

# The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter

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## Summary

*This article analyses the causes, nature and settlement of the conflict in the Democratic Republic of Congo (DRC), a conflict that has left four million people dead. The problems of implementing the Lusaka Ceasefire Agreement of 1999 are discussed. This is followed by a discussion of the Inter-Congolese Dialogue that led to the adoption of the Global Agreement and the Interim Constitution in April 2003. Though the Interim Constitution recognises a wide range of human rights, no provision for the enforcement of these rights exists. A complex power-sharing system has been set up to integrate the various former rebel groups into the interim government. An effective state is essential for the protection of human and peoples' rights. Lasting peace will not be possible without a state built on democracy, constitutionalism and human rights.*

## 1 Introduction

In his famous encyclical *Populorum Progressio*, Pope Paul VI emphatically stressed that development was 'the new name for peace'.<sup>1</sup> Development is unlikely without peace and *vice versa*. On the other

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<sup>1</sup> Encyclical of Pope Paul VI on the Development of Peoples, 26 March 1967, available at <[http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_26031967\\_populorum\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html)> (accessed 31 July 2003).

hand, as evidenced by the situation in a number of African countries such as Côte d'Ivoire, Liberia, Zimbabwe and the Democratic Republic of Congo (DRC), peoples are denied peace wherever there is no democracy or respect for human rights. Democracy promotes and ensures popular participation in political and public affairs, development and peace. Development and peace are particularly interrelated in the African context. They feature among the rights enshrined in the African Charter on Human and Peoples' Rights (African Charter or Charter),<sup>2</sup> which was ratified by the DRC and is therefore binding on that country.

Ever since its independence from Belgium on 30 June 1960, the DRC has represented the full range of African maladies, from colonial domination and exploitation through corruption, authoritarian rule and ethnic conflicts, to military regimes and mismanagement.<sup>3</sup> The political and constitutional history of the Congo has been a vicious circle of *coups* and counter-*coups*, rebellions, mutinies, round-tables, national conferences or dialogues and unconstitutional regimes, the whole unfolding as tragedy and farce.<sup>4</sup> Some 40 years on, we have gone from one crisis to another crisis, with actors nearly identical to the ghosts of the past.<sup>5</sup> In 1996, after three decades of authoritarian rule, Mobutu was terminally ill and unable to serve his Western patrons. Laurent-Désiré Kabila, a former Lumumba disciple turned businessman, was traced to Eastern Africa, reconverted to active politics, and appointed to lead a rebellion against Mobutu by the US-proclaimed 'new breed' of African leaders. On 17 May 1997, Kinshasa fell to Kabila's *Alliance des Forces Démocratiques de Libération* (AFDL). Kabila proclaimed himself President. On 2 August 1998, some of Kabila's comrades from the Banyamulenge ethnic group rebelled against Kabila, accusing him of authoritarianism, corruption, mismanagement, nepotism and tribalism.

<sup>2</sup> Arts 13, 22 & 23. Other peoples' rights in the African Charter are equality of peoples (art 19); self-determination (art 20); the right to freely dispose of their wealth and natural resources (art 21); and the right to a favourable environment (art 24). Individual and collective rights enshrined in the Charter include non-discrimination (art 2); equality (art 3); life (art 4); dignity and freedom from slavery, torture and inhuman punishment (art 5); liberty and security of person (art 6); fair trial and access to courts (art 7); freedom of religion and conscience (art 8); freedom of expression and information (art 9); freedom of association (art 10); freedom of assembly (art 11); freedom of movement of nationals and right of asylum (art 12); the right to participate in the political and public affairs (art 13); property rights (art 14); equal pay for equal work (article 15); the right to attainable health (art 16); the right to education (art 17); and family rights and non-discrimination against women (art 18). Peoples' rights encompass equality of peoples (art 19); self-determination (art 20); the right to freely dispose of their wealth and natural resources (art 21); the right to development (art 22); national and international peace and security (art 23); and the right to a favourable environment (art 24).

<sup>3</sup> T Mkandawire 'Introduction' in K Mbaya (ed) *Le Zaïre vers quelles destinées?* (1992) IX-X.

<sup>4</sup> As above.

<sup>5</sup> As above.

They created a rebel movement named *Rassemblement Congolais pour la Démocratie* / Congolese Rally for Democracy (RCD), with backing from some of Kabila's former allies, notably Rwanda and Uganda. The *Mouvement pour la Libération du Congo* / Movement for the Liberation of Congo (MLC) joined the rebellion against Kabila. The RCD later split into RCD-Goma, which remained the main rebel group, RCD-National (RCD-N) and RCD-*Mouvement de Libération* (RCD-ML).

The most recent conflict in the DRC involved several foreign rebel groups allegedly based in the DRC and launching attacks against their respective governments.<sup>6</sup> At the climax of the conflict, at least seven other African countries had regular troops in the DRC. Angola, Namibia, Zimbabwe and Chad lent support to President Kabila, while Rwanda and Uganda backed the rebels. This conflict is probably the most important crisis Africa has experienced in its post-colonial history, and one of the most complex and perplexing events that the post-Cold War world has seen,<sup>7</sup> with 'effects beyond the sub-region to afflict the continent of Africa as a whole', according to UN Secretary-General Koffi Annan.<sup>8</sup> In the words of Howard Wolpe, the US Special Envoy to Africa's Great Lakes region, the DRC war was 'the most widespread interstate war in modern African history'.<sup>9</sup> It was also considered by some analysts the 'African equivalent of World War I' and labelled 'African War'.<sup>10</sup> The conflict resulted in the violation of virtually all the rights in the African Charter. Over four million people reportedly died during the conflict. This is a figure much higher than the national population of many African countries and several times superior to the number of victims of the Rwandan, Yugoslav and Sierra Leonean conflicts that attracted so much attention that the Security Council eventually resolved to set up three international tribunals to prosecute and judge those persons responsible for the violation of international human rights law and humanitarian law.<sup>11</sup>

<sup>6</sup> These included the FDD (Forces for the Defence of Democracy in Burundi), the Interahamwe, the ex-FAR (*Forces Armées Rwandaises*, Former Rwandan Army of the late President Habyarimana), the Ugandan ADF (Allied Democratic Forces), LRA (Lord's Resistance Army), UNRF II (Uganda National Rescue Front II), NALU (National Army for the Liberation of Uganda), FUNA (Former Ugandan National Army), and WNBFF (West Nile Bank Front) as well as the Angolan rebels of UNITA (National Union for the Total Independence of Angola).

<sup>7</sup> W Breytenbach *et al* 'Conflicts in the Congo: From Kivu to Kabila' (1998) 8 *African Security Review* 33.

<sup>8</sup> 'Extract from the Report of the UN Secretary-General on UN Deployment in the DRC' (2000) 7 *South African Journal of International Affairs* 183.

<sup>9</sup> H Wolpe 'The Great Lakes crisis: An American view' (2000) 7 *South African Journal of International Affairs* 27.

<sup>10</sup> S Naidoo 'Rebels without a pause: Diplomacy in the DRC conflict' (1999) 6 *South African Journal of International Affairs* 155.

<sup>11</sup> See UN Doc S/RES/808 of 22 February 1993 (Security Council Resolution authorising the establishment of the International Criminal Tribunal for the Former Yugoslavia

Despite calls from the belligerents themselves and human rights organisations, it is unlikely that an international criminal tribunal will ever be established for the DRC. All in all, the international response to human rights violations in the DRC was an unsatisfactory one. Even worse was the response of the African Commission on Human and Peoples' Rights (African Commission).<sup>12</sup> Anyone concerned with the protection of human rights should be interested in the DRC conflict which impacted so negatively on the rights of more than 50 million African people and the resolution of which constitutes a step forward in the promotion of human and peoples' rights in Africa. Peace and democracy in the DRC are critical for peace, democracy, and development in Central Africa, the Great Lakes region and Africa as a whole. This is not only a Congolese but also an African affair. The resolution of the DRC conflict is essential if the vision on an African Renaissance or African political and economic renewal is to be realised.<sup>13</sup> The resolution of the conflict is also instrumental for the success of initiatives such as the New Partnership for Africa's Development (NEPAD), whose main objective is to place African countries individually and collectively on the path to sustainable growth and development that require peace, security and good governance.<sup>14</sup>

The present paper briefly examines the causes and the nature of the DRC conflict. It reviews the efforts made at settling the conflict, starting from the signing of the Lusaka Agreement, to the organisation of the Inter-Congolese Dialogue (ICD) that ended with the adoption of the Global and Inclusive Agreement and an interim Constitution for the Congo. It also highlights some crucial challenges ahead on the road to sustainable peace and development in the Congo.

## 2 Causes and nature of the conflict

The causes of the conflict, as should be its solutions, were both internal and external.<sup>15</sup>

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(ICTY) and UN Doc S/RES/827 of 25 May 1993 establishing the ICTY; UN Doc S/RES/955 of 8 November 1994 establishing the International Criminal Tribunal for Rwanda; Security Council Resolution 1315 of 14 August 2000 on the establishment of the Special Court for Sierra Leone.

<sup>12</sup> Arts 30–59 African Charter.

<sup>13</sup> Wolpe (n 9 above) 27–33.

<sup>14</sup> See NEPAD documents available on <<http://www.avmedia.at/nepad/indexgb/html>> (accessed 7 September 2003).

<sup>15</sup> MB Mangu 'Maintenance and restoration of peace in the Great Lakes region: A reflection on the crisis in the Democratic Republic of Congo' (2000) Paper read at the 12th Annual Conference of the African Society of International and Comparative Law, Accra, Ghana, 7–12 August 2000.

## 2.1 Internal causes: Authoritarianism, human rights violations, ethnicism, the national question and rebellions

The rebellion against Mobutu owed much of its success to the support it received from the people, the political opposition and civil society that were dissatisfied with the corrupted and dictatorial regime. They welcomed Kabila with high expectations that he would work with everybody to rebuild the country. Unfortunately, their expectations were too high, as one dictatorship replaced another. Kabila managed to amend the AFDL's charter and to confiscate all its powers. He committed some of his former comrades to prison, creating frustration in his own movement. Power was progressively ethnicised. The majority of the members of the cabinet, senior officers in the administration, the security services and the army were appointed along ethnic lines among the Balubakat. The tribalisation or ethnicisation of power was even faster than it was under Mobutu's rule. Tribute should be paid to Kabila for having succeeded in a very short time — just a few months, where Mobutu spent years — to build up his ethnically-based power and dictatorship. As Bernardin Mungul Diaka, a well-known Congolese politician, rightly puts it: 'Only the driver changed but the car (country), road, methods and techniques of driving it remained all the same.'<sup>16</sup> After Belgium's King Léopold II and Mobutu, Kabila was the Congo's new 'King' and the 'rightful' owner of the country and its abundant resources.

His sense of ownership was so strong that he found it fit to unilaterally change the country's name from Zaire to the DRC as Mobutu had done the reverse of in 1971. The DRC had no constitution other than Kabila's word. The 'Bill of Rights' only consisted of those rights Kabila was willing to give his subjects.

Under Kabila, the Congolese people lost the few rights and freedoms gained in the struggle against the Mobutu's authoritarian regime. The rights curtailed were not only individual rights, but also collective rights, including the rights of minorities such as the Banyamulenge, who were denied their Congolese citizenship. In 1996 a violent inter-ethnic conflict broke out, in the form of the expulsion of Congolese Tutsi from the Masisi region. This conflict was the backdrop to the Banyamulenge-dominated rebellion that led to the clearing of the refugee camps and eventually to Mobutu's ousting.<sup>17</sup> Laurent-Désiré Kabila, who benefited from the Banyamulenge revolt against Mobutu, turned out to be their new target, as his regime engaged in a manhunt against the

<sup>16</sup> MB Mangu 'State, conflict and reconstruction in the Democratic Republic of Congo' (2002) Paper read at the General Assembly of the Council for the Development of Social Sciences in Africa (CODESRIA), Kampala, Uganda, 5–8 December 2002 22.

<sup>17</sup> Wolpe (n 9 above) 31.

Banyamulenge and other Tutsi, who were compared with 'vermin',<sup>18</sup> to be squashed throughout the country. However, the Kabila regime did not create any paradise of rights. In fact, it froze all individual and collective rights of the Congolese. Accordingly, like Mobutu, Kabila himself called for a rebellion against his own power. He could not count on the massive popular support he enjoyed against Mobutu. Nor could he rely on a national army strong enough to defend his power and the integrity of the Congolese territory against the rebels who were backed by some foreign powers with vested interests in the DRC.

## 2.2 External causes of the conflict: Foreign interventions

External factors contributed to the Congolese conflict. As already emphasised, the conflict in the Congo was also externally driven and involved troops of several other African countries, siding with either the rebels or the DRC government, all providing official justifications for their interventions, but acting on a common hidden agenda.

### 2.2.1 Official justifications for foreign interventions

In September 1996, the Banyamulenge, many of whom had served with their kinsmen in the Rwandan army, were prompted by Zairean persecution and the (Tutsi-led) Rwandan government's anticipation of an increase in attacks by Hutu militias from their bases in the refugee camps of Eastern Zaire, to launch a counter-strike, partly retaliatory but in the main pre-emptive, against the Mobutu and thereafter the Kabila regime that reportedly backed them.<sup>19</sup> It is the repeated failure of the international community to take effective action against the *génocidaires* of 1994 that provided the major justification for Rwandan unilateral intervention in the DRC.<sup>20</sup> Uganda also made it clear that its army was in the Congo to fight Ugandan rebels allegedly based in Eastern Congo.

<sup>18</sup> The word was used by Abdoulaye Yerodia Ndongbasi, the DRC Foreign Affairs Minister under President Laurent-Désiré Kabila. On 11 April 2000 a Brussels magistrate, Damien Vandermeersch, had issued an international arrest warrant against him on charges of crimes against humanity. The prosecution was based on statements made by Mr Yerodia in August 1998 when he was head of the Presidential Office. He denied that he referred to the Banyamulenge or Congolese Tutsi as 'vermin', but rather to the 'aggressors' of the DRC. The Belgian public prosecutor Benoit Dejemeppe told Reuters that Mr Ndongbasi was liable to arrest if he entered a country willing to execute the warrant. However, the International Court of Justice, seized by the DRC government, nullified the warrant in 2002 on the ground that it was issued in violation of immunity enjoyed by Mr Ndongbasi as DRC Minister of Foreign Affairs. See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* <<http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>> (accessed 7 September 2003).

<sup>19</sup> R Cornwell & J Potgieter 'Africa Watch: A large peace of Africa?' (1998) 7 *African Security Review* 74.

<sup>20</sup> Wolpe (n 9 above) 31.

Rwanda and Uganda referred to international law and justified their cross-border raids and interventions in the DRC as 'hot pursuit'. This was, however, an unfortunate misuse of the term. The right to hot pursuit belongs to the law of the sea. According to Dugard, if a state wishes to justify cross-border raids, it must do so in terms of the right of self-defence or, possibly reasonable reprisal action.<sup>21</sup>

Dugard noted that, unlike self-defence, which is authorised in modern international law,<sup>22</sup> reprisals remain illegal *de jure* in view of article 2(4) of the United Nations (UN) Charter.<sup>23</sup> Even if the argument of hot pursuit and self-defence or anticipatory self-defence could stand by default, it would not hold. Hot pursuit or self-defence cannot be invoked to acquire title to the territory of a foreign state. Nor can it be used to justify the occupation of the Congolese territory, the exploitation of the Congolese natural resources, the commission of gross human rights violations and the establishment of a puppet government in Kinshasa under the false pretence of helping the Congolese people establish democracy.

Ugandan and Rwandan leaders also justified their campaign in the DRC on the basis that they wanted to help the Congolese people get rid of Kabila and establish an all-inclusive democratic regime in the DRC. Such a justification was really surprising and made a mockery of democracy. At no time did we hear that the people of the DRC called upon Rwanda and Uganda for assistance in ousting their dictator and establishing a genuine democratic regime. Rwanda and Uganda, who pretended to help 'free' or 'liberate' the Congolese people from dictatorship and establish a more human-rights friendly regime in the Congo, are not known as fully-fledged democratic countries respectful of these rights.

Such arguments, as recently advanced by 'Big Brothers' Bush and Blair to wage war on Iraq, are unjustifiable in modern international law. It is inconsistent with the principles of non-aggression, non-interference in the internal affairs of another state, development of friendly relations among nations, equality of states, self-determination of peoples and respect for the political independence of a foreign state that should govern the civilised world.<sup>24</sup>

<sup>21</sup> J Dugard *International law: A South African perspective* (2000) 421.

<sup>22</sup> See art 51 of the UN Charter; *Nicaragua v USA* 1986 ICJ Reports 14 99–100 (the court held that self-defence was a rule of customary international law); Dugard (n 21 above) 418.

<sup>23</sup> Dugard (n 21 above) 420.

<sup>24</sup> See art 1(7) UN Charter; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations 1970 (GA Res 2625 (XXV) 1970); Resolution on the Definition of Aggression, Preamble and art 7.

Just weeks after the outbreak of the rebellion initiated by Banyamulenge-dominated regiments in Kivu on 2 August 1998, the rebel troops had already advanced across the country from the east to the western seaboard. They had captured the Kitona and Mbanza-Ngungu military bases in the Bas-Congo, where they recruited a number of soldiers of Mobutu's past army and were heading for Kinshasa. Faced with this rapidly deteriorating military situation, Kabila denounced the rebellion as an invasion by Uganda and Rwanda in an effort — in which he ultimately succeeded — to mobilise the Congolese people around an anti-Tutsi banner and to secure his own political survival.

Kabila also appealed to other SADC members for assistance to a fellow SADC member state under external aggression.<sup>25</sup> Following a meeting of their defence ministers in Harare on 17 to 18 August 1998, Angola, Namibia and Zimbabwe agreed that the government of Laurent-Désiré Kabila required the full support of the SADC to guarantee its survival. Speaking in his capacity as head of the SADC Organ on Politics, Defence and Security, President Mugabe announced that the meeting had agreed that military aid should be sent to secure Kabila's position.

Although President Mandela, who was the chairperson of the SADC, disagreed that it was a proper SADC decision, since he was not consulted and all SADC members did not attend the meeting Angola, Namibia and Zimbabwe later sent troops to the DRC. Chad also joined them.

In line with the principle of political independence or sovereignty, people are free to choose their own political system or government.<sup>26</sup> This is an internal affair, an exercise of self-determination, which allows no interference by any foreign state. However, there are circumstances where interventions by foreign governments to support a friendly incumbent government are permissible under international law. This is the case, for instance, when the rebels are supported by another or other states and such support is sufficiently substantial to amount to an armed attack or an aggression.<sup>27</sup>

### 2.2.2 *Hidden agenda for foreign interventions*

With the end of the Cold War, President Mobutu, who had served the American and Western interests in Africa, was no longer of use and was regarded a man of the past. America had now to bank on a new generation of leaders represented by Presidents Museveni and Kagame in the Great Lakes region, and the new American 'boys' were asked or just too willing to assume leadership in the region. To better serve their interests, the Rwandan and Ugandan leaders realised that they had to

<sup>25</sup> The DRC became SADC member state at its Blantyre summit in 1997.

<sup>26</sup> *Nicaragua v USA* (n 22 above) 108.

<sup>27</sup> Dugard (n 21 above) 426–428.



maintain control over the exercise of power in the DRC. By dismissing the Rwandan and Ugandan officers who commanded the Congolese army and were accredited with him to look after the interests of their governments, Kabila's days were numbered, and according to the logic of his former patrons he no longer qualified to remain in power in the DRC.

Rwanda and Uganda sought to replace him with a more pliant client. Angola, Chad, Libya, Namibia and Zimbabwe reacted by sending troops or providing some kind of assistance to President Kabila in an attempt to restore the regional balance of power and help maintain their own influence in the region.

As Howard Wolpe stressed, the interests at stake in the Congolese crisis were enormous.<sup>28</sup> They were political, military but also, and even mostly, economic ones. The recent UN report on the plundering of the resources of the DRC in which the Congolese warring parties and their respective allies were involved, bears testimony to this. Foreign countries involved in the Congolese conflict became exporters of diamonds, gold, copper, timber and other natural resources from the DRC. The fighting between Rwandan and Ugandan armies on the Congolese territory of Kisangani, for instance, may only be understood as a fight for leadership and control over diamonds, the gold mining industries and other natural resources.<sup>29</sup> On the other hand, the Zimbabwean battle for Mbuji-Mayi was mostly a war over the control of diamonds. Economic interests were important for the rebels' allies and Kabila's supporters as well.<sup>30</sup>

<sup>28</sup> Wolpe (n 9 above) 27.

<sup>29</sup> Dugard (n 21 above) 126.

<sup>30</sup> The management of *Gécamines*, the leading Congolese mining company, was given to Billy Rautenbach, a Zimbabwean businessman very close to President Mugabe, in compensation for the role played by the latter in Kabila's political survival. Zimbabwe entered into a joint venture with the DRC in the diamond industry through Zimcon operating in Mbuji-Mayi. Senior officers within the Zimbabwe Defence Force, through a Harare registered company, Osleg, also embarked on a partnership with a Congolese company, Comiex. This company had links with Sengamines, an alluvial diamond-mining project in the DRC. Zimbabwe was even poised to take over MIBA, the *Minière des Bakwanga*, in Kasai. Meanwhile Zimbabwe, through the Zimbabwe Defence Industries, entered into a partnership with the DRC through Congolese Strategic Reserves to form Congo Duka (Pty) Ltd. The Zimbabwean parliament ratified this agreement in 1999. To name but a few theatres of conflict, internal wars in Angola, Sierra Leone and DRC were also diamond-fueled. Ironically, the precious stone and oil have turned out to be a curse of many African peoples. The real motivation of the recent British and US war on Iraq also demonstrates how oil may be a misfortune for Iraq and other Arab countries around Israel.

### 3 Nature of the conflict: Rebellion and foreign aggression

One of the very crucial questions about the Congolese conflict concerns its nature. Up to the signing of the Lusaka Agreement, the rhetoric of the Kinshasa government and its allies tended to deny the internal dimension of the Congolese crisis. According to them, there was no rebellion in the DRC. The country was rather a victim of aggression by Rwanda, Uganda and Burundi.<sup>31</sup> On the other hand, the RCD, MLC and their supporters argued that what was raging in the DRC was a rebellion of the Congolese people against the authoritarian rule of President Kabila and not a foreign aggression. In fact it was a rebellion and a foreign aggression.<sup>32</sup> A rebellion, as any insurrection, civil war or revolution, is a conflict under domestic or national law.

One of its prominent features is that an organ of the state, generally the army or part thereof, revolts or takes up arms against the government in an ultimate effort to obtain regime change. The rebels are citizens or claim the citizenship of a state. In the DRC conflict, those who took up arms against Kabila were advised and equipped by foreign countries, but the majority of them were Congolese citizens. The Bugera, Karaha, Ondekane and the like who formed the RCD were previously state minister, foreign affairs minister and commandant of the Congolese Armed Forces under the AFDL government of President Kabila. Like many other Congolese warlords, Jean-Pierre Bemba, who headed the second rebel faction backed by Uganda, the MLC, is a Congolese citizen whose father was even appointed minister in the Kabila government. Rebellion is outlawed in domestic law where it is generally considered a crime of high treason against the security of the state. Should they succeed in overthrowing the government of the day, the rebels would then be acclaimed as liberators and impose themselves as the new leaders of the country. This is a strange paradox.

In terms of international law, article 2(7) of the UN Charter in principle prevents the world body from intervening in matters under the domestic jurisdiction of states, but things are changing in African international law. It was decided during the 1999 OAU summit in Algiers that leaders who came to power by use of force should no longer be welcomed in any assembly of democratically elected heads of state.<sup>33</sup> The

<sup>31</sup> Wolpe (n 9 above) 34.

<sup>32</sup> Mangu (n 15 above) 12–16.

<sup>33</sup> Surprisingly, most of those who took the decision did not qualify as 'democratically elected heads of state'. However, it was enforced against Côte d'Ivoire when the government of General Robert Guei was not invited and failed to participate in the 2000 OAU summit. It is highly expected that the AU 2003 summit in Maputo will make the same decision against the government of General Bolize who overthrew the democratically elected government of President Ange Patassé in the Central African Republic.

Constitutive Act of the African Union (AU) prohibits the use of force to bring about regime change. UN Secretary-General Kofi Annan, who suggested that it should inspire the UN General Assembly, welcomed the decision of the 1999 OAU summit.<sup>34</sup> There was an internal dimension of the Congolese conflict that could not be ignored.

However, analyses such as the study by Geldenhuis,<sup>35</sup> addressing the DRC crisis as a rebellion and ignoring its external dimension as a foreign aggression, were partial and partisan. The conflict involved a complex mix of ethnicity, politically alienated militia and foreign troops that were not easily distinguishable from the rebels they supported. The efforts furnished by Rwanda and Uganda in particular were really extensive and their intervention could be depicted as a kind of invasion of the DRC.<sup>36</sup> It was an aggression and as such a flagrant violation of universal and African international law.<sup>37</sup>

## 4 Conflict settlement

Diplomatic efforts within the SADC, OAU/AU and the UN culminated in the signing of the Lusaka Agreement and the holding of the inter-Congolese political negotiations that ended with the adoption of the global Agreement and an interim Constitution for the DRC.

### 4.1 Lusaka Agreement

The 1999 Lusaka Ceasefire Agreement was negotiated within the framework of the SADC.<sup>38</sup> It consisted of three articles and three annexes. Article I dealt with the ceasefire, the date of its entry into force, its meaning and implications for the parties. Article II addressed the security concerns of the DRC and its neighbouring countries. Article III embodied the 'Principles of Agreement'. Annexe A, which comprised 13

<sup>34</sup> K Annan 'Durable peace and sustainable development in Africa' (2000) 7 *South African Journal of International Affairs* 2.

<sup>35</sup> D Geldenhuis 'Rebuilding the DRC' (2000) 7 *South African Journal of International Affairs* 43–50.

<sup>36</sup> C de Coning 'Peacekeeping in the DRC: A new role for the United Nations' (1999) *Conflicts Trends* 17.

<sup>37</sup> See arts 1 & 2 UN Charter; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (GA Res 2625 (XXV) 1970); art III OUA Charter; arts 3(b), 4(a), (b), (e), (f), (g), (i), (o) & (p) Constitutive Act of the AU; Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res 1514 (XV) 1960); and 1974 UN General Assembly Resolution GA Res 3314 (XXIX) 1974 on the Definition of Aggression; Statute of the International Criminal Court (UN Doc A/CONF183/9 of 17 July 1998), arts 5(1)(d) & (2).

<sup>38</sup> 'DRC ceasefire agreement' (2000) 7 *South African Journal of International Affairs* 165–181.

chapters, concerned the different modalities for the implementation of the Agreement. Annexes B and C related to its framework and defined the key words of the Agreement respectively. Although it was clear that nothing could be achieved without prior ceasefire, the titling of the Agreement as 'DRC Ceasefire Agreement' was misleading, since it was designed to achieve far more than the official designation suggested.

Taking stock of all the diplomatic efforts undertaken since the outbreak of the conflict, the Lusaka Agreement was an important document because for the first time, the regional states themselves agreed upon a framework for the region's political reconstruction.<sup>39</sup>

Nevertheless, by authorising the Rwandan and Ugandan armies to stay on Congolese soil, hundreds of miles away from their borders, to administer part of the Congolese territory, it regrettably condoned the Rwandan and Ugandan aggression and 'legalised' their violation of the sovereignty and territorial integrity of the DRC, and their interference in the Congolese internal affairs. On the other hand, the disarmament and tracking down of various armed groups, some of which were Congolese, Rwandan, Burundian or Ugandan, were to be a tremendous task not only for the DRC, but also for Rwanda, Burundi and Uganda. The rebels remained successful in carrying out their deadly operations against their respective countries. All the same, by providing that 'all parties — including Rwanda and Uganda — commit themselves to the process of locating, identifying, disarming and assembling all members of armed groups in the DRC', the Lusaka Agreement left the door open to further foreign adventure in the Congo.

The implementation of the Agreement was to pose far more formidable challenges.<sup>40</sup> Firstly, there was too much suspicion and mistrust among the parties. This caused them to regularly send mixed messages about the Agreement. They were not genuinely committed to complying with it. Secondly, the interests at stake were enormous for the foreign states involved, the multinationals, mercenaries, arms dealers and suppliers of ammunition and other military equipment. The Congolese warlords themselves looked very comfortable with war and were involved in what Arthur Abraham could have termed 'state conspiracy in perpetuating armed conflict'.<sup>41</sup> Thirdly, there was little commitment of the so-called international community to ending the Congolese conflict.

The Security Council unfortunately decided to deploy to the DRC a 520 600 man peacekeeping force only and this force was not concerned with the operations of peace-enforcement, tracking down and

<sup>39</sup> Wolpe (n 9 above) 28.

<sup>40</sup> As above, 41–42.

<sup>41</sup> A Abraham 'War and transition to peace: A study of state conspiracy in perpetuating armed conflict' (1997) XXII *Africa Development* 101–116.

disarming of armed groups, screening mass killers, perpetrators of crimes against humanity and other war criminals, and handing over of *génocidaires* to the International Criminal Tribunal for Rwanda. Kofi Annan previously recognised that '[t]he problem of armed groups . . . lies at the core of the conflict in the sub-region and undermines the security of all states concerned. Unless it is resolved, no lasting peace can come.'<sup>42</sup> Months before the vote of Resolution 1279, establishing a UN force for the DRC under the code name of MONUC, Wolpe anticipated that it was unlikely that a UN peacekeeping force could be granted a mandate that extended beyond the tasks of monitoring and observation, thereby reducing the substance of the Lusaka Agreement, which provided for such an extensive mandate. The Security Council actually rejected an initial proposition by the UN Secretary-General, who declared in a speech at Georgetown University on 23 February 1999 that a UN force should not be deployed in the DRC unless given sufficient strength and firepower to carry out its assignment.<sup>43</sup> Nobody would ever imagine an American or European-led UN force sent to Afghanistan, Iraq, Ireland, Kosovo or the Middle East without being fully equipped as required by the situation. A well-funded and equipped AU force would have been more useful and more effective than MONUC in preventing or stopping the killings and protecting human rights in the DRC. Without dismissing the Security Council Resolution 1484, authorising the deployment of a European or French-led force in the African country, one must acknowledge that this is a terrible lesson taught by the former colonial masters to a continent unable to enforce peace on its own soil more than 40 years after independence.

The importance of the European force cannot be exaggerated. It should be welcomed to help restore peace to the Eastern part of the DRC, where an ethnic conflict exploited by political leaders and neighbouring countries has been raging between the Lendu and the Lema and resulted in the killing of thousands and the displacement of many more.

However, the mission of this force is very limited both *ratione temporis* (up to 1 September 2003) and *ratione loci* (the city of Bunia). As a gentleman's agreement between the Anglo-Americans and the French, who supported the Security Council Resolution 1483 which provided for the US-British 'recolonisation' of Iraq, they occupied against all the norms and principles of international law, the French-sponsored Resolution 1484 on the DRC authorised the members of the multinational force to use force to protect themselves and the Congolese population. One of the reasons for granting such firepower to this force as different from MONUC seems that, unlike was the case with MONUC,

<sup>42</sup> n 8 above 185.

<sup>43</sup> K Annan, quoted by De Coning (n 36 above) 16.

whose elements were contributed by third world countries, the Europeans themselves and a permanent member of the Security Council lead the force. One should understand that Europeans could not be deployed to Africa without allowing them to use force against Africans likely to use fire against them. The same would have applied were the US government of the view that the African continent deserved the 'Boys' to die for its peoples, soil and sub-soil. The full implementation of the Lusaka Agreement required commitment and good faith from all the parties and sustained assistance and pressure by other countries acting individually and collectively through the UN, the European Union (EU), the OAU/AU and the SADC.<sup>44</sup>

#### 4.2 Inter-Congolese dialogue

In terms of an agreement reached by the Congolese parties during their August 2001 meeting in Gaborone, Botswana, the ICD was set to take place in Addis Ababa, Ethiopia, in October 2001. It was finally held in Sun City, South Africa, in February to April 2002 and April 2003.

##### 4.2.1 *Sun City I and Mbeki Plans I and II*

Five components participated in the ICD, namely the DRC government, RCD, MLC, the opposition and the *Forces Vives* (Civil Society), which were joined by the RCD-ML, RCD-N, and the Mai Mai (Congolese militia). Around 360 delegates participated in the ICD after its adjournment in Addis Ababa in October 2001 and its reopening in Sun City on Monday 25 February 2002 in the presence of the facilitator, Sir Ketumile Masire, Presidents Mbeki, Muluzi and Mwana Lesa of South Africa, Malawi and Zambia in their respective capacities as the president of the host country, SADC Chairperson and President of the country where the Agreement was signed. Thirty-seven resolutions were adopted, but a few days ahead of the closing, there was no agreement on the critical issue of the establishment of a consensual political dispensation for the country during the transition. This issue remained the main stumbling block up to the last day of the talks that were to close on 11 April 2002. An RCD request for an extension of the negotiations to close on a better note was considered by both the facilitator and the South African government. The ICD was therefore extended for seven days, namely to 18 April 2002. To break the deadlock, the Congolese parties and Sir Ketumile Masire requested the President of the Republic of South Africa to assist in the process of reaching an agreement. President Mbeki suggested two plans of power sharing during the transition in the post-war DRC. Mbeki Plan I proposed a presidency to be

<sup>44</sup> Wolpe (n 9 above) 33.

held by Joseph Kabila and a second executive organ to be named 'High Council of the Republic' and to consist of the President, the RCD and MLC leaders as well as a prime minister to be appointed by the political opposition. Civil society was offered the presidency of parliament, which was meant to act both as a legislative and a constitutional assembly during the transition.

A special court was to serve as the Constitutional Court. Independent institutions, such as the Human Rights Commission, the Truth and Reconciliation Commission, the National Electoral Commission and the High Authority of the Media were also considered of critical importance during the transition. The defence, police, security and intelligence services and the Reserve Bank were to be neutral, apolitical and autonomous. The RCD and the *Union pour la Démocratie et le Progrès Social* (UDPS), the leading Congolese party, blamed Mbeki Plan I for favouring the Kabila government. Mbeki Plan II attempted to address this criticism by putting the MLC and RCD leaders at the level of vice-presidents, also holding important ministerial portfolios. The first vice-president was to be in charge of economy and finances, while the second was to be responsible for defence, internal affairs and elections. The delegates, still busy discussing Mbeki Plan II, were surprised that the DRC government and the MLC had entered into an agreement according to which Joseph Kabila remained President of the Republic while the MLC leader Jean-Pierre Bemba became Prime Minister and head of the transitional government.

The RCD, UDPS and some other parties rightly opposed this agreement on the basis that it was concluded outside the ICD and violated both the spirit and the letter of the Lusaka Agreement. When the ICD was to be adjourned on Friday 19 April 2002 after 52 days of negotiations, the delegates had not reached any agreement. Sir Ketumile Masire then recommended the constitution of a follow-up committee to deal with the issue of the formation of a broad and consensual government of national unity for the transition. He suggested that each of the components should select its delegates and leave them behind in South Africa so that the negotiations could continue without any delay. The RCD, UDPS and a number of other parties agreed and complied with this request. They met in Sun City on 22 April 2002 and set up the *Alliance pour la Sauvegarde du Dialogue Intercongolais* (Alliance for the Defence of the Inter-Congolese Dialogue) (ASD).

The aim of the ASD was to undertake anything possible to bring the DRC government and the MLC back to the negotiation table in order to achieve an inclusive and consensual agreement on the transitional government. The DRC government, the MLC and their respective allies disagreed and left South Africa. Yet, as emphasised elsewhere, there was no alternative to the ICD as to which form it could take. An inclusive and sincere political dialogue resulting in power sharing based on a

constitutional act that protects and promotes human rights was and remained the best way of addressing the crisis of constitutionalism and democracy in the DRC.<sup>45</sup> After the failure of the ICD in Sun City in April 2002, the Congolese people and international community within the SADC, the AU and the UN kept on pressing the Congolese parties to return to the negotiation table. In the meantime, the DRC government and the MLC failed to implement their own agreement, as Joseph Kabila, advised by his supporters, had come to realise that he had conceded too much and could not be a figurehead president. This paved the way for a return to the negotiations and the reopening of the ICD.

#### 4.2.2 *Final Mbeki Plan, Sun City II and global agreement*

An amended Mbeki plan for power sharing during the transition in the DRC was presented to the Congolese parties in August 2002. This plan provided for a presidency consisting of President Joseph Kabila and four vice-presidents (RCD, MLC, Kabila government and unarmed opposition), each supervising several governmental commissions, the famous formula 'One plus Four', a bicameral parliament (National Assembly and Senate), an independent judiciary and a number of institutions to support democracy.

The new Mbeki plan was accepted by the DRC government and endorsed by the RCD, the MLC and the political opposition subject to a number of amendments. In October and November 2002, the representatives of all the components that participated in the ICD were back to the negotiation table in South Africa. The talks were facilitated by Thabo Mbeki, South Africa's President and Chairperson of the AU, and Ambassador Moustapha Niasse, Special Envoy of the UN Secretary-General. On 17 December 2002, the representatives of all the components of the ICD signed a global and inclusive agreement on the transition in the DRC. On 6 March 2003, the Congolese parties adopted a Draft Constitution for the transition in line with the Global Agreement. The two instruments were referred to Sir Masire for their formal adoption by the ICD. This took place on 1 April 2003 in Sun City.

The Pretoria Agreement consisted of seven parts. Part I dealt with the cessation of hostilities. The parties renewed their commitment to cease their hostilities and seek a peaceful and fair solution to the crisis facing their country in accordance with the Lusaka Agreement, the different disengagement plans and relevant Security Council resolutions. The parties with fighting forces agreed to commit themselves to the process of forming a national, restructured and integrated army in line with a resolution adopted during the ICD on 10 April 2002. All the parties

<sup>45</sup> MB Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* (2002) 467.



agreed to combine their efforts in the implementation of the UN Security Council resolutions on the withdrawal of the foreign troops from the DRC, the disarmament of the armed groups and militia and the safeguard of the sovereignty and the territorial integrity of the DRC. They also committed themselves to taking the necessary measures to ensure the security of the population and transitional leaders. Part II related to the objectives of the transition.

These included the reunification, pacification and reconstruction of the DRC; the restoration of its territorial integrity and the re-establishment of the authority of the state throughout its national territory; national reconciliation; the formation of a national, restructured and integrated army; the organisation of free and transparent elections; and the establishment of a new political dispensation in the DRC. Part III contained the eight basic principles for a peaceful transition in the DRC. The first principle was that of 'appropriate representation' of all the 11 provinces and the political and social forces of the Republic, especially the women. This was a very important principle although it did not define what 'appropriate representation' meant and how it could be achieved. The second principle related to the stability of transitional institutions and provided that the President, the Vice-Presidents of the Republic, the President of the National Assembly and the President of the Senate should remain in office for the period of the transition, except in the case of resignation, embezzlement or corruption. In terms of the third principle, the parties committed themselves to establishing a system that could be respectful of the values of democracy and fundamental rights as embedded in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the African Charter and other international conventions duly ratified by the Republic. The fourth principle was the separation of powers between the executive, the legislature and the judiciary. According to the fifth principle, the parties were required to abide by the rule of consensus, inclusiveness and peaceful cohabitation during the transition. The sixth principle referred to the equal sharing of responsibilities amongst all the components of the ICD, taking into account the criteria of competence, credibility and honorability.

Closely related to the above was the seventh principle that required a fair and balanced sharing of responsibilities amongst the parties in the transitional government and particularly in the governmental commissions. To achieve this, careful attention was to be paid to the number and weight of ministerial portfolios. The last principle aimed at achieving national reconciliation and recommended the enactment of an amnesty law by the transitional National Assembly, or temporarily by a presidential decree-law. The amnesty was to be granted for acts of war and political and opinion offences, excluding genocide, war crimes and crimes against humanity. Part IV fixed the duration of the transition to

24 months, starting with the appointment of the transitional government to end with the election of the President. This duration could be extended for six months and renewed once for the same period. Part V concerned political institutions and other institutions supporting democracy. The transitional institutions were the President of the Republic, the government, the National Assembly, the Senate and the judiciary. Under the President as executive authority, a distinction was made between the President as the head of state and the Presidency, made up of the President and four Vice-Presidents to co-ordinate the political commission, the economic and financial commission, the reconstruction and development commission and the social and cultural commission respectively. The government was to comprise the President, Vice-Presidents, ministers and vice-ministers. The National Assembly and the Senate were to consist of 500 and 120 members respectively. Like the members of the government, they were to be appointed or nominated by the different components of the ICD. Particularly interesting for constitutionalism and the rule of law was the reaffirmation of the principle of the independence of the judiciary. The five institutions that were set up to support democracy during the transition included the Independent Electoral Commission, the High Authority of the Media, the Truth and Reconciliation Commission, the Human Rights National Observatory and the Commission on Ethics and Fight against Corruption.

Part VI of the Global and Inclusive Agreement related to the formation of an integrated and restructured national army and the establishment of a supreme defence council. Part VII comprised the final provisions. According to the first of these provisions, the transitional constitution was to be based on the Global and Inclusive Agreement and became part thereof. This provision was somehow problematic, since it made the Agreement the supreme law during the transition and not the Constitution. Part VIII related to the implementation of the Agreement, which was to come into effect on the date of its adoption by the ICD, and to the commitment of the parties to abide by it fully. It introduced five appendixes or schedules as integral part of the Agreement. Appendixes I and II concerned the sharing of responsibilities in the political institutions and in the public enterprises respectively. Appendixes III and IV related to the monitoring of the implementation of the Agreement by a national commission (Appendix III) and an international committee (Appendix IV). Appendix V dealt with security issues and especially with the interim measures to ensure the safety of the political leaders in Kinshasa.

#### 4.2.3 *Interim Constitution*

The Preamble to the interim Constitution stressed the commitment of the Congolese parties to building a sovereign nation and establishing a

society healed of the divisions of the past, based on democratic values, social justice, the rule of law and fundamental human rights enshrined in international instruments already referred to in the Pretoria Agreement. Women's and children's rights featured prominently among the rights and freedoms to be guaranteed in the Republic. The Preamble reaffirmed the attachment of the Congolese parties to the UN and the AU, the relevant resolutions adopted by the ICD in Sun City earlier and to the principles of the Global and Inclusive Agreement. Part I dealt with the general provisions.

Article 1 reiterated that the Constitution was drawn on the Global and Inclusive Agreement and both instruments were the only source of power during the transition. Article 2 provided for the supremacy of the Constitution. Article 3 entitled every Congolese citizen to defend the nation and its territorial integrity and to resist any individual or group of persons who could use force to seize power or yield it in violation of the Constitution. It also outlawed the use of power to serve personal interests and prohibited the interference of any state institution or service in the functioning of another. Part II concerned the state, its independence, subdivision and sovereignty. The DRC was to be a unitary decentralised state comprising 10 provinces and Kinshasa, the capital city of the Republic (article 5). All the central, provincial and local authorities were bound to safeguard the integrity of the territory, the national unity of the people of the Congo and the sovereignty of the Republic (article 6). The democratic principle was embodied in article 10, which stressed that national sovereignty belonged to the people and all power emanated from the people who exercised it directly by way of referendum and indirectly through their representatives. Political pluralism was recognised through the right of every Congolese citizen to form a political party or join a political party of their choice freely. The imposition of a single party was outlawed and considered a 'crime of high treason' (article 11). The Congolese citizenship, a single and exclusive one, was granted to anyone whose ethnic group inhabited the DRC at independence (article 14).

Part III was the Bill of Rights. It entrenched a very wide range of rights and freedoms as enshrined in the African Charter and other international and African human rights instruments ratified by the DRC. The main problem with this Bill of Rights is that it contains neither an application nor an enforcement clause, but only enumerates the rights. There is no specific mandate for the courts of law and other state organs to respect or enforce human rights and the Constitution does not provide any guidance as far as their interpretation is concerned.

Part IV dealt with the organisation and exercise of power. The executive power was vested in the President who enjoyed the traditional authority of the head of state (articles 65–79), the Presidency consisting of the President (articles 80–82) and four Vice-Presidents (articles 83–88), and the government composed of the same plus the ministers and

vice-ministers nominated by the different components of the ICD (articles 89–96). The Presidency of the Republic was an original executive organ (articles 80–82), a sort of collegial presidency unknown in the constitutional post-colonial history of the Congo. In light of the Global and Inclusive Agreement, the Constitution provided that each Vice-President should head and co-ordinate one of four governmental commissions, consisting each of a number of ministries. It clearly designated the components of the ICD to supervise the four commissions and therefore hold the four Vice-Presidencies, namely the RCD (Political, Defence and Security Commission), the MLC (Economic and Financial Commission), the DRC government (Commission for Reconstruction and Development), and the Political Opposition (Social and Cultural Commission) (articles 80, 83, 86 and 87). The President was bound to consult with the Vice-Presidents regularly on almost all the matters relating to the management of the government. The legislative authority was bestowed on the National Assembly and the Senate (articles 97–109). The ministers were accountable before these two legislative chambers (article 91). However, these chambers could not censure the government and remove it from office (article 112). The relationship between the executive and the legislature was regulated by the Constitution (articles 110–136) which also determined the regime of incompatibilities and immunities and provided for the conditions under which the members of the government and the national legislature could be prosecuted and arrested (articles 137–145). Based on the principle of the separation of powers, the Constitution established a presidential regime *sui generis*.

Like the President, the Vice-Presidents of the Republic, the President of the National Assembly and the President of the Senate (article 197), the Presidents and members of the institutions supporting democracy (article 159), the members of the National Assembly (Deputies) and the Senate (Senators) were to be appointed for the whole duration of the transition (articles 100, 102 and 106), except in the case of resignation, death, permanent incapacity, or conviction for high treason, embezzlement and corruption by the Supreme Court of Justice (articles 66, 84, 89, 100, 106 and 159). The National Assembly and the Senate could not be dissolved. Nor could they remove the President, the Vice-Presidents and the Ministers from office. However, the separation of powers gave the executive a net advantage over the legislature, as the former could interfere in the legislative domain with the power granted to the President to exercise statutory power by way of decrees (article 71) or to legislate by decree-laws deliberated in the Council of Ministers, even though the authorisation of the National Assembly was needed to enact such decrees (article 119). The judicial authority was vested in the Supreme Court of Justice, the Courts of Appeal and civil and military courts and tribunals, as well as the public prosecutors attached to them (articles 146–153). According to the French constitutional tradition, the

President — not the Constitution — unfortunately was made the guarantor of the independence of the judiciary (article 147). Only the Supreme Court of Justice, the highest judicial institution of the Republic, was competent to decide on the constitutionality of the laws and other legislative acts, to interpret the Constitution, and to judge the members of the government, the National Assembly, the Senate and the different institutions supporting democracy (articles 150–153). Its composition, organisation and functioning were to be determined by an organic law and its decisions were final and binding. The Independent Electoral Commission, the Human Rights National Observatory, the High Authority of the Media and the Commission on Ethics and Fight against Corruption were established to support democracy (articles 154–160). Part IV also dealt with financial matters and institutions, such as the Reserve Bank (articles 161–172), the national police and armed forces (articles 173–186) and the Superior Defence Council (articles 187–190). Part V was missing in the draft Constitution.

Part VI of the draft Constitution related to treaties and international agreements. The Constitution adopted a monist approach to international law in the sense that treaties and international agreements duly concluded were directly binding on the Republic. Moreover, they were to prevail over the laws of the Republic other than the Constitution, subject to the application of each treaty or international agreement by the other party (article 193). Part VII comprised the final and transitional provisions. These provisions concerned the duration of the transition (article 196); the terms of office of the President, the Vice-Presidents of the Republic, the President of the National Assembly and the President of the Senate (article 197); the appointment of new governors, vice-governors, ambassadors and chief executive officers of public and mixed economy enterprises (article 198); the adoption of an amnesty law by the transitional National Assembly (article 199); the termination of office of all the previous political institutions with the exception of the President of the Republic (article 200); the amendments to the Constitution (article 201); the repeal of the previous Constitution and legislation (articles 202 and 203); the adoption of the transitional Constitution, its coming into operation and the period of its validity (articles 204 and 205). Article 204 of the Constitution provided that ‘it comes into force on its promulgation by the President of the Republic within the three clear days that follow its adoption’. Accordingly, President Joseph Kabila promulgated the transitional Constitution on 4 April 2003 and it has been in operation since then. On 7 April, he was sworn in as DRC President for the transition, while the transitional government and parliament were only inaugurated in July and August 2003 respectively. It was clear that the process was fraught with many dangers.

## 5 Challenges to sustainable peace, democracy, national reconstruction and human rights promotion

### 5.1 Internal challenges

The first challenge concerns the state in the DRC. Generally presented as an illuminating study case of a 'failed', 'disintegrated' and 'collapsed' state, the DRC even became the epitome of 'statelessness' in Africa.<sup>46</sup>

Crawford Young, undoubtedly one of the most famous experts on the Congo, became ironically one of the renowned champions of 'statelessness' or 'state collapse' in Zaire/Congo. In 1983 Young questioned: 'Zaire, is there a state?'<sup>47</sup> Two years later he agreed with Turner on the 'Decline of the Zairean state'.<sup>48</sup> In 1993, Joseph also wrote:<sup>49</sup>

There are cases in which something calling itself the 'state' still stands but is unable to conduct any of the normal functions of statehood. Zaire is not the only country in which the 'state' disappears a short drive outside its capital or the area of residence of its presidency. Where civil servants are irregularly paid, and funds for normal functions are absent, government offices may exist in various localities but nothing of consequence takes place within them. The governing structures of the state have thus joined the hospitals and infirmaries that lack medicines and equipment and schools that lack books and chairs . . . In addition to the 'failed or collapsed states,' there are many cases in Africa of the advanced erosion or atrophy of the state.

Elsewhere,<sup>50</sup> I dealt with the empiricist and political scientist theories of state collapse, which are based on faulty premises while, at worst, ignoring, or at best, disregarding constitutional and international law and are also contradicted by the survival of the very same states considered 'weak',<sup>51</sup> 'failed',<sup>52</sup> 'disintegrating',<sup>53</sup> 'collapsed',<sup>54</sup> or *fantômes* (ghosts).<sup>55</sup>

<sup>46</sup> L Sindjoun 'Politics in Central Africa: A reflective introduction to the experience of states and region' (1999) 4 *African Journal of Political Science* 11.

<sup>47</sup> C Young 'Zaire, is there a state' (1993) Paper for the Annual Conference of the Canadian Association of African Studies (copy with author).

<sup>48</sup> C Young & T Turner *The rise and decline of the Zairean state* (1985).

<sup>49</sup> R Joseph 'The reconfiguration of power in late twentieth century Africa' (1999) in R Joseph (ed) *State, conflict and democracy in Africa* (1999) 68.

<sup>50</sup> Mangu (n 45 above) 48–59.

<sup>51</sup> RH Jackson & CG Rosberg 'Why Africa weak states persist: The empirical and the juridical in statehood' (1982) 35 *World Politics* 1–24.

<sup>52</sup> J Herbst 'Responding to state failure in Africa' (1996) 21 *International Security* 120–144.

<sup>53</sup> L Villalon & P Huxtable (eds) *Critical juncture: The African state between disintegration and reconfiguration* (1997).

<sup>54</sup> IW Zartman *Collapsed states* (1995).

<sup>55</sup> See P Quantin 'L'Afrique centrale dans la guerre: Les Etats-fantômes ne meurent jamais' (1999) 4 *African Journal of Political Science* 106–125.

In many respects these Afro-pessimist theories are problematic. In case we might agree with Sindjoun that 'collapsed states are conflictualised states',<sup>56</sup> no state is immune to conflict.

The Western literature on Northern Ireland, Eastern European and other non-African states, for many years confronted with a number of conflicts, never emphasises state collapse in Europe, Latin America or in Asia. 'Responding to the state failure in Africa',<sup>57</sup> 'malignant minds in the service of imperialism', including Ali Mazrui, called for radical, neo-colonial and questionable solutions such as 'self-colonisation' or 'benign recolonisation'.<sup>58</sup> Archie Mafeje,<sup>59</sup> Bangura,<sup>60</sup> Wanyonyi<sup>61</sup> and this author<sup>62</sup> rejected such neo-colonialist views shared by many policy makers in Europe and the USA. This is not denying the fact that the Congolese state has been suffering a terrible crisis, as demonstrated by the existence of several 'governments' in the DRC. However, the state still exists in the DRC. One of the primary challenges relates to its rehabilitation and its reconstruction on the foundations of constitutionalism and the rule of law. On the other hand, the political history of the Congo is littered with political agreements and constitutions that were never honoured fully by those who signed them or formally committed to respecting them.

Accordingly, another challenge, and even the most urgent after Sun City, was, and still remains, to make the Global Agreement and the interim Constitution work and ensure that all the Congolese parties and people unreservedly abide by them. According to Nwabueze, wars and conflicts are the first forces that work against reconstruction, development, constitutionalism and democracy.<sup>63</sup> At the national level, there is no way the DRC can be reconstructed if the conflict is not terminated, without peace and security within its borders and with its neighbours. Another internal challenge is therefore to achieve and consolidate peace in the DRC and the sub-region.

However, the establishment and consolidation of peace and security in the DRC would require the disarmament of all other armed groups

<sup>56</sup> Sindjoun (n 46 above) 11.

<sup>57</sup> Herbst (n 52 above) 120–144.

<sup>58</sup> A Mazrui 'Towards a benign recolonisation of the disintegrating states of Africa' (1995) 2 *CODESRIA Bulletin*.

<sup>59</sup> A Mafeje 'Recolonisation or self-colonisation and malignant minds in the service of imperialism' (1995) 2 *CODESRIA Bulletin*.

<sup>60</sup> Y Bangura 'The pitfalls of recolonization: A comment on the Mazrui-Mafeje exchange' (1995) 4 *CODESRIA Bulletin*.

<sup>61</sup> PK Wanyonyi 'The notion of self-colonisation: Is it an appropriate solution in the 21st century?' (1996) 1 *CODESRIA Bulletin* 19–21.

<sup>62</sup> MB Mangu 'Conflict settlement in post-colonial Africa: Recolonisation or decolonisation? A reflection on the Mafeje/Mazrui debate' (1996) 1 *CODESRIA Bulletin* 21–30.

<sup>63</sup> BO Nwabueze *Constitutionalism in the emergent states* (1973) 174.

and the formation of a national army. This army should be capable of protecting the sovereignty and territorial integrity of the Congo against all forms of aggression. It should also ensure that the Congolese territory is no longer used as a sanctuary by foreign armed forces fighting for control of power in the neighbouring countries. The demilitarisation of these armed groups and the formation of a new national army feature among the issues that should be taken into account. The army should be educated to become the army of and for the entire people of the Congo and not an instrument for the conquest and exercise of power by some political leaders or even by its own commandants. Military-led authoritarianism has been an important ingredient in the decay of the state and the disintegration of the military itself.<sup>64</sup> The military has proved to be a wild card in the transition process, sometimes intervening to hasten, but generally to impede reform. The capacity of the military to obstruct or roll back the political reform process should not be underestimated.<sup>65</sup> Another important challenge relates to ethnicity or the national question that is generally presented as one of the major obstacles to nation building in Africa. Some scholars tend to see ethnic conflicts and problems everywhere in Africa. Ronen argued that '[m]ost conflicts in African states, whether political or armed ones, could not have reached their high intensity without the underlying ethnic factor'.<sup>66</sup> According to Wiseman, '[p]erhaps the greatest problem African states face is their cultural heterogeneity . . . states without nations'.<sup>67</sup> Busia held that '[o]ne of Africa's most intractable problems is how to integrate different tribes into a modern nation within a democratic framework. All African states have this problem'.<sup>68</sup> Ottaway also contended that:<sup>69</sup>

The challenge for African countries, as for the rest of the world, is to accept the inevitability, and indeed the legitimacy of different ethnic identities and to find ways to manage the conflicts that arise, particularly when political movements manipulate these identities for political purposes.

<sup>64</sup> E Hutchful & A Bathily 'Introduction' in E Hutchful & A Bathily (eds) *The military and militarism in Africa* (1998) IV.

<sup>65</sup> See M Bratton & N Van de Walle 'Popular protest and political reform in Africa' in JE Nyang'oro (ed) *Discourses on democracy: Africa in comparative perspective* (1996) 220; A Olukoshi 'State, conflict and democracy in Africa: The complex process of renewal' in Joseph (n 49 above) 460; D Ronen 'The challenges of democracy in Africa: Some introductory observations' in D Ronen (ed) *Democracy and pluralism in Africa* (1986) 4.

<sup>66</sup> D Ronen 'The state and democracy in Africa' in Ronen (n 65 above) 198.

<sup>67</sup> JA Wiseman *Democracy in black Africa. Survival and revival* (1990) 14.

<sup>68</sup> KA Busia *Africa in search of democracy* (1967) 111.

<sup>69</sup> M Ottaway 'Ethnic politics in Africa: Change and continuity' in Joseph (n 49 above) 316.



Clapham and Wiseman suggested that 'it is autocracy rather than ethnic variety that has posed the most important threat to the maintenance of African states'.<sup>70</sup>

Even in a state as ethnically divided as Nigeria, democratisation may plausibly be regarded as an integrating rather than a centrifugal force.<sup>71</sup> The challenge is how to accommodate that heterogeneity.<sup>72</sup> It is about nation building.<sup>73</sup> The possibility of an authoritarian solution not only appears remote, but in our view unworkable.<sup>74</sup> The problem may be addressed through peace agreements and all-inclusive negotiations leading to some agreed upon a form of power sharing, which is through democratisation.<sup>75</sup>

The Preamble to the Lusaka Agreement and article 14 of the interim Constitution provide that '[a]ll ethnic groups and nationalities whose members and territory constituted what became the Congo on independence must enjoy equality of rights and be protected by law as citizens'. This is a very important provision, given the role played by the ethnic question in the armed conflict that mainly developed because people from some ethnic groups, namely the Banyamulenge, were denied their human rights, especially their political rights as citizens of the Congo. Although ethnic conflicts should not be surprising in this multi-ethnic country, bringing and consolidating peace among the various ethnic groups inhabiting the Eastern and Kivu Provinces, including the Hema, Lendu and Banyamulenge, will constitute a serious test of national reconciliation during the transition and beyond.

Related to ethnicity is citizenship. In Africa, the concept of citizenship continues to be more closely associated with kinship than with territory.<sup>76</sup> Moreover, the organisation of the citizenry — autonomously and pluralistically from the roots — both inside and outside the formal polity, is an indispensable condition for the development and maintenance of a secure democracy.

As stakeholders in the democratic transition, civil society organisations are key actors in the transformation process. Political culture also plays a major role in the values-learning process and is an important factor affecting both the establishment and the consolidation

<sup>70</sup> C Clapham & JA Wiseman 'Conclusion: Assessing the prospects for the consolidation of democracy in Africa' in JA Wiseman (ed) *Democracy and political change in sub-Saharan Africa* (1995) 224.

<sup>71</sup> As above, 223.

<sup>72</sup> Busia (n 68 above) 17–20 32–33.

<sup>73</sup> As above, 17–20.

<sup>74</sup> Ottaway (n 69 above) 315.

<sup>75</sup> See D Rothchild 'Ethnic insecurity, peace agreements and state building' in Joseph (n 49 above) 319–337.

<sup>76</sup> Busia (n 68 above) 19.

of constitutional and democratic institutions.<sup>77</sup> It has to be 'nursed by teaching and by precepts diffused among children at school, among the members of various organisations and associations, and among the society generally'.<sup>78</sup> Therefore, building a viable, strong, autonomous, development-oriented civil society and promoting the political culture of the people are among the challenges that must be overcome to win the struggle against authoritarianism, underdevelopment and conflicts in Africa.<sup>79</sup> A further challenge relates to the leadership that is needed, both politically and intellectually, to reconstruct the DRC and the continent.

As far as the political leadership is concerned, its role in reconciling the people, rebuilding the country and implementing political and constitutional agreements is of the utmost importance. Some peoples may have been fortunate, but not the people of the Congo. Rulers have come to power to serve their own interests, ready to destroy what they never built, disrespectful of the rule of law and the Constitution, if any, preaching the language of war, conflict and exclusion rather than peace and national reconciliation. The challenge in the DRC and much of the continent is to get a new breed of leaders truly committed to democracy, peace, national reconciliation and reconstruction. However well crafted a legal order may be, its net value mainly depends on the qualities of men and women to make it work.

Most of the prospective Presidents and heads of state would hardly agree that the Robben Island cell once occupied by Nelson Mandela might be the best training camp for leaders who would care for their people and preach the language of constitutionalism, democracy, human rights, peace, national reconciliation and reconstruction instead of violence, abuse, division, exclusion, authoritarianism, war and revenge. The implementation of the Global Agreement as well as the transitional Constitution and the achievement of national reconciliation will first of all depend on the commitment of the Congolese political leaders to abide by these instruments and make peace amongst themselves. However, one should not expect that people who fought for power for so many years should become good friends overnight. There is a great deal of distrust and suspicion among the parties. Therefore, combating the 'belligerent syndrome' is another challenge for democratic transition in the Congo. On the other hand, as Adama put it, when we speak of democracy and rule of law, the key question is that of

<sup>77</sup> See DP Franklin & MJ Baun 'Conclusion' in DP Franklin & MJ Baun (eds) *Political culture and constitutionalism. A comparative approach* (1994) 225 226 231; Nwabueze (n 63 above) 304; Busia (n 68 above) 104 109.

<sup>78</sup> Nwabueze (n 63 above) 304.

<sup>79</sup> On the role civil society may play in the process of renewal, see L Diamond 'Introduction: Persistence, erosion, breakdown and renewal' in L Diamond *et al* (eds) *Democracy in developing countries: Africa* (1988) 50.

the independence of the judiciary expected to uphold the law and ensure the respect for human rights.<sup>80</sup> The principle of division and checks of powers must be welcomed as a step towards democratisation.<sup>81</sup> The respect of the separation of powers and the independence of the judiciary will definitely be another test during the transition. A further challenge for sustainable peace in the DRC relates to the reconstruction of the country, which was destroyed during several years of authoritarian rule and rebellions under Mobutu and Kabila. Where they still exist, hospitals are running out of medicines, doctors and nurses. Schools, roads and railways were bombed in many regions. The communications are very poor amongst the different provinces and regions of this vast country.

The achievement of national unity and reconciliation and the re-establishment of the state authority over the whole Congolese territory require that the DRC be functioning effectively as a single entity with its various parts interconnected and linked to the seat of the government in Kinshasa. Furthermore, credible elections cannot be held at the end of the transition without adequate infrastructures or an efficient administration.

The fundamentals of the economy must be put in place and resources generated. The Congolese people must return to work in order to rebuild their country. The end of the armed conflict, as heralded by the signing of a global and inclusive agreement and the adoption of the transitional Constitution, cannot alone resolve all the problems of the Congo. People do not eat agreements. The Congolese leaders and people should now embark on a massive programme of reconstruction and development.

## 6 External challenges

External challenges for democratic and peaceful transition in the DRC concern the situation in the neighbouring countries, the commitment of other African leaders and the international community, including the rich Western countries. There cannot be sustainable peace and democracy in the DRC without peace and democracy in its neighbourhood, without the leaders of the neighbouring countries stopping their interference in the Congolese affairs, and without the

<sup>80</sup> D Adama 'Démocratie et primauté du droit' (1993) in G Conac (ed) *L'Afrique en transition vers le pluralisme politique* (1993) 467.

<sup>81</sup> M Mamdani 'Social movements and constitutionalism in the African context' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 243. See also IG Shivji 'Contradictory class perspectives in the debate on democracy' in IG Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 255.

commitment of other African and Western countries to helping rebuild the Congo. Many analysts and politicians are quick to forget that without Western and mainly American support, Mobutu would not have come to power and ruled us for over 32 years, Laurent-Désiré Kabila would not have seized the reigns of power in Kinshasa, and the rebellion would probably not have erupted or would have been rapidly contained.

After so many years of war, conflict and destruction, the commitment of the Congolese people alone would hardly suffice. It is important that some countries, which have been part of the problem or the conflict, become part of its resolution and participate in the reconstruction of the DRC and the Great Lakes region.

## 7 Conclusion

The conflict that unfolded in the DRC in the late 1990s was the most serious crisis in Africa since the end of the Cold War, and even since independence in the early 1960s. The Congolese conflict was both an internal rebellion against an authoritarian regime that did not care for the rights of the people and also a foreign aggression of the DRC by some of its Eastern neighbours, namely Rwanda and Uganda, with the complicity of the most powerful actors on the international scene. From a human rights perspective, the war in the DRC resulted in the violation of nearly all human and peoples' rights in the African Charter that is the cornerstone of the African human rights system. Regrettably, while it was clear that massive human rights violations were being committed by all parties involved in the conflict as well as by their respective allies, no communication was filed with the African Commission that therefore played no significant role in the protection of the rights of the peoples of the Congo. As stressed earlier, war being a violation of the right to peace and resulting in the negation of almost all human and peoples' rights, a first step in the promotion and protection of these rights is to achieve peace. On the other hand, it appears that when the survival of the state itself is at risk, the protection of human and peoples' rights becomes a minor issue. An effective state is needed to promote human rights. State rehabilitation would require the foundation on the state on the values of constitutionalism and democracy.

Human rights cannot flourish in a country without a supreme constitution that enshrines the rights of all the people and provides for their enforcement by independent organs, especially courts of law. The adoption of the Global and Inclusive Agreement and an interim Constitution with a Bill of Rights for the DRC was a step forward in the right direction and should be welcomed by all those interested in the promotion of human and peoples' rights on our continent. Peace, democracy and development are human and peoples' rights and

constitute the future of man all over the world, including in the DRC and the rest of the African continent. Nothing condemns us to embrace the Afro-pessimist discourse so much triumphant in the Western media and literature.

Despite the challenges ahead, there is a future for human and peoples' rights in the DRC. It is anticipated that one of the first acts of the newly appointed transitional government will be the ratification of the Protocol on the Establishment of an African Court on Human and Peoples' Rights, which should contribute to putting an end to massive violations of human rights and to improving the life conditions in Africa, transforming it from a land of 'human wrongs' into a continent more respectful of human and peoples' rights, for which a Charter was adopted in 1981. Hopefully, the DRC will also adhere to NEPAD's African Peer Review Mechanism (APRM), which takes human rights and governance issues very seriously. True peace is impossible without democracy, respect for human and peoples' rights and the rule of law. To paraphrase and borrow once more from Pope Paul VI's *Populorum Progressio*, democracy and human rights are prerequisites for enduring peace and development. Although conflicts and wars are inherent to social life in any society, the best way to save our peoples from these scourges, which brought untold sorrow and misery, is to unreservedly embark on the road to democracy, constitutionalism and human rights.