

Combating malnutrition through human rights instruments for
the benefit of people living with HIV and AIDS in the
Democratic Republic of the Congo

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Table of content

Table of content.....	i
Dedication	iii
Acknowledgements	iv
List of abbreviations	v
Chapter 1. Introduction.....	1
1. Background to the research	1
2. Research questions	4
3. Literature review	4
4. Methodology	8
5. Outline of chapters	8
Chapter 2. The DRC’s international obligations pertaining to the right to adequate food.....	10
1. Introduction	10
2. The right to adequate food in international human rights law.....	10
3. International trade and the right to food.....	14
3.1 <i>Presentation of problems pertaining to the right to food</i>	14
3.2 <i>In the DRC</i>	15
4. The implementation of the right to food on the ground	16
4.1. <i>A law analysis</i>	17
4.2. <i>Government’s action analysis</i>	21
Chapter 3. Obstacle to the realization of the right to food in the DRC	25
1. Armed conflicts and food security	25
1.1. <i>Impact of armed conflicts on food security</i>	25
2. Where do PLHIV come in?	32
2.1. <i>Consistency of food aid to PLHIV in associations</i>	32
2.2. <i>Food distributed in IDP camps</i>	33
2.3. <i>Quality of the distributed food</i>	34
Chapter 4. Recommendations on adapted response to malnutrition for the benefit of PLHIV in the DRC.....	35
1. The role of PLHIV	35
1.1. <i>PLHIV and isolation</i>	35

1.2. Problems related to PLHIV's association	35
2. Role of PLHIV associations with regard to HIV-related programs	36
2.1. Framing HIV-related programs with realism	36
2.2. The role of PLHIV association in monitoring the implementation of the NSP.....	38
3. PLHIV associations and submission of claims	38
3.1 Administrative procedures.....	38
3.2. Tribunals and courts involvement	39
4. Recommendations to the Congolese Government.....	41
Bibliography	43

Dedication

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List of abbreviations

AIDS	: Acquired Immuno Deficiency Syndrome
AoA	: Agreement on Agriculture
AP I & II	: Additional Protocol I & II to the Geneva Convention
ARV	: Antiretroviral
AU	: African Union
CEDAW	: Convention on the Elimination of All forms of Discrimination Against Women
CESCR	: International Covenant on Economic, Social and Cultural Rights
CRC	: Convention on the Right of the Child
CRPD	: Convention on the Rights of People with Disability
DRC	: Democratic Republic of Congo
ESCR	: Economic, social and cultural rights
FAO	: Food and Agriculture Organization
FARDC	: Forces Armées de la République Démocratique du Congo
FDLR	: Forces Démocratiques pour la Libération du Rwanda
GIV	: 4 th Geneva Convention on the protection of civilians
HIV	: Human immuno virus
IDP	: Internally Displaced Person
IPCC	: International Panel for Climate Change
M23	: Mouvement du 23 Mars
NGO	: Non-governmental organization
No	: Number
NSP	: National Strategic Plan
OHCHR	: Office of the High Commissioner on Human Rights
PLHIV	: People living with HIV
PRSP	: Poverty Reduction Strategy Paper
TNCs	: Transnational corporations
UN	: Unated Nations
UNDP	: United Nations Development Program
WFP	: World Food Program
WFP	: World Food Program
WHO	: World Health Organization
WTO	: World Trade Organization

Chapter 1. Introduction

1. Background to the research

‘As we enter into the final years of working towards the Millennium Development Goals and the United Nations Political Declaration on HIV/AIDS, much remains to be done to reach our targets. Treatment has not yet reached 7 million people’.¹ Part of this treatment is related to food. People living with HIV and AIDS (PLHIV) need medicines together with food for their treatment. Adequate food intake is a requirement for antiretroviral (ARV) therapy to work properly for the best of PLHIV. Reduced food intake reduces the intake of vitamins or micronutrients: there is data suggesting that HIV infection diminishes the levels of a range of micronutrients and that HIV positive individuals may have increased micronutrient requirements.² Providing medicines is not enough; adequate food and nutrition are essential elements of treatment: recent reports show that in health programs medicines are of little or no use without adequate food and nutrition.³ Antiretrovirals (ARVs) are very strong medicines which need to be taken by someone who does not lack food. The consequences can be severe. It has been reported that undernourished PLHIV cannot continue their ARVs due to their side effects.⁴ Some others have abandoned their ARVs due to lack of food because when they take ARVs without food, they become very weak. The most common physical sign of nutrition inadequacy in HIV and AIDS is weight loss.⁵ Lacking physical strength, a PLHIV under treatment is not in a good position to work. It also affects his possibility to continue caring for himself. This shows the cycle and the interconnectedness between food intake and HIV treatment on the side of physical strength. Insufficient food has another effect on PLHIV, that of avoidance in medicine adherence. It is reported in some areas that people have to make a choice between buying food and buying medicine. And when they do not have food, they prefer buying food and abandon the treatment. This has the effect of creating resistance to ARVs.

The need for food for women and children living with HIV poses a specific problem. Women living with HIV expose their babies while breastfeeding. They should be informed of the risk of HIV transmission to their children and should be in a position to make an informed choice with regard to the feasible, affordable and available food of replacement that they can give to their children.⁶ Thus babies are exposed both to malnutrition and to HIV infection.⁷

¹ As write Aung San Suu Kyi Michel Sidibé in UNAIDS *World AIDS Day Report. Results2012* (2012) 2-3.

² A Vandenbogaerde *The right to food in the context of HIV* (2009) 17.

³ n 2 above 18.

⁴ MA Munzara-Chawira ‘The Right to food of People Living with HIV and AIDS’ 3 available at www.rftn-watch.org (accessed 07 September 2013).

⁵ Two patterns of weight lost have been observed in HIV: acute or rapid weight loss from secondary or opportunistic infections; chronic or slow weight loss from anorexia and gastrointestinal disease. See DC Macallan and others ‘Prospective analysis of patterns of weight change in stage IV human immunodeficiency virus infection’ *Am J Clin Nutr* (1993) 58 417-424 as mentioned in E Colecraft ‘HIV/AIDS: nutritional implications and impact on human development’ *Proceedings of the Nutrition Society* (2008) 67 110.

⁶ Vandenbogaerde (n 2 above) 22.

Unfortunately, in some Sub-Saharan countries, food is lacking more and more. There are many causes that can explain this.⁸ But generally, political instability in some of these countries is one of the major causes. Among Sub-Saharan countries, some of them have been at war for a long time whereas others have ceased with armed conflicts.

The Democratic Republic of Congo (DRC) is known as a country embroiled in armed conflict. This country has been facing armed conflicts and political instability for two decades. In this context, issues pertaining to food have been raised mostly out of necessity. Different organizations that work on the ground have highlighted the issue of inadequate food and about the collapse of agricultural activities.⁹ Harvesting is getting difficult due to insecurity resulting in millions of undernourished people in the Eastern part of the DRC. Access to food is becoming difficult also due to the incapacity of the Congolese Government to effectively control some parts of the territory. Different armed groups have taken control in some areas and apply their own rules on top of the insecurity that they cause.

Armed conflicts have increased the number of camps of internally displaced people (IDP) where food is reported not to be sufficient.¹⁰ Although this results in the lack of food for everyone, it is much harder for PLHIV.

The DRC has a population of 67,7 million people. It is estimated that 2,57% of the general population is infected by HIV,¹¹ chronic malnutrition rate for children under 5 years old is 11,5% and in general 64% of people are found to be undernourished in the DRC.¹²

Another cause of inadequate food is climate change. During the 21st century, climate change is one of the important problems that States are called upon to address. It is even seen in concurrence with the fight against HIV. The International Panel for Climate Change (IPCC) has undertaken studies that show the consequences of climate change in different domains.¹³ Its past studies suggest that diverse effects of climate change on agriculture and food security will be concentrated in developing countries. Roger E and Jeanne X Kaperson summarize their findings as follows: 'Overall, owing to geographic and temporal shifts in agriculture, worsening social and economic situations and new extremes in temperature and precipitation,

⁷ The principal recommendations are that exclusive breastfeeding is recommended for HIV-infected women for the first 6 months unless replacement feeding is acceptable, feasible, affordable, sustainable and safe for the infant.

⁸ On structural and conjectural causes, see OCHA (2013) *The Democratic Republic of Congo. Humanitarian Action Plan 2013* 106. Available at www.ocha.org (accessed 3 April 2013).

⁹ In the DRC, food production has dropped. It is inferior for a proportion of 30 to 40% to the total food production of 1997. Conjectural causes of food insecurity are related to armed conflicts, displacement of populations, natural disasters (floods, droughts, ...), etc. See OCHA (n above).

¹⁰ From testimonies of IDPs heard on different local radios.

¹¹ PNMLS *Rapport d'activité sur la riposte au VIH/SIDA en R.D. Congo* (2012) 5 available at www.pnmls.cd (accessed 3 September 2013).

¹² OCHA *République Démocratique du Congo. Plan d'Action Humanitaire 2013* 4 available on www.unocha.org (accessed 03/04/2013).

¹³ See IPCC *Synthesis report, summary for policymakers, 4th Assessment report* (2007) available at www.ipcc.ch.

food security in areas already insecure, and particularly in Africa, will worsen'.¹⁴ Thus climate change will impact on food production, specifically, through anomalous changes in weather and precipitation which will result in agriculture not being conducted as it normally should be. Floods and storms will destroy crops and force people to move to other parts of their countries, resulting in groups of people called climate refugees. Climate change is a challenge that is being addressed differently by countries either through mitigation or adaptation strategies. It is said that climate change will impact more drastically on developing countries than on developed countries.¹⁵ This means that sick people in these poor countries will be exposed to severe consequences of climate change. Arguably, HIV may increase vulnerability to the consequences of climate change in the sense that PLHIV are likely to suffer from lack of food much more than they would in *normal* conditions. It is important to note that PLHIV need a specific diet with a range of nutrients that allow them to take their medicines in a better condition. Hence, they form a special case in this context.

Lack of food is also perceived as a human rights issue. The right to food is recognized in several human rights instruments. The International Covenant on Economic, Social and Cultural Rights (CESCR),¹⁶ the Convention on the Right of the Child (CRC),¹⁷ the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)¹⁸ and the Convention on the Rights of People with Disability (CRPD).¹⁹ With regard to HIV, we may add the political declaration on HIV/AIDS adopted in 2006 by the United Nations General Assembly which mentions 'food and nutritional support' as part of a comprehensive response to HIV/AIDS'.²⁰ States have ratified the human rights instruments mentioned above and recognize the part of soft law that is related to HIV and AIDS.

Several organizations are working on food issues and help not only in alerting countries to food problems but also offer assistance in solving them. The Food and Agriculture Organization (FAO) is one of them. Other United Nations (UN) agencies also work in alleviating the lack of food in poor countries and in situations of armed conflicts. In some countries, these agencies have set up strategies and are applying them. In the DRC, clusters of UN agencies and local organizations undertake activities during emergency situations to address nutrition and the food security issue.

Regarding the problem of nutrition, they focus on the reduction of mortality for children under 5 years old and of acute malnutrition.²¹ On the issue of food security, these UN

¹⁴ RE & JX Kasperson 'Climate change, vulnerability and social justice' *Stockholm Environment Institute* (2001) 4

¹⁵ n above.

¹⁶ See article 11.

¹⁷ See article 24(2)(c) and (e) in the context of the right to health and article 27(3) in the context of the right to an adequate standard of living.

¹⁸ See article 12(2).

¹⁹ See article 24 (2) (c) and (e) in the context of the right to health and article 27 (3) in the context of the right to an adequate standard of living.

²⁰ UN General Assembly, Political Declaration on HIV/AIDS 60/262 (2006) paragraph 28.

²¹ The interventions will consist of; (1) setting up of a system of nutritional supervision and of alert; (2) detection of affected children and care to be provided to children suffering from acute malnutrition; (3) preventing

agencies aim to provide urgent food and agricultural assistance for saving lives, restoring food security and protecting the livelihood of people affected by acute food crisis and livelihood crisis.²² These goals are at the centre of the work of UN agencies that currently operate in the Eastern part of the DRC.

This dissertation focuses on how human rights instruments can be used to fight HIV and AIDS through addressing issues of malnutrition. Thus, in this dissertation, food problems are analyzed from the perspective of the *right to food*. The study suggests that people should enjoy a constitutional right followed by specific legal provisions with regard to the right to food. Further, when governments, particularly the government of the DRC, claim to be fighting malnutrition, they often show that the food problem is being addressed because it is already contemplated in their constitutions and their laws. This dissertation analyzes how these sorts of legal provisions operate and how to make them more useful on the ground in the DRC.

2. Research questions

This dissertation answers the following questions:

- 1) What are the DRC's obligations with regard to the enforcement of the right to food especially in the case of PLHIV?
- 2) Are these obligations fulfilled?
- 3) How can malnutrition be fought against? Is there any national mechanism that PLHIV can use to claim the right to food?
- 4) In the current context of war, is the Congolese government justified in not fulfilling its obligations? Who else bears duties with regard to the enforcement of the right to food in a context of war and how does it operate?

3. Literature review

There are many studies that have been conducted and that have answered the question of States' obligations for the implementation of international instruments on human rights. Starting in the UN system itself, treaty based bodies explain the real content of the obligation that a State has in terms of the right to adequate food. General comment No 12 issued by the Committee on Economic, Social and Cultural Rights (UN Committee on ESCR) explains it very well. States bear the responsibility to realize the right to adequate food. The right to food

malnutrition through promotion of nutrition concerning babies of 6 to 35 months old via the 'blanket feeding', and care is also to be provided to pregnant and breastfeeding women; (4) training of caregivers. And regarding the issue of PLHIV, as it is sometimes forgotten, some interventions are planned. They consist on a follow-up of interventions in PLHIV's nutrition. (See OCHA (n 12 above) 100).

²² These activities target in priority women headed household and PLHIV for a proportion of 75% of the affected people. They concern: (1) food aid (money counter work or training), distribution of agricultural inputs and training); (2) strengthening sustainability of livelihood, income generating revenue activities in agriculture, rehabilitation of some roads to make food accessible, sensitization about nutritional good practices and the promotion of diversified food production (training and practice on domestic plots), etc., (3) re-organizing and redynamizing information collection system and follow-up of food security system as well, evaluating the needs, follow-up of food security, analysis and households selection. (See OCHA (n 12 above) 110).

does not equal to the right to be fed.²³ But where people are not able to have food for them, States have a duty to fulfil the right to food which means the obligation to facilitate and to provide for food. The right to adequate food is to be realized progressively. But, there are four sorts of different obligations pertaining to the right to food that are of immediate realization: non-discrimination, minimum core obligation, prohibition of retrogressive measure, obligation to take steps.²⁴

While the Office of the High Commissioner on Human Rights (OHCHR) writes that implementation of the right to food varies from country to country, it emphasizes that countries that are committed to realizing the right to food must take immediate steps. The OHCHR mentions the following specific steps: at a national level there should be a national strategy, legal framework and institutions, ensuring effective and appropriate judicial remedies; and at an international level States should comply with regional and international monitoring mechanisms as fundamental elements of human rights implementation.²⁵

This dissertation analyses the DRC's obligations in the light of General Comment No 12. It goes further to examine the significance of these obligations during times of war. Further, with regard to effects of war, a State is obliged to do whatever it can to make food accessible. A State's government must combat rebellions that impede access to food for everyone. The case of DRC is instructive because rebels control some parts of the territory. Thus, this dissertation focuses much of its attention on the situation where a State is unable to provide food or to secure access to food not because of lack of will but mostly because of incapacity. It answers the question of how a State under armed conflict puts into practice its human rights obligations..

Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States.²⁶ This shows that actors other than States also have a role to play in the realization of the right to food in terms of international human rights instruments. Companies must ensure that the food they put in the market is of good quality.²⁷ States should play their part and control trade activities to ensure that people access proper food.

Regarding relations amongst States in accordance with development, M Chopra and I Darnton-Hill studied the role of globalization in exacerbating hunger in poor countries. They propose the development of international standards with the participation of nutritionists in placing the

²³ OHCHR 'Fact sheet on the right to food n°34' 3 available at www.ohchr.org (accessed 5 February 2013).

²⁴ n above 20-22. See also the phrasing of General comment No 12 paragraphs 17&18.

²⁵ n above 27

²⁶ See UN Committee on ESCR *General Comment* No 12 paragraph 19.

²⁷ According to the Special Rapporteur on the right to food, the problem of food was perceived, in the past, only in terms of quantity. But since food productivity has extended, it is worth to start looking at the quality. Now the focus should be on sustainable diet taking into account adequacy of diet, social equity and environment. Challenges are: micronutrient deficiency, overweight and obesity (excessive caloric intake). Obesity is said to be killing more people than underweight does. See UN General Assembly 'Report submitted by the Special Rapporteur on the right to food, Olivier De Shutter' A/HRC/19/59 26 December 2009 paragraph 9.

nutritional status of the most vulnerable at the centre of any discussion concerning globalization, development and Africa.²⁸

The realization of the right to food also depends on civil society's action in pressuring the government.²⁹ International policies and regulations related to trade and cultural (sic), food and other forms of human rights must ensure the viability of food systems rooted in local ecology and cultural tradition.³⁰ In fact, traditional foods of indigenous populations typically draw on local biodiversity and are based on local production and management of land and distinctive environments.³¹

This dissertation also focuses more specifically on how the human right to food is implemented by non-state actors during times of armed conflicts. The dissertation examines the situation of the DRC, where in some parts there is war, and looks at ways in which one could render non-State actors accountable. Non-State actors include not only non-governmental organizations that intervene in IDP camps, but also intergovernmental organizations. Voices rise often from some camps to say that the distributed food is not enough. This situation is addressed in a context where we analyse how the right to adequate food ought to be considered in IDP camps. The dissertation analyses who *is* responsible or who *can be* rendered accountable in an area where State's Government has no control.

As Andrew Clapham writes,

International law originally only considered rebels as having international rights and obligations from the time they graduate to insurgency. Today, international law imposes obligations on certain parties to an internal armed conflict irrespective of any recognition granted by the state they are fighting against or by any third state.³²

The dissertation looks at the extent to which government and armed groups bear the responsibility regarding the realization of the right to adequate food in times of war. The analysis of this question will also help us to see if in camps specific conditions are taken into account, such as HIV, which is the matter at the heart of this dissertation. The work tries to analyse if IDPs who are living with HIV receive necessary attention with regard to their right to adequate food.

On how to fight malnutrition linked with HIV and AIDS in general, available literature proposes the use of programming systems. Aileen Robertson insists on fighting against

²⁸ M Chopra & I Darnton-Hill 'Responding to the crisis in Sub-Saharan Africa: the role of Nutrition' *Public Health Nutrition* (2006) 9 548.

²⁹ R Shrimpton 'International and Public Health Nutrition Group Symposium on 'The interface between evidence, policy and practice in public health nutrition'. Evidence v. rights-based decision making for nutrition' *Proceedings of the Nutrition Society* (2003) 62 560.

³⁰ T Johns & P B Eyzaguirre 'Symposium on 'wild-gathered plants: basic nutrition, health and survival'. Linking biodiversity, diet and health in policy and practice' (2006) *Proceedings of the Nutrition Society* 65 188.

³¹ n 27 above 184.

³² A Clapham *Human rights obligations of non-State actors* (2006) 271-272.

poverty in general which is a factor of unequal access to safe food.³³ Esi Colecraft pleads for a kind of cross-cutting HIV mitigation interventions to prevent and treat HIV and AIDS and to mitigate the social effects of the disease looking carefully at the interaction between HIV and AIDS and nutrition.³⁴ Well-designed targeted food aid programs should also promote the use of locally grown foods in combination with food from external sources in order to avoid creating a dependency on food aid.³⁵ These authors suggest using programming in fighting malnutrition for the benefit of PLHIV. They do not show how it has to be done. They only formulate principles. Others have suggested using human rights in programming.³⁶ International human rights instruments help to view the process of providing services to people affected by HIV and AIDS as one of the means to fulfil their rights, instead of providing charity; ‘beggars are transformed into claimants and thus are able to hold Governments accountable’.³⁷ Compliance with the right to adequate food involves applying the human rights based approach to food security, but there are few actual examples of this approach in HIV and AIDS programming. The value-added of human rights in such programs is related to food security and the right to food, which goes beyond the concept of food security.³⁸ These ideas help in the advancement in answering how to apply human rights based approach. But they are limited on claim and programming and again in a country where institutions work normally. This dissertation asks firstly, if there is a programming system in the DRC; secondly if this is used in a sense that human rights are included. Of course it is only a kind of verification. But the actual gap that this dissertation needs to fill is about looking for other ways of using human rights in a country like the DRC because I assume that programming itself cannot solve a great part of problem. Thus it is logical to proceed by showing if there is any programming system before suggesting other means in the fight against malnutrition.

The last question concerns human rights implementation. This question asks if there can be a claim or complaint to lodge efficiently with Congolese institutions. Studies that have been conducted earlier discussed the Congolese system amongst others and concluded that as a monist country, international human rights instruments are to be applied directly by Congolese judges since they are ratified and published.³⁹ But in practice, that is not working. There are some causes of this practice and among them, the mere fact that Congolese judges seem not to be familiar with international instruments. This has something to do with the role that the DRC should play in ensuring that people can claim their rights within its system before they use regional mechanisms. Still, it is important to analyze on how human rights instruments can be used within the Congolese system. An author suggests that international

³³ A Robertson ‘Social inequalities and the burden of food-related ill-health’ *Public Health Nutrition* (2001) 4 1372.

³⁴ E Colecraft ‘HIV/AIDS: nutritional implications and impact on human development’ *Proceedings of the Nutrition Society* (2008) 67 111.

³⁵ J Bukusaba, JK Kikafunda & R G Whitehead ‘Food security status in households of people living with HIV/AIDS (PLWHA) in a Ugandan urban setting’ *British Journal of Nutrition* (2007) 98 217.

³⁶ In the same sense, but especially for women and children see A Lartey ‘Maternal and child nutrition in Sub-Saharan Africa : challenges and interventions’ *Proceedings of the Nutrition Society* (2008) 67 105-108

³⁷ K Greenblott ‘Food an essential weapon in the battle against HIV and AIDS’ *Human Rights* (2010) 37 18.

³⁸ A Vandenbogaerde (n 2 above) 13.

³⁹ M Killander (ed) ‘Introduction’ *International law and domestic human rights litigation in Africa* (2010) 5-10.

instruments should be used by constitutional judges as a means to interpret the constitution.⁴⁰ He argues that judges, while examining constitutional matters, should use international human rights instruments to interpret the constitution. This can work where judges show any interest in human rights law. But in a country where it is difficult to tell if human rights law means something for judges, it appears interesting to think on how combination of litigation, setting up and follow-up of programs as well as using administrative procedures can take into account human rights instruments.

These are some considerations that the dissertation takes into account while it tries to answer the aforementioned research questions. It centres its analysis on the effectiveness of provisions that protect access to nutritious food for PLHIV even though the analysis may start from a general perspective.

4. Methodology

The questions mentioned above are related to legal matters. As a part of legal studies, they will require necessarily a use of legal methods. One of the most used methods is text interpretation. It helps in understanding legal instruments. In addition, with regard to the nature or the content of a number of those questions, desktop research is adequate. In order to analyze the DRC's obligations by their existence or by their efficiency, the dissertation analyses pertinent international human rights instruments and relevant internal laws. We also use informal interviews and personal observation for approaching PLHIV and collection of their specific information.

5. Outline of chapters

Given the way in which the research questions are presented, this dissertation needs to look at the DRC's obligations pertaining to the right to food by explaining how they are supposed to be enforced and then to verify how they are being implemented. The implementation analysis goes through DRC's laws and policies. Thus, chapter 2 looks at the implementation of DRC's obligations pertaining to the right to food. After this analysis the dissertation analyzes obstacles to the realization of the right to food. It looks at the possible obstacles and examines the possible responses. The two main obstacles are those of armed conflicts and issues of climate change. But for the sake of this dissertation and according to the current situation in the DRC,⁴¹ Chapter 3 presents problems related to war. It ends its analysis by showing how PLHIV are concerned. Lastly, chapter 4 presents recommendations to enhance the implementation of the right to adequate food for PLHIV. It suggests a way to go beyond the different problems that were discovered through the previous analysis.

⁴⁰ n above 21.

⁴¹ There is not as much concern about climate change compared to current concerns regarding the ongoing war in the Eastern part of the DRC. This is not to say that climate change has nothing to do with food or HIV (see on this issue the pertinent study by R Gomme and others *Climate change and HIV. A hotspots analysis for early warning rapid response system* (2004) UNDP, FAO & NCAR). It remains a matter of interest in the context of the DRC to study the effect of this obstacle. It will however not be the focus of this study.

It is worth bearing in mind that the whole study is meant to address the problems of PLHIV.
The analysis turns around their specific problems.

Chapter 2. The DRC's international obligations pertaining to the right to adequate food

1. Introduction

The international obligations regarding the right to adequate food are analyzed under this chapter and focuses firstly on the scope of the obligations and secondly, on the extent to which they are implemented. While the DRC's obligations pertaining to the right to adequate food may be analyzed in many ways, this dissertation analyzes human rights instruments and other international instruments pertaining to international trade.

2. The right to adequate food in international human rights law

There are provisions pertaining to the right to adequate food within several human rights instruments. According to the UN Committee on Economic, Social and Cultural Rights (UN Committee on ESCR), the International Covenant on Economic, Social and Cultural Rights (CESCR) gives the very content of the right to adequate food.⁴²

In terms of article 11(1),⁴³ adequate food is part of the right to an adequate standard of living. It has to be implemented by State parties by taking appropriate measures. In fact, it has to take progressive measures, as set out in the General Comment No 12. The right to adequate food is of crucial importance in the realization of other human rights.⁴⁴ [It] is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.⁴⁵ The principal obligation is to take steps to achieve *progressively* the full realization of the right to adequate food.⁴⁶ The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*.⁴⁷

The obligation to *respect* means the State must refrain from taking acts that violate the right to adequate food. The obligation to *protect* is to be understood in the sense that the State should prevent acts of other violators; it should take measures to prevent a third party's infringement of the right to food. The obligation to fulfil contains the obligation to facilitate and to provide as is more clearly explained in the quote below:

'The obligation to *fulfil (facilitate)* means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and

⁴² UN Committee on ESCR General Comment No 12 on adequate food.

⁴³ Article 11(1) of CESCR: The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent'.

⁴⁴ n 42 above paragraph 4.

⁴⁵ n above paragraph 6.

⁴⁶ n above paragraph 14.

⁴⁷ n above paragraph 15.

means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly'.⁴⁸

Article 11(2) of CESCR⁴⁹ insists on measures to be taken in accordance with food production, food-importing and food-exporting. In the case of DRC, importation is very frequent since food production in the country is not yet enough to favour exportation. In this regard, the DRC has to look very consciously at its trade agreements in order to encourage internal production.

Other provisions are found within the Convention on the Right of the Child (CRC).⁵⁰ Its article 24(2)(c)⁵¹ links foods with health services. It states that malnutrition should be combated and provides some measures, amongst them provision of adequate nutritious foods and clean drinking-water. This article is of importance not only because it links food and health but also because it insists on the quality of food to be given: nutritious foods. The word 'provision' is also of importance because it is understood in a sense that the Government is called to *provide food* within the framework of primary health care. Basically, this sounds like the Government has to distribute food for those children in need.

Pursuant to article 24(2)(e) of the CRC, States parties shall take measures:

'[t]o ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;'

This article concerns education about nutrition linked with child health. In fact, in the terms of the CRC, food provision has to be accompanied by awareness because, it will be of no use for parents to have food supply for their children when they do not take into consideration some other important aspects cited in the said article. Thus, counselling programs are supposed to be organized with hospitals, in order to put article 24(e) into practice. Follow-up sessions should also be provided because some parents may not take immediately understand all the knowledge they are given.

⁴⁸UN Committee on ESCR (n 42 above) paragraph 15.

⁴⁹ 'The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need'

⁵⁰ See article 24(2)(c) and (e) in the context of the right to health and article 27(3) in the context of the right to an adequate standard of living.

⁵¹ 'States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: [t]o combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;'

Under articles 27(1) & (3),⁵² nutrition is taken in the context of the right to an adequate standard of living. Article 27(3) states that government should take appropriate measures to assist parents. States are called upon to provide for material assistance particularly with regard to nutrition. This means basically, and again, distribution of food without asking whether or not there is a health problem. This provision wisely frames food assistance within the boundaries of ‘available resources’ which means that a government is not compelled to provide material assistance on the basis that it does not have enough resources. However, in my opinion while there is no objection to understanding this article to suggest that progressive steps should be taken, Government should clearly state what has been planned with regard to assisting parents in combating malnutrition.

After a provision concerning non-discrimination towards women in the field of health care, article 12(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) insists on the free provision of services, and amongst them, the provision of adequate nutrition, specifically in conjunction with health and more especially in matters of pregnancy. States are called to assist pregnant women by granting adequate nutrition. This means literally, there should be adequate food in hospitals so that pregnant women in need have adequate and appropriate food. There is no indication of States’ available resources thus the non- implementation of this provision may not be justified by lack of resources.

The Convention on the Rights of People with Disability (CRPD) also gives some interesting provisions on the right to food. In fact, article 25(f) concerns non-discrimination against people with disability in matters of provision of health services and food. Article 28(1) foresees adequate food in the right to an adequate standard of living for people with disability. This article insists on free access to poverty reduction programs and financial support without discrimination. I would say this Convention is actually concerned with non-discrimination. In fact, in the Convention, we find the word ‘discrimination’ 25 times either in the form of ‘non-discrimination’ or ‘discrimination’. Thus with regard to access to food greater emphasis is placed on the issue of non-discrimination such that in any circumstance where government is to provide for food, there should not be discrimination against people with disability.

The DRC is a State party to these four important human rights instruments at the universal level.⁵³

In the regional human rights framework, it has to be mentioned that the right to adequate food is not mentioned *expressis verbis* in the African Charter on Human and Peoples’ Rights

⁵² ‘States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing’

⁵³ See the state of ratification of international human rights instruments available at www.un.org

(African Charter). But, according to the implied rights theory,⁵⁴ the right to adequate food can be read through the right to health⁵⁵ or within the right to property to some extent.⁵⁶ From the known experience of the African Commission on Human and Peoples' Rights (African Commission), some rights may be read through articles 14, 16 and 18(1). This is the case of the right to shelter or housing.⁵⁷

Pursuant to article 14(b) and article 15 of the Protocol on the rights of women,⁵⁸ women have a right to access nutritional services during pregnancy and while they are breastfeeding. States parties are also called to ensure that women have the right to nutritious and adequate food. These provisions are made for the benefit of women not only in terms of health services and even out of health care. The Protocol foresees the measures that States should put in place in order to implement the right to nutritious and adequate food. They concern amongst others, access to land, to the means of producing nutritious food. But we may say, this Protocol contains some general provisions. This is the case of article 15(b) which states that States should establish adequate systems of supply and storage to ensure food security. We may also mention article 10(3) which states that States parties shall take the necessary measures to reduce military expenditure significantly in favor of spending on social development in general, and the promotion of women in particular. These are examples of articles that concern every African human being. As they are written, I can say they benefit both men and women.

According to the African Children's Charter,⁵⁹ States are called to make sure that every child enjoys the best attainable state of physical, mental and spiritual health and to take measures to ensure the provision of adequate nutrition and safe drinking water⁶⁰ and to combat disease and malnutrition within the framework of primary health care.⁶¹ States are also called to provide material assistance and support programs for parents particularly with regard to nutrition, health, education, clothing and housing.⁶² Thus the African Children's Charter takes into account the need of the child not only in the context of the right to health but goes further by requesting assistance from States for parents. This means, the Government should put in place a program of food distribution or financial support to families in order to reach children in need of food. This requires poverty reduction programs. If Government's programs do not include these provisions, a claim can be made in accordance with the African Children's Charter because it is clearly mentioned.

⁵⁴ See eg. M Ssenyonjo 'Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter' *Netherlands Quarterly of Human Rights*(2011) 29/3 358-397.

⁵⁵ See article 16(1) of the African Charter.

⁵⁶ See article 14 of the African Charter.

⁵⁷ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2000) AHRLR 60 (ACHPR 2001) §60.

⁵⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of women in Africa (2003/2005).

⁵⁹ African Charter on the Rights and Welfare of the Child (1990/1999).

⁶⁰ See article article 14(2)(c) of the African children's Charter.

⁶¹ See 14(2)(d) of the African children's Charter.

⁶² See article 20(2)(a) of the African children's Charter.

Briefly, this paragraph has shown us how the right to food is taken in two contexts. Firstly, the right to food is considered in the context of the right to health, as one of services to be provided in health care.⁶³ Secondly, the right to food is taken separately but as a part of an adequate standard of living. In this regard, the State's obligation is to make sure food is accessible, available and culturally acceptable for the poor and vulnerable that cannot access food for diverse reasons (such as disasters and other forms of calamities).

3. International trade and the right to food

3.1 Presentation of problems pertaining to the right to food

The issue of the effect of international trade law has been addressed by scholars and especially the Special Rapporteur on the right to food.⁶⁴ To sum up, it has been pointed out the fact that international trade law in the World Trade Organization (WTO) framework, especially the Agreement on Agriculture (AoA) may have an effect on food security. In agricultural trade, market access restrictions and export subsidies are considered to impose the largest obstacles to the realization of the right to food. High tariffs, non-tariff barriers as well as measures affording protection to domestic producers can impede market access.⁶⁵ Dumping practices, where goods are exported at prices below the costs of production and exporters receive compensatory subsidies is also seen to be inimical to agricultural production for domestic markets in developing countries.⁶⁶ The AoA provides for the eventual reduction in tariffs for agricultural products. However, lowering tariffs may preclude developing countries from using an available method of protecting domestic markets, and therefore food security, since alternative safety measures such as special safeguards, have only limited application for a few developing countries.⁶⁷ Despite all these, there are decisions within the WTO that are meant to improve food security in developing countries by obtaining financial support through negotiations.⁶⁸

Transnational corporations (TNCs) pose other sorts of problems to the realization of the right to food⁶⁹ such as the concentration practices and other anti-competitive behaviours among input providers,⁷⁰ commodity traders,⁷¹ food processors⁷² and seed sellers. It is also necessary

⁶³ Which is summarized within the WHO Constitution.

⁶⁴ In fact, one of the current concerns of the Special Rapporteur on the right to food is related to the role of international trade law in the implementation of the right to food (see O De Schutter 'International Trade' *OCCASIONAL PAPER N° 46* (2009)).

⁶⁵ KR Gray 'Right to food principles vis à vis rules governing international trade' *British Institute of International and Comparative Law* (2003) 12.

⁶⁶ Gray (n above).

⁶⁷ n above 15.

⁶⁸ n above 25-26.

⁶⁹ A Bloom and others 'Transnational Corporations and the Right to Food' *Law Students for Human Rights* (2009).

⁷⁰ Inputs are materials and infrastructure used on farms to facilitate crop production such as commercial seed (eg. genetically modified, or GM seed), agrochemicals, and fertilizers. See Bloom (n above) 7.

⁷¹ Commodity traders are transnational agribusiness corporations that purchase commodities, such as wheat, soy, coffee, cocoa, and sugar, from farmers. See Bloom and others (n above) 19.

⁷² Food processors are food and beverage companies that transform raw output from farms into retail-ready product. See Bloom and others (n above) 20.

to look at the imported food and at subsidies for exportation granted by developed countries to their farmers.⁷³ The Special Representative of the United Nations Secretary General on human rights and transnational corporations and other business enterprises, Professor John Ruggie, has argued that states should protect against human rights abuses by third parties including TNCs, that TNCs have a responsibility to respect human rights,⁷⁴ and that both state and corporate actors should work to provide remedies for human rights abuses.

It is necessary to look at imported food in developing countries. What kind of food do multinationals sell? What do retailers distribute in supermarkets? What is the concern of advertisements related to food? What is the role of the government against them? These are some of current issues on which States may be called to focus on. In fact, this is a matter of how each State protects its citizens against distribution of food of poor quality in supermarkets or in the ordinary markets.

3.2 In the DRC

In the light of General Comment No 12, the DRC is called to protect its people against the acts of corporations who are considered as third parties which could impede the full realization of the right to food. Do we find some solutions within the Congolese legislation?

i) Competition law is old.⁷⁵ It regulates a dishonest competition among traders and focuses on acts that create confusion amongst them.⁷⁶ It cannot be used against multinational's concentration in the DRC nor outside the country because the issue of concentration does not appear clearly within this law. The effect from outside is that concentrated companies invade internal market with their produce at a lower price than for local produce. The latter, to be heard, are encouraged to gather in associations.⁷⁷ But there is a need for financial support from the State.⁷⁸ The National Fund on the agricultural development which is supposed to collect money and finance agriculture⁷⁹ is not yet effective.

Regarding individuals, they cannot use local provisions because there are not yet appropriate laws and constitutional provisions are not meant to be used as suggested by Lily Endean

⁷³ Export subsidies allow for the export of agriculture surpluses at prices below production costs, which bring world prices down and cause import surges and agriculture dumping in developing countries. Gray (n 65) above) 21.

⁷⁴ Bloom and others (n 69 above) 6.

⁷⁵ Dating from 24th February 1950.

⁷⁶ Article 2 of the 24th February 1950 Ordinance 41-63 on the repression of dishonest competition.

⁷⁷ See UN Economic and Social Council 'Implementation of the International Covenant on Economic, Social and Cultural Rights. Combined second, third, fourth and fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant Democratic Republic of Congo' Substantive session of 2009 E/C.12/COD/5 paragraph 209(a).

⁷⁸ However, the Government has committed to undertake the development of savings banks and local financial services (microcredit) to meet the specific needs of rural activities. See UN Economic and Social Council (n 74 above) paragraph 209(b).

⁷⁹ See article 57 of 24th December 2011 Law n°11/022 on fundamental principles pertaining to agriculture (the 2011 Agricultural law).

Nierenberg.⁸⁰ Indeed, if there was a specific law protecting consumers, individuals could hold companies accountable for improper food put in the markets. Using traditional civil law poses some difficulties related to the requirements of proving the fault or establishing the injury. It is even more difficult to use it against government's institutions in charge of controlling the quality of food. From the side of the Constitution, article 47 foreseeing the right to food security seems to concern, mostly, laws that are contrary to the realization to the right to food. This is because constitutional provisions are usually interpreted as guiding the Parliament activity in making laws. Thus, a law contrary to constitutional provisions may be subject to annulment.⁸¹ Some Congolese scholars seem to consider economic rights as programmatic and not directly 'justiciable'.⁸² Thus, in this view, the government is somehow justified and excused if there are some measures taken. But it is not easy to use that constitutional provision directly against the government.

On the issue of price fixing, prices of goods and services are freely fixed by sellers, in the DRC.⁸³ But some products and services are controlled by the government and the Central bank. Those are hydrocarbon, public transport, water and electricity⁸⁴ as well as the money exchange rate.⁸⁵ Other ordinary produce, including the price of food, is fixed according to demand on the market. Thus, the Congolese market may face multinationals concentration and may also be affected by the impossibility of harvesting in times of war as is the case in the Eastern part of the DRC currently. A good use of taxation measures on imported produce may help in lowering prices of these produces.

4. The implementation of the right to food on the ground

Implementation of international obligations is usually analyzed according to article 26 of the Vienna Convention on the Law of Treaties. According to this article, States should avoid any act that infringe or is contrary to its international obligations. These States' acts are those of its Government, its Parliament and its Judiciary. For the sake of this section, some relevant laws will be analyzed before the analysis of government's action. The Congolese judiciary does not provide a good example of international human rights law application due to a lack of relevant judgments.

⁸⁰ LE Nierenberg 'Reconciling the Right to Food and Trade Liberalization: Developing Country Opportunities' (2011) available at www.sss.org

⁸¹ See article 162 of the Constitution on the recourse in unconstitutionality of laws.

⁸² See for instance EBB Mpongo *Droit constitutionnel et institutions politiques* (2004) defending the old conception of economic, social and cultural rights. Compare with the explanation given in UN Economic and social Council *Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2001/25 E/CN.4/2002/58* 10 January 2002 paragraph 36.

⁸³ See article 1 of the 20th March 1961 Decree-law on Price as modified by the 12th September 1983 Ordinance-law n°83-06.

⁸⁴ See article 3 of the 1962 Decree-law.

⁸⁵ This is not as such fixed rather it is controlled by the Congolese Central Bank according to article 6 of the 7th May 2002 Law No 005-2002 related to the constitution, organization and functioning of the Central Bank of the Congo.

4.1. A law analysis

There are some laws that are related directly to the issue of food in the DRC. Those are: the 2011 Agricultural law, the 1973 Land law, the Forestry Code and the PLHIV's rights 2008 law on the specific concern of people living with and affected by HIV and AIDS (PLHIV).

4.1.1. The 2011 agricultural law⁸⁶

This law has been taken in order to boost food production and food security in the DRC.⁸⁷ In the past years, the DRC did not have any serious policy in agriculture whereas it has many places, especially in the countryside, where agriculture takes place. It is with a view to end this gap that the 2011 agricultural law was adopted. This law organizes 'agricultural concessions' as the right to exploit the soil for agricultural activities. It also provides for phytosanitary measures.⁸⁸ It is meant to fight against any kind of obstacle on the Congolese agricultural framework. However, it faces some criticisms.

i) Conditions to obtain 'agricultural concession'

Article 16 of the agricultural law provides for several conditions⁸⁹ that the applicant must comply with in order to be eligible for an agricultural concession. Unfortunately, these conditions exclude foreigners. It is said that to obtain an agricultural concession, the applicant must be of Congolese nationality or the company must be composed of a majority of Congolese shareholders.⁹⁰ This condition has the effect of turning away the potential support of external investors. It is often criticized in a sense that food production in the DRC cannot be bolstered by its nationals themselves. There is a need for external expertise. It has already been suggested that this provision should be removed.⁹¹

In the perspective of the right to food, I may agree that the exclusion of foreigners in the exploitation of agricultural concession might be motivated by the intention to protect local producers. The question is to know if they are able to feed the whole country by themselves. Are they in a position to be competitive with imported produce? The answer is clearly: Not yet.

ii) The 2011 agricultural law states a word with regard to local communities' rights. It states that they have a right to exploit and cultivate.⁹² According to this law, their exploitation is not

⁸⁶ Law n° 11/022 setting broad guidelines for the agricultural sector available at www.leganet.cd

⁸⁷ Article 1 of the Agricultural law.

⁸⁸ Articles 47-51 of the Agricultural law.

⁸⁹ Five conditions are set out.

⁹⁰ Article 16(a) of the Agricultural law.

⁹¹ As pointed out by J van Kempen and N Mayifuila 'The Democratic Republic of the Congo new agricultural law n° 11/022 of December 24, 2011 is currently being amended and supplemented' (2013) available at <http://www.cabemery.org/> (accessed on 09 April 2013).

⁹² See article 18 of the Agricultural law.

to be established by any document, especially the 'registration certificate'.⁹³ I may conclude that local communities obtain their rights from the law itself. The legislator decides manifestly to keep local communities' lands disorganized or only under customary law. This leads to confusion and conflicts as better explained below.

4.1.2. The 1973 land law, as modified in 1980⁹⁴

i) Relevance of the land law

Around 2005 a PLHIV NGO⁹⁵ lost land where it used to practice agricultural activities with the help of FAO in the rural area in northern part of Goma. This loss was caused by an invasion by local inhabitants arguing that part of land was theirs since a very long time and they now want to recover it. This NGO had no means to protest because it had no title on these lands. In fact, usually these rural lands are not covered by documents. If one can get them, he is not as such secured because local families can rise anytime and evict him. Even if he comes with a judgment, the enforcement is not guaranteed. Thus, the disorder in organizing rural lands is of consequence even for PLHIV. In urban areas, agriculture cannot be conducted on a large scale because, as we will note below, urban lands are of residential and commercial designation and not of agricultural one.

Is the land law relevant in matters of food? The answer to this question seems evident since we know that food production may depend on land availability. The manner in which land accessibility is organized can allow, or not, land accessibility and then increase or decrease food production.⁹⁶ This section focuses on how land tenure is organized in the DRC.

ii) Land law and land accessibility in the DRC

Pursuant article 53 of the 1973 Land law, the State is acknowledged to have sole, exclusive ownership of the land.⁹⁷ This means that land cannot be sold and no one can have concurrent property rights on the land with the State. This provision is enshrined in the current land law (that of 1973) and in the current Constitution.

The current law (1973 as modified in 1980) divides State land into two domains: private domain and public domain.⁹⁸ The public domain comprises land reserved for the public use and for the use of public institutions such as a place to build offices.⁹⁹ All other lands fall into private domain.¹⁰⁰ Individuals can request and obtain rights within the private domain. In terms of the 1973 land law, private domain is under the management of a public service under

⁹³ See article 19 of the Agricultural law.

⁹⁴ Law n°73-021 of 20th July 1973 as modified by Law n°80-008 of 18 July 1980.

⁹⁵ Conversation with Mrs X of a PLHIV NGO based in Mugunga, on 25 July 2013.

⁹⁶ See also Caritas Australia *Food, a fundamental right* (2013) available at www.caritas.org.au (accessed 5 February 2013).

⁹⁷ See also article 9 of the Congolese 2006 Constitution.

⁹⁸ Article 54 of the 1973 Land law.

⁹⁹ Article 10 & 55 of the 1973 Land law.

¹⁰⁰ Article 56 of the Land law.

the control of the Government.¹⁰¹ In general, urban lands are supposed to be with residential or commercial designation whereas rural lands can be of industrial, agricultural as well as residential and commercial designation. Individual rights are given in accordance with conditions set out in the 1973 land law in terms of ‘contracts of concession’. The Congolese land ownership is framed on the Torrens system.¹⁰² Congolese individuals are entitled to a ‘perpetual concession contract’¹⁰³ generally given for a residential purpose. Legal persons and foreigners may request and obtain 25 years concession which is renewable.

iii) Land management

The Congolese administration is known to be dysfunctional to some extent. Concession contracts and the Registration certificate¹⁰⁴ establishing any right on lands are given by a Governmental service. This service is supposed to verify whether or not the applicant complies with all conditions before delivering land documents. Despite this system, there are land conflicts pending before Congolese tribunals¹⁰⁵ that originate from the dysfunctional administration. One cause is non-application of the law and another is corruption. If one is able to pay a certain amount, he may obtain documents on a land already under someone else’s concession. Hence, the occurrence of violence and conflict between the one who was supposed to have held rights on the land and the new person who obtained documents fraudulently. This impedes any kind of agricultural activity to start. These conflicts are somehow spread all over the country.

iv) Rights of local communities

It has been demonstrated above¹⁰⁶ how indigenous food needs to be preserved. It is not to say that only the local community is entitled to save it. But they are the ones who still know the variety of indigenous food. They should be given the right to access land in order to practice traditional agriculture. However, in the 1973 land law, there is an uncertain provision concerning the rights of local communities in accessing land.¹⁰⁷ There are problems of definitions and protection of local community rights. First, the 1973 land law does not explain clearly what ‘local community’ stands for. Is it a family? Is it a group of families? That seems to be unclear. Sometimes, it is a cause of conflicts. When one tries to get a concession on rural land, he is confronted with opposition from diverse families. And the confusion remains.

¹⁰¹ Article 223 of the Land law.

¹⁰² This system was conceived by Sir Robert Torrens, working as a State agent for the administration of lands in the South Australian Provinces. He sought to put in place a system guaranteeing a secured circulation of real properties. This system is based on the establishment of a certificate on the name of the owner. Any future transfer of property is conditioned by the change in the name of the new owner. This certificate also serves to prove the property, in the Congolese law. It is called ‘Certificat d’enregistrement’ which I translate, for commodity, ‘Registration certificate’. See JP Kifwabala Tekilazaya *Droit civil, les biens. Les droits réels fanciers* (2003) 414.

¹⁰³ Article 80 of the land law.

¹⁰⁴ Article 59 & 219 of the Land law.

¹⁰⁵ The majority of cases before Tribunals is related to land conflicts.

¹⁰⁶ See chapter 1, littérature review.

¹⁰⁷ About the uncertainty of rural land tenure, see JP Kifwabala Tekilazaya *Droit civil, les biens. Les droits réels fanciers* (2003) 15.

Second, the 1973 land law states that local community has rights on lands that it ‘occupies’, which basically means a right to ‘live there, to cultivate, ...’. This right is unclear. It is somehow under the customary law with regard to its transmission and management. It is not guaranteed by any kind of concession contract. The right of local community is also collective. The only protection from external people is the provision of a compulsory enquiry before the establishment of any concession contract on those rural lands.¹⁰⁸ Briefly, rights of the local communities on their land are not organized under the 1973 land law nor are they by the 2011 agricultural law.

Is there any danger? Mugangu Séverin¹⁰⁹ has demonstrated how land conflicts sometimes come from the lack of clear organization of local communities’ rights. In accordance with matters of food production, there is no certainty if Government would like to plan for food production in these areas. As local communities domain are not clearly delimited, it is sometimes difficult to determine where a land starts and ends in clear dimensions. In this case, experts are needed. This disorder was supposed to end by a Presidential ordinance. But from 1973 up to now the President has not yet organized rural communities land rights.¹¹⁰

4.1.3. The Forestry code¹¹¹

Looking at the Forestry code, we find some interesting provisions. Article 4(17) gives a content to ‘Local community’ as composed with a population traditionally organized on the ground of customs and united under solidarity or parental linkages. It is also attached to a certain territory. Article 28 sets up a public service in charge of forest management. This service is entitled, amongst others, to issue contracts of forest exploitation and acts (administrative documents) that attribute forests to local community. Pursuant to article 36, rights of local community are those recognized by their local customs and traditions which are consistent with the law. They concern especially their individual or collective needs. Article 39 allows the local community a right to exploit the forest in fruit gathering, wood collection, hunting and so on.

We are concerned with the relevance of the provision of article 28(c) which provides for administrative acts attributing forests to a local community. This article seems to be different from the two laws analyzed above. But it is worth noting that these administrative documents concern only local communities around forests. Thus this code does not to apply to all kinds of local communities. It cannot, then, solve the confusion caused by the two laws analyzed above.

¹⁰⁸ See article 193 of the land law.

¹⁰⁹ ‘La crise foncière à l’Est de la RDC’ available at www.ua.ac.be (accessed 11 June 2013).

¹¹⁰ One has proposed to recognize powers on customary chiefs in the issuance of the Registration certificate in rural areas, also he has proposed to make a complement to the announced Presidential Ordinance. See RM Mukokobya *Pluralisme juridique et règlement des conflits fonciers en République Démocratique du Congo* (2013) 298.

¹¹¹ Law No. 011-2002 of 29 August 2002 on Forestry code.

4.1.4. The 2008 PLHIV Law¹¹²

Article 11 states that '[t]he Government puts in place structures in charge of psychological, social, economic and legal assistance of PLHIV'. This suggests also food provision for PLHIV. It is not clearly linked with the enforcement of the right to health. This provision stands alone and understood, on my view, in a sense that those structures put in place by the Government are supposed to be well equipped in food distribution either in hospitals where we find PLHIV or in their settings. Do they exist? Not yet.

4.2. Government's action analysis

4.2.1. Presentation on policies and budget

i) The health policy and HIV Strategic plan¹¹³

The Congolese Government has integrated food concerns within its policies related to the health system. This shows how conscious it is about the interrelationship between nutritional problems and the right to health. Thus, according to the National policy on health of 2001, the DRC committed itself to achieve the content of the 'Rome Declaration on the elimination of hunger' by 2025. The Government plans that it will:

- Strengthen the abilities (capacities) of structures involved in conception and execution of strategies and interventions in the whole country;
- Organize nutritional monitoring;
- Update or enrich food composition for Congolese;
- Take measures regarding food security in collaboration with other sectors for the promotion of national production;
- Organize nutritional education for people especially forbidden food and the promotion of food equilibration regimes.¹¹⁴

According to the National strategic plan on the fight against AIDS (2010-2014), the government wishes a result by the end of 2014 of 100% PLHIV in need, who will benefit from the provision of ART together with nutritional supplements.. The strategic plan foresees:

- The integration of nutritional aspects within the package of complete treatment and care offered to PLHIV;
- The provision of food assistance for those PLHIV most in need;

¹¹² Law No. 08/011 of 14 July 2008 protecting PLHIV and affected person's rights available at www.leganet.cd

¹¹³ According to the UN General Assembly Political Declaration on HIV/AIDS A/R/60/262 2006

States have [e]mphasized the need to strengthen policy and programme linkages and coordination between HIV/AIDS, sexual and reproductive health, national development plans and strategies, including poverty eradication strategies, and to address, where appropriate, the impact of HIV/AIDS on national development plans and strategies. See the Political Declaration on HIV/AIDS A/R/60/262 2006 paragraph 21.

¹¹⁴ DRC National Policy on health (2001) 14.

- To strengthen food security of households affected by HIV and AIDS and by food insecurity;
- Sensitization on the national protocol on nutritional care.¹¹⁵

These two policies express the Congolese government's 'intention' in matters of food. We all bear in mind that it will depend on the availability of resources to enforce them. Further, the government expresses its intention to provide for financing the agricultural sector according to the 'Maputo Declaration on Agriculture and Food Security in Africa' (Assembly/AU/Decl. 7(II)).¹¹⁶ Thus it should allocate at least 10%¹¹⁷ of its budget to agriculture.¹¹⁸

It is interesting to see to what extent the Congolese government has taken these intentions seriously. At the same time, according to the integrated food security and nutrition analysis carried out in October 2011, the Congolese population who lived in a situation of acute food and livelihood crisis was estimated at 4,5 million (6% of the population).¹¹⁹ The major part of this population (57%), were very affected by this severe food insecurity and prone to malnutrition and mortality. It is important to note that this is primarily in the zones with no armed conflict namely Kasai, Bandundu, Katanga, etc..¹²⁰ This is because, in the zones affected by armed conflicts, humanitarian assistance helps in mitigating malnutrition.¹²¹

ii) Budget

It has been difficult to find data on the Congolese budgets. But from a quick analysis of criticisms and general remarks addressed by the Congolese Parliament with regard to budget proposal from different years (2004 and 2012),¹²² we may notice that generally administrative expenses usually take the great part of the budget.¹²³ This concerns members of different institutions: Government and Parliament including cabinets of different authorities (President, Prime Minister, Ministers and Members of parliament). We put aside teachers and doctors of the public sector. Then, analyzing those critics, they reveal that the health sector, education, agriculture and other sectors of development do not benefit greatly from the budget. Recently, the Congolese Government showed in its discourses that it is concerned with social matters and is willing to allocate to this sector 29,4% of the budget¹²⁴ and, in the agricultural sector

¹¹⁵ PNMLS *National Strategic Plan on the fight against AIDS (2010-2014)* 51.

¹¹⁶ Adopted at the Second Ordinary Assembly of the African Union in Maputo by African Heads of State and Government. See <http://www.nepad.org/nepad/knowledge/doc/1787/maputo-declaration> (accessed 04 August 2013).

¹¹⁷ The said article 10(3) of the African Charter Protocol on women's rights

¹¹⁸ Congolese Ministry of agriculture and rural development 'Vision du Gouvernement. Note politique' (2011) 2.

¹¹⁹ DRC Ministry of Agriculture, fishery and breeding 'Rappoport du 6ème cycle d'analyse du Cadre intégré de classification de la sécurité alimentaire IPC' October 2011 to March 2012 3.

¹²⁰ n above 3.

¹²¹ See n above.

¹²² See Independent civil society Kinshasa 'DRC Budget analysis' (2004); Member of Parliament EB Majangira '2012 Proposal budget. Brief analysis and critics' (2012).

¹²³ Almost 30% of the 2012 proposed budget allocated to the central administration against 6% for the health sector. See MP Majangira (n 127 above) 1.

¹²⁴ 'RDC : 29,49% du projet du budget 2012 destinés à l'amélioration du social de la population' available at <http://www.afriquinfos.com/articles/2012/6/24/2949-projet-budget-2012-destines-lamelioration-social-population-204904.asp> (accessed 11/07/2013).

the Ministry of Agriculture wish to plead for the allocation of 10% to the agricultural sector.¹²⁵

4.2.2. Assessment of the Government actions

In the periodic report submitted by the DRC to the UN Committee on ESCR¹²⁶ we find data that facilitates an assessment of whether the DRC enforces the content of article 11 of CESCR.

In terms of nutrition, the Ministry of Planning reports that 16 million people or 33% of the population were facing serious shortages following the prolonged displacements caused by war as well as by isolation, lack of market outlets, the disruption of supply routes, and inflation.¹²⁷ With regard to food reserves, 66% of households say they have food reserves, this means a stock of foodstuffs, a plot for growing food, or money. The proportion is highest in rural areas (76%), where production is based essentially on farming. In cities, the situation is less favourable, and more than half of city dwellers (56%) have no food reserves.¹²⁸ In terms of the number of meals per day, one of the food supply indicators, the Congolese people eat once a day, and their meal is not nutritionally balanced in some parts of the countries where some people end up not having a meal on some days.¹²⁹

The Government has designed a set of programs as part of the Poverty Reduction Strategy Paper (PRSP). Among them, improving agricultural productivity and food security by increasing storage capacity and moving firm products to local and urban markets; combating malnutrition with the collaboration of UNDP and NGOs,¹³⁰ even with FAO.¹³¹ The Government plans to take, among others, the following steps toward agrarian reform, involving farming, livestock and fishing:

- Development of savings banks and local financial services (microcredit) to meet the specific needs of rural activities;
- Promoting women's access to land, credit, agricultural inputs and training;
- Harmonizing land ownership laws with existing uses and customs and the needs of users, particularly poor people, to help them acquire assets and other factors of production, etc.

I note that, all these steps to be taken concern a response to the obligation to facilitate. There is no measure regarding the obligation to provide food to those unable to get it by themselves.¹³²

¹²⁵ DRC Ministry of Agriculture, fishery and breeding (n 119 above).

¹²⁶ See UN Economic and Social Council 'Implementation of the International Covenant on Economic, Social and Cultural Rights. Combined second, third, fourth and fifth periodic reports submitted by States parties under articles 16 and 17 of the Covenant Democratic Republic of Congo' Substantive session of 2009 E/C.12/COD/5.

¹²⁷ Report before the UN Economic and Social Council (above) paragraph 197.

¹²⁸ UN Economic and Social Council (above) paragraph 198.

¹²⁹ n above paragraph 199.

¹³⁰ n above paragraph 203.

¹³¹ n above paragraph 207.

¹³² We must recall the insertion of food provision within the National strategic plan on the fight against HIV and AIDS (2010-2014). See PNMLS (n 112 above) 51.

It is declared in the report before the UN Committee on ESCR that '[a] part from the war that some Provinces have experienced, the effects of which have made food less available, the Government has never followed a policy that would deny access to food for any portion of the population or any given Province'.¹³³ It is also said that the Government launched a demobilization and reintegration program between 2002 and 2006 to assist displaced persons. The Government assistance is usually given to displaced people (3 000 vulnerable persons assisted from September 2001 to the end of February 2002, etc.).¹³⁴ Some other actions in vaccination of children of 0-5 years old with administration of Vitamin A and other sensitization campaign on good practices in food security and cassava consumption are claimed to have been done.¹³⁵ I note that Government's action is not yet convincing.¹³⁶ Although there may not be a lot to say about the obligation to respect, which is a negative obligation and easy to implement, there is unsatisfactory action regarding the obligation to protect and to fulfil, as positive obligations, which have not yet been significantly implemented.

¹³³ As declared in the Report before the UN Economic and Social Council (above) paragraph 205.

¹³⁴ UN Economic and Social Council (above) paragraph 206.

¹³⁵ BL Mukidi 'Efforts déjà réalisés dans le domaine de la nutrition' (2011) Programme national de nutrition.

¹³⁶ This is confirmed by concluding observations made by the UN Committee on ESCR on several points. And taking especially the issue of malnutrition, '[t]he Committee expresses concern at the high level of acute and chronic malnutrition and the vulnerability of the population to food shortages in spite of the impressive agricultural potential of the State party. The Committee notes with concern that out of 6.7 million hectares of arable land in the country, only some 1.1 million are currently under permanent cultivation (article 11), that fisheries and livestock rearing potential remains under exploited and that although recognized as a top priority by the State party, the agriculture sector only received 3.5 per cent of the State budget in 2008'.

'The Committee urges the State party to strengthen its efforts to revive the country's rural economy and achieve food and nutrition security, notably by adopting an agricultural code and a programme on food security. The State party should accord effective priority to the agricultural sector by allocating the necessary resources to rehabilitate the transport and agricultural infrastructure, strengthen the capacity of communities through training, improve access to agricultural inputs and microcredit to boost agricultural, fishing, livestock rearing, and handicrafts activities, and to improve agricultural techniques'. See UN Economic and Social Council *Concluding observations of the Committee on ESCR, Democratic Republic of the Congo* E/C.12/COD/CO/4 16 December 2009 6-7.

Chapter 3. Obstacle to the realization of the right to food in the DRC

This chapter analyses the obstacles faced by the DRC in implementing the right to food provision enshrined in its Constitution and international human rights instruments. There are several obstacles that can be cited. However we decided to focus on armed conflicts. Although the DRC has been through armed conflicts all over its history, the last two decades have shown a great persistence of armed conflicts with great losses in human lives and other consequences. This dissertation thereafter discusses specifically how PLHIV are affected. .

1. Armed conflicts and food security

It seems not important to recall the whole context of armed conflicts in the DRC since 1993 starting with interethnic conflicts up to persistent armed groups in 2013. Our concern is to analyze how these armed conflicts have affected people in the specific need of food (1.1). It will also be an occasion to qualify those acts within the scope of humanitarian law and analyze separated responsibilities on the head of the Congolese Government and rebels (1.2). In the end, we will see how humanitarian assistance tries to mitigate food insecurity in some parts of the DRC affected by armed conflicts and how rights of PLHIV are met (1.3).

1.1. Impact of armed conflicts on food security

1.1.1 Presentation of facts

As a starting point, it is important to mention that not all the country is currently under war or armed conflict. The principally affected region is the Eastern part of the DRC, in particular the North-Kivu Province.¹³⁷ It is then the indicated place to study effects of armed conflicts.

i) The effects of armed conflicts can be studied, pertaining to the food issue, on two sides. The first one is about massive displacement of populations and the second is about impracticability of roads. Thus armed conflicts have effects on people directly found within the region subject to war and it also has effects on people who are not directly in the region but who depend on food produced in that region.¹³⁸ Armed conflicts in the North-Kivu Province have displaced people from their homes and their land. They can no longer cultivate. Armed conflicts are characterized by having their starting point in the countryside before they

¹³⁷ Some armed groups have started showing themselves in the South-East, Katanga Province but not as permanently as it is in the North-Kivu. South-Kivu Province also has some armed conflicts, but this Province is currently quiet.

¹³⁸ Trends in chronic malnutrition are complex but overall improvements in the non-war-affected parts of the country have been offset by deterioration in conflict-affected areas. The data indicate that chronic malnutrition decreased somewhat in urban and rural areas of the western Provinces. However, chronic child malnutrition increased substantially in both urban and rural of the Eastern Provinces. See Africa Region Human Development & The Ministry of Health, Democratic Republic of Congo Health *World Bank* (2005) 32 paragraph 37.

evolve in cities and towns. So the first to suffer are those who live in the countryside. These people usually live from agriculture or breeding. According to the good quality of the Congolese land, food production is sometimes sufficient for these people in a sense that they can export their produce to neighbouring countries such as Rwanda. Usually, food coming from the countryside will transit in Goma¹³⁹ (for example), supporting those who live there, and then be sent from Goma to other cities in the country via airport or via the lake. Then, when sufficient food cannot reach Goma itself, other cities will not get enough food supply. Also armed conflicts render land inaccessible and thus impede food production activities. Indeed, there is no means to cultivate, feed animals and consequently to harvest.

ii) We must mention the fact that soldiers and rebels fighting need to feed themselves. During the past years, Congolese soldiers were not fed sufficiently due to food mismanagement even though currently this problem seems to have been resolved. In those conditions, soldiers or rebels attempt to destroy civilian crops or livestock. Pillage occurs in times of war. We have to mention the destruction of crops due to war activities. It may not be intentionally done but occurs as a direct consequence of bombing. By the mere fact of fighting in fields or by the use of bombs, there is massive destruction of crops in the battlefield.¹⁴⁰ In summary, war activities in the North-Kivu Province have led to land, crops and cattle destruction by fighters either intentionally or not. These acts fall within the scope of humanitarian law.

1.1.2. Humanitarian law and its relevance

i) Humanitarian law is known to be applicable in times of armed conflicts (internal or international armed conflicts). In fact, humanitarian law regulates the extent to which fighters should conduct conflicts without infringing human rights of individuals. Humanitarian law is related not to the right to fight (*jus ad bello*) but to human rights within a war or armed conflict (*jus in bello*). In this regard, there are several prohibitions regarding how different belligerents should conduct war.¹⁴¹ They concern amongst others the rights of civilians, the right of war prisoners, forbidden weapons and tactics to combat, the protection of civilian sites,¹⁴² etc. How is the right to food linked with all this? A situation of armed conflict is a contradiction with food production and food accessibility. Moreover, famine is sometimes utilized as a mean or tactic to combat the enemy.

The DRC is bound by the Geneva Conventions and their Protocols.¹⁴³ In the DRC, war currently engages the National Army and other military groups.¹⁴⁴ This might be a situation of

¹³⁹ The capital city of the North-Kivu Province in the Eastern part of the DRC.

¹⁴⁰ Not less than this year 2013, we have witnessed war activities that amounted in cities burning (Kitchanga in Masisi). These acts were intentional. People have been burnt in their houses.

¹⁴¹ In both the sense of the 'Geneva law' (concerning the protection of those who do not or no longer attend war (and the 'Hague law' (usage of weapon that do not cause unnecessary injury and superfluous injury). See eg. K Makintosh 'The principles of humanitarian action in international humanitarian law' *Report HPG* (2005) 6.

¹⁴² See also article 8(2)(b)(ii),(v),(xxv) of the Rome ICC Statute.

¹⁴³ We found the four Geneva Conventions within the DRC's legislation. See *Les Codes Larquier, Tome VI Droit public* (2003) 123.

¹⁴⁴ Although Rwanda has been cited several times to be involved, it always denies.

non-international armed conflict.¹⁴⁵ The 1949 Geneva Convention IV (G IV) on the protection of civilians is applicable,¹⁴⁶ so is the 2nd Additional Protocol on the 12th August 1949 Geneva Convention related to the protection of victims in a non-international armed conflict (AP II).¹⁴⁷ In the sense of G IV, there are some obligations¹⁴⁸ related to the right to health and then to the right to food. Article 23(1) concerns the obligation to secure a free transit to medications, other materials related to people's religion... and foodstuff to the protected population. However, it is worth mentioning that these provisions concern the protected persons as set out in article 4 of G IV.¹⁴⁹ So it seems article 23(1) cannot be taken as a basis for the protection of people under the control of rebels.¹⁵⁰ Nevertheless, in the sense of common article 3 of G IV, each party to a non international armed conflict shall avoid, among other things, ill-treatment of civilians and shall make sure wounded and ill people are treated.¹⁵¹

In the context of Africa, the African Union Convention on the protection and assistance of internally displaced persons in Africa (AU Convention on IDPs)¹⁵² contains some clear provisions. This Convention sets out obligations related to IDPs and to abuses from armed groups.¹⁵³ States are called to respect the principle of human dignity, humanitarian law and human rights towards IDPs.¹⁵⁴ The State is called, itself or with the cooperation of others,¹⁵⁵ to

[p]rovide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any

¹⁴⁵ But with the involvement of the UN mission on the stabilization of the Congo, it seems to evolve into an international armed conflict. Also the intervention of Rwanda in the shadow of M23, despite its denial, may lead to think about an international conflict (on this see Human rights watch in its report published on 23 July 2013. See also the declaration from the United States of America asking to Rwanda to cease supporting rebels available at www.afrique.kongotimes.info accessed 11 August 2013).

¹⁴⁶ See article 2 of the 4th Geneva Convention.

¹⁴⁷ See also A Clapham 'Human rights obligations of non-state actors in conflict situations' *International Review of the Red Cross* (2006) 88 493.

¹⁴⁸ Above all the general obligations enshrined in the 1949 Geneva Convention IV on the protection of civilian. See article 27 stating the general responsibility borne by a State to provide a treatment of dignity to civilians under control.

¹⁴⁹ People on a territory occupied by another State engaged in the armed conflict and bound by the 4th Geneva Convention. (See article 4).

¹⁵⁰ In the very specific case of the DRC.

¹⁵¹ Article 3(1) & (2) of the 4th Geneva Convention on the protection of civilians. We should also add article 7 of the 2nd Protocol to the Geneva Convention.

¹⁵² Adopted by a special summit of the African Union in Kampala, Uganda on 23 October 2009. The Convention is the first international treaty on internally displaced persons. The Convention entered into force on 6 December 2012 but not yet ratified by the DRC. See C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 143.

¹⁵³ 'Armed groups' means dissident armed forces or other organised armed groups that are distinct from the armed forces of the state. See article 1(e) of the AU Convention on IDPs.

¹⁵⁴ See article 2 of the AU Convention on IDPs.

¹⁵⁵ It might be other States or international organisations and humanitarian agencies, civil society organizations and other relevant actors. In the latter case, it is a State obligation to cooperate when there are no sufficient resources. See the verb 'shall' in article 5(6) of the AU Convention on IDPs. If a State neglects to do so, this may be interpreted as it is willing to starve people.

other necessary social services, and where appropriate, extend such assistance to local and host communities'.¹⁵⁶

As to non-state armed groups, the AU Convention on IDPs, without granting them any international status,¹⁵⁷ calls each State to '[e]nsure individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law'.¹⁵⁸

All these provisions are related to the region affected directly by armed conflicts. What about the right to food for regions indirectly affected by war? Is the State justified in times of war if one claims his right to food? In other words, do international human rights obligations pertaining to the right to food stand in times of armed conflicts? We must mention that human rights law continues to apply in situations of armed conflict and occupation.¹⁵⁹ Strictly speaking, the DRC is supposed to do all that is possible in order to make food accessible. This means, it also has a duty to make sure that any rebellious group is under control. However, this is meaningless where the DRC's army is unable to stop rebellious movement. Shall we say the DRC has failed to render accessible the right to food or the DRC is justified in the non accessibility of food? In the sense of the General comment No12, this amounts to a failure of the State. Should rebellious group be concerned? This will be analyzed separately below.

ii) The effects that we have highlighted above, fall within humanitarian law and other instruments. According to AP II, it is forbidden to destroy civilians' property such as foodstuff.¹⁶⁰ It is also forbidden to use famine as a mean or tactic to combat.¹⁶¹ Also, civilians should be protected against the effects of armed conflicts.¹⁶² These forbidden acts are known as 'war crimes' (when they are not committed in a large scale and with the intention of exterminating a group of population). In the case of the North-Kivu Province, it is quite disturbing to know who is exactly concerned with rights of people. There are some parts of this Province that are no longer under the Government's control. Then who bears responsibilities?

The DRC bears the primary responsibility. The UN General Assembly Resolution 46/182 (1991) (Guiding Principles on Humanitarian Assistance) confirms that:

'Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory. Hence, the affected

¹⁵⁶ Article 9(1)(b) of the AU Convention on IDPs.

¹⁵⁷ Article 7(1) states: '1. The provisions of this article shall not, in any way whatsoever, be construed as affording legal status or legitimising or recognising armed groups and are without prejudice to the individual criminal responsibility of the members of such groups under domestic or international criminal law.'

¹⁵⁸ Article 3(1)(g) of the AU Convention on IDPs.

¹⁵⁹ See *Nuclear Weapons Advisory Opinion* ICJ (18 July 1996) (1996) ICJ Reports 240; *Armed Activities Case DRC v. Uganda* ICJ (19 December 2005) (2005) ICJ Reports 116, paragraph 220; *Wall Advisory Opinion* ICJ (09 July 2004) (2004) ICJ Reports 178 as analyzed by E Schmid 'War crimes related to violations of economic, social and cultural rights *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* (2011) 528.

¹⁶⁰ See article 14 of AP II. Compare with article 54(1) & (2) of AP I.

¹⁶¹ n above.

¹⁶² n 160 above article 13.

State has the primary role in the initiation, organization, coordination, and implementation of humanitarian assistance within its territory'.¹⁶³

This is to mean, the DRC's official institutions¹⁶⁴ in matters of refugee and displaced people are responsible to put in place mechanisms for the assistance of people in situation of war. What about civilian population in the occupied region or under the control of rebels? The Government's obligation is to protect every citizen. By its failure to do so, it has to save those in held hostage by rebels. But it is difficult for such a Government to care about feeding people in these regions. The right to food seems to be difficult for the Government to implement in a region where it has no control. The Government was supposed to make food accessible by creating secure settings for people to cultivate and others to sell or export food produces. In the context of the North-Kivu Province, we may say the Congolese Government has failed in this obligation. The least it can do is to secure judicial reparation when affected people will be in position to claim their rights, yet currently the Court of Appeal has jurisdiction on war crimes, crimes against humanity and crimes of genocide.¹⁶⁵

The other question is to know how do people live since armed conflicts have taken place for a long time? In fact, humanitarian assistance may be provided with the consent of the State.¹⁶⁶ As in international armed conflicts, where lack of relief would lead to starvation, no valid reason can be invoked to justify a refusal.¹⁶⁷ In practice, the consent of a non-state armed group will be sought in order to provide assistance in its controlled zone without being interpreted as 'recognition' in the sense of international law.¹⁶⁸ What about the situation of towns affected indirectly by the effect of war? Surprisingly, food continues to circulate within the Province from parts where rebels control to those under Government's control. Rebels are conscious of the fact that people they control cannot live without eating. They usually put in place political ideology according to which all they fight for is the better conditions for people. Then they say to be looking for better conditions of living for the whole population, they would like to save people from Government's incapacity. Thus, they allow some agricultural activities and allow food to cross their territory but on the condition of some tax payment. The thing is, those who sell products are obliged to pay several taxes. They pay Government's taxes and rebels' taxes as well.

iii) The consequence of the acceptance by rebels that people under their governance are under their administration can be seen as a transfer of Government's obligations. And the biggest ones are the well-known FDLR and M23.

¹⁶³ See F Schwendimann 'The legal framework of humanitarian access in armed conflict' *International Review of the Red Cross* (2011) 93 996.

¹⁶⁴ This the role of the National Commission on Refugee which was created to deal with refugees matters but which currently cannot put aside problems of displaced people. See article 9 of the Law No 021-2002 of 16 October 2002 on refugee status in the Democratic Republic of Congo.

¹⁶⁵ See article of the 91(2)1 of the new law No 13/11-B of 11 April 2013 related to the organization, functioning and attributions of jurisdictions of the judicial order in *J.O.R.D.C* 2013.

¹⁶⁶ See article 18 of the 2nd Protocol to the Geneva Conventions.

¹⁶⁷ Felix Schwendimann (n 163 above) 1001.

¹⁶⁸ n above.

The international community has focused on the DRC in 2013 by passing a Resolution¹⁶⁹ stating that negative forces should be fought against and destroyed by an 'Intervention brigade'.¹⁷⁰ Is it to say there cannot be any attention to what these groups are doing on their 'territory'? The said Intervention brigade has not yet started working efficiently nor is it expected to work and finish in a short time and so does the National Army (despite its recent success). At the same time, there are some human rights abuses reported from the occupied territory illustrated by journalists' detentions, killings of people and so forth.¹⁷¹ In our view, rebels are covered by international humanitarian law within the occupied territory even if they are currently qualified as 'negative forces' by the international community.¹⁷² This is a logical consequence of the absence of the Government's control over that part of the territory.¹⁷³ Thus, the provisions regarding food are to be applied on the head of rebels in the occupied territory. In terms of the AU Convention on IDPs, obligations could be even clearer for those armed groups in the DRC. Article 7(4) & (5) states:

'Members of armed groups shall be held criminally responsible for their acts which violate the rights of internally displaced persons under international law and national law.

Members of armed groups shall be prohibited from:

(b) Hampering the provision of protection and assistance to internally displaced persons under any circumstances;

¹⁶⁹ See UN Security Council 'Resolution 2098 (2013)' S/RES/2098 (2013) adopted by the Security Council at its 6943rd meeting, on 28 March 2013.

¹⁷⁰ The Security Council: '... 9. Decides to extend the mandate of MONUSCO in the DRC until 31 March 2014, takes note of the recommendations of the Special Report of the Secretary-General on the DRC and in the Great Lakes Region regarding MONUSCO, and decides that MONUSCO shall, for an initial period of one year and within the authorized troop ceiling of 19,815, on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping, include an "Intervention Brigade" consisting inter alia of three infantry battalions, one artillery and one Special force and Reconnaissance company with headquarters in Goma, under direct command of the MONUSCO Force Commander, with the responsibility of neutralizing armed groups as set out in paragraph 12 (b) below and the objective of contributing to reducing the threat posed by armed groups to state authority and civilian security in eastern DRC and to make space for stabilization activities;'

¹⁷¹ Very recently kidnapping of male persons (25 & 26 July 2013 in Kiwanja, in the northern part of Goma). Also the UN Security Council '[s]trongly condemns the M23, the FDLR, the ADF, the APCLS, the LRA, the National Force of Liberation (FNL), the various Mayi Mayi groups and all other armed groups and their continuing violence and abuses of human rights, including summary executions, sexual and gender based violence and large scale recruitment demands that all armed groups cease immediately all forms of and use of children, violence and destabilizing activities and that their members immediately and reiterates that those responsible permanently disband and lay down their arms, and for human rights abuses and violations of international humanitarian law will be (p.5) held accountable and should not be eligible for integration into the FARDC or other elements of state security forces'; see Resolution 2098(2013) paragraph 8.

¹⁷² Andrew Clapham writes: 'Today, international law imposes obligations on certain parties to an internal armed conflict irrespective of any recognition granted by the state they are fighting against or by any third state'. (A Clapham 'Human rights obligations of non-state actors in conflict situations' *International Review of the Red Cross* (2006) 88 493).

¹⁷³ The UN Security Council also [s]trongly condemns the continued presence of the M23 in the immediate vicinity of Goma and its attempts to establish an illegitimate parallel administration demands that the M23 cease immediately all forms of violence and in North-Kivu, destabilizing activities and that its members immediately and permanently disband calls for the restoration of state authority of the and lay down their arms, and Government of the DRC in Goma and in North-Kivu'; see Resolution 2098(2013) paragraph 7.

- (c) Denying internally displaced persons the right to live in satisfactory conditions of dignity, security, sanitation, food, water, health and shelter; and separating members of the same family;
- (g) Impeding humanitarian assistance and passage of all relief consignments, equipment and personnel to internally displaced persons;'

This provision concerns especially rights of IDPs but tells a little about armed group obligations.

iv) During several armed conflicts, the Congolese Government has gone through negotiations with his opponents.¹⁷⁴ What is the relevance of these negotiations? Or what benefit can people take from them? This question is of relevance because since negotiations started on 09 December 2012 with the Congolese Government in Kampala, the M23 sought to discuss matters of socio-economic impact with despite the Government's refusal to do so. If their agreements take into account human rights, it will mean actions of rebels have to be evaluated on that ground. What they are doing while occupying those part of the territory is to be regarded on the basis of human rights implementation. On one hand, the Government succeeded in imposing that negotiations should be held considering the Congolese Constitution. This has an effect to consider human rights enshrined within the Title II of the Congolese Constitution. On another hand, the debate around general socio-economic problems of the DRC would give a forum to evaluate again the Government's action with respect to its obligations under human rights instruments. Unfortunately, in Kampala discussions had a political coloration. The Congolese Government would like to push the M23 into a situation of rebels who have nothing to tell from the moment they took arms against the State in contradiction with the Constitution. This may have the effect of raising the human rights concerns on one side: that of rebels. In this sense, Government may end up saying it was justified not to care about human rights implementation because some negative force occupied the territory despite taking its responsibilities.¹⁷⁵ Nevertheless, from the past experience, the Congolese Government signed an agreement with CNDP (a political and military movement) ordering a cease-fire¹⁷⁶ and containing other obligations such as 'the respect of international human rights and international humanitarian law';¹⁷⁷ grant of amnesty¹⁷⁸ not covering 'war crimes, crimes against humanity and crime of genocide'. Although Congolese military Tribunal and Courts had jurisdiction on war crimes, we did not

¹⁷⁴ In fact, the Government organized a 'Conference for peace and development in the North and South-Kivu' in January 2008 which led to an 'Engagement act' with all participants (containing 4 articles). The Government attended together with civil society and military armed groups including CNDP. One year after, the problem rose again and CNDP had other claims which led to another meeting with the Congolese Government. This ended by a 'Peace agreement between the Government and CNDP' (with 16 articles) on 23 March 2009. It is on the so-called 'violation' of this latter that was born M23 (Movement of 23 March) claiming to be fighting for the full realization of the Peace agreement of 23 March 2009.

¹⁷⁵ This argument fails in front of the AU Convention on IDPs because, a State party is generally called to prevent internal displacement. See article 3 of the AU Convention on IDPs.

¹⁷⁶ See article I of the 'Engagement act' (Acte d'engagement) of 2008.

¹⁷⁷ Article III of the 'Engagement act'.

¹⁷⁸ Article article IV of the Engagement act of 2008 and article 3 of the 'Peace agreement between Government and CNDP' of 23 March 2009.

witness any prosecution. The fear is to see this repeated at the end of Kampala negotiation between Government and M23.

2. Where do PLHIV come in?

We will be guided by an informal interview in analyzing how PLHIV's right to food is concerned. By a personal observation, Congolese PLHIV live, in majority, in silence of their status.¹⁷⁹ They do not appear publicly and it is not easy to find where they are. So I thought it could be easy to conduct an informal interview rather than a formal one for the sake of this dissertation. It was done so in order to avoid to be questionable or to appear suspicious in PLHIV matters or to appear as someone who needs to make money from their problems. Since the beginning of the last armed conflicts in the Eastern part of the DRC, there has been a movement of PLHIV from Goma town to IDP camps.¹⁸⁰ This is abnormal because, some PLHIV prefer to leave the town and go to live within IDP camps.¹⁸¹ This shift is mostly motivated by the need to get food that is being given to IDPs.

This is of great concern due to the fact that, even in IDP camps, food aid is not sufficient. So, people are exposed to risky behaviour.¹⁸² Those who remain in town are gathered in associations. They are sensitized in how to live positively with HIV and AIDS and how to avoid as amongst others voluntary HIV transmission and opportunistic diseases. These associations seek assistance from some UN Agencies.¹⁸³ They present project proposals. And among those proposals, some concern food aid. It is also important to mention that other PLHIV are IDPs. Thus food issues have to be mentioned in relation with IDPs rights.

2.1. Consistency of food aid to PLHIV in associations

Due to generalized poverty, some PLHIV are not in a position to take care of themselves in food matters. They cannot cultivate due to land unavailability for all and in the particular case of the Eastern part of the DRC, armed conflicts. In the Eastern part of the DRC, humanitarian organizations¹⁸⁴ work in mitigating or alleviating food problems for the benefit of IDPs.¹⁸⁵ As

¹⁷⁹ This is by fear of stigmatization which is frequent in the DRC.

¹⁸⁰ As we were told during our conversation with a member of a PLHIV working nearby the IDP camp Mugunga III on 24th July 2013.

¹⁸¹ Indeed, within the IDP camp Mugunga III, after a voluntary counseling test, some cases of HIV transmission were detected. We were told by one nurse from the IDP medical care that there were old cases of infected people who are in treatment in Goma that they found in the IDP camp.

¹⁸² As we were told by the IDP representative and one PLHIV NGO near the IDP camp Mugunga III. Increase in HIV transmission is also viewed as a consequence of war. On this issue, see for instance PB Spiegel 'HIV/AIDS among conflict-affected and displaced populations: dispelling myths and taking actions' *Disaster* (2004) 28 322-329.

¹⁸³ The UN World Food Program usually provides food aid to PLHIV associations.

¹⁸⁴ Such as World Food Program (WFP), Food and Agriculture Organisation (FAO), etc.

¹⁸⁵ We may recall some of the objectives targeted by humanitarian assistance on nutritional sector in the DRC for the year 2013.:

Specific objective (SO1): strengthening and extending the system of nutrition supervision or monitoring and of alert to other zones of the territory. Activities concern: organizing nutritional surveys in the whole country; strengthening the system of monitoring and of alert; organizing surveys in case of alert and providing a quick response for at least 6 months in case it is confirmed.

we heard from one Association of PLHIV,¹⁸⁶ the quantity is not sufficient they do not have varied food. In fact, from the observations made in one of these NGOs (Groupe Deborah), they receive sugar and flour to make porridge. This package is not aimed at meeting their food needs. It is only given as a complement to what they are expected to have at home. They receive something they can drink in order to strengthen them for a while. So the composite of what they are given cannot replace a normal daily meal. Thus, they need to find something else either by doing agricultural activities, income generating activities, and so on. In fact, some other NGOs fund income generating activities for an amount of 50 to 150 USD and they report good practices from PLHIV who get money from their activities and are able to return back money for others. Others, however, are not able to get benefit from that money and do not return back the lent money.

From the above observations, we notice that at some points, PLHIV are supported not sufficiently or as it could have been expected. They cannot have what they would need in order to make normal life. Consequently, what they earn from their NGOs is not meant to provide them sufficient food as people could wish getting periodic quantity of food. It has to be mentioned that only international agencies are involved. The Congolese Government does not have such an intervention¹⁸⁷ whereas it should have been the principal responsible.¹⁸⁸

2.2. Food distributed in IDP camps

This food is supposed to meet basic 'dietary needs' of IDPs. From what we observed in Mugunga camp III, it is said to be distributed 25 kg per household which amounts to almost 6 kg per person and per month because each household is calculated as comprising 5 persons. They are given flour, rice, beans, oil, sanitary kit and so on. But, from IDPs themselves,¹⁸⁹ this quantity is not sufficient. They argue, through the IDP representative that one cannot live with 6 kg per month. They also think, this food is not sufficiently diversified. They find themselves eating the same thing for a month. As a solution, some of them practice income

SO2: Detection of cases and care provision to children of 6 to 59 months, undernourished PLHIV and pregnant and breastfeeding women suffering from malnutrition within targeted health zones. Activities concern: detection of children [affected] within 100% of intervention zones in order to send malnourished cases to appropriate structures for a support; treatment to be provided to 609 868 malnourished children; equipping 9200 units specialized in providing nutritional care with therapeutic food, essential medicines and anthropometric materials; nutritional support to 19527 PLHIV.

SO3: Support nutrition of babies and pregnant women in difficult situation (sustainability of maternal breastfeeding, distribution of micronutrients, provision of complementary adequate food); psychosocial help; sensitization of local communities on health and nutrition good practices emphasizing the case of babies' nutrition; provision of nutritional supplements to 234 000 children of 6 to 23 months; provision of nutritional supplements to 42 000 pregnant women in prenatal consultation.

SO4: Re-enforcement of technical and operational capacities of partners by: training of 6 000 caregivers; training of 12 000 community liaises. See DRC *Humanitarian Action Plan 2013* available at www.ocha.org.

¹⁸⁶ Located in Goma (at Heal Afrika), in our conversation with PLHIV on 6 July 2013.

¹⁸⁷ From a report issued in 2012 by the National Multisectoral Program on the Fight against AIDS (PNMLS in french), there is not yet policy in place on economic and social assistance from the Government ! See PNMLS *Rapport d'activité sur la riposte au VIH/SIDA en R.D. Congo* (2012) 34 available at www.pnmls.cd (accessed 3 September 2013).

¹⁸⁸ Considering its goal to reach 100% of PLHIV free from hunger in 2014. See PNMLS *National Strategic Plan on the fight against AIDS (2010-2014)* 51.

¹⁸⁹ According to our conversation with the IDP representative, Mr Evariste on 9th July 2013.

generating activities such as bread fabrication (with the support of some UN agencies), they also sell the distributed food within the camp or in the surrounding city in order to get diversified food. However, they say the distributed food is cheaper on the market because every IDP is involved in selling that food and consequently prices drop.

In the very specific case of PLHIV, those with problems of malnutrition are supported if they are children.¹⁹⁰ This means, children infected by HIV are the only ones to get supplementary food. In fact, their parents are given a flour supply for porridge above what is generally given to other IDPs. Here, they are given this to complement to what they have already. It is not given as a specific meal for PLHIV. I was told by the IDP representative that the distribution of food does not take into account their specific need. This is to mean, the composition of food is discussed and calculated within the humanitarian organization.

2.3. Quality of the distributed food

It is reported by PLHIV, in Goma, and IDP camps that the given food is of poor quality. This problem was mentioned both in the PLHIV association visited in Goma and in the IDP camp Mugunga III. It is said that PLHIV receive expired food or food that is about to expire. Interviewing some international organisations working in the IDP camp, they claim to have a reporting mechanism amongst humanitarian organizations. They report this and obtain a withdrawal of the expired food in some cases. In some others, IDPs said that they have no other choice but to eat it like that.¹⁹¹

In Goma, women living with HIV found at Heal Afrika in July 2013 also mentioned that they received expired meals from some UN agencies in their food aid program. They said that they try to sell it on the market or to eat it like that.

Arguably, expired meals do not meet the requirement of acceptable and qualitative food. It may lead to other forms of diseases for PLHIV. It is the duty of the Congolese government to make sure that its citizens have access to acceptable and qualitative food. In this case, humanitarian organizations should provide assistance with due respect to international laws and local laws.¹⁹² Thus they may be held accountable for their abuses or inattention in their mission. However, we also need to analyze how human rights instruments can help in alleviating these problems for the benefit of PLHIV.

¹⁹⁰ From the saying of a nurse in the medical center within the camp Mugunga III, our conversation of 9th July 2013.

¹⁹¹ One woman, PLHIV, has declared to have been given very bitter flour and even by a mixture of sugar the porridge remains difficult to eat. In our conversation of 6th July 2013.

¹⁹² See article 6(1) of the AU Convention on IDPs.

Chapter 4. Recommendations on adapted response to malnutrition for the benefit of PLHIV in the DRC

The preceding chapters demonstrated that the right to food has not been achieved and is not evident in government's actions either in general cases or in the specific case of PLHIV. Further, we have noticed that even the humanitarian assistance has some problems such as the distribution of expired food is not efficient. These negative dimensions need to be addressed if PLHIV's right to food is to be realized fully. This is the reason why some explanations are given below which culminate in recommendations addressed both to PLHIV themselves and to the Congolese Government.

1. The role of PLHIV

We have already mentioned that PLHIV in the DRC live in secrecy for fear of stigmatization whereas this dissertation calls for actions in association.

1.1. PLHIV and isolation

In fact, the majority of PLHIV declare that they face stigma in the DRC.¹⁹³ Thus, they are forced to fight HIV individually which may not have success. Some individual claims may lead to much stigmatization and may then produce negative effects. This is the reason why we argue for greater organisation of PLHIV into associations. PLHIV who are treated in the same medical centre or hospital may gather to discuss their common problems. They may also be divided into small groups on based on their location. Gathered together like this they may be better able to fight stigmatization together, to start with, using among others the provision of article 42 of the 2008 PLHIV's rights law. To favour this fight, this law should also be revised on its penalty. Someone found guilty from stigmatization may be imprisoned for a maximum of 6 months whereas someone who is found guilty of harmful accusation may be imprisoned for 1 year.¹⁹⁴ I therefore, recommend that PLHIV advocate for the revision of the 2008 PLHIV's rights law in order to favour them to gather without fear This revision should lead to an increase of the penalty to at least 1 year in matters of stigmatization as well.

1.2. Problems related to PLHIV's association

In order to set up an effective association, it is of much interest to request and obtain legal personality.¹⁹⁵ Some claims (as mentioned below) will not be effective if the group of PLHIV does not have legal personality. All this requires for PLHIV to take the initiative with interest

¹⁹³ Conversation with some PLHIV in Goma at Heal Afrika.

¹⁹⁴ See article 74 of the Congolese Penal Code If we even compare with the 7th June 1966 Ordinance-law No. 66-342 repressing racism and tribalism, we notice a penalty of 2 years of imprisonment at maximum. See *Les Codes Larcier* Tome II Droit penal (2003).

¹⁹⁵ Pursuant articles 3, 4 & 5 of the 20th July 2001 Law No 004-2001 related to general provisions on associations.

and to sit together in order to control the group and to follow the required procedures. However, PLHIV are usually busy with their health status, looking mostly for treatment rather than other rights. This is the reason why we often find PLHIV organizations held by non-PLHIV people. Very often, we have witnessed problems resulting from such associations run by non-PLHIV people. A member of a PLHIV NGO in Mugunga informed us that non-PLHIV leaders of PLHIV NGOs pose problems. They usually do not follow values in their work. Some of them are interested in money and in raising funds. She reported fund mismanagements and food aid misdistribution as the main problems. The consequence is that funders reduce their support or simply cancel food aid. On the ground, PLHIV members are the ones who suffer. Hence, I recommend that PLHIV set up an association with one of them as chief of the board.

2. Role of PLHIV associations with regard to HIV-related programs

Many scholars agree on the importance of using the human rights-based approach in combating HIV and AIDS, as explained in the first chapter.¹⁹⁶ This approach is a way of using human rights instruments for the benefit of people. That, in observing some human rights principles, HIV can be fought against in a better way. Those principles are of participation¹⁹⁷ and non-discrimination. While framing HIV-related programs, Government is supposed to involve PLHIV so that the said program will take into account their real needs. In the DRC, PLHIV are usually involved. However, they have a great role to play in framing the program with realism. Another important part of the involvement of PLHIV association concerns the follow-up of programs implementation.

2.1. Framing HIV-related programs with realism

Since the Political Declaration on HIV and AIDS and the International Guidelines on HIV/AIDS and human rights¹⁹⁸ have mentioned the fact that Governments should set out policies and programs related to HIV-response, the Congolese Government did the same. Currently, HIV-response is coordinated within a framework guided by a specific institution: the Multisectoral national program on fight against AIDS (called PNMLS in French). The ongoing national strategic plan (NSP) on the fight against HIV and AIDS covers the years 2010-2014. Regarding its elaboration, we may easily notice that it was made up by the Government with all relevant Ministries (as required in those Guidelines and Political Declaration). The process involved a great number of PLHIV NGO.¹⁹⁹ This is to say, in a formal analysis, we may agree that this strategic plan follows the requirements set out by the above relevant instruments related to HIV. However, in its content, the strategic plan lacks realism, on my view. On the very specific issue of the right to food, the Strategic plan

¹⁹⁶ See also S Kindornay and others 'Rights-based approaches to development: Implications for NGOs' *Human rights quarterly* (2012) 34 472-506.

¹⁹⁷ See its recognition by PNMLS *National strategic plan on the fight against HIV and AIDS (2010-2014)* 39.

¹⁹⁸ See Guideline 1 of the *International Guidelines on HIV/AIDS and Human Rights* contained in Annex I to the report of the Secretary-General to the Commission on Human Rights in document E/CN.4/1997/37.

¹⁹⁹ See the list.

mentions that the goal to achieve is of 100% of needy PLHIV free from hunger (in 2014).²⁰⁰ This equates more to a dream than a reality.²⁰¹ In fact, analyzing the situation of malnutrition in the DRC, the Government recognizes great problems in its report to the UN Committee on ESCR (deposited in 2007). Thus, from 2007 to 2010, the general situation was of great malnutrition in more than half of the population. While the Government was not able to curb this general problem, how could it wish to achieve 100% of PLHIV free from hunger in 2014? PLHIV are a particular group within the 56% of the general population to need food. What would justify specific focus on them rather than the general population?

If the Government was logical and realistic, there should have been a correlation between the strategy of mitigating malnutrition and increasing food production. Yet we know, there was, by that time, no policy in agriculture. The law on agriculture was issued in December 2011 and was supposed to enter into force in June 2012.²⁰² Again, the entering into force of a law does not mean that food production automatically increases or malnutrition drops. Furthermore, the strategies proposed by the government in its report before the UN Committee on ESCR were not yet effective to help farmers. The National Fund on Development was not and is not yet operational. So, the point this dissertation is trying to make here is that of an idealistic wish of the government to provide food to all PLHIV by 2014 while more than 50% of the whole population are prisoners of hunger.

In my view, these related issues should have been looked at by different stakeholders before developing the National Strategic Plan against HIV and AIDS (2010-2014). Their exact role should have been to examine the feasibility of such a promise by comparing what the Government has done so far. We know the Government was only able to help thousands of people here and there in disasters. They were only sporadic interventions. Yet to provide food to 100% of PLHIV requires more than a sporadic intervention since food intake is supposed to accompany intake of medication treatment. And this is for a very long period of time.

In my view, NGOs or associations of PLHIV should suggest progressive realization of the right to food. They should have suggested very realizable interventions that can be a matter of evaluation after certain periods of times. A proposal to have a certain percentage from the budget (National budget) could be with a good starting point.²⁰³ My recommendation is that the NSP could specifically provide for a certain part of the National budget to be allocated to the fight against HIV and divided, noticeably, on all medical treatments needed including

²⁰⁰ See Strategic Objective 2.1.4 within the National strategic plan (2010-2014). It cites as principal strategies to achieve this goal: 1. integration of food aspects in the package of treatment provided to PLHIV; 2. Nutritional assistance delivery to PLHIV; 3. Enhancing food security within households affected by HIV and AIDS and food insecurity; 4. Raising awareness about the protocol on food care. See PNMLS National strategic plan 39.

²⁰¹ By comparison with the Humanitarian action plan made by the cluster of humanitarian agencies and other relevant stakeholders with aims at reaching 25% of PLHIV. Although it is not enough but this is something that can really be done. See OCHA 2013 Humanitarian Action Plan for the DRC available at www.ocha.org

²⁰² See article 85 of the 2011 Agricultural law.

²⁰³ Within the NSP they only mention that a line item should raise annually from the national and provincial budget in order to finance interventions in HIV matters. See Strategic objective 4.3.1.

provision of food.²⁰⁴ This part of the budget could evolve into larger portions as possible. And this could offer a basis for evaluation.²⁰⁵ At a national level, this has not worked properly because the provision on budget is foreseen for the whole health sector. However, we must notice the effort made by the Provincial assembly of North-Kivu in inserting a certain amount in the provincial budget after a lobbying mechanism from PLHIV.²⁰⁶ Although they succeeded and may be congratulated, the issue is that this amount seems to respond generally on an uncertain amount regarding the NSP. If there were a clear provision on what the budget should contain, at least the minimum, relating to HIV matters, there could have been a basis for action of PLHIV associations in the country.

2.2. The role of PLHIV association²⁰⁷ in monitoring the implementation of the NSP

In my view, monitoring the implementation of the NSP is a very important and crucial role that PLHIV associations should play. It is of no use to set up NSPs with good and wonderful promises while they are not implemented. There is a need to monitor the implementation of the NSP carefully. This is a way to make Government accountable for its failure to meet PLHIV's rights and to find gaps to make claims and assert rights.

3. PLHIV associations and submission of claims

Submission of legal claims and assertion of legal rights using the administrative or judicial mechanisms are the last line of defence in attempting to realise one's rights. In fact, by issuing a NSP, the Government commits to follow a certain line in realizing PLHIV's rights including the right to food. If the Government does not respect, protect and fulfil PLHIV's right to food, as well as for other citizens, the last way to do so is to try to get it legally by force. In the Congolese system, this matter can be treated in different ways. But it seems appropriate to take an administrative or a judicial path.

3.1 Administrative procedures

It is possible to begin with an administrative procedure to realise the right to food. Claims can be submitted to different concerned ministries. In the specific matter of PLHIV and with regard to the right to food, claims may be submitted to the Provincial or National Ministry in charge of health. In fact, PLHIV's right is directly linked with the issue of health status. Their

²⁰⁴ Yet from the budget needed by PNMLS to implement the NSP, it allocated to nutritional support an amount of 6 669 300,00 USD in a total of 4 918 060 311,10 USD which equates, if I am not mistaken, 0.13% of the NSP's budget. Can 100% of PLHIV in need of food be supported in the period of 2010-2014? Even if we had to take into account the nutritional support to orphans which benefits with 5% of the Budget, I do not see how one may be convinced!

²⁰⁵ I am in the contrary way of the NSP which aims at monitoring the evolvement of percentage until it reaches 100%. Also, I disagree with the unclearness of the amount that the budget should contain since this is not the first NSP. There was a previous one (1999-2010). I think, the current NSP should be in position to evaluate clearly at least the minimum of amount that should the budget foresees.

²⁰⁶ On 21st July 2013 PLHIV gathered in front of the Provincial Assembly's hall in Goma, North-Kivu Province.

²⁰⁷ See the 20th July 2001 law No. 004-2001 related to general provisions applicable to associations.

need for food is not only linked with poverty but is directly linked to their health status.²⁰⁸ The response that the Government is supposed to give pertaining to PLHIV and malnutrition is directly linked with their need to have food while taking medication. Thus, including this matter with the capacity of the Ministry of health is of relevance. He, then, may have to submit this issue to other ministries.

May this procedure succeed? Theoretically, this procedure may be followed. But its success depends on how the claim is grounded. This is the reason why we previously suggested that PLHIV associations work on lobbying for clear provisions within NSPs. If for example we could take a claim from the current NSPs, it would be difficult to succeed in an administrative procedure. There is no clear obligation on the head of the Government regarding food provision. Again, if we combine the NSP with the recent provision of a line item in the North-Kivu budget, just in this case, it is difficult to know which amount is to be allocated for which health service precisely.²⁰⁹ This amount may be given to the provincial representation of PNMLS or may be to some PLHIV associations regarding a proposal submitted to the Provincial Government. Yet PNMLS may use this money for any kind of service because there are many within the NSP.²¹⁰

I would suggest using this administrative procedure. However, claimants should bear in mind that it is not a strong strategy since it is not clearly grounded in the 2010-2014 NSP. Thus it is a limited way of having their rights enforced. In the DRC, this procedure is usually meant to get a withdrawal or annulment of an illegal regulation. In fact, a regulation denying PLHIV's right to food is easy to combat.²¹¹ But a simple lack of food provision to PLHIV for consumption of medication seems to be difficult to challenge efficiently.

3.2. Tribunals and courts involvement

Not all matters are to be brought before Tribunals and Courts. And in the case of the realization of the right to food for PLHIV, in the DRC, there is an important element to mention.

i) In fact, some problems highlighted earlier may not necessarily find appropriate solution before Courts. In the case of improper food distributed within IDP camps or food distributed following proposals submitted by PLHIV NGOs, there is a way to advocate with the concerned agency. The experience shows in Goma, for instance, World Food Program (WFP)

²⁰⁸ This is because food intake is to conceive as part of medical treatment.

²⁰⁹ Taking into account the fact that in the past years, it has been pointed out that the Government does not usually pay the full amount provided for in the budget. See the recommendation made by MSF in its Explicative note titled 'Fight against HIV/AIDS in the DRC: ignored emergency' January 2012.

²¹⁰ Like enforcing education of sensitization. Recently, in June 2013, PNMLS in Goma distributed some school materials to children infected of affected by HIV. An action made by the end of the school year, for which purpose? Or even if it was for IDP children, was it a primordial need?

²¹¹ Administrative procedure is very often meant to seek the annulment of an illegal administrative act or regulation. See articles 146 to 149 of the 31st March 1982 Ordinance-law No 82-020 related to the code of organization and jurisdiction of tribunals and courts in the DRC (as they still applicable although the entry into force of a new law in this matter since 11 April 2013), see article 154 of the 2013 new Law.

gives an opportunity to PLHIV to criticize the way in which they receive food aid. I witnessed this method within the PLHV CBO at Heal Afrika. Community members gave their observations by themselves and which were to be brought to WFP for improvement in the distribution. Then, the issue of improper food was discussed. However, in the IDP camp Mugunga III, this method seems not to be working. As declared by the IDP representative, there has been claims that he sent to humanitarian agencies to denounce both the improper quality and insufficient quantity of the distributed food. This has been done several times without any positive change. In these kinds of cases Tribunals and Courts may be involved.

A complaint about food distributed by UN agencies has to follow existing laws.²¹² Indeed all these agencies are subjected to local laws. Unfortunately, as mentioned in the earlier chapter, the existing civil code does not provide for easy solutions. Practically, it may be argued that improper food has negative effects on health and, for PLHIV, it may open a door for opportunistic diseases. This argument is not as such convincing because the civil code requires a current injury not an eventual one.²¹³ Even if there were illness as a result of consumption of the improper food, the claimant will be required to prove further the direct link between the improper food and the subsequent degradation of health. This is not easy because his health status may have degraded from a combination of many causes. This is why I recommend a specific law on the consumer's protection. It will be helpful in condemning the mere fact of distributing or putting on the market improper food which exposes consumers to health problems. Thus, the consumer will not need to prove the injury.

As we also mentioned the responsibility of armed groups as other non-state actors concerned by human rights infringement in this period of war, the DRC should consider the necessity of ratifying the AU Convention on IDPs. As we noticed in Chapter 3, this Convention contains clear provisions on the obligations of States, armed groups and humanitarian agencies. Its ratification could help in the appreciation of cases that can be brought before judges in matters of war crimes. Indeed, while prosecuting for war crimes, one may claim reparation for any injury suffered in times of armed conflicts. We hope the ongoing armed conflict in the Eastern part of the DRC will not end with an agreement preventing or impeding prosecution.

ii) In the DRC, cases are usually individual.²¹⁴ However, in the very specific case of PLHIV's right to food, the case should not be individual but collective. In fact, acting individually may not be the most efficient strategy since the problem is general and concerns a great number of PLHIV. But in the Congolese system, there is not a similar 'claim of public interest' nor a 'class action' as it works in English countries.²¹⁵ So, in DRC, each individual has to lodge his

²¹² The AU IDP Convention on IDPs is clear about the fact that internal or local laws have control over humanitarian agencies. See its article 6.

²¹³ See article 258 of the Congolese Civil Code III *Les Codes Larcier* Tome I Droit civil et judiciaire (2003).

²¹⁴ Individuals or even legal persons cannot represent others in justice. This is the monopoly of Advocates. Some exceptions exists for minors and other incapables, they may be represented in justice by parents or other designed persons. Also a trade union may act on behalf of its members. Unless these exceptions, each person has to claim his right individually in justice. See article 14 of the Congolese Civil Code of Procedure.

²¹⁵ In France, there is an attempt to organize such actions for the benefit of consumers. See Brayan Cave's Commercial Litigation Briefings 'L'introduction de l'action de groupe dans le droit français' available at

own complaint. And in a society where stigma is pointed out, it will be risky for one PLHIV to expose himself claiming for his right. That is why I would suggest a claim lodged by a PLHIV association as a legal person acting in the interest of its members. Again, this requires for this Association to have obtained a specific ‘administrative authorization’ in representing its members in legal proceedings.

I also recommend for the rapid adoption of the proposal on a National Human Rights Commission because, in the text of the proposal it is provided that claims may be lodged by individuals or collectively by associations working in human rights matters.²¹⁶

Another problem to solve is about claiming on the basis of a human right enshrined in the Constitution and international instruments. As already mentioned above, it is rare to find a judge willing to base their decision on international instruments.²¹⁷ They would rather base their findings on internal laws. This is why, PLHIV’s associations should lobby for incorporating the right to food within the consumer protection law that this dissertation argued for earlier on. This will have the effect of having such a right within an internal law directly applicable by judges.

4. Recommendations to the Congolese Government

From the above analysis, we may summarize as below, recommendations addressed to the Congolese Government:

- The government should verify whether associations of PLHIV are led by a person living with HIV as a pre-condition of granting legal personality;
- The Congolese government should be flexible in granting PLHIV information on how line items contained in the national budget were spent;

www.bryancave.com/bulletins (accessed 23 August 2013). Compare with the previous system of the said ‘action de groupe’ in J Vincent and others *La justice et ses institutions* (1996) Dalloz 672.

²¹⁶ See the coming law on a National Human Rights Commission (Commission Nationale des Droits de l’Homme, CNDH) in its proposed article 32 currently under the examination of the Parliament. Unfortunately, we must warn that the coming Commission is framed as a technical and consultative organ towards other institutions. It may issue recommendations, advisory opinions and technical views on human rights matters. There seems not to be any power of sanction. In spite of its affirmed independence from other Institutions, I do not see how it can be balancing for them; it is not clear if it can balance the Government for instance if a Ministry refuses to give access to certain documents. Hopefully, the National Assembly will look at how to render this Commission stronger than it appears in the preparatory text under examination.

²¹⁷ The UN Committee on ESCR also noticed the same problem when it stated in 2009 ‘[t]he Committee is concerned that in spite of the fact that international treaties supersede domestic legislation and that several rights enshrined in the Covenant were incorporated into the 2006 Constitution, domestic legislation which is contrary to the Covenant and to the new constitution have not been abrogated and laws giving effect to the provisions of the Covenant are hardly implemented. The Committee is also concerned that the State party has not given full effect to the provisions of the Covenant in the domestic legal order, especially by providing for judicial and other remedies for violations of economic, social and cultural rights’. In light of its general comment No 9 (1998) on the domestic application of the Covenant, the Committee also urges the State party to take immediate steps, including legislative measures, to create and ensure effective domestic remedies for all economic, social and cultural rights and to include in its next periodic report precise information on judicial decisions which give effect to Covenant rights’. See UN Economic and social Council *Concluding observation of the Committee on ESCR, Democratic Republic of the Congo* E/C.12/COD/CO/4 16 December 2009 2.

- The Congolese government should: 1) develop consumer protection legislation; 2) review the land tenure laws and clear up current confusions around certain issues and 3) modify article 16 of the agricultural law especially removing the citizenship condition in land exploitation;
- Regarding armed conflicts, the Congolese government should remain consistent by not signing any kind of agreement which will leave victims without any possibility to seek reparation before Congolese or international judicial institutions for all crimes and especially food-based crimes;
- The Congolese government should, finally, undertake to ratify the AU Convention on IDPs as it contained relevant provisions regarding the responsibility of armed groups and humanitarian organisations.

Those are my recommendations that may hopefully work in alleviating the non-implementation of the right to food of PLHIV.

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Words: 18 311