat which FDLR, LRA constitute and what remains of armed Congolese groups.

The second task is to build a professional army. Finally, the third task of critical importance consists of establishing effectively the authority of the State in the areas freed from armed groups, in particular along strategic axes in the eastern provinces.

Concerning progressive withdrawal of UNOMCO, the technical assessment mission concluded that it was essential to maintain a big presence in the two Kivus and in the Eastern Province but that the other eight provinces of the country would offer the government the possibility of ensuring independently maintenance of law and order and protection of civilians without military presence of the UNOMCO. The TAM therefore developed a withdrawal plan in four stages which can be terminated in three years.

Within the framework of this plan, UNOMCO would no longer have direct military role beyond the provinces affected by conflict in the eastern part of the country and in Kinshasa.

UNOMCO would therefore maintain a small military presence of the size a battalion maximum in Kinshasa to ensure protection of the UN staff and facilities.

Moreover, the reserve force of the Mission, based in the eastern part of the country, would preserve the capacity to intervene on the entire country. The two first stages of the proposed withdrawal plan would consist of evacuating military forces of the UNOMCO from defense areas of 1 and 2 (the entire country except provinces of Maniema, Eastern, North Kivu and South Kivu).

Stages three and four would consist of reducing progressively military presence of the UNOMCO in the defense area 3 (Maniema, Eastern, North Kivu and South Kivu) until the force reaches about 5000 soldiers. The total withdrawal would subsequently decide, according to the program, jointly by the UNO and the Congolese government.

In this context, the TAM recommends that UNOMCO be divided into three components: military support component, rule of law and protection component and stabilization and consolidation of peace component.

The military support component would be deployed in North Kivu and South Kivu provinces, Eastern provinces and Maniema Province, in a flexible manner which enables it to effectively protect civilians and facilitate humanitarian access, help in creating a safe environment for the return of displaced people and refugees and to support the operations of FARDC against armed foreigners and Congolese. The head office of the force and a small military presence would remain in Kinshasa.

The two civil components (rule of law and protection, stabilization and consolidation of peace) would maintain their presence in the entire country.

B. LEGAL BASES: SOFA AGREEMENT BETWEEN DRC AND UNO (MANDATE OF UNOMCO AND APPLICATION OF THE LUSAKA AGREEMENT), RESOLUTIONS 1234 (1999), 1925(2010), 1991(2011),...

The SOFA Agreement constitutes the status of the UNO force in the Democratic Republic of Congo.[131] It pertains to a headquarters agreement which is a type of a treaty which an international organization (IO) signs with a state which hosts it on its territory, so as to define its legal status in the latter. It mainly has the objective of guaranteeing independence of the organization and its officers, which makes the host state to grant privileges, such as immunities for the officers of the organization, or a status of extraterritoriality for its premises.[132]

For the second time in four years, the United Nations intervenes in Congo within the framework of a peace maintenance mission.

History first reminds us of the United Nations Operations in Congo (UNOC), which took place from July 1960 to June 1964 following the proclamation of secession of Katanga on 11th July 1960. The war started on 2nd August 1998 against the Democratic Republic of Congo (DRC) by Uganda, Rwanda and Burundi justifies the second presence of the United

[131] MULUMBENI G., International Public Law Cours : International Organizations, op.cit., Inédit.
[132] PHILIPPE C., Study of Headquarters agreements signed between IO and the countries where they reside, Milan, éd. Antonino, Giuffrè, 1959, P.449.

Nations Organization (UNO) in this state, the largest and the richest in mineral resources in the heart of Africa.

Due to this conflict, the UN Security Council adopted the Resolution 1234 of 9th April 1999 which asks for "immediate signing of cease fire agreement "supported by Articles 36 and 52 of the UNO Charter.

Paragraphs 1 and 2 of the article provide that:

1. « The Security Council can, at any time of the development of dispute (whose extension is susceptible of threatening maintenance of international peace and security , art.33) or of a similar situation, recommend appropriate adjustment procedures or methods.

2. The Security Council shall be required to take into consideration all procedures already adopted by the parties for the settlement of this dispute.»

Concerning Agreements or Regional Bodies, Paragraphs 2 and 3a of Article 52 stipulates that:

1. « Members of the United Nations who sign these agreements or constitute these bodies (regional) must do all their efforts to settle peacefully [...] local disputes, before subjecting them to the Security Council.

2. The Security Council encourages development of peaceful settlement of local disputes through these agreements and regional bodies either on the initiative of interested states, or on referral from the Security Council.»[133]

It is thus this framework agreement that was signed on 10th July 1999, commonly referred to as the « Lusaka Agreement ». The signatories parties to this agreement are: *'Angola, Namibia,* Uganda, *DRC, Rwanda, Zimbabwe* (10th July 1999); the Restoration of Democracy in Congolese (August 31, 1999) and the Movement for the Liberation of the Congo (August 1, 1999) [le *Rassemblement Congolais pour la Démocratie, (31st August* 1999) and *Mouvement pour la Libération du Congo (1*er août 1999)].

Witnesses were: *Zambia, UNO, OAU, SADC.*

1. The first call for assistance from Congo to the UNO was made to the Secretary General, Dag Hammarskjöld by the Congolese Head of State, Joseph Kasa-Vubu, in agreement with the Prime Minister, Patrice E. Lumumba on 12th July 1960. The first troops were deployed in Kinshasa on 15th July.

2. The terms of this Agreement and the schedules "A" and "B" are an integral part of this arrangement whose official term is the *Cease fire Agreement.* The definitions of common terms used in the Agreement are found in Schedule "C".

The United Nations Organisation Mission in Congo (UNOMCO), led by the Special Representative of the Secretary General in the DRC, Ambassador Kamel Morjane, appointed

[133] Résolution 1234 of 09/Aoril/1999 on immediate signing of a cease fire agreement which thought as the basic resolution

by the Secretary General Mr. Kofi Annan, on 16th November 1999, arises therefore from commitment taken by the UNO and the Organization of African Unity (OAU) on the basis of Article III of the Agreement and especially Chapter 8.1 of Schedule A of the said Agreement, which stipulates: « The United Nations, in collaboration with OAU shall constitute, facilitate and deploy an appropriate effort in the DRC to ensure implementation of this Agreement. » But finally, in spite of all these precautions defining the framework of action of the UNO, the question which arises one year after the signing of the Agreement is that of knowing why we are witnessing absolute violations of the cease fire, to non-adherence or little or ineffective application of the Lusaka Agreement.[134]

Bearing in mind often rapid development of the Congolese crisis, analysis of the question of the UNO mission in Congo is limited to the period between 9th April 1999 to 15th July 2000 of the one hand and on the other hand, possible future changes on the mandate of UNOMCO and their impact on the implementation of the Agreement will be subject of a subsequent study.

Since the break out of the war on 2nd August 1998, the Security Council made several declarations and adopted several resolutions dedicated to the situation in Congo which are mainly: The Resolution 1234 of 1999 which is thought to be the basic resolution. Voted unanimously, the Resolution 1234 of 9th April 1999 hardly translated into change of attitude of the UNO that the DRC waited for long from the international organization.[135] These agreements and resolutions were the basis of UNOMCO intervention in the DRC.

Indeed, the Security Council on 30th June 2010 extended the mandate of the mission. The country having entered « into a new phase », This will be called, from 1st July 2010, « United Nations Mission for stabilization of the Republic of Congo » or « UNOMSCO », and shall be deployed until 30th June 2011.

The Security Council, through its Resolution 1925 (2010), unanimously adopted, and acting by virtue of Chapter VII of the United Nations Charter, authorizes « withdrawal before 30th June 2010 of a maximum number of 2000 UNO solders from areas in which the security conditions allow » and to maintain, « while concentrating its military forces in the eastern part of the country », a « reserve force capable of being redeployed rapidly in other parts of the country ».

In this Resolution, presented by the United States of America, France, Gabon, Uganda and the United Kingdom, the Council authorized UNOMSCO « from this date, in addition to appropriate civil, judiciary and prison components, a maximum number of 19 815 solders, 760 military observers, 391 police workers and 1 050 members of the police units constituted.» The Council also decided that future reconfigurations of the Mission will be determined by« change of the situation on the field » and the « realization of the objectives that the Government of the Democratic Republic of Congo and the Mission will have to achieve », namely completion of the ongoing military operations in North Kivu, South Kivu and Eastern Province, improvement of means which the Government has to effectively protect the population and strengthening the authority of the State on the entire territory.

The Council undersigned that protection of civilians « must be the priority when it pertains to deciding the use of available capacities and resources » and authorizes UNOMSCO

[134] Hubert KABUNGULU NGOY KANGOY, mandate of the UNOMSCO and the application of the Lusaka Agreement of 9th April 1999-15 July 2000, in Congo-Africa, XXXX e Year-N°349, November 2000, p .2

[135] Read in this subject the Sofa Agreement between UNO and the DRC.

to « use all necessary means » to discharge its mandate of protection, which includes « effective protection » of civilians, including humanitarian staff and the personnel in charge of defending human rights, personnel and premises, facilities and materials of the United Nations.

Similarly, UNOMSCO will be required to support the action led by the Government of the DRC of protecting civilians against violations of international humanitarian law and human rights, including all forms of sexual violence, promote and protect human rights and fight against impunity.

It will be required to support its action « to successfully end the current military operations against Democratic Forces for liberation of Rwanda (FDLR), Lord's Resistance Army (LRA) and other armed groups» The Security Council lastly requires that all armed groups, in particular FDLR and LRA « immediately ceases committing acts of violence and violations of human rights in respect to civilian population.»

Moreover, the Council gladly commits the Government of the DRC and the Rwandese Government to work together and agree on a clearly defined unity defining the final objectives in respect to FDLR, within the framework of a multidimensional approach.

In his report of 30th March 2010, the Secretary General was recommending to the Security Council to « extend again by 12 months the deployment of UNOMSCO » and to'« authorize immediate implementation of the first phase of withdrawing the force.» He also took note of the « position of the Government of the Democratic Republic of Congo according to which the operations of withdrawal should be completed not later than 30th August 2011.»[136]

It is important to note here that the UNO Security Council adopted on Tuesday the 28th June 2011, the Resolution 1991 which extended the mandate of UNOMSCO until 30th June 2012. Through this Resolution UNOMSCO undertakes to give upon request by Congolese authorities, a technical and logistics support for the organization and holding of elections on all levels in the DRC and without desisting from its mission of maintaining peace and security in the east as well as consolidation of the same in whole of Congolese territory.[137]

C. FIELDS OF INTERVENTION FOR UNOMSCO.

UNOMSO is also authorized, while concentrating its forces in the eastern part of the DRC, to maintain a reserve forces capable of being rapidly redeployed elsewhere in the country. The Council emphasizes that protection of civilians must be the priority when it pertains to deciding the use of available capacities and resources and authorizes the Mission to use all the means necessary to discharge its mandate of protection within the limit of its capacities and in the areas where its units are deployed.

It should be noted that, future reconfigurations of the UNOMSO shall be done in line with the situation affecting three objectives of the government and the Mission.

1) Complete current military operations in the two Kivus and in Eastern province and also possibly reduce the threat posed by armed groups and restore stability in the most sensitive areas. ;

[136] Report of the United Nations Secretary General, Doc. ONU, S/2010/164,30 Mars 2010.
[137] Doc. UNO, Security Council, S/RES/1991(2011), 30 June 2011.

2) Improve the capacity of the Congolese Government to efficiently protect the population by equipping it with sustainable security forces which will take up progressively the duties of UNOMSCO in matters of security;
3) Strengthen State's authority on the entire territory by putting in place a civil Congolese administration in the areas liberated from armed groups, in particular police, territorial administration and organs guaranteeing the rule of law.

The tasks entrusted to the UNOMSCO by the Security Council are divided into two categories, which are in the order of importance: protection of civilians; stabilization and consolidation of peace. More specifically, UNOMSCO must accomplish the abovementioned tasks, in order of priority.

D. MANDATE OF THE UNOMSCO

The United Nations Security Council is of the opinion that the Democratic Republic of Congo is now entering into a new phase of transition towards consolidation of peace and that it is necessary to establish a solid partnership between United Nations Organization and the Government of the Democratic Republic of Congo to face these challenges.

The Resolution 1925 adopted by the Security Council on 28th May 2010 acknowledges "the progress made in the Democratic Republic of Congo, bearing in mind the challenges the country had to face over the last 15 years". It however notes that there are still challenges which prevent stabilization of the Democratic Republic of Congo.

In respect to the changes of the situation, the Security Council estimated that it is necessary to give a new direction to mandate of the United Nations Mission in the country, by granting increased importance to the consolidation of peace so as to strengthen and advance the stabilization of the country.

It is thus at the end of this Resolution, the Council decided that the Mission will be called from 1st July 2010 "United Nations Organization Mission for Stabilization of the Democratic Republic of Congo" or "UNOMSCO ", replacing UNOMCO

The Security Council bases the UNOMSCO mandate on major priorities:
- Protection of civilians
- Stabilization and consolidation of peace

1. Protection of civilians

- The Resolution 1925 once again places protection of civilians at the heart of the UNOMSCO mandate, as was the case with UNOMCO. The Resolution clearly emphasizes that "protection of civilians must be the priority when it pertains to deciding the use of available capacities and resources". It authorizes the Mission to "use all the means necessary, within the limit of its capacities and in the zones where its units are deployed, to discharge its mandate of protection".
- The Council states that UNOMSCO must ensure effective protection of civilians, including humanitarian staff and the personnel in charge of human rights protection, found under imminent threat of physical violence, in particular violence which would be caused by the parties in conflict. It must also ensure protection of staff and premises, facilities and materials of the United Nations.

- The rest of the responsibilities devolved to the UNOMSCO within the framework of its mandate of protection, come mainly in support of Government actions, which bears in the first place, the responsibility of protecting its population. Thus UNOMSCO is charged with the responsibility of:

  - Supporting the action led by the Government of the Democratic Republic of Congo to protect civilians against international humanitarian law and human rights violations, including all forms of sexual violence, so as to promote and protect human rights and fight against impunity.
  - Supporting the action led at national and international levels so that the perpetrators of these violations are brought to justice
  - Collaborating closely with the Government to ensure realization of its commitments so as to prevent serious violations against children;
  - Supporting efforts deployed by the Government, together with international partners and neighboring countries, so as to create conditions which enable displaced persons and refugees to freely go back home, in safety and in dignity, or to integrate themselves or resettle willingly on the spot ;
  - Supporting the action led by the Government of the Republic of Congo to successively end the current military operations against FDLR, Lord's Resistance Army (LRA) and other armed groups;
  - Supporting completion of DDR activities for armed Congolese groups, or their effective integration, as soon as they will have been formed and equipped appropriately;
  - Supporting DDRRR activities for foreign armed groups, including FDLR and the LRA done in the eastern part of the country.[138]

2. Stabilization and consolidation of peace

Stabilization is certainly the fundamental novelty introduced in the mandate of the United Nations mission in the DRC. It pertains, for the Mission, to capitalizing on the progress made in the Democratic Republic of Congo, maintaining the cap on the recovery of the country after 15 years of conflict and assist in consolidating peace and security in the country.

Indeed, a lot had been accomplished since the arrival of UNOMCO in 1999 mainly bringing peace to a big part of the territory, holding democratic elections, creating State institutions. The country has now entered into a phase of consolidation and stabilization, as acknowledged by the Security Council.

- To consolidate the gains, the Security Council assigns to UNOMSCO the responsibility of supporting the actions led by Congolese authorities to strengthen and reform security institutions and the judiciary.

UNOMSCO shall assist the Government of the DRC to build its military capacity, including military justice and military police and, if the Government makes a request for it, will assist in training FARDC battalions, support military justice institutions. Police and justice reforms and enhancement of the state authority on the territory freed from armed groups are also actions which will be supported by UNOMSCO.

[138] Read the thirty first report of the Secretary General on United Nations Organization Mission in the Democratic Republicof Congo (UNOMSCO) (S/2010/164), 30th March 2010.

3. Enhancement of State authority

The Security Council estimates that stabilization and consolidation of peace passes through enhancement of state authority on the whole territory of the DRC. Moreover, Resolution 1925 identifies enhancement of state authority as being one of the principle indicators which must determine the beginning of the withdrawal of the Mission. These indicators include at least deployment of an efficient police force and a civilian administration in the areas freed from armed groups, so as to avoid a security and institutional vacuum which would lead to return of instability.

Putting in place professional and sustainable national security forces, and establishment of efficient judicial institutions are necessary steps towards establishment of a sufficient level of security and the rule of law.

This work will be done within the framework of a stabilization and reconstruction plan developed by the Government (STAREC) and international support strategy on security and stabilization; (ISSSS).Unfortunately STAREC lacks not only the means but also the logistics which can help it work as such. This explains why UNOMSCO is practically obliged to assist in place of the latter.

4. Main axes of the Resolution 1925 of the Security Council

Support to the Government of the DRC in security sector reforms

- Protection of civilians largely depend on the presence of professional and disciplined security forces who respect civil rights, human rights and the rule of law. The Mission is called to support the efforts of the Government of the DRC aiming at ensuring more sustainable performances for security institutions and the judiciary. Specifically, the Resolution gives mandate to UNOMSCO to help the government to enhance its military capacities, mainly by supporting military justices and by helping to train military police. Moreover, if the Government asks for it, the Mission would ensure training of FARDC
- For what pertains to reforming the National Police of Congo (NPC), the Resolution enhances the mandate so that UNOMSCO not only trains police forces but also it mobilizes donors so that they give necessary equipments and funds for this training.
- In conformity with the Congolese strategy for justice reforms, the Resolution clearly asks UNOMSCO to develop and implement a multi-year program of the United Nations to support justice, centered on the development of criminal justice system (police, justice, prisons).

Support the electoral process to consolidate democracy

- The Resolution envisages the possibility of supporting the Government of the DRC with technical and logistics support for organizing national and local elections, at the express request of the Government. Free and fair national and local elections are recognized here as an essential element for consolidation of peace, since holding elections would help in reversing any tendencies towards concentration of power and curtailing the political space, thus reducing secessionist feelings in some regions of the DRC.

Multidimensional approach to the problem of armed national and foreign groups

- While underlining the importance of putting in place reliable and sustainable police forces, the Resolution 1925 calls for the promotion of non military solutions as an integral part of a general strategy against the threat posed armed national and foreign groups. The Resolution encourages the Government of the DRC to adopt such a strategy, in close collaboration with the Mission and neighboring countries.
- The current military operations must be completed, while new political initiatives must be undertaken to solve the problem of armed groups who are still in existence.
- The programs of Disarmament, Demobilization and Rehabilitation (DDR) of Congolese armed groups and Disarmament, Demobilization, Repatriation, Resettlement and Rehabilitation (DDRRR) of foreign armed groups are important elements of this multidimensional approach.
- On the question of FDLR, the Resolution insists that the governments of the DRC and Rwanda work together to harmonize the objectives so as to achieve a lasting solution to this problem, mainly repatriation or resettlement of demobilized fighters in other regions of the DRC. On the question of LRA, the Resolution advocates for a coordination between UNOMSCO and other UN missions deployed in the region.[139]

Regional Approach: Dialogue and cooperation between the DRC and neighboring countries

- Peace and stability are considered as a regional question involving different countries in the stabilization of the DRC. Consequently, it is insistently recommended to all neighboring countries to undertake concerted efforts so as to resolve problems affecting the eastern part of the DRC, specifically through simultaneous implementation of the Resolution 1925 by all states concerned. As already described here above, the multidimensional approach and the general strategies for solving the problem of FDLR and LRA can fall under the framework of such a regional strategy.
- In conformity with subsequent resolutions, cross-border cooperation is recognized as necessary to put an end to illegal mining and trade of mineral resources, from which armed groups have been benefitting for long time. Regional cooperation is also considered as a way towards economic development.

Fight against sexual violence

- The Security Council remains very concerned by the humanitarian and human rights situation in areas affected by armed conflicts. It castigates, among others, widespread sexual violence.

  The Council notes that it is upon the Government of the Democratic Republic of Congo, acting in cooperation with United Nations Organization and the other concerned players, to urgently put to an end, these human rights and humanitarian law violations, fight against impunity, bring the perpetrators to justice and provide medical care, humanitarian assistance and other forms of assistance to the victims[140]

[139] Read the thirty first Report of the Secretary General on the United Nations Organization Mission in the Democratic Republic of Congo (UNOMSCO) (S/2010/164) ,30 March 2010.
[140] Read the thirty first Report of the Secretary General on the United Nations Organization Mission in the Democratic Republic of Congo (UNOMSCO) (S/2010/164) ,30 March 2010.

Strengthening partnership between the Mission and the Government of the DRC

- The resolution calls for enhancement of dialogue between the Government of the DRC and the Mission. The resolution acknowledges the prominent role of the government concerning reforms of the security system and judicial institutions. In this regard, the general role of the Mission is that of a facilitator and coordinator between different players, in accordance with the objectives and strategies established by the Government of the DRC through relevant national legislation and planning. The coordination between the United Nations and the Government of the DRC will be the main pillar for the assessment of the situation on the ground for the future reconfiguration of the Mission..

Duration of the UNOMSCO mandate

- By virtue of the Resolution 1925, the mandate of MONUSCO will expire on 30th June 2011. It is important to point out here that this mandate will always extend each time the necessity or the situation on the ground would demand. It shall have until this date, besides appropriate civil, judicial and prisons components, a maximum number of 19 815 solders, 760 military observers, 391 police workers and 1050 members of police units constituted.[141]

- But the Resolution 1925 does not exclude future extensions of this mandate and other reconfigurations of the Mission. If this is supposed to be the case, the Resolution states that ''future reconfigurations of the Mission will be in line with the changes of the situation on the ground and realization of the objectives that the Government of the Democratic Republic of Congo and the Mission will have attained, namely :

  - Complete the current military operations in the two Kivus and in eastern province and thus reduce within the shortest time possible the threat posed by armed groups and restore stability in the sensitive areas;
  - Improve the means which the Government of the DRC has to effectively protect the population by providing it with sustainable security forces who will take over progressively the functions of UNOMSCO on matters pertaining to security.;
  - Enhance state authority on the entire territory by putting in place in the areas freed from armed groups a Congolese civil administration, in particular police, territorial administration and bodies guaranteeing the rule of law.

Resolution 1991 extending the mandate of UNOMSCO to 30th June 2012

By virtue of the Resolution 1991 of the United Nations Security Council adopted on 28th June 2011, the mandate of UNOMSCO was once more extended until 30th June 2012. Over and above the mission entrusted to it by the previous Resolutions, the new Resolution indicates in particular that UNOMSCO will offer upon request from Congolese authorities, a technical and logistics support for organization and holding of national and provincial elections in the Democratic Republic of Congo. [142] We need to state at this level that recently, the Government of the DRC through its Minister of International Cooperation, Raymond Tshibanda, asked for extension of the mandate of the UNOMSCO from the Security Council. Precisely the Minister stated that the Security Council should review the part of its mission

[141] Lire le trente et unième rapport du Secrétaire général sur la Mission de l'Organisation des Nations Unies en République Démocratique du Congo (MONUSCO) (S/2010/164) ,30 Mars 2010.
[142] Doc.ONU, Résolution du Conseil de sécurité, S/RES/1991(2011) du 28 Juin 2011.

dedicated to the military spirit of UNOMSCO but to give this assistance to the financial plan more so especially because DRC was in need of financial assistance for her development and reconstruction program[143]

For this reason, the UNO Secretary General pleaded in the same direction as the Congolese Minister. In his pleading, he proposed the extension of UNOMSCO mandate until 30th June 2014 so that it can devote itself in the duty of stabilizing the DRC. He noted that although some progress has been made, a lot remains to done in Congo-Kinshasa. We also need to state that it is after this consultation with authorities in Kinshasa that the request was formulated. It is important to say if this proposal is accepted, the mission of MONUSCO which is supposed to come to an end on 30th June 2012, will be extended until 30th June 2014.[144]

E. PROSPECTS

The conception of prospects for the mandate of UNOMSCO in the Democratic Republic of Congo must be envisaged by analyzing the goals to be met which the Security Council entrusted to its mission in this country.

Certainly, from this UNOMSCO mission, we can boast of some outstanding achievements it realized but it is important to also pick out weaknesses noticed pertaining to its goals with a view to making some suggestions. As a reminder the mission of UNOMSCO can be summarized in these terms: Bringing peace to the DRC, installation of State democratic institutions, holding of the first elections; logistics and material support for recent elections, in brief support DRC in democratization, stabilization and consolidation peace and protection of civilians.

From these objectives, many achievements and advancements deserve to be pointed out and applauded. Within the framework of pacification and installation of institutions, the strong point is to note that UNOMSCO contributed to the return to peace and democratic institutions.

Peace which has been sought for so long by the DRC is restored in most parts of the country except in East and in certain parts of the Eastern province where sometimes there is calm, sometimes return of trouble and attacks from armed groups who sow the seeds of terror, panic and who cause instability among the said population. The latter is not only a victim but more so unbalanced.

UNOMSCO within the framework of enhancing peace formed the DRC police. Formerly, a police force without adequate training, used to arresting, fleecing the citizens and propagating anti-social practices, became a bit conscious of its traditional mission namely:

protection of the population and their property. This training enabled the latter to contribute to development and rehabilitation of the population and this, through learning some notions. For purposes of illustration, we can say the traffic police after leaving the UN training is teaching pedestrians how to cross roads and thorough fares. In some places it

[143] Freddy MONSA IYAKA DUKU, De la Monuc à la Monusco : une mission de plus en plus élastique, Le Potentiel, Edition 10018 du Jeudi 12 Janvier 2012.
[144] Freddy MONSA IYAKA DUKU, De la Monuc à la Monusco : une mission de plus en plus élastique, Le Potentiel, Edition 10018 du Jeudi 12 Janvier 2012.

advices drivers to respect traffic rules. Regular visits by UNOMSCO officers to some prisons and dungeons is to be saluted for it enables straightening up of detentions and detainees irregularly arrested get to be freed but in other prisons and dungeons where this visit is not organized the detentions leave a lot to be desired.

Putting in place democratic facilities is effective even if sometimes we notice immaturity of facilitators in some of these facilities. It is return to peace which encourages the putting in place and has enabled these institutions to physically protect the population in a better way and within its rights; rescue it by alleviating the most glaring vital emergencies in terms of food, health, sanitation during time of crisis. This is for example the case where we find officers of the UN system.

Within the framework of stabilization and consolidation of peace, UNOMSCO supports its partner on the path of development. It supports reforms of the security sector through political commitment at the highest level, capacity building for what affects the abovementioned police training at some points and the army for a comprehensive and viable national strategy. UNOMSCO supports and assists disabled persons, rehabilitates some training centers for young girls and mothers who are victims of violence. It applies a policy of proximity assistance in several fields. This proximity of assistance is visible through providing transport for several new magistrates, training within the framework of development and promotion of women and propagation of human rights etc.…

However, besides these significant advancements there are also weaknesses which need to be raised and examined critically. UNOMSCO until today is yet to achieve one of its primary objectives namely pacification of the DRC since the East and Eastern province of this country are still experiencing war situations, repeated attacks and insecurity.

These situations push us to castigate at this level the fact that UNOMSCO set its military base in Bukavu while there troubled situations noticed elsewhere. Why not move it to where there are repeated troubles to be in a position to hit back. Military interventions of UNOMSCO must be felt by its reactions, ripostes and its defense for it does not ignore that the DRC still does not have a well organized and strong army to face attacks.

It is regrettable to note that UNOMSCO is weakening the actions of the Congolese military force by taking its counter attacks as actions of human rights violations while it pertains to an army which providing efforts for the defense of its territory.

UNOMSCO does not take into account the role of the civil society with a view to a better appropriation of an undertaking consolidation of peace and development.

The Congolese opinion does not stop from criticizing the observer attitude always being shown by UNOMSCO at the time when the population of the east is being killed and this, to a point of wondering not only the purpose of its presence in the country and until when will it remain while it is immobile, observer and without any convincing riposte. Will we say that UNOMSCO transformed itself into a permanent structure in the DRC despite its reputation of an international mission?

Stabilization and consolidation of peace supposes the management of any information between two partners, but it is clear to note often that UNOMSCO sometimes gives information based on unilateral enquiries and which, from the rest, arouse contradictory reactions from its partner.

Protection of civilians is the cornerstone of the mandate of this mission, but how do we conceive the fact that the elements of the said mission get involved in all forms of violence and violation of human rights targeting civilian population, in particular acts of sexual violence, without forgetting illegal mining to the point of neglecting its mission.

No one can ignore that the budget of this mission is so important and the concern in terms of this budget is to know where these funds are often allocated. Interventions of proximity assistance in our humble opinion, does not justify at all expenses of the latter and by this fact, questioning budgetary management of this mission by Congolese and donors, deserves to be pointed out.

In respect to the foregoing, we suggest that DRC can request the Council to adjust the UNOMSCO mission as compared to the current context and to war situations which are recurring in the East and in Eastern province in such a way that it is able to counter attacks from armed troops at this time when the Congolese military is not well organized and strong. May UNOMSCO help the Congolese Government to practice the policy of good neighbourhood to avoid possible trouble.

UNOMSCO must stop from being a perpetual observer against attacks which cause deaths of thousands and thousands of Congolese from the East and Eastern province. We paraphrase here Professor Kishiba Fitula Gilbert who still teaches that UNOMSCO must apply the formula of response to the situation of attacks and not situation of response.[145]To say that observation of situations of armed attacks by UNOMSCO must make room for an efficient implementation force, which is permanent as long as the mission will still be in this country so as to protect civilians who need to see peace being restored and consolidated in this part of the country. Protection of its premises and international humanitarian does not constitute protection of civilians. Armed reaction of the mission would be a possibility for cessation of armed attacks.

The eastern part of the country does not need immobile observers as long as UNOMSCO knows well that the Congolese armed force is still under construction. And therefore an implementation force which is active, reactionary, strong and capable of countering attacks from armed groups who sow the seeds of terror and desolation.

Treatment or management of information between these two partners would be a good thing and would avoid possible contradictions which would one day risk a trouble situation even where there was peace even if UNOMSC was makes unilateral enquiries.

The military section the UNOMSCO resource must improve military know-how
and ethics so as to achieve the expected goals since it has been demonstrated that the multiple concept showed serious shortcomings at the level of leadership and especially at logistics level, mainly due to lack of individual and collective equipments and camps, insufficient quantity of ammunitions, teaching materials.

UNOMSCO must in its resolutions take into account the role of the civil society with a view to have better appropriation for the undertaking of peace consolidation and development. Congolese State and UNOMSCO must push all groups to fully integrate the process of demobilization and reintegration.

[145] KISHIBA F., cours de Droit International Public II : Les organisations Internationales, L1 Droit, Unilu, 2011-2012, Inédit.

The DRC must be responsible and have a professional and dissuasive army for the security of her national territory and not always wait for other countries, regional and international organizations to intervene to secure it. The DRC must apply the policy of good neighbourhood with all neighbouring countries. To conclude would we not ask ourselves the eternal question of knowing what consists of protection of civilians according to the understanding of UNOMSCO?. Does counting the dead and the displaced in the east, denouncing the weaknesses of the Congolese army or to say it is difficult to access some areas in conflict to protect civilians while it has all necessary materials for this purpose. To say everything, we dare believe that this mission is there to monitor the management of the DRC.

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FOOD SECURITY IN THE DEMOCRATIC REPUBLIC OF CONGO, LEGAL BASIS, ENVISAGED LEGAL INSTRUMENTS FOR ACHIEVING THIS GOAL

By **Baudouin WIKHA TSHIBINDA***

INTRODUCTION

The concept of food security refers to the availability as well as to accessibility of food in sufficient quantity and quality to the whole population. This concept encompasses the availability of domestic production of a country, import capacity; in such a way that surplus in production is directed towards States in deficit, the availability of stock and food aid to people in difficult situation.

The Democratic Republic of Congo devotes in the Constitution of 18th February 2006 the principle of food security in Article 47 of the said constitution. Food security is a part of fundamental rights which must be respected by public authorities and the obligation for every person to enjoy accessibility to food.

The situation which the DRC, a post-conflict country, is going through does not enable the population to enjoy the right to food. The causes for food insecurity are known and have even been dated in many international forums so as to see that this big African country attains the right to food security. Among the causes, we can cite : political instability brought about by armed conflicts which lead to displaced of persons and refugees ; soil degradation pushes the people to farm big pieces of land with poor yields ; Demographic explosion not followed by a good urbanization policy for open spaces in the urban areas; theft of agricultural produces and farm animals, decrease of investors both at the national and provincial levels and lack of a support policy for crop and animal farmers. As an illustration, Katanga Province found itself with tractors and agricultural inputs which have to today have not been of use to rural crop and animal farmers. These materials are stored in private lands and in warehouses, and the spare parts have been stolen. Sometimes, they are tractors without accessories for agriculture.

In tackling the question of food security, it raises certain concerns for its efficiency:

Can we talk of food security in the DRC?

How do we feed an increasing population in a post-conflict country?

What are the legal bases to guarantee the right to food security?

Is there an agricultural policy?

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The answers to all these questions enable us to get the objective of our study. It is about seeing how to make the population enjoy a right to food security. The DRC is counted as being among the countries with the best laws, but unfortunately they are not applied if not violated. Agriculture and animal keeping practiced in rural and urban areas have become a means of survival due to lack of a framework policy at the government level. To this is added unemployment rate which only increases poverty.

The population of the DRC in general and in particular that of Katanga is characterized by apathy to landing tilling. This is noticeable in South Katanga , due to mining activity. The fall of Gecamines, the big mining company has just created another phenomenon of mining *boom* in the province. Outside Gecamines tackled here above, there were other mining companies in Katanga which offered food to workers thus leading a high growth rate in many households. We can mention some of these companies: Congo-Étain, Sodimico, Kisenge-Manganèse, Cimenterie de Lubudi. Currently the province is experiencing « *mining* », phenomenon where industrial and artisanal miners are in competition, thus neglecting agriculture.

Farming in the rural areas is centered on family structures, production of food to be consumed locally. Small scale farmers need financial resources to buy seeds, tools and fertilizers. They also need roads and means of transport to take their foods to the big consumption centres.

The right to food security in the DRC requires development of a legislative framework which is in conformity with the necessity to respect, protect and realize the right to food. A framework which encourages investment in the field of agriculture and animal keeping. The goal pursued by this study consists of joining the two worlds, urban and rural to contribute to food security. It is important to facilitate transport of agricultural products between production centers and the consumption centers to satisfy the theory of supply and demand. In the urban areas there is a development of vegetable farming and small scale animal keeping for survival. In the rural areas it is access to family food centered on local production in small scale. For food security to be effective it should combine local production, importations and food aid to enable every person to have access to good food. A better policy framework for farmers and animal keepers for a development in the field of food security should pass by the creation of a legislative framework which encourages investment by the State and private individuals in the agricultural sector.

Our analysis concern Katanga province, mainly the town of Lubumbashi and its environs. We shall, during this same study tackle certain districts which come to supply Lubumbashi with food products. We used the comparative method to see how we can draw a parallel between right to food in the rural and urban areas. The right to food security being part of fundamental rights and liberties requires from public authorities the creation of conditions for accessibility and availability. Thereafter, the legal method enabled interpretation of different laws. Personal experience in the rural areas will have enabled us enhance our argument. Pertaining to the period covered by our study, it will concern the period from 1990 to date. This period will not prevent us from seeing the DRC before in view of the assessment of the situation. The reason for choosing this period is that it marks the beginning of the DRC crisis.

In addition to the introduction and conclusion, our thinking is on three essential points. The first point is on general considerations as advocated by the Constitution of 2006. The second point explains the legal foundation guaranteeing the right to food so as to enable the

population to take advantage of it to have access to food self-sufficiency. The third point tackles the instruments to be put in place to achieve food security, food self-sufficiency and health security for foodstuffs.

I. General considerations

The Democratic Republic of Congo is one of the countries most hit by hunger and food security in the world. According to the report on the state of food insecurity in the world written each year by FAO, the DRC was the country most hit by food insecurity in 2001, affecting about 64% of its population, i.e. 37 million people. In 2002 instead of going down, the number of people affected by food insecurity increased from 64% to 73% of the Congolese population estimated to be 52 million people.[146]

Several concepts become common in collaboration between nations, namely: food security, food self-sufficiency, health security, poverty, malnutrition so as to explain the state of the African continent which consumes more than it produces.

I.1. Definition of concepts

A. Food security

According to the definition established during the World Food Summit which was held in Rome in 1996, food security is ensured when all people, at all times have economic, social and physical access to sufficient, safe and nutritious food which meets their nutritional needs and their food preferences to enable them lead an active and healthy life.

Food security is defined as the capacity at all times to supply the world, country, and region with basic products to support increase in food consumption, by controlling fluctuations and the price. Food security must be understood as the right of each one to have access to food at any time. But this right requires the means to face it. The State should have a good policy for job creation, a policy which attracts capital investments for both national and foreigners, a good salary policy which enables the population to feed itself. The state itself should invest in the agricultural and animal keeping sector. It is no longer enough for a national economy to have sufficient food stuffs so that « food security » is attained. It is also necessary that individuals have the possibility of accessing food. The link with the question of poverty is directly expressed.[147] The assessment of food security brings obligation to the State of respectability, protection and creation of conditions enabling realization of the right to food.

The term appeared in mid 1970s when the World Food Summit (1974) defined food security in terms of food supply, namely guarantee availability and stability of prices for basic food products at the national and international level.[148] An increase in food production, if it is necessary, does not automatically resolve hunger demonstrations and does not allow all people to feed themselves sufficiently[149]

An individual, a household and a community, a region or a nation enjoys food security when each person has at all times economic and material possibility to buy, produce obtain

[146] FAO, Conference on food security in the Democratic Republic of Congo, Kinshasa, Alliance Belgo Congolaise, Financial Report, 2003, p. 1.
[147] G. AZOULAY et J-C DILLON, *La sécurité alimentaire en Afrique,* Paris, Ed. Karthala, 1993, p. 124.
[148] FAO, *Sécurité alimentaire*, Notes d'orientation, n°2, juin 2006, p. 1.
[149] G. AZOULAY et J-C DILLON, *La sécurité alimentaire en Afrique*, Op.cit, p. 124.

or consume sufficient, safe and nutritious food satisfying his needs, according to his states and enabling him to lead an active life.[150]

B. Food insecurity

The factors at the basis of food security are many putting the Congolese population in general and that of Katanga in particular in a state of food inaccessibility. Although the country has rich land, its population continues to live in misery which does not enable it to have good food. The best known causes are:

Poverty characterized by meager salaries on one hand, unemployment and lack of salary for inhabitants of villages who only live on rustic products on the one hand. This state makes the peasant farmer dependent on towns; drop in investments in the agricultural and animal keeping sector, lack of agri-food policy which does not follow demographic changes. An armed conflict in the DRC created a political instability and was followed by displacement of people both within the country and outside the country.

C. Poverty

Jacques Fierens defines poverty as the state of a person who lack material means, money; insufficiency of resources. Financial dimension take it[151] to different degrees according to people and time, under the form of all sorts of combinations, poverty refers to lack of income, but also lack of work, schooling, professional training, poor quality housing, poor health, difficulty in having access to law and justice.[152] Poverty does not enable access to food security.

Opinion polls on the perception of poverty per Congolese population (SOPPPOC) indicates: 79% of the population are not satisfied with their food consumption, 81% not satisfied with their housing, 82% are incapable of catering for their health and 84% cannot afford decent clothing. SOPPPOC also reveals that there is poor access to basic social services (76% households are not satisfied with the schooling of their children)[153]. In the DRC, the main sources of income are composed of salary, profits from business, sale of agricultural products and professional fees from professional activities and handicraft trade[154]. There is also the transfer of money which occupies a significant place, especially among students and those who have family members in Europe. Beyond this transfer, there are also small businesses which are an important source of survival for urban population. « This salary is moreover not paid regularly. Small trade has become the main activity for a good part of households. »[155]

Salary occupies a place of choice in accessibility to food in almost all households. The study carried on the population of Lubumbashi in 2006 before the mining boom gave the following result:

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[150] Fédération internationale des sociétés de la Croix-Rouge et de la Croissant-Rouge, *Comment évaluer la sécurité alimentaire*, Guide pratique des sociétés nationales africaines, Myanmar, 2004, p. 7.

[151] J. Fierens, *Droit et pauvreté, droits de l'homme, sécurité sociale, aide alimentaire*, Bruxelles, Bruylant, 1992, p. 18.

[152] J. Fierens, *Droit et pauvreté, droits de l'homme, sécurité sociale, aide alimentaire*, *Op.cit*, p. 22.

[153] http://www.rdc-agriculture.com (visited on 28 December 2011)

[154] C. Nkuku Khonde et M. Rémon, *Op.cit*, p. 58.

[155] *Idem*, p. 82

22% receive[156] their salaries but irregularly; 12, 7 % have a regular salary; 65,3 % live without salary, but from their professional activities.

To face this food insecurity, people are coming with survival strategies. Small professions tend to save the population, it pertains to fitting, knitting, copper beaters, brickworks, hairdressing, iron works, masonry, stone chiseling, mechanics, carpentry, bicycle repair, bicycle and motorcycle transport, errands, catering , small scale animal keeping, telephone booths, currency exchange, etc. All these activities come for the survival of the family.

D. Food self-sufficiency

The concept of self-sufficiency has become dominant in agricultural policies implemented in Africa in the mid 1970s.[157]Self-sufficiency became a duty for African countries with a view to meet fundamental needs of the population. To meet such a goal, the country should have a consequent food policy and whose implementation will be materialized through a national strategy for food security.

E. Food safety

Food safety encompasses all measures meant to offer the safest food possible for consumption. The policies and measures applied in the matter must be on the entire food chain, production and consumption. The foods in their production must respect hygiene rules for their consumption. The services must monitor the expiry date. This monitoring enables one to avoid food poisoning and sale of contaminated products. We need to add to this accessibility, drinking water which is a very fundamental element contributing to food security. Water for cooking, consumption and other domestic needs.

Mortality noticed in the Democratic Republic of Congo is largely caused by food borne diseases. Millions of people often fall sick and a big number of them die after taking in foods which are unsafe for consumption. Deeply concerned with this problem, member states of the WHO adopted in 2000 a resolution acknowledging that food safety is an essential aspect of public health. Among the official bodies in the DRC responsible for monitoring food safety, we have Office Congolais de Control (Congolese Control Office) and *Direction de la quarantaine Internationale.*

I.2. Evaluation of food security

A. Assessment of food security

The assessment passes through three essential indicators to show if a State can claim food security of its population. These are: accessibility to food, availability of food and use of food.

1. Accessibility

This is the manner in which people can obtain the food available. Accessibility to food can be restrained by physical insecurity related to a conflict situation, by resistance capacity (seasonal jobs in foreign countries) arising from closure of borders or by disappearance of social

[156] *Idem*, p. 61.
[157] G. Azoulay et J-C Dillon, *La sécurité alimentaire en Afrique, Op.cit,* p. 138.

protection which was formerly being enjoyed by people with low incomes.[158]Accessibility refers to physical and economic capacity of all individuals to meet their needs through recourse to the market in a given period.

2. Availability

Food must be available at the national, regional and local levels. This component involves the present of all food stuffs which make up food regime in sufficient quality and quantities to meet the needs of the whole population in a determined period.[159] This food offer can come from local production, commercial imports or food aid.

3. Use

Use of food is the manner in which people use food and depends of the quality of foods, their storage and their preparation, basic nutritional principles as well the state of health of individuals consuming them. Some diseases do not allow optimum absorption of certain foods. The use of food is often reduced by endemic diseases, poor hygiene conditions, lack of knowledge for basic nutritional principles or even traditions which limit access to certain foods due age or sex ».[160]

A. Respectability

The State should not reduce the right to food security guaranteed to the population. It has the obligation of creating the condition which can enable the population to have access to food and that which is deprived by humanitarian circumstances to be assisted to satisfy the social character of the Congolese State.[161] Taxation on food stuffs dependent on importation will have consequences on the market of the products. The socio-economic covenant requires states to work towards attaining this goal. This requires a bit of means and will of the state. The will is noticeable through government efforts to create conditions of accessibility, availability and use.

B. Protection

The State should not tolerate violation of the right to food by individuals. It must implement everything so as to protect the population, fight against any fact susceptible of creating food insecurity. The Congolese must besides the legislations in place, have a strong army capable of fighting any threat which would cause displacement of populations by exposing them to any risk of lack of food, housing, employment or even falling sick.

The State must protect the population against any natural catastrophe which would put the population in a situation of food insecurity.

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[158] G. Azoulay et J-C Dillon, *La sécurité alimentaire en Afrique, Op.cit,* p. 129.
[159] G. Azoulay et J-C Dillon, *La sécurité alimentaire en Afrique, Op.cit,* p. 126.
[160] Fédération internationale des sociétés de la Croix-Rouge et de la Croissant-Rouge, Comment évaluer la sécurité alimentaire, Guide pratique des sociétés nationales africaines, Myanmar, 2004, p. 7.
[161] Lire l'article 1er de la constitution de la RD Congo du 18 février 2006

C. Realization of the right to food

The Congolese state must put in place conditions for effective exercise of food security. All the rights to be effective require the conditions for their realization. Food security should not be contained in the constitution or stop at the start of implementation of coordination without a short, medium or long term program. Developed countries to be able to face food security were forced to increase their agricultural yields so as to feed their people. This was possible thanks in the first place to mechanization; secondly use of fertilizers and chemical pesticides, and also by use of selections and genetic modification. The DRC is far from reaching this level following political instability, lack of a policy in the agri-food sector and infrastructure.

I.3. Causes of food insecurity

Causes of food insecurity can be categorized into four: political causes, natural causes, economic causes and religious beliefs.

A. Political causes

At independence, two cropping systems existed side by side: shifting cultivation (where the problem of access to land was not acute) and allotment system or peasant farming, whose goal was to rationalize use of land respect of fallow land. People practiced basic foods farming for their nutritional needs. This system of allotment was the motivation for farmer to do cash crop farming like cotton, groundnuts, palm oil, sugarcane. It is shifting agriculture with isolated farms which prevailed upto today. Subsistence farming is almost controlled by small scale farmers who practice traditional farming on small areas. Most of the modern farms had to close down due to looting, wars and zairianisation.

The political context of crisis that has affected agriculture and livestock, began in 1970 with the Zairianization, 1990 and 1991 with the democratization which has resulted in looting and finally in 1996 until 2001 with the wars. .

1. Urban areas

At the colonial period, food policy had, as the first objective, provision of basic and storage foods to workers working in farms owned by Europeans by respecting the diet they had before being employed[162].All industries made human food to fight food deficiency for African taken to places of work. After independence, zairianisation finally plunged the country into crisis. Urban growth seemed to leave little time for agriculture to become modern and satisfy new needs: while a farmer was only able to feed 0.18 people in 1950, he supposed to take care of 1,121 in 2010[163]

«Urban construction is indeed the result of a very big number of historical, social and geographical interactions ( ) on the one hand, it is not for the town in absence of food supply,

[162] Mafulu Uyind'a Kanga, *La place du maïs dans l'alimentation de la population ouvrière noire de l'Union Minière du Haut Katanga,* Mémoire d'Études approfondies, *Facultés de Lettres*, Université de Lubumbashi, 2011, p.58.
[163] G. Courade, « Peut-il y avoir des politiques d'autosuffisance alimentaire ? » in *Autosuffisance alimentaire*, *Op.cit*, p. 82.

on the other hand the town believes on open proximity spaces. »[164] Demographic rate noticed at the border town of Kasumbalesa and in the towns of Lubumbashi, Kolwezi and Likasi, bring about food insecurity. Hunger, poverty and poor nutrition force the population to move to towns. Lubumbashi town is a proof of this demographic explosion.

To face food insecurity, there is a development of urban and peri-urban farming. Vegetable farming is of help in improving food security, but land problem puts women in difficulty. In the concession of the University of Lubumbashi, the Tingi-tingi women [165] are in permanent conflict with people seeking land to build houses. « Recourse to rustic activities becomes more and more necessary to supplement the salary level. The fact that we see this activity representing 115 in our survey, among the secondary sources of income, does not mean that it pertains to a consequence of the crisis »[166]. It is normal that the employees of Annexe commune, to purely rural aspects, are actively and intensively involved in agriculture[167] in towns. Urban and peri-urban farming is mainly composed of rain season crops, by order of importance: maize, groundnuts, sweet potatoes, amaranth, hibiscus, soya, eggplant, cassava[168] and rice. During the dry season, it is often common cabbage, yams, tomatoes, onions, spinach, carrot, celery and vegetables. Unfortunately half of the production is for sale and the other half for consumption and theft.

This situation is not new. Dibwe dia Mwembu in *l'histoire des conditions de vie des travailleurs de l'Union Minière du Haut-Katanga/GECAMINES (1910-1999)*, shows that the highest salaries for clerks and nurses were reduced in 1932, from 25 francs to 16 francs per day. In 1933, the lowest salaries also experienced a reduction from 5 francs to 4 francs. It is during this period that UMHK forced wives of the workers to have small pieces of land to plant and maintain vegetable gardens.[169]

The peri-urban concept concerning the city of Lubumbashi is directly related to the problem of security and insecurity (theft of electricity cable, burglary by thieves,…). Any person wanting to live far from the city centre, for an animal production activity runs the risk of having his/her products looted.[170]

On animal keeping all farms near big towns have been abandoned either due to the crisis, or those who inherited them did not have good continuation policies following difficult moments the country experienced.

1. Rural areas

Small scale farming, the poor parent of the system, but whose impact cannot be neglected in feeding the Congolese people, suffers mainly from enclosure and lack of real outlets, following the collapse of transport and communication system in the rural areas. How to

[164] Les mamans Tingi-tingi est une association des femmes des agents de l'Université de Lubumbashi qui se livre à la culture maraichère. Cet endroit marécageux se trouve non d'un camp de l'Université appelé « six maisons ».
[165] Les mamans Tingi-tingi est une association des femmes des agents de l'Université de Lubumbashi qui se livre à la culture maraichère. Cet endroit marécageux se trouve non d'un camp de l'Université appelé « six maisons ».
[166] C. Nkuku Khonde et M. Rémon, *Stratégie de survie à Lubumbashi (R-D Congo)*, Paris, L'Harmattan, 2006, p.68.
[167] *Idem*, p. 72.
[168] Victor Dibualonji, « L'agriculture intra et péri-urbaine à Lubumbashi (RDC) », in *villes du Nord et villes du Sud à la rencontre de l'agriculture*, Bruxelles, Septembre 2002, p. 33.
[169] Cf. Dibwe dia Mwembu, *Histoire des conditions de vie des travailleurs de l'Union Minière du Haut-Katanga/GECAMINES (1910-1999)*, Lubumbashi, PUL, 2001, p. 44.
[170] Mertens Ngoy Limbu Mbayo, « Le travail législatif en agriculture urbaine, réflexion à partir de la ville de Lubumbashi », in *villes du Nord et villes du Sud à la rencontre de l'agriculture*, Bruxelles, Septembre 2002, p. 32.

conceive a modernization of the big majority of small scale farmers often enclosed, working first for self-supply and only releasing surplus occasionally.[171] In Africa on-farm consumption is generally the biggest form of meeting food needs in the rural areas. It is hard to assess in quantitative terms, at the national, the agricultural production part which is directly used in the household and does not enter in the marketing channel.[172] « At the end of two decades of poor agricultural development, modernization with or against producers, both costly and wasted, new policies of self-sufficiency in the actual context attempt to put the record straight : priority to subsistence farming and therefore to the peasant farmer(s). »[173] According to FAO, even if peasant farming should still remain for a long time the main source of food supply, employment and services, it should nevertheless evolve rapidly towards modern agriculture. In this context, it should encourage emergence and development of means for large scale farming[174].

Food potential is enormous in North Katanga and before the war, each farming family used to produce its food and the surplus was sold. Today, due to the war, insecurity and its collateral effects, food availability and accessibility have drastically reduced.[175]

« The poor and the hungry need technologies and less costly practices available immediately to increase local food production. Generally, women and children are the ones who suffer the most from food deficit. »

Peasant farmers are forced to cover long distances to find fertile land due to lack of agricultural inputs. Production is reduced at the local consumption. Despite this local food production, city dwellers invented « the agricultural campaign ». It pertains to agricultural middlemen and brokers who exploit the peasant in his local production. They identify the needs of the peasant in terms of basic necessities. These are mainly, table salt, soap, cooking oil, clothing, match boxes etc. The peasant farmer is supposed to leave a big part of his harvest for food needs.

Many places in Katanga Province which were grain baskets lost this monopoly following destruction of infrastructure. We have the territories of Nynzu, Kanyama, Kabalo, Bukama, Nkongolo, Manono which supply big towns with maize, fish, groundnuts and palm oil. Le Lualaba, it is sugar cane, cassava, groundnuts, bananas, pineapples, etc. To date, different wars which wrecked havoc in these areas made people to be discouraged due to lack of infrastructure to transport their produce.

1. Armed conflicts

People are forced to move out of these combat areas leaving behind their properties, job, land and animals. The Congolese army since the eve of independence and in its development had to face a lot of mutinies, rebellions as well as secessions. This situation continued with Muleliste rebellion and that of the East (1964), mutinies by ex-soldiers of Katanga in Stanleyville (1964) ; the Bukavu war with the 10th Commando Battalion of Schramme (en

[171] G. Courade, « Peut-il y avoir des politiques d'autosuffisance alimentaire », in *Autosuffisance alimentaire,* ORSTOM-MSA, p. 81.
[172] G. Azoulay et J-C Dillon, *La sécurité alimentaire en Afrique, Op.cit*, p. 130.
[173] G. Courade, « Peut-il y avoir des politiques d'autosuffisance alimentaire », in *Autosuffisance alimentaire Op.cit*, p. 83.
[174] FAO, *Mission à moyen terme de la FAO : les grands enjeux pour la RDC en matière de production alimentaire*, document FAO présenté à la Table Ronde sur l'agriculture, Kinshasa 19 mars 2004, p.6
[175] Donnés d'enquête OCHA 2005, République Démocratique du Congo : analyse de la sécurité alimentaire et de la vulnérabilité, Kinshasa, SENAC, 2005, p. 49.

1967), Luashi and Kisenge attack by marceneries from Angola, under the orders of Bob Denard (November 1967) ; the war of « eighty days »(March 1977 June 1977) ; Kolwezi war (in May 1978) ; Moba I and Moba 2 wars and AFDL war. [177]

Self-proclamation of M'siri, which was associated with Arab-swahili and the Batetela, as the king, was accompanied by a big disorder as well as insecurity in the whole of Katanga; this was followed by people escaping in the bushes for fear of being arrested by M'siri men.[178]

B. Religious convictions

Churches adopted a faith which easily attracts the attention of marginalized people and others living in difficulties.[179] The people who themselves are already in difficult conditions to have access to right to food are asked to pray. There are also other forms of traditional Christian religion which prohibit their faithful from eating meat of certain animals either because they represent the devil or by their divinity. For example among the Kimbanguistes, it is prohibited to eat meat from pig, monkey, boar or all sorts of drinks. Among the Kitawala, pig, boar and black drinks are prohibited. Among the Jehova Witnesses, any animal before being eaten has to be slaughtered. When we take the sale conditions of meat in our urban centers, it is hard to know the circumstances for slaughter of animals. Among some healers, it is a list of fish and animals that the sick are prohibited from eating.

Witch craft also constitutes a factor of food insecurity, first, it is the source of rural-urban migration. People abandon villages for towns where they are exposed to food insecurity. Thereafter, in the rural areas, for fear of witch craft peasant farmers are afraid of cultivating big farms.

C. Socio-economic causes

The effects are unemployment, degradation of road infrastructure, loss of employment following closure of some companies, increase in poverty in rural and urban areas.

1. Infrastructure

Infrastructural degradation affected communication channels. Impassability of roads is a determining factor for food vulnerability. The National Railway Company of Congo which promoted transport was not spared. It suffered reduction of its tools of production until it became incapable of ensuring transport of food products.

Since the colonial period, agriculture and animal keeping were controlled. In each chieftaincy and grouping, there was an agricultural supervisor, whose duty was to visit every village to measure a farm for each adult at the beginning of cropping season. At the end of each cropping season, there would be supervision by the supervisor accompanied by policemen of the chieftaincy and the sector. Any person who did not finish his work was pursued and condemned. During the time of caning, the lazy one were canned before the members of the family.

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[177] Mukendi Nkashama et Kabeya Mukamba, *Guerres et mutations sociolinguistiques en République Démocratique du Congo (1960-1999)*, PUL, Tome II, Lubumbashi, 2000, p. 133.

[178] Mafulu Uyind'a Kanga, *La place du maïs dans l'alimentation de la population ouvrière noire de l'Union Minière du Haut Katanga, Op.cit, p. 67.*

[179] C. Nkuku Khonde et M. Rémon, *Stratégie de survie à Lubumbashi (R-D Congo), Op.cit*, p. 53.

1. Soil degradation

Monoculture and intensive agriculture are big factors of soil degradation. To cope with this situation employment of agricultural inputs are important for better yields. Land when it is cultivated continuously suffers degradation. Access to fertilizers becomes very costly, and this has an influence on agricultural production. The contact with companies supplying agricultural inputs is annoying. This assistance becomes more targeted without objective criteria in the selection of beneficiaries.

2. Demographic explosion

The incapacity for public authorities to manage the proportion in towns lead to malnutrition. In the towns of Katanga (Lubumbashi, Kolwezi, Kipushi, Likasi), rural urban migration makes rent costly and urban standards are not respected. For some when we have many houses, possibility arises to let the houses and get profit from rental income.

D. Natural causes

Certainly throughout the world there are several natural elements which can lead to reduction in food production. For the case of DRC we can mention floods, rain water deficiencies and heavy rains should warn weather specialists for their contribution. Effects of climatic change are being felt through disruptions of the rain pattern.

II. Legal basis of food security

Addressing food security started before independence. Public authorities imposed upon employers through various laws the duty to provide workers not only with safe food but also sufficient.[180]

II.1. International foundations

A. Universal Declaration of Human Rights

Article 25 of the Universal Declaration of Human Rights provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The universal declaration creates a block of rights which are linked to assure the human person a sufficient standard of living. This threshold of life must enable the person to ensure his health and that of his family through food, clothing, housing, and medical care.

[180] Mafulu Uyind'a Kanga, *La place du maïs dans l'alimentation de la population ouvrière noire de l'Union Minière du Haut Katanga, Op.cit, p. 75.*

B. International Covenant on Economic, Social and Cultural Rights

Article 11 on International Covenant on Economic, Social and Cultural Rights of 16th December 1966 provides:

1. *State parties to this Covenant recognize the right of every person to a sufficient standard of living for himself and his family, including sufficient food, clothing and housing, as well as constant improvement of his living conditions. State parties will take appropriate measures to ensure realization of this right and they recognize in this regard the essential importance of an international cooperation freely agreed upon.*
2. *State parties to this Covenant, recognize the fundamental right fort every person to be free from hunger and shall adopt individually and through international cooperation, necessary measures, including concrete programs (…).*

The DRC demonstrates this international solidarity through FAO, PAM and NGOs. However, the dimensions of the DRC and her politico-economic instability do not allow covering this food security.

C. African Charter on Human and Peoples' Rights

Article 29 of the African Charter on Human and Peoples' Rights of 26th June 1981 provides: *The individual has further the duty:*

1. *To preserve harmonious development of the family and work towards cohesion and respect of this family, to respect at all time his parents, to feed them and assist them in case of necessity (…)*

The African Charter talks of respect to parents, assistance to parents by giving them food and helping them as need arises. The framers of the Charter wanted to insist on African solidarity which involves a duty to parents.

Within the framework of sub-regional integration, intensification of changes will enable making agricultural products competitive not only domestically but also externally in all countries of sub-regional organizations: SADC, COMESA, CEEAC, CPGL, etc.

II.2. Internal Foundations

Article 47 of the 18th February 2006 Constitution provides:

The right to health and food security is guaranteed (…).

We notice that this concept was used in the normative context of the Democratic Republic of Congo.

Act n° 73-021 of 20th July 1973 on general regime on property, land and real estate and collaterals, in article 193, provides**:**
Any concession of rural lands is subject to enquiry carried in the form and according to the procedure provided by this procedure.

The enquiry has the objective of noting the nature of the land and the extent of rights which third parties would have on the land for concession (…).

This provision is the basis of many land conflicts in the rural areas where peasant farmers are often victims.

The ministerial order 003/CAB/MIN/AGRI.EL/2000 of 16th March 2000 on creation of the Technical Committee for coordination of a special program on food security of the *Ministry of Agriculture and Animal Husbandry* implemented a coordination structure of food security

Article 1er :

A technical committee for coordination of a special program for food security is created. The committee shall work under the authority of the National Committee on Food Security.

III. Conceivable legal instruments

III.1. Agricultural code

The agricultural code covers all economic activities of the agricultural and peri-agricultural sector ; it pertains to agriculture, animal keeping, fishing and fish farming, beekeeping, hunting, agro-forestry, processing, trade of agricultural and agri-food products, distribution and other agricultural services, as well their social and environmental functions.

The objective of the code is to move from a status of subsistence farming towards intensification of production and a status of small entrepreneurship. Applying an efficient arbitration on diversity of customary practices on the sector, simplify secured access to land to the benefit of peasant farming and investors in respect of land law, as we have demonstrated it during this study.

III.2. Regulatory acts

III.1. Applied agricultural research and extension work

This project was created in the department of agriculture and rural development for applied agricultural research and extension work known by the abbreviation« R.A.V. ».[181] It is in charge of coordinating national programs of for food crops and to develop therein activities of applied agricultural work and extension work.

The project of agricultural research and extension work exercises its activities in the entire national territory. It develops majority of these activities in stations and research facilities of the national institute for agricultural study and research known by the abbreviation « INERA ».

[181] Departmental Order n° 0008/BCE/ AGRIDRAL/85 of 20 August 1985 creating applied agricultural research and extension work.

III.2. Production and marketing

This Order creates within the department of Agriculture and rural development a development project for production and regional agricultural marketing.[182] The objective of this project is to increase agricultural production and develop marketing of agricultural products, enhance existing physical and institutional infrastructures so as promote development in Bandundu region.

III.3. Small and medium agricultural enterprises

This Order creates a project known as Project for establishment of small and medium agricultural enterprises,[183] with administrative and financial autonomy and placed under the direct authority of the State commissioner.

The project for establishment of small and medium enterprises is in charge of promoting small and medium enterprises. Its head office is in Kinshasa. It exercises its activities on the entire national territory.

III.4. Perennial crops in Zaïre

This ministerial order creates with the Ministry of Agriculture, rural animation and community development a project known by the name Development project for perennial crops in Zaïre, «P.D.C.P.» en sigle.[184]The development project for perennial crops has the duty of promoting and developing perennial crops in rural and industrial areas.

III.5. National coordination and agricultural centers

This Order creates within the Ministry of agriculture, fishing and animal keeping, a national coordination of agricultural centers, «CONACA» in abbreviation.[185] CONACA has several duties mainly of coordinating activities of all agricultural centers of the country ; to promote professionalization and modernization of agriculture in the agricultural centers mainly installation and support of agricultural professionals, rehabilitate existing centers and build new centers, plan in agreement with the heads of the center, activities of their respective center.

III.6. Presidential Property

This Order create, under the name «Domaine présidentiel de la N'Sele» (D.P.N),[186] (*Presidential Property of N'Sele*) a public institution with legal personality and subjected to the control of the President of the Republic. This institution stands in for public service under

[182] Departmental Order 0011/BCE/AGRIDRAL/85 of 17th December 1985 on creation and organization of the development project for regional agricultural production and marketing.
[183] Departmental Order 024/BCE/DDR/87 of 15th August 1987 on creation of a program for establishment of small and medium agricultural enterprises «P.I.P.M.E.A.».
[184] Ministerial Order 0028/BM/AARDC/91 of 18th July 1991 on creation of a development project for perennial crops in Zaïre, «P.D.C.P.».
[185] Order 012 of 11th November 2002 on creation of national agricultural centers, «CONACA».
[186] Ordinance-Law 73-034 of 19th September 1973 on creation of a public institution known as Domaine présidentiel de la N'Sele.

the same name, whose property, rights and obligations it takes. The institution is in charge of managing and using on behalf of the state, lands, buildings and facilities found within the perimeter of the N'Sele property. In Lubumbashi, this same presidential property is found within Kampemba area.

III.7. Agricultural study and research

The national institute for agricultural study and research,[187] created by Ordinance 186 of 12th November 1962, is a technical and scientific public institution with a legal personality. It also governed by the provisions of the Act 78-002 of 6th January 1978 on general provisions applicable to public companies. Its head office is in Yangambi. Study and research centers can be established in any other place within the Republic, through an authorization issued by the supervision authority. Its objective is to promote scientific development of agriculture in Zaire. It is mainly in charge of ensuring administration of agricultural institutions whose management is entrusted to it, organize agricultural study missions and training of experts and specialists, carry out any study, research, experiments and, in general all works which are related to its objective.

III.8. National Seeds Bureau

A National Seeds Bureau in abbreviation «Bunasem»[188], is created in the Department of Agricultural and Rural Development, in charge of development and control of the quality of national seeds production. It is specifically in charge of installing and controlling farms for multiplication of seeds, ensure planning and programming production of controlled and certified seeds at seeds multiplication farms; establish production and multiplication plan leading to certification of seeds; ensure planning and programming for acquisition of basic genetic material in research facilities, ensure quality control of all seeds produced and introduced on the national territory.

It exercises its activities in the entire national territory. It is represented in the regions by regional delegates in charge of control and supervision of operations for multiplication of seeds in the farms. They are also in charge of assessing real seed needs, stimulate effective demand for improved seeds and program production of quality seeds per multiplication structure.

III.9. National Information Center

This Center is in charge of information and early warning on agricultural calamities, «Ceniarca» in abbreviation,[189] whose head office is in Kinshasa. It specifically oversees coordination of all available sources of information with a view to write reports on crops, mainly meteorological data, surface areas sowed, general state of harvests and pastures, information on diseases and pests affecting plants and animals;

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[187] Ordinance 78-211 d 05 may 1978 on articles of association of a public company known as Institut national pour l'étude et la recherche agronomiques, en abrégé «I.N.E.R.A.».

[188] Departmental Order 00003/BCE/AGRIDAL/84 of 12th May 1984 on creation of the National Seeds Bureau «Bunasem».

[189] DEPARTMENTAL ORDER 0009/BCE/AGRI/87 of 15th September 1987 on creation of the National Information Center and early warning on agricultural calamities «Ceniarca».

- Early detection of precursory signs of an agricultural crisis by having recourse to warning indicators and write a report on imminent food shortages due to poor harvests attributable to drought, locusts, floods, hurricanes and other agricultural calamities;
- The collection of all information and date on the availability of food crops, mainly cereals, seeds and agricultural inputs;
- Writing a report on socio-economic indicators of food supplies;
- Studies and putting in place all short and long term measures to fight against drought, locusts or other causes of agricultural calamities, in collaboration with specialized national departments and international bodies;
- Coordination and direction of various interventions aimed at reducing the extent of damage and ensure follow-up of rapid rescue operations on the field for victims of agricultural calamities.

The Centre serves as a Liaison Center for FAO within the framework of the World Information System and Early warning on food and agriculture.

III.10. National Service for Animal Traction

A National Service for Animal Traction in abbreviation «Senatra».[190] is created in the General Secretariat of Agriculture. It is in charge of promoting light mechanization in small scale farming through animal traction, mainly by initiating small scale farmers to the techniques of training animals to do yoke ploughing, as well as managing draught animals ; technical advice from uses of animal traction. This service is also in charge of defining animal policy, mainly bearing in mind economical and ecological requirements through development standards for manufacturing ploughing materials, development of annual statistics for yoking and fields sown with cereal crops relating there to, etc.; trials and similar tests of bovine traction materials introduced or to be introduced in Zaïre. Its activities are practiced on the entire national territory and its management office is in Kinshasa in the General Secretariat of Agriculture.

Conclusion

Africa appears on the world's screens in form of dramatic clichés : droughts, famines, disorders, coups d'états, epidemics, refugees ( ) the desert is growing bigger and bigger, swallowing up millions of hectares each year ; natural balances are staggering because havoc has been wrecked in forests and vegetation covers. Children are being in big numbers, but nobody knows for how long they will live. Big towns are stretching their overpopulated slums.[191] Food security is an ideal to attain for all countries of the world with a view to fight against poverty, malnutrition and famine in the world. DRC has agro-pastoral potentialities capable of attaining local, national and international food security.

The soul of a nation is the peasant farmer who seems to be excluded, marginalized from the political scene and even from international fora on food security. This exclusion poses problems of tolerance between urban dwellers and peasant farmers. The peasant farmer sees resolutions taken in big fora being imposed on him and which sometimes poses a

[190] ARRÊTÉ 0020/CAB/VPM/AGRIDRAL/93 of 26th July 1993 on creation of a National Service for animal traction «SENATRA» in abbreviation.

[191] E. Pisani, *Pour l'Afrique*, Paris, Ed. Odile Jacob, 1988, p. 17.

problem of applicability. The DRC needs an agricultural code which encourages agriculture and animal keeping. Current investments are directed towards the mining sector while the Congolese still remember the case of Gecamines, the big mining which plunged the country into a critical situation which paralyzed the national economy. Cleaning up the legal and fiscal framework is necessary for the promotion of agriculture and animal keeping so to realize the right to food security.

Experience in the DRC demonstrated that political and economic instability, failure of SOFIDE, insolvency of the Agricultural Credit Bank and abandonment of cooperatives were principally the reasons behind the fall of the agricultural sector, fishing and animal keeping. Revival of activities in this sector as described by the agricultural code must start by a short term, medium term and long term project.

1. Short term

- Securing agricultural and animal keeping lands in the rural areas. The Act n° 73-021 of 20th July 1973 on general regime on property, land and real estate regime and regime of collaterals, especially in Article 193 does not seem to secure people living in rural areas. The observation done on all farms and parks around Lubumbashi show how the peasant farmer is not safe while he is the soul of the nation.
- Manual digging of roads before the start of big works will enable farmers to get their produce to the market. A robust budget should be allocated to the chieftaincy. The chieftaincy will support the roadmen to make the agricultural roads passable. Through world solidarity on hunger, this budget can be obtained from donors.
- Promotion of cash crop farming to get financial means for people living in rural areas with a view to meet the basic needs for housing (iron sheet roofed house),schooling for children and medical care etc.
- Grouping of villages for an urbanization project and modernization of villages. Multiplicity of villages as is the case in the DRC where there are two or three people provided that we talk of a village. The grouping can take into account the main town in the area, chieftaincy, groups or lands.
- Supporting and training farmers and animal keepers from the rural areas. Rehabilitation of agronomists and veterinaries in sectors and counties for monitoring agricultural and animal keepers works (sharing of spaces, advice).
- Convicting theft by imposing the maximum sentence to deter and discourage potential thieves.

2. Medium term

- Electrification program for villages grouped together to enable installation of modern structures. Modernization of Kashobwe[192] village was possible thanks to electrification, which enabled the construction of a modern hospital and many activities.
- Providing safe drinking water to avoid people living in rural areas from covering long distances on foot to fetch water. In most cases, women are the ones who transport water for domestic use, which affects women rights.

[192] Kashobwe village is situated in Kasenga territory, it was constructed by Moise Katumbi Governor of Katanga using his own funds, today Kashobwe is a tourist attraction site.

- Rehabilitation of chieftaincies and sectors into real basic institutions, in conformity with the Act 08/016 of 17th October 2008 on organization and functioning of decentralized territorial entities.
- Mechanization of agriculture and improvement of animal species and fish industrialization for food self-sufficiency.
- Creation of community radio to sensitize farmers and animal keepers on the new technology which would improve their yields and thus get the necessary resources with a view to meet their vital needs
- Commencement of big works for setting transport channels for goods (roads, rail and river).

3. Long term

- Creation of agricultural credit banks to finance farmers and animal keepers.
- Establishment of local supermarkets in areas within the reach of peasant farmers where they can find their improved seeds, fertilizers, agricultural inputs, fishing machines, animal keeping tools etc.
- Construction of modern hospitals and schools to make this area attractive. This will inversely change the movement of people from towns to villages if the infrastructure is similar to the one in towns.
- Setting recreation centres in the rural areas: halls, football stadia, volley-ball pitches, basket-ball and tennis courts, etc.
- Exportation of surplus produce towards countries in need through a good storage system for the products and good preservation.
- Imposing agricultural tax so as to contribute to the state budget. Wrong mentality of the Congolese people is imposing the tax before the activity starts, which discourages people who want to invest in the field of agriculture. As an illustration, we can take the mining sector where there is the practice of « key money »,a practice drawn from our culture : « *kingiya pori*[193], *kifunga mulango*[194] »
  Sustainable development of the agricultural sector can lead to the development of the rural areas. This state can only be realized through rehabilitation of roads, railways and rivers so as to promote production and marketing of products to urban centers where the biggest number of population is found. Formerly, at the beginning of every cropping season, the agricultural supervisor used to pass and measure the surface of the land to be cultivated for each family in line with the family composition. If any person did not finish cultivating his farm he was subjected to payment of fine and sometimes prison sentence.

[193] *Kingiya pori* is a practice for manifestation of will, when one goes to see a healer for treatment, he/she leaves him/her some money to enable him/her to collect the necessary ingredient, not dependent on the results which will require payment of the service rendered. The payment can be done in kind.

[194] For he who wants to marry, it is *kifunga mulango*. He must start by paying pre-dowry which is different from dowry, the meaning is that no other person can come and ask this girl for marriage.

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