

Introduction, Application and Place of Treaties and International Agreements in the Congolese Legal System

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1. Introduction

In the Democratic Republic of the Congo, treaties and international agreements that have been duly ratified have, since their publication, an authority superior to the laws. Such an assertion is based on the Constitution of 18/02/2006 as revised to date in Article 215⁽¹⁾.

Starting from this provision, several interpretations have been made. To the extent that some think that this superiority of treaties and international agreements is possible only when it comes to laws other than the constitution, others believe that the superiority of treaties and international agreements is binding not only on laws other than the constitution but also on the constitution itself⁽²⁾. As the title of our subject « introduction, application and place of treaties and international agreements in the Congolese legal system » indicates, we want to make a careful examination of this question of the relations between international law (treaties and international agreements) and the internal law (state internal law to give our scientific point of view.

It must be emphasized that this question of the relationship between Internal Law and International Law as well as the question of the application and the place of this one in the internal legal order did not let silence the researchers who each demonstrate their strength in the field of its competence. Thus, in his book of public international law on the application of international treaties, NGUYEN QUOC DINH raises the question of the execution of a treaty and shows that governments are also sometimes tempted to justify non-compliance. respect for a treaty by its incompatibility with national law.

On the contrary, in his view, to this argument, which threatens the security of international legal relations, he referred to article 27 of the Vienna Convention on the Law of Treaties which reaffirmed the primacy of international law: "a party can not invoke the provisions of its internal law as justifying the non-execution of a treaty".⁽³⁾ For the author,

an international treaty has primacy over the internal laws of a State.

For his part, David RUZIE shows that the practice of States in relation to the place of treaties in the internal order is very variable but in many cases, the primacy, that is to say the primacy, of international law. This practice is not codified; Consequently, its complexity is certain, whereas France was generally considered to be related to the monist conception with the primacy of international law, recent jurisprudence (see below, pp. 12-13) tends to devote a primacy of internal law.⁽⁴⁾

The same author gives the example of the constitution of the United States (Article VI), which consecrates the superiority of self-executing treaties (that is, treaties whose provisions are sufficiently precise and unconditional) on the laws. earlier; in case of contrariety between a treaty and a later law, and the national law prevails.

To be noted: cases in which the Congress manifests its will (Aff. Of the compatibility of the anti-terrorist law and the agreement of seat with the UN, about the office of the PLO in New York, 1988). The Supreme Court has thus removed the supremacy of an international convention, in particular because, in the present case, the federal legislation is sufficiently protective of individuals.⁽⁵⁾

As for Pierre Marie Dupuy, the principle "pacta sunt servanda" which is an obligatory principle of treaties is often presented as a sort of law of laws, and the logical possibility of recognizing in effect a scope that the it could be said to be structurally imperative, insofar as it constitutes a primary requirement of the requirement and the law of coherence of an international legal order.

He continues to develop his arguments by saying that the problem of relations between the national and international legal orders arises for different reasons: the first is undoubtedly the realization in the international order of an obligation on a State to In other cases, in many cases, it involves the intervention of internal organs and sometimes also the adoption of administrative, legislative or regulatory measures in the internal order. Moreover, certain international standards are intended to be applied in the internal order, in particular because their purpose relates to the status or condition of individuals.

¹ Article 215 de la constitution du 18/02/2006 telle que révisée à ce jour par la loi (2011)

² KISHIBA FITULA, cours de droit international public, (notes polycopiées) troisième graduat Droit (UNILU) Année académique 2016-2017

³ NGUYEN QUOC DINH, *droit international public*, 6^{ème} éd. L.G.D.J, Paris, 1999

⁴ David RUZIE, *droit international public*, 22^{ème} éd. Dalloz, 2013

⁵ Idem, p.12

He concludes by saying that the relations between internal law and international law constitute a "pont-aux-ânes" whose analysis and exegesis have long opposed the doctrine in two camps, an irreducible opposition: that of the proponents of dualism and that of the partisans of monism. According to the first school, there is an absolute duality between the internal legal order and the international legal order. Each constitutes an autonomous whole and without any possible link with the other. International order binds states to one another by mutual obligations and rights.⁽⁶⁾

Moreover, each state has its own legal order of which it retains exclusive control. And on the other hand, the school of monism abolishes the borders between the two legal orders and holds in the affirmation of the unity of the internal legal order and the international legal order. The monistic theory, the international takes precedence over the internal and the dualist theory ignores it.⁽⁷⁾

For Mr. Benjamin MULAMBA MBUYI, in relation to the perfect and complete execution of the statements of a treaty at the internal level requires the assistance after ratification of the executive and legislative powers that must review the national legislation to allow the implementation of the 'agreement. This observance of conventional commitments will be made without hindrance if the ratification is done with respect for the internal law, that is to say by the organ invested with the power to bind the state in question by the agreement. All constitutional experts share this view. Moreover, "a State can not invoke national difficulties of implementation to justify its failure to perform the treaty under Article 27 of the Vienna Convention and customary international law."⁽⁸⁾

For his part Joseph KAZADI MPIANA was interested in the question of the respect of the procedure required in particular in the matter of parliamentary authorization which constitutes in DRC a constitutional custom, sometimes violated, but presents even in silence provisions ad hoc. The Congolese constitution of 18 February 2006 has taken over this provision in Article 215. The latter is largely inspired by Article 55 of the French Constitution, which rejects the condition of reciprocity for its lack of relevance and randomness, the primacy of international treaties is subject, in Congolese law, to the regularity of their conclusion, which is extended by publication in the official journal.

The question of regularity refers to the rules of treaty-making power. In the DRC the President negotiates and ratifies international treaties and agreements (Article 213, paragraph 1 of the constitution of 18 February 2006). However, the constituent states that the conclusion of certain treaties, referred to in article 214, paragraph 1 is subject to parliamentary authorization. The combined reading of Articles 214 and 215 makes it clear that the conclusion of international treaties and agreements by the President of the

Republic, in the areas covered by the parliamentary authorization, could not be considered as regular.⁽⁹⁾

For Valérie KABEYA VULUKA, examining the question of the Congolese judge and the applicability of international treaties and agreements shows that in the relationship between international law and internal law, the Congolese justice is at the heart of the turmoil following conflicts between conventional standards and internal standards, the tendency of the judge being to favor the application of the second to the detriment of the former. The provisions of a treaty may conflict not only with other conventional international standards or not, but also with internal standards. Such an "incident" is related to the general problem of the relationship between international law and domestic law. To solve it, the doctrine is divided between dualism and monism. Proponents of the former believe that such conflicts can not occur while, although rare monists still advocate the primacy of domestic law, most of them are in favor of the superiority of international law.

They can find an argument today in Article 27 of the Vienna Convention which provides that: "a party may not invoke the provisions of its internal law as justification for the non-performance of a treaty" rule which appears as the complement of the principle "pacta sunt servanda" expressed in the aforementioned article.⁽¹⁰⁾ The law's organ of the people, the international judge affirms in all circumstances the superiority of this one: it does not draw all the consequences of principle: here as elsewhere, international litigation is generally a litigation of liability and not of cancellation. G. Scelle's statement that the domestic standard contrary to an international standard is "repealed" is rightly a figure of rhetoric. Therefore, says the author, standard of domestic law, the constitutional rule can not defeat the application of a treaty. The International Criminal Court (PCIJ) strongly recalled this in its advisory opinion of 4 February 1932 concerning the treatment of Polish nationals.

2. General Considerations on Treaties

Definition: the treaty is the expression of concordant will emanating from legal subjects with the requisite capacity, with a view to producing legal effects governed by international law.

The meaning and implications of the elements of the definition

- 1) The expression of concordant wills in relation to the submission of the treaty to consensualism, the treaty is first of all a contract; it results from the agreement of two or more wills in order to achieve a goal and a specific object. The consensualism that dominates all the Law of Treaties resides first and foremost in the idea that each of

⁹ Joseph KAZADI MPIANA, la cour pénale internationale (CPI) et la République Démocratique du Congo (RDC) : 10 ans après, étude de l'impact du statut de la CPI en droit interne congolais, revue soutenue par l'Institut des sciences humaines et sociales du CNRS N°2, Avril – juin 2013, p.421

¹⁰ Valérie KABEY VULUKA, *le juge congolais et l'applicabilité des traités et accords internationaux*, CAAK Lubumbashi, 2010, p.2

⁶ Pierre Marie Dupuy, *Droit international public*, 8^{ème} éd. Dalloz, p.300

⁷ Pierre Marie Dupuy, *op.cit.*, p.419

⁸ Benjamin MIULAMBA MBUYI, *Droit des traités internationaux*

the subjects who commits it does so on a strictly equal footing with the other partner (s), to the strict extent that it has freely wanted. This conception solidly in a whole tradition exemplified by the philosophy (consensualist and individualist) of the eighteenth century ;

- 2) Autonomy of the will and formalism unlike the internal law, international law is thus very little formalist. It admits both the passion of agreements orally or by written means or by means of an articulation of unilateral act, each taken by a party, form commonly practiced for example by exchange of letters. It is even admitted that, apart from any expression of legal acts, certain material conduct may, in relation to certain claims of law made by others, commit the State which has manifested them to certain conditions.⁽¹¹⁾
- 3) Designation of the competent authority to make treaties; The attribution of the agreement to a subject of international law presupposes that this agreement has been passed on behalf of the subject concerned, by the competent authority to do so.

This designation is not accomplished by international law but by the internal law of the State or the "own right" to the organization in question. With regard to States, Article 7 of the 1969 Vienna Convention, however, indicates persons regarded as having full powers in this respect, whether they themselves can produce them or that the States concerned that they intended to consider that person as representing the State "for the purpose of engaging him. Thus, heads of state, government, ministries of foreign affairs, and in certain situations heads of diplomatic missions or accredited representatives of States at an international conference are exempted from producing full powers. international law or domestic law will not, however, allow a State to invoke thereafter a possible violation of its domestic law, committed at the time of the conclusion of the treaty, as a defect of consent, to pretend to disengage that he would have thus concluded. It could only be otherwise if this violation of domestic law was manifest and concerned "a rule of fundamental importance."⁽¹²⁾

2.1 Imputation to a subject of international law, with the required capacity

As a general rule, only States and international intergovernmental organizations have the ordinary capacity to pass treaties whose functions have made it possible to assimilate them either to States (the case of the Holy See) or to organizations intergovernmental affairs (in the case of the ICRC or the Order of Malta), although in law they are non-governmental organizations.⁽¹³⁾

On the other hand, legal persons under private law do not conclude international treaties, even though some authors and arbitral awards seem to admit that they may very exceptionally be recognized in certain cases, particularly in the context of contractual links. of States (passed between a

sovereign State and a foreign private person) a certain contractual capacity in the international order.⁽¹⁴⁾

2.2 Classification of Treaties

There are many ways to draw up a typology of the treaties, according to the peculiarities specific to this category, which one will be able to have place to emphasize. Thus, as part of this work, we will have to classify the treaties in the way that will be structured in the following lines.

2.2.1 Distinction according to the number of parties to the agreement.

We have two categories that are listed here:

2.2.2 Bilateral treaties

Bilateral treaties are those that unite two subjects. It must be emphasized that they are the first to have appeared if we follow the chronological line in interstate practice. They were for a long time all concluded in solemn form, and are most often (but not necessarily) characterized by the synallagmatic equilibrium of the rights and obligations of both parties.

2.2.3 Multilateral conventions

These conventions have tended, as Dupuy said, to take up an important place in contemporary international practice. This growth is due to several factors, including the institutionalization of international society, with the creation of a large number of international organizations, many of which serve as a framework for the negotiation of many of them, following the example United Nations.⁽¹⁵⁾

2.3 The Conclusion of the Treaties

The concept of a conclusion in the strict sense of the term means that a treaty is concluded by States only when they have definitively expressed their consent to be bound by its provisions more broadly, however, the term concludes, as the Convention does. Vienna itself, all the successive phases of the procedure which leads to this commitment, thus understood, this concept covers at the same time the negotiation, the adoption and the expression of the consent to be bound, ordering the entry into the strength of the agreement. The conclusion of a treaty is indeed a procedural transaction, involving separate organs and legal orders, international as well as internal.

2.3.1 The complexity of the procedure

This complexity stems from the fact that the sovereignty of States is repugnant to light commitment. Each stage of the conclusion of the treaties is marked by the concern to verify that the State will not risk, once the agreement concluded, to be bound beyond its will.

2.3.2 Knowing that it will result from the definitive conclusion of the agreement a formal source of obligations, the States seek to define these, moreover more or less precise, according to the representation that they are made

¹¹ Pierre Marie Dupuy ; *op.cit.*, p.272

¹² Article 46 de la convention de Vienne sur le droit de traité de 1969

¹³ V. Paul Reuter, *la personnalité internationale du CICR*, mélanges Pictet, Genève 1984, p.85

¹⁴ V.P. Weil, *problèmes relatifs aux contrats passés entre un Etat et un particulier*, RCADI, 1969 III, p.549

¹⁵ Pierre Marie Dupuy, *op.cit.*, p.279

their interest. This is the purpose of the negotiation, during which the content of the agreement and its formulation will be defined.

2.3.3 They then aim to make sure that the text that has been drawn up at the end of it is a faithful expression of their will. It is thus a question of authenticating the document resulting from the negotiation, the realized object, except otherwise decided by the participants, by means of the signature, definitive or ad referendum, affixed by the authorized representatives of these States at the bottom of the text of the treaty or final act of the international conference which served as a framework for its negotiation.⁽¹⁶⁾

What about reservations?

We must first define the concept reserves. The reservation is understood to be a unilateral declaration made by a State to modify for itself the legal effects of certain provisions of a treaty in respect of which it is about to make a final commitment (by signature, ratification, approval or accession) is therefore a procedure conditioning the entry into force of the treaty for a State that issues it.

2.4 Conditions of Validity of Treaties

As he is in internal civil law, in international law, for a treaty to be valid, certain conditions must be respected. These conditions are among others, the consent which must be free on pain of nullity and the lawful object. The wrongfulness of the object causes the treaty to be absolutely null. And so, these conditions are very necessary and even imperative for a treaty to be valid.

2.5 Effects of Treaties

The legal act treaty produces legal effects which, moreover, are not necessarily summarized in Rights and Obligations. Thus, we will see these effects firstly with respect to the parties, with respect to third parties and with respect to other standards.

2.5.1 The effects of the treaties on the parties

By virtue of the principle "pactasuntservanda", which is the basis of the binding nature of treaties, is often presented as a sort of law of laws, and it can be recognized that it has a scope that could be said to be structurally imperative. as long as it constitutes a primary requirement of the existence and coherence of an international legal order. The preamble of the Charter of the United Nations affirms the determination of the member states to create the necessary conditions for the fulfillment of the obligations arising from treaties and other sources of international law. As we have said above, Article 26 of the Vienna Convention on the Law of Treaties recalls that "every treaty in force binds the parties and must be performed by them in good faith"

2.5.2 The effects of the treaties on third parties

The principle of the relative effect of treaties makes the general rule concerning third States and this is recalled in Article 34 of the Vienna Convention: "a treaty does not

create an obligation or a right for a third State without its consent".

It is also because such a principle exists in the international order that treaties can be said to constitute a source of "special international law" concerning only the states they bind as opposed to "General international law" constituted by custom and the general principles of international law.

It must be observed in practice, however, that the contractual links between certain subjects are not always without effects on third parties.

2.5.3 Exception to the principle of the relative effect of treaties

The only hypotheses envisaged by the Vienna Convention concern cases in which a treaty provides for the creation of either a right or an obligation for the benefit or the charge of a third State.

The two situations are dealt with in two separate provisions, directly inspired by the case law of the PCIJ in the "free zones" case between France and Switzerland (1932, Series AB, N°46 p.147).⁽¹⁷⁾

After the clause of the most favored nation, it is necessary to add also the stipulation for others. In fact, the stipulation for others takes effect as soon as the treaty providing for it comes into force, even if it is subsequently open to a third-party recipient to accept or refuse it.

3. Introduction of Treaties in the Internal Legislation and their Place in the Legal Ordering of States

3.1 Introduction of treaties

The problem of the introduction of treaties into the internal legal order stems from two conceptions: the first conception is called dualistic and the second conception is called monistic.

3.1.1 Dualistic design

It stems from the voluntary conception of the foundations of the binding character of public international law. This theory is exposed by the German positivist authors HEINRICH TRIEPEL in 1899, HELBORN, STRUPP and the Italian authors DIOMISIO ANZILOTTI in 1905 and CAVAGLIERI. This view considers that domestic and international law constitute two independent and separate legal systems. The intrinsic value of internal law is independent of its conformity with international law.

3.1.2 Advanced arguments

Heinrich Triepel who is the father of this theory evokes the following arguments: the sources of the two rights are different in the sense that:

- a) Domestic law is the will of a single State; and public international law is the will of several states.

¹⁶ Article 10 de la convention de Vienne sur le Droit de traités de 1969

¹⁷ Affaire des zones franches, entre la France et la Suisse (1932, série AB, N°46

- b) The subjects of law are not the same :
- Internal law equal to individuals or individuals-states
 - International law equal to state between them. ⁽¹⁸⁾
- c) The international illegality of an act of the State, will nonetheless force its subjects to perform an irregular act under international law example law racist segregation etc ...

There are therefore no laws in International Law and valid in domestic law, which proves that there is complete opposition between the two Rights which move on two levels without ever penetrating. For this school, to be applicable.

- d) In neither of the two legal systems can there be mandatory standards emanating from the other. This can be measured both in depth and in terms of form
- **Fund:** the State being at the same time subject of International Law and creator of domestic law is in principle bound by the obligation to conform its Internal Law to its international engagements. But the sanction of non-fulfillment of this obligation is almost non-existent: if the internal law is not in conformity with the international law, the international responsibility of the State will be admitted, but one will not go, concretely, beyond. ⁽¹⁹⁾
 - **Form:** to be applicable internally, a rule of International Law must first be "transformed" into domestic law by promulgation for example. This mechanism is called by the proponents of the dualistic theory the "reception in Internal Law"
- e) There can be no possible conflict between the two legal orders, the two orders being totally separated the only possibility that will exist will be only the return of one to the other.

Criticism of the dualistic theory:

Dualistic theory can be regulated and objected to a number of facts.

Rebuttal arguments

Here, it will often be made by opponents of voluntarist theories. Thus: with regard to sources: (G.Scelle) it is inaccurate to speak of the diversity of the sources of the Internal Law and the International Law, the dualists confuse the origin of the norm and its factors of expression. International law and domestic law are not a creation of states, but a product of social life, of which only the mode of expression differs.

With regard to subjects, G. Scelle demonstrates that the individual remains the final recipient of the norm of International Law through the person of his rulers. On the other hand, in domestic law, the state is also subject to law. ⁽²⁰⁾

f) The Moniste Design

The monistic theory is based on the initial idea that international law and domestic law constitute one and the same set in which the two types of rules will be subordinated to one another.

Naturally two options will be possible and, according to the authors, we can have either a monism with primacy of the Internal Law, or a monism with primacy of International Law.

3.2 The Monism with Primacy of Internal Law

This conception is presented in Germany by the Bonn school: Zorn, Erich Kaufmann, Max Wenzel (1920); in France by Decenciere-Ferrandiere, and having largely inspired the "Soviet" conception of international law, this theory considers that:

- International law derives from domestic law;
- Domestic law is superior to international law;
- International law is only a kind of public external law of the state.

3.2.1 Case

The arguments raised by the proponents of this theory are:

- a) In the absence of super-state authority, the State therefore freely determines its international obligations and remains sole judge of the manner in which it executes them;
- b) The constitutional (therefore internal) foundation of the powers to conclude treaties on behalf of the State and to engage it on the international level.

3.2.2 Criticism of the theory

This theory has been criticized for being both inadequate and contradicted by positive international law.

• The inadequacy of the theory:

If the argument raised by the partisans of the monist theory with primacy of the Internal Law, can possibly be retained with regard to the treaties whose validity would be based on the state constitution. It remains worthless for all international standards that are not of a conventional nature: especially for customary rules.

• The contradiction by positive international law:

If the international obligations were based on the state constitution, they should disappear together with the constitution on the basis of which they would have been contracted (especially in the event of a constitutional change following a revolution). Such is not the state of international practice according to which the constitutional amendments of States can not affect the validity of the treaties concluded by them (principle of the continuity and identity of the State).

Monism with Primacy of International Law

According to this theory exposed by the Austrian normativist school (KUNZ, KELSEN, VERDROSS) and, in France by Duguit, Scellereglade, polite, Bourquin, Fur, pillet.

For this theory,

¹⁸ HEINRICH cité par NGUYEN QUOC DINH, *op.cit.*, p.222

¹⁹ Pierre Marie Dupuy, *op.cit.*, p.300

²⁰ G. Scelle cité par David RUZIE, *op.cit.*, p.177

- Internal law derives from international law;
- International law is superior to the internal law that it conditions;
- The relationship between international law and internal law would be comparable to those existing in a federal state between the law of member states and federal law.⁽²¹⁾

As Verer dross writes, "the right of people is superimposed on national rights at the top of the universal legal edifice".

3.3 Criticism of the theory

The monist constitution, though more satisfying to the mind, was opposed to certain objections:

- He has been reproached for suppressing all distinctions between international law and domestic law by founding it in a unified universal law.
- It does not correspond to the historical truth (Triel and Anzilotti's voluntarist criticism) because we see that it is first the internal law that appears.
- It would ignore formal data of positive law.

Monism with primacy of international law implies a theory of the automatic abrogation of inferior norms to the contrary, therefore, of the possibly contrary internal law) that we do not find in positive law.

Contrary to this theory indeed, continues to apply in positive Law the "principle of the opposite act".

4. The Attitude of Diplomatic Practice and International Jurisprudence

Before we can give the position of the Democratic Republic of Congo in relation to the place of treaties in the Congolese legal system, we will first see the attitude of diplomatic practice and international jurisprudence on the issue.

4.1 Diplomatic practice

We will discuss here two types of situations:

- a) Some treaties have expressly recalled the superiority of international law over domestic law.

Example: Article 3 of the General Franco-Tunisian Convention of 3 June 1955 which expressly states: "The two governments recognize the primacy of international conventions and treaties over internal law".⁽²²⁾

- b) The international jurisprudence of many international decisions has affirmed that in case of conflict, the domestic law must give way before International Law.

- The Permanent Court of Arbitration at The Hague on October 13, 1922, in the Norwegian Shipping Companies' Case between the United States and Norway, recognized the right of arbitration to confront domestic law with international law and to apply the former only in case of

concordance with the second (...) the facts of the case: "it was a request for compensation for requisition during the war, by the United States, of ships built by Norwegian shipowners in America.

- The Permanent Court of International Justice (PCIJ), July 31, 1930, in the case of the Greek-Bulgarian communities declares; it is a generally recognized principle of the law of nations that, in the relations between the contracting powers of a treaty, the provisions of an internal law may not prevail over those of a treaty.⁽²³⁾ problems posed by the exchange of populations between Greece and Bulgaria, in application of the Treaty of Neuilly of November 27, 1919, and of the Bulgarian Greco Agreement signed on the same day; determination of individuals, liquidation of property etc.
- The International Court of Justice, in a judgment of August 27, 1952, in the case concerning US nationals in Morocco, declared the 1948 decrees incompatible with the earlier Conventional Law. The facts: this is a dispute between France and the United States relating to the system of capitulations in matters of trade and consular jurisdictional study problems.

4.2 Attitude of Internal Law

The internal constitutions elaborated by certain States since 1919 also confirm the principle of the subordination of domestic law to international law. But it must be emphasized that we observe several degrees in this constitutional recognition.

4.2.1 The principle of submission in international law by certain constitutions:

- Preamble of the French Constitution of October 27, 1946: the French Republic, faithful to its traditions, complies with the rules of public international law (...)
- article 29-3 of the Irish constitution of July 1st, 1937.⁽²⁴⁾
- Article 1, §2-2° of the Greek Constitution of 11 June 1975; Greece, conforming to the generally recognized rules of international law, continues the strengthening of peace and justice.⁽²⁵⁾

4.3 Constitution Giving the Treaty the Value of Internal Law

Article VI of the American Constitution recognizes self-executing treaties as worth more than previous laws. In case of contrariety between a treaty and a later law, everything depends on the will expressed by the congress. Be that as it may, a treaty can never depart from the constitution.⁽²⁶⁾

Article 10 of the Italian Constitution of December 27, 1947, the Italian legal system conforms to generally recognized rules of international law.⁽²⁷⁾

Article 25 of the German Basic Law of May 8, 1949; the general rules of international law form an integral part of

²¹ Pierre Marie DUPUY, op.cit, p300

²² Article 3 de la convention générale Franco-Tunisienne du 3 juin 1955

²³ Affaire des communautés Greco- Bulgares, CPJI, le 31 juillet 1930

²⁴ Article 29-3 de la constitution irlandaise du 1^{er} juillet 1937

²⁵ Article 1§2-2° de la constitution grecque du 11 juin 1975

²⁶ Article 4 de la constitution Américaine

²⁷ Article 10 de la constitution Italienne du 27 décembre 1947

federal law. They take precedence over the laws and directly give rights and obligations to the inhabitants of the Federal territory. () But Article 59-2° provides for treaties the necessity of the promulgation of a law, which gives them, then in fact the value of an ordinary law.

4.4 Constitution recognizing the treaty as superior to the law

- Article 55 of the French Constitution of October 4, 1958, but with three conditions: ratification (or approval), publication and reciprocity.⁽²⁸⁾
- Article 94 of the Constitution of the Netherlands of October 1989.⁽²⁹⁾

4.5 Constitution giving the treaty a higher value than the constitution

Article 63 of the old constitution of the Netherlands, as revised on May 22, 1953, provided: "If the evolution of the international legal order so requires, treaties may be concluded in derogation from the constitution."⁽³⁰⁾

5. Introduction in DRC

International treaties are introduced into the legal order of a State in two ways: either that State is in a monistic system; or he is in a dualistic system.

We have shown in the preceding pages the substance of each system in a dualistic system, the treaties to be introduced, they must be subjected to the procedure of reception while in the monistic system, the treaties are introduced directly and without any reception procedure.

The Democratic Republic of Congo simply shows through its constitution of 18 February 2006 that it is beautiful and well characterized by the monist system with the primacy of treaties over domestic laws including even the constitution. This statement is based on Article 215 of the above-mentioned Constitution, which provides that treaties and international agreements which are duly concluded have, since their publication, an authority superior to that of the laws, subject, for each treaty or agreement, to its application by the other part.⁽³¹⁾

The principle of the performance of treaties in good faith drawn from the Vienna Convention on the Law of Treaties in its article 27 shows with great sufficiency that no State will rely on its internal law to extract itself from the execution. of its international obligations () and therefore it is an obligation imposed by this Convention on all Member States to execute their agreements which have been duly concluded.

²⁸ Article 55 de la constitution française du 04 octobre 1958

²⁹ Article 94 de la constitution des Pays Bas d'octobre 1989

³⁰ Article 63 de l'ancienne constitution des Pays Bas telle que révisée le 22 mai 1953

³¹ La constitution du 18 février 2006 telle que révisée à ce jour par la loi N°...../..... Article 215

We will first speak in a few words of the authorities empowered to ratify international treaties and agreements in the DRC, then we will make an enumeration of the main international legal instruments ratified by the Democratic Republic of Congo and finally, we will talk about the application of these conventions by the Congolese judge

Authorities having Treaty Making Power

It is clear that the constitution enumerated *expressis verbis*, the authorities that are empowered to conclude or ratify international treaties and agreements in the DRC.

Article 213 states that the President of the Republic negotiates and ratifies international treaties and agreements.

The government concludes international agreements not subject to ratification after deliberation in the Council of Ministers. He informs the National Assembly and the Senate

While Article 213 gives the President of the Republic free power to negotiate and ratify international treaties and agreements and the Government to conclude agreements not subject to ratification, the same is not true of Article 214.

Indeed, this article has the following way:

"Peace treaties, trade treaties, treaties and agreements relating to international organizations and the settlement of international disputes, those that commit public finances, those that modify the legislative provisions, those that relate to the state of the people those involving exchange and addition of territory may be ratified or approved only by law.

No cession, no exchange, no addition of territory is valid without the agreement of the Congolese people consulted by way of referendum ".⁽³²⁾

Conflict between the Constitution and an International Treaty or Agreement

The position of the Democratic Republic of Congo is concretized by the constitution in its article 216 which ultimately shows that if the Constitutional Court consulted by the President of the Republic, the Prime Minister, the President of the National Assembly or the President of the Senate, by one-tenth of the deputies or one-tenth of the senators, declares that a treaty or international agreement contains a clause contrary to the constitution, the ratification or the approval can not intervene that after the revision of the constitution.⁽³³⁾

It sometimes happens that a State can conclude treaties or international agreements of association or community involving a partial surrender of its sovereignty with a view to promoting African unity. This is a provision of article 217 of the constitution of February 18, 2006 as revised to date.

The main international legal instruments to which the DRC is part

We are going in the framework of this part to confine ourselves to enumerating some legal instruments relating to

³² Article 214 de la constitution du 18 /02/2006 art. 215

³³ Article 216 de la constitution du 18 février 2006

the human rights and to the international humanitarian law with which the Democratic Republic of the Congo is part the Congolese State is regarded as a good child or a good student to the extent that it is very willing to ratify international treaties or agreements but for the application of these legal instruments, there is a problem.

These instruments are the following:

- Universal Declaration of Human Rights ;
- International Covenant on Economic, Social and Cultural Rights;
- International Covenant on Civil and Political Rights;
- Optional Protocol to the International Covenant on Civil and Political Rights
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Elimination of All Forms of Discrimination against Women;
- Convention on the Political Rights of Women;
- Convention on the Rights of the Child;
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict;
- Rome Statute of the International Criminal Court.

Regional Legal Instruments of Human Rights

- African Charter on Human and People's Rights;
- Ouagadougou Protocol of an African Court on Human and Peoples' Rights;
- Convention on the Organization of African Unity Governing the Specific Aspects of Refugee Problems in Africa;
- African Charter on the Rights and Welfare of the Child.

Who Should Ensure the Execution of Treaties in the DRC?

It is important that we be able to show the authorities that are called upon to implement international treaties and agreements. Firstly, we will say that it is the President of the Republic because Article 69 in its first paragraph gives the President of the Republic to be the guarantor of national independence, territorial integrity, national sovereignty and respect for international treaties and agreements.⁽³⁴⁾ And the parliament called upon to intervene not only to authorize, in cases the ratification or approval of international treaties or agreements, particularly those relating to the state of the person, as Article 214 demonstrates, but also to ensure their execution to the fullest extent of its competence.⁽³⁵⁾

Application by Congolese Judge

The obligation to apply international treaties and agreements by the Congolese judge derives from the obligation incumbent on his State, which obligation is international as

we have seen, its foundation is taken from the principle "pactasuntservanda" which also draws based on article 27 of the Vienna Convention on the Law of Treaties.

Unfortunately the Congolese judge in the application of treaties and international agreements is timid in the exercise of his powers. This is proved when there is a conflict between these and the internal law.

It should be noted, moreover, that article 215 of the constitution in principle channels the position of the Congolese judge on this problem, since according to the article cited, only "superior laws treaties regularly ratified and published ". It is permissible to deduce from this system the invitation addressed by the grantor to the courts to verify first whether each treaty fulfills the conditions laid down for its applicability, then to order the unenforceability of a prior or subsequent legal provision, contrary to and, in the end, find that it is obsolete after more than one domestic judicial decision and the outcome of a conviction by an international court.

6. Conclusion

Like any scientific work, as soon as you start with the introduction, you have to come to the conclusion. The topic of our research focused on the introduction, application and place of international treaties and agreements in the Congolese legal system.

We have shown throughout the writing of our work that the problem of the introduction of treaties and international agreements into the internal legal order stems from two conceptions namely: the so-called dualist conception and the monistic conception the dualist theory is that to HEINRICH TRIEPEL since 1899 and HELBORN STRUPP who are Germans as well as the Italians DIONISCO ANZILOTTI to 1905 and cavagliori this conception considers that Internal Law and International Law constitute two equal, independent and separate legal systems. The proper value of internal law is independent of its conformity with international law, in spite of the fact that this school separates these two rules, namely, the internal rule and the international rule, international law can be introduced into the internal law of the states at the end, for its introduction into the internal legal order with regard to dualistic design, a reception procedure is required.

The second school called monist is based on the idea that domestic law and international law constitute one and the same set in which the two types of rules will be subordinated to one another. Naturally, two options will be possible and according to the authors, we have monism with primacy of the Internal Law.

For the school of monism with primacy of the internal law, the EZORN school, erich KAUF MANN, maxwenwel in 1920 in Germany and in France by DECENCIERE-Férrandière and having largely inspired the conception "Soviet of the International right. International law is only a kind of public external law of the state.

³⁴ Article 69 de la constitution du 18 février 2006

³⁵ Valérie Vu, *op.cit.*, p.14

For the conception of monism with primacy of international law which conception is animated by the Austrians (KUNZ, KELSEN, VERDROSS and the French Auguit, seals reglade, politis, Bourquin, fur and pillet.

For this school, International Law derives from internal law, international law is superior to domestic law and conditions relations between domestic and international law that would be comparable to those existing in a federal state, between the law of member states and federal law. .

Notwithstanding, all the considerations of all the theories arising from the school of monism, the monistic system does not make use of the procedure of receptions and therefore International Law is of direct introduction.

With regard to the application of international treaties and agreements in the Democratic Republic of Congo, it must be admitted that the Congolese judge applies them timidly or seldom, and in our opinion, given either ignorance or contempt or the lack of appropriate training for the mastery of the rules of international law. Whatever the Congolese judge does, whenever there is a conflict between national law and international law or rule, he applies a national rule to the detriment of international rule, it is hoped that in the future he will end to become familiar with these rules of international law.

As regards the place of international treaties and agreements, in the Congolese legal system, the finding of 18 February 2006 is very clear. This is easily explained to the extent that Article 215 of the Constitution provides that international treaties and agreements regularly concluded, upon their publication, an authority superior to that of the laws, subject, for each treaty or agreement, to its application by the other party. This is how we say that the reciprocity of which the Congolese constituent speaks is superfluous and, moreover, Article 27 of the Convention comes on the Law of Treaties and is very clear and forbids States to use their internal laws. to get rid of the execution of international conventions and especially that the Democratic Republic of Congo is in a monistic system where the application is direct and without reception (monist with primacy of International Law).

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