THE MANAGEMENT OF BASIC EDUCATION BY PARENTS IN DRC: POSSIBLE REMEDIES

By Arnold NYALUMA MULAGANO

INTRODUCTION

1. Since the mid-1980s the Congolese state has gradually detached from its constitutional obligation, reaching a climax in 1992. This year, the teachers' strike culminated in a blank academic year without succumbing to the government's whims.

In South Kivu (a Congolese province) the following year, the teachers union met with the parents' association. This meeting was born out of an agreement 1 under which the parents committed to an exceptional payment support (called premium or motivation) of teachers just to allow the resumption of the academic year. This interim measure has not only been kept to date but it has spread throughout the country. It has finally been endorsed by the State which has abandoned all charges related to public education to parents.

2. The consequences were long coming. While in 1995 2, 23% of children were admitted to school at the age of 6, the rate fell to 17% in 2001. A comprehensive diagnosis of the Government 3 informs that "the gross primary enrollment declined from 92% in 1972 to 64% in 2002. At all levels, the quality of education has fallen sharply. The products formed no longer meet the needs and requirements of development.

3. Faced with this bleak picture, parents and teachers have resolved to revoke the agreement of 10 October 1993 4. Despite the revocation practice is kept up to date.

4. The concern of this study is whether and on what basis the victims of this practice can take legal action and if so what claims are justifiable.

5. To meet its international commitments, the constitution of DRC provides for the right to education (art. 42-45) 5 and Law No. 86-005 of 22 September 1986 in which Article 9 states "the State has an obligation to provide education for children in primary schools and ensure that all Congolese can read, write and calculate. As such, it has an obligation to implement all appropriate mechanisms at the structural, educational, administrative, financial and medical education." 6 The Law on Child Protection 7, states in Article 38 "the State guarantees the right to education by making free and compulsory primary education."

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1 Memorandum of Understanding between the SYEZA and ANAPEZA of October 10, 1993, unpublished.
6. Do these instruments offer any guarantees of justiciability to children who could not access (or continue) school because of the "premium" practice? Just after Claudia Scotti-Lam noted that "the essence of any international treaty is to present a binding on the Contracting States. If the contractors on Economic, Social and Cultural Rights had wanted to deny them the character of international obligations, they could stick to adopt resolutions and other international non-mandatory."

7. On this basis, it is necessary to check whether the order in Congolese domestic law that may have a direct and thus start a legal action for violations. First section 215 of the Constitution establishes the supremacy of treaties, on the other section 153 authorizes the court to enforce them. Congolese Justice and could apply not only the provisions of the African Charter on Human and Peoples' Rights makes no distinction between categories of rights but also those of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and they will be expressed by the national legislature. It is recognized that "standards of a purely declaratory internationally can become binding law that gives them even a constitutional status". Provided that these texts contain provisions that are "clear and precise."

8. Applicable text "programmatic and progressive" which is "devoted not to individual rights of individuals"? The Committee on Economic Social and Cultural Rights, case law, and an abundant doctrine can see that the programmatic nature does not preclude judicial review.

9. The direct effect, and to limit the standstill effect, would therefore discourage the practice of "premium" in the DRC to the liability of the state. The question remains, what kind of internal dispute lends itself to such control between the court, the administrative court and the constitutional court. There is also the question of the nature and modalities of their decisions. If all these avenues are open and many others, it remains true that a comprehensive study should help to certify, confirm or deny such optimism in favor of the rights for over a half century to make them justiciable.

10. It is possible that a mechanical reading of Article 2 of the International Covenant on Civil and Political Rights, for example, the Congolese judge recalls the decision of the

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9 Adam Diang, "The right to live in the African context," Daniel Premont (General Editor), Try the concept right to live, In memory of Yougindra Khushalan, Brussels, Bruylant, 1988, p.185.
United States’ Supreme Court that "ensure the minimum subsistence to citizens is not a matter for the courts."\(^{14}\)

11. We therefore verify the hypothesis that the obligations to social rights are amenable to judicial review\(^{15}\). The question of means does not relieve the State\(^{16}\).

12. Of course, part of our discussion, we impose a limit, so let us devote our thoughts to the theory of direct effect and the effect of the passage standstill effect in terms of how the right to education is received in the Congolese legal system. It is necessary then from the evaluation of the practice of "premium" and its consequences before examining the rules applicable to these facts through the sources of the right to education. Of these, we will release the contents of the law in question and the obligations to the state by insisting on their degree of enforceability. Which will lead to discovering the judicial guarantees that due in the domestic and the international order and claims, or more violations that these courts are called upon to punish and so too the nature of the said penalties?

I. THE PRACTICE OF “PREMIUM” IN REGARD TO THE INTERNATIONAL COMMITMENTS OF THE CONGOLESE STATE

A. THE PLACE OF THE STATE: THE PRACTICE AND CONSEQUENCES

13. In the Memorandum cited above, parents and union pin on the situation created by the state as a result of non-payment of wages. They denounced the strike of 1992 -1993. Section 1 sets the date for the new school year. Article 2 establishes the management, saying "pending the payment of teachers' salaries by the government, their employers, parents will agree to a sacrifice as a primary responsibility for educating their children and will carry costs of specific intervention to support teachers and school operations." The letter of the agreement, it appears that this is a provisional text and informal. There is indeed, no statutory and legal relationship between the parents' committee and the teachers union. The parties did not intend that their agreement would run until the end of the school year. That is why they have stipulated in Article 6 "during this special and difficult time, no other fees will be charged to parents." The measure was taken in the vernacular and official name of "premium teachers" would continue to date. Successive governments would not only live with but generalize across the country.

14. As would be expected, in a country where the GDP per capita does not exceed $ 10 per month, the consequences were disastrous. Many children from poor families are thus excluded from school. As an illustration, according to a UNICEF\(^{17}\) report a child from 6 to

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\(^{15}\) Jean Paul Costa, Towards protection of economic, social and cultural rights of man on the threshold of the 3rd Millennium, Essays in honor of Pierre Lambert, Brussels, Bruylant, 2000, p.152.

\(^{16}\) Committee on Economic, Social and Cultural Rights, Obs. Gén.n 3 quoted by Olivier Frouville, op.cit. p. 448

14 years out of every three has never attended school and may never visit it. One out of four children in first grade reaches the fifth grade.

15. UNDP\textsuperscript{18} attributes this to lack of support by parents (79%) followed by causes such as war, lack of staff, illness (15%), the distance to school (4%), lack of school (2%).

16. Before the excesses of this practice, the Teachers Union and the committee of parents had signed a new agreement\textsuperscript{19}. The memorandum of 1993 agreement was terminated. After reminding the parties that the premium (the concept shown here) is not an entitlement, they agreed to send a memorandum to the authorities.

17. Despite the revocation and multiple legislative and regulatory acts that remind the free education and the prohibition of "premium", the practice has continued until during the 2010-2011 school year. Given this persistence, a second agreement\textsuperscript{20} was reached January 25, 2010 between the Teachers Union of the Congo (SYECO), Catholic Teachers Union (SYNECAT), the Union of Protestant Teachers (SYNEP) and the National Association of Parents of Congo, the Association of Catholic parents and the association of Protestant parents. The first article dedicated to "the repeal of the MoU of 10 October 1993 with the consequent removal of the support of teachers by parents, commonly called" premium "over the whole province of South Kivu. In legal terms, this agreement adds nothing to the decision of 6 February 2004 referred above. On the political front against by two contextual entrust an obvious symbolic value. First few months earlier, a round table on Education, convened by the provincial government had considered the matter and had decided to abolish the premium on 31 December 2010. By "burying the premium," parents and teachers placed the government to account. Then the agreement was followed by a major public event as a base with the coordination office of civil society, thus taking to witness the "lifeblood" of the province. A funeral dirge was sung and the immortal agreement of 10 October 1993 was "buried". But this folklore could only move one iota on our insensitive government. Instead, the head of state signed an order introducing free classes in first, second and third primary throughout the country except the city of Kinshasa and Lubumbashi. By this act, the head of state institutionalizes the violation of the Constitution and all national and international instruments mentioned above. So these days parents can continue to support the education of their children. The poorest are resigned to keep them at home if they are not recruited by a gang or militia.

18. Central to this reflection is a concern: the justiciability for those out there who have found themselves excluded from education by the said practice hence the need to check if they have individual rights or at least claims litigants.

B. SOURCES OF LAW IN DRC

1. International sources

\textsuperscript{18} UNDP, The profile of poverty in the DRC, the level and trend, Kinshasa, http:jordi.free/pnud.rapport.drc

\textsuperscript{19} Minutes of joint meeting held SYECO-ANAPECO Friday, 6 February 2004 a provincial division of primary, secondary and vocational South Kivu in Bukavu, unpublished.

19. Whether universal or regional treaties, the treaty system is organized into law by two important articles of the Constitution. Section 215 provides that "treaties and international agreements duly concluded upon publication are superior laws." Section 153 adds that "the courts, civil and military, apply the duly ratified international treaties, laws and regulatory acts provided they comply with laws and custom, provided that it is not contrary to public order and morality." These provisions embody the direct applicability of treaties in the domestic Congo by giving them extra prominence on domestic law provided that the right to education is rooted in these treaties.

1. 1. The universal sources

We will mention here only the main texts.

1.1.1. The International Covenant on Economic, Social and Cultural Rights

This pact is binding in DRC since 1 November 1976\(^{21}\). It enshrines the right to education in Article 13. Thus, victims of the "premium" can claim a violation of this article which as we noted above is directly applicable in DRC.

Is this sufficient to permit judicial review?

1.1.2. Convention on the Rights of the Child

This agreement is directly applicable in DRC since September 28, 1990\(^{22}\). The practice of the premium being reached after three years, people have seen this excluded from the training system, can rely on the rights guaranteed by Articles 28 and 29. Could a judge condemn the Congolese State which has committed to a progressive realization of this right? We see here that the judge retains the power to control, as the progressive realization does not deprive the beneficiaries of any right to claim.

1.2. Regional sources

Unlike other systems, the O.A.U. now African Union has the advantage of not distinguishing between categories of rights.

1.2.1. The African Charter on Human and Peoples' Rights

The DRC ratified the Charter dated 20 July 1987\(^{23}\) and its protocols. Article 17 guarantees the right to education. The Congolese people under the jurisdiction could invoke before the courts if the Congolese practice of "premium" they could not continue or initiate the studies, at least at primary level (in our study).

The judge will he succeed?

1.2.2. The African Charter on the Welfare of the Child

\(^{21}\text{http://www3.unhchr.ch/fr.}\)
\(^{22}\text{http://www3.unhchr.ch/fr.}\)
\(^{23}\text{http://www3.aidh.org}\)
Adopted in Addis Ababa, July 11, 1990, effective November 29, 1999, the African Charter on the Welfare and Rights of the child is applicable in the DRC since March 28, 2001. It enshrines the right to education in Article 11. And those who have not benefited from this provision as a result of the ”premium” may appeal to the courts.

2. National sources

20 The Congolese Constitution reflects the will of the State to fulfill its international obligations particularly regarding the right to education. That materializes into law Act No. 86-005 of September 22, 1986.

2.1. The Constitution

In addition to the above provisions that give a direct application of treaties, the preamble of the constitution "reaffirmed the commitment to the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, to Conventions of United Nations on children's rights and the rights of women and the international instruments on the protection and promotion of human rights.” Sections 42 to 44 are devoted to the right to education. Free and compulsory primary education is enshrined in these provisions.

2.2. Framework Law No. 86-005 of 22 September 1986 on national education and law No. 09/001 of 10 January 2009 on Child Protection

This law organizes education and indicates the obligations of the State for an effective right to education. The law of 10 January 2009 reaffirms the obligation of school and free education.

C. CONTENT OF THE RIGHT ORDER AND CORRESPONDING OBLIGATIONS OF THE STATE

Examination of the prerogatives of individual rights (or legitimate claims) arising from these sources can enter the corresponding obligations on the part of their debtor is the state and provides tools accordingly to the judge assigned to perform its control.

1. The free education

21. Free primary education is enshrined in the International Covenant on Economic, Social and Cultural Rights, Article 13, 2, a), the Convention on the Rights of the Child, Article 28.1, has, the African Charter on Rights and Welfare of the Child, Article 11.3, has the Constitution, Article .43,4 ... To the Committee on Economic, Social and Cultural Rights nature of this requirement has no ambiguity. This right is expressly formulated to indicate that primary education should be borne not by the children or parents or guardians. Registration fees imposed by government, local authorities or schools, and other direct costs, constitute disincentives to the exercise of the right and may jeopardize its realization.

They often result in a net decline of that right. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when it is not the case), or the obligation to wear a relatively expensive school uniform, can also be considered from the same perspective. Other indirect costs may be permissible, subject to review by the Committee on a case by case basis."

Outside of the Constitution which enshrines a current (primary education is free), other texts rather announce a commitment to achieving progressively.

22. What obligations arise from such a commitment?

According to the Committee26 “that the International Covenant on Economic, Social and Cultural Rights provides an approach that is part time, in other words progressively, can not be misinterpreted as depriving the obligation of all meaningful actual content. On the one hand, this clause allows you to save the necessary flexibility, taking into account the realities and difficulties involved for any country that strives to ensure the full enjoyment of economic, social and cultural rights. On the other hand, it must be interpreted in light of the overall objective, and indeed the purpose of the Covenant, which is set to the States Parties clear obligations regarding the full enjoyment of human in question. Thus, imposes an obligation to move as expeditiously and effectively as possible towards that goal. " The Belgian Council of State has in the case MFEDAL27 allowed to specify the obligations corresponding to the free education "Whereas it appears from the wording of Article 14 that the need for progressively by provisions of the law mandatory and free primary education does not delay the immediate implementation of the principle enshrined in Article 13.2, has, in states that have not yet reached that goal, that However, States that have already posted such provisions in their domestic law, the same article imposes an obligation directly and immediately applicable to not waive in future."

From there emerges a positive obligation to fulfill it to the States which had already in their domestic laws. International engagement strengthens the internal assets. Therefore the same as the text would not have in the international order as a constraint, this commitment later in the internal order would perfect its legal validity. But history28 tells that primary education was free in the DRC since 1960. It follows therefore that if other states for these texts instituted progressive commitments, commitments later in the internal Congolese have given them one called immediately. The doctrine29 also states that "the DRC being party to the International Covenant on Economic, Social and Cultural Rights since 1972 can not escape this obligation to which it has freely consented. It will therefore have the maximum of its available resources to materialize the free education."

What would happen if the Congolese government had not previously bound by its laws?

27 Olivier de Schutter and Sebastian van Drooghenbroeck, op.cit., P.314.
The Committee on ESCR has identified in this case, the obligation to act\textsuperscript{30}, "in the English text, the obligation is "to take steps" (action) in French, states undertake" to act "and in Spanish "a adoptar medidas" (to adopt). Thus, while the full realization of rights may be achieved progressively, steps towards that goal must be in a reasonably short time after the entry into force of the Covenant for the States concerned. These steps must be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. The State can not absolve itself by extending indefinitely the realization of free education. It is required to adopt a plan within two years\textsuperscript{31}. This period should be interpreted as meaning within two years from the date of entry into force of the Covenant for the State concerned, or within two years of a change in the situation in the origin of the disregard of the obligation. This obligation is a continuing one and States parties to which it applies because of the prevailing situation are not exempted by the fact that they have not acted in the past within the two year limit. The plan must cover all measures to ensure implementation of all necessary elements of the law to ensure the full realization of this right. Otherwise, the scope of the article would be undermined. "Therefore," the Congolese government has an obligation to provide education for children at primary level and ensure that each Congolese can read and write. As such it is obliged to implement all appropriate mechanisms at the structural, educational, administrative, financial and medical.\textsuperscript{32}

Onto this primary obligation to act is a secondary obligation to justify delay or failure. If the justification is based on inadequate resources, the ESCR Committee has stated that "for a State to invoke the lack of resources when it does not even pay its minimum core obligation, it must demonstrate that every effort was made to use all the resources at its disposal to satisfy, as a priority, those minimum obligations.\textsuperscript{33} This is also the position of the doctrine\textsuperscript{34} which states that States without an obligation of result have an obligation of means and can therefore be condemned if they do not implement policies to improve this or that law or otherwise if they are implementing policies that make it worse.

Free also implies a standstill obligation. The progressive nature of these rights implies the prohibition of claw back on the progress made. This doctrine is supported by the decision of the Belgian State Council\textsuperscript{35} which ruled that "Articles 13 and 14 of the ICESCR does not impose immediately and unconditionally to make primary education free to all. They needed to move towards the free. Implicitly, but certainly, they prohibit at all times the States to enact measures that would run counter to the commitment they made. This commitment includes at least the right of fixing of the existing situation."

\textsuperscript{30} Committee on ESCR, The nature of the obligations of States Parties, General Comment No. 35\textsuperscript{th} Session, 1990, www.aidh.org / UN-GE / Committee-Dreteco / hp-desc.htm


\textsuperscript{32} Art.9 of the Law of September 22, 1986.

\textsuperscript{33} Sciotti-Lam, op. cit.p.484.

\textsuperscript{34} Jean Paul Costa, Towards a judicial protection of economic, social and cultural rights in the man on the threshold of the 3rd Millennium, Essays in honor of Pierre Lambert, Brussels, Bruylant, 2000, p.152.

\textsuperscript{35} Belgian Council of State, September 6, 1989, e M’Feddal crts c. the Belgian State. With a score by Michel Leroy, "The power, money, education and judges", quoted by Jean-Marie Dermagne, the free education, Bernadette Schepens (ed.) What rights in education? Teachers, Parents, Students, Proceedings of the conference and des13 May 14, 1993, Faculty of Law of Namur, Regional Law Centre, Namur, 1994, p.35
"a strong presumption that the pact does not allow any retrogressive measures taken in respect of the right to education, as well as other rights enumerated therein. Thus, in considering the Maurice report of the committee said it was concerned about the reintroduction of fees at the tertiary level, which is a deliberate step backwards. "Now the situation is indeed similar in the DRC where education was free in 1960 and the practice of "premium" was introduced in 1993.

In summary the following obligations arising from the free education: the obligation of immediate realization for States which had already established the right of their national law, the obligation to take measures that tend towards free as a corollary, the obligation to justify inaction or delays in the realization of free for States which had not yet committed themselves, and for all the standstill obligation in addition to the obligations to respect and protect.

2. Compulsory education

23. Compulsory education for primary school appears in the ICESCR (art. 13, 2, b), the CRC (Art. 28, 1, a), ACRWC (art. 11, 3, a), the constitution (art .43, 4), the Law of September 22, 1986 (s.115 and 116), the Law of January 10, 2009, section 38. Again international sources include a commitment in time when the constitution grants a right of immediate application. Section 115 of the law imposes an obligation in Congolese school children aged 5 to 15 years. But paragraph 2 states "However, compulsory education will be established in phases determined by the following specific local governments and the general development plan of national education." considering on the sidelines of the constitution, the law stands behind the regime of progressive realization. We will see in the second chapter how the judge should resolve this conflict. For now, it is worth noting that the obligation rests with the householder (art.116) and can lead to criminal sanctions for failure to prove the non-existence of a school within 5km radius or absolute poverty (art.137). For the Committee on ESCR37 "this element highlights the fact that neither parents nor guardians, nor the state should consider access to primary education as optional. Likewise, it reinforces the principle that access to education must be open to all without discrimination based on sex, as also specified in Articles 2 and 3 of the Covenant. "The doctrine38 justifies this obligation by the fact that "education of young people is beyond the individual interest and of direct interest for each member of the community."

24. What is ultimately the exact content of compulsory education? It should first be noted that everywhere it appears "free and compulsory education," we cannot consider separately the compulsory and free education. Otherwise39 "the introduction of compulsory education and its gradual increase would have been emptied of meaning if they had been accompanied by a guarantee that each child can access education without pecuniary

36 Sciotti-Lam, op.cit : pp.239-240.
38 J. De Groof, Right to education and academic freedom, Centre for Policy Studies, economic and sociales ASBL, Brussels 1984 p.71.
obstacle." Therefore the obligation may be understood in terms of demands made to parents to enroll children in school. And proposed compulsory education leads in the Congolese head of state an immediate obligation in protection of ensuring that parents or guardians cannot remove children aged 5 to 15 years from school.

The state also has an obligation to perform services for physical containment barriers pecuniary or logistical issues that could undermine compulsory education. The fact that the State has included the implementation of this obligation in time reflects its desire to bring together the means to that end. This does not differ, however, due to the extent that the constitution has opted for an immediate payment; the principle of the clause more favorable will be applied.

3. Educational pluralism and academic freedom

25. These principles are affirmed by the PIESC (article 13, 3-4), the CRC (Art. 29, 2) ACRWC (art. 11, 4), the constitution (art. 43, 4; Art. 45, 1), the law of September 22, 1986 (art.10).

According to Ngondakoy40 "educational pluralism has a double aspect. It presupposes the existence of several networks of learning, whether public or private. It then assumed the tolerance of common scientific, philosophical or religious group within the education system. . "The educational pluralism is thus the condition of freedom of education in its different facets. As regards the obligations they imply that the State there may be noted that these principles are affirmed in Article 2 Protocol number 1 of the European Convention on Human Rights41. That states have resumed in the rights whereby justiciability is not questionable enough to confirm with the Court that42 "no watertight division separating the sphere of economic and social rights of the scope of the Convention" Like all rights in the Convention requires that law State the obligation to refrain from any action which might impede the exercise or enjoyment and protect this right against harming others. But since the Belgian Linguistic case, the court held that abstention does not exhaust the obligations of the State43, "the government argues that the European Convention is a convention for the Protection of Civil Rights, a civil law does only negative obligations and the right to education, as guaranteed by the Convention does, therefore, that negative obligations. In its judgment of 23 July 1968 the court interpreted the right to education as a right of access and right to get (our emphasis). "In order of Chypre C. Turkey of 10 May 200144, the court noted "that the authorities after organizing primary education in Greek have not done the same for the secondary can only as a denial

40 Ngondakoy Nkoy−ea-Loongoa, op. cit.: p.299.
42 Order Airey against Ireland October 9, 1979 quoted by Pierre-Henri Imbert, Opening Remarks of the Symposium on Social Rights, or demolition of a few clichés, (ed.) Constance Grewe and Florence Benoit-Rohmer, University Press of Strasbourg, p .11.
of the substance of the law concerned.” The Court announces a true positive obligation (our emphasis). It is therefore clear that freedom and pluralism of education necessarily result in the head of state a positive obligation in the European case is subject to control by a judicial body. If we should conclude here, this would be sufficient to qualify the division maintained between social rights and civil and political rights.

4. Equality in school

26. The principle of equality has its source in the ICESCR (Art. 2, 2), the CRC (article 2), the ACHPR (Article 2 and 3), ACRWC (Article 3), the constitution (Art. 3 and 4), the Law of September 22, 1986 (Article 5, 2). According to Keba Mbaye,45 “ACHPR guarantees the right to equality on public goods and services. Any person, not just the citizen has the right of access to public goods and services in full equality before the law. According to Ngondakoy,46 "the first principle that governs the matter of the right to education is that of equality before the law, or more precisely, the equality of all before the means and structures in place to access an education system.” Thus the committee47 ranks among the obligations immediately due and therefore justifiable and non-discrimination. While Article 14 prohibits discrimination as to the rights guaranteed by the Convention, Frédéric Sudre48 notes that Protocol 12 brings any right afforded to individuals by national law within the scope of control exercised by the Court. A similar provision exists in the ACHPR and the Congolese Constitution; it is clear that judicial review shall be exercised.

5. Creation and funding of schools

27. Part of the doctrine is unequivocally "the Congolese government was held in several types of bonds from the creation of schools to the subsidization of private schools."49n This doctrine adapts with a combined reading of Articles 4 and 6 the Education Law (quoted above), Article 4 stipulates that the state creates conditions and the necessary structures and Article 6 stipulates that education is provided by public institutions created by the State or private schools approved by it. If it seems obvious that the state should fund its schools and help approved private schools, the issue is not resolved so far. In fact, the sharpest criticism against social rights involves such an obligation, what type of action is able to induce the State to establish schools? For the right to education, is there a requirement to establish schools or is it applicable to only existing schools? Since the principle of subsidiary leaves the state free of its submissions, it would be risky to confirm the first term of the alternative. It therefore seems more correct to say that the Congolese have the right to free and compulsory education at primary level and the state is free to choose the means that is suitable for its implementation, not being bound by an obligation

46 Ngondakoy Ea-Looyga, op cit. p.298.
48 Frédéric Sudre exercise of "jurisprudence - fiction": the protection of social rights by the European Court of Human Rights, Florence Benoît-Rohmer and Constance Grewe (ed.), op.cit, p.157.
of result. As noted by Francis Gaudu50 "in many cases, simply put social actors able to act to ensure respect for social rights. The realization of social rights, however, often requires a more intense action of the State: technical regulations and technical public service. "So the Congolese state can choose between creating public schools, the grant of this service to individuals or liberalization, in practice the three techniques are combined. The important thing is that the choice made to allow the State to fulfill its obligations.

After this first chapter, we retain the right to education has in the Congolese legal content that leads to the state obligations in their nature do not differ from those derived from other rights, namely: respect, protect, fulfill (or justify the delay or failure) and to limit the obligation to stereotype the standstill or acquired situation and which are amenable to judicial review.

II. POSSIBLE REMEDIES AGAINST "THE PREMIUM" FOR TEACHERS

A. POSSIBLE REMEDIES IN DOMESTIC LAW

1. Integrating the right to education in the block of constitutionality: constitutional review

28. Claudia Sciotti-Lam51 "finds that in young democracies, the law does not distinguish between different sources of international law of human rights. These are needed in domestic law, whatever their origin, whether domestic or international, or nature, mandatory or declaratory. This observation is based in particular on the place of the universal declaration of human rights in the constitutions." According to Maurice Kamto52 " because of the entrenchment, judicial guarantee them [...] from, first through control of the constitutionality of laws and secondly, through the litigation rights and freedoms. "This is indeed the case in DRC. The right to education with constitutional action of unconstitutionality is open to the governed for breach of obligations. Article 162 of the Constitution grants every person the right to petition the Constitutional Court not only as a defense but also by action. The task of the litigant is even easier than "in a dispute of legality, it is not necessary that the individual can derive subjective rights of the international instrument which it relies, and which, in the legal International, entered into force at the site of the State against which it is invoked. It is sufficient that the applicant be accepted as having an interest in provoking review of the legality of the regulation that affects it."53 The control of constitutionality is not about the conventionality. But the moment one acquires a constitutional convention, constitutional judge must determine whether the acts and rules below conform to it especially that it has value above laws in the

case of the DRC. By “double-checking, the constitutional court is a model of sanction violations of human rights.”

A priori control, under section 160 of the Congolese Constitution allows preventive protection while the ex-post control under sections 161 and 162 of the Constitution provides redress for violations of the rights guaranteed. The law of several jurisdictions supports this position.

In South Africa the Constitutional Court said "the state must create conditions that allow individuals of any condition of access to decent housing." Furthermore, in Minister of Public Works and Others v Kyalami Ridge and Others said it that without access to education, to adequate food, health, social security and housing, the poor cannot participate equally in social life of the country.

In Egypt the High Constitutional Court made under section 17 of the ACHPR. Decision No 40/16 (53) involved in Article 3 of Law No. 99 of 1992 on social protection of students. This law imposed an annual contribution more important for private institutions. A father of three children enrolled in private schools referred to the Tribunal of First Instance of Tanta, seeking reimbursement of his contributions and invoked the unconstitutionality of article. The court has seized the High Constitutional Court for a plea of unconstitutionality. The court shall examine the compatibility of its products with article 40, 18 and 7 of the constitution. It insists especially on the right to education, which requires positive actions which the State must guarantee the right to schooling in non-public without discrimination. The court then states that these principles were recognized in the Universal Declaration of Human Rights (Art 26), the International Covenant on Economic Social and Cultural Rights (art13) and Article 17 of the African Charter on Human and Peoples Rights. The court therefore concludes the unconstitutionality of the article.

The Madagascan High Constitutional Court decided that "a court's judgment entered in violation of the international bill of human rights and the ACHPR which are part of domestic law in Madagascar, as set out in the preamble to the constitution."

In Benin Mr. Moise Bossou has censored the Constitutional Court order No. 260/MISAT/DC/DAI/SAAP of 22 November1993 on terms and conditions of registration of associations [...]. The court found that the interior minister has encroached upon the

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54 William Drago, The effectiveness of sanctions for the violation of fundamental rights in the countries of the Francophone community in AUPELF-UREF, the effectiveness of fundamental rights in the countries of the Francophone community, Proceedings of International Symposium on 29th September to 1st October 1993, Port Louis, p.537.
56 Maurice Kamto, op. cit, p.39.
58 Claudia Sciotti-Lam, op.cit ,p.277.
59 Grégoire Alaye, “The administrative court of Benin and freedom,” Etienne Picard, op.cit; P187
domain reserved to the law by sections 25 and 98 of the Constitution and Article 10 of the African Charter on Human and Peoples’ Rights.

In Italy\textsuperscript{60} “the Constitutional Court says mandatory standards program and therefore the unconstitutionality of laws are inconsistent with them. (In that they prevent the achievement of objectives established by the constitution makers). ”

In Belgian\textsuperscript{61} Court of Arbitration (Constitutional Court today) held that the fundamental rights and freedoms which must be respected in the legislation to education result not only from other provisions of Title 2 of the Constitution but also international treaties on this subject which are mandatory for Belgium. The court can determine whether the impugned legislation does not violate Article 2 of Protocol to the Convention concerning the right to education ”.

The Supreme Court of Canada\textsuperscript{62} "ruled in March 15, 1990 in Mahé v Alberta that the province of Alberta had the obligation to establish the structures of public education that the Constitutional Charter of Rights guarantees the francophone minority. "

Interpreting of that law, the integration treaties in the block of constitutionality is a function not of binding nature of these in the international order but the legislative will. Therefore, as is the case in the DRC, the legislature may give the text a justiciability to which its authors could not draw, which is consistent with the subsidiary principle of international control.

2. The role of the administrative judge

32. Alay Gregory\textsuperscript{63} notes that "litigants, strong decisions in favor of the constitutional court, may appeal to the administrative judge to request on his part that draws the consequences by condemning the state government or the compensation for damages caused to citizens, match the needs of damages. “It will be recalled that in most cases before the constitutional court as a defense in connection with a particular dispute. The judgment thus rendered just answer a question to allow the administrative judge to decide. On this occasion, the administrative judge shall give effect to a right-treaty and integrated into the block of constitutionality. Apart from this hypothesis, control of legality, traditional mission of the administrative judge does not preclude litigation of social rights. Christoph Gusy\textsuperscript{64} saw that "the rights - claims are realized by formal laws whose justiciability is not discussed. Thus the jurisdiction of administrative tribunals is not generally excluded if a right - debt is at stake or if that right is infringed in a particular

\textsuperscript{60} Alessandro Pizzorusso, generations of rights in Florence Benoît-Rohmer and Constance Grewe (dir.) Social rights or demolition of a few clichés, University Press of Strasbourg, 2003, p.26

\textsuperscript{61} Rusen Ergec, the arbitration court and the international and European judge. Censorship of the legislature: the litigant from the Court of Arbitration, the Strasbourg Court and the Court of Luxembourg; Delpéré Francis, Roland and Anne-Rasson Verdussen Marc (dir.) Perspectives on the arbitration court, Bruylant, Brussels , 1995, pp.208 art.

\textsuperscript{62} Ghislain Otis, The injunction power of the judge as a condition of the effectiveness of human rights; AUPELF-UREF, op.cit, p.574

\textsuperscript{63} Gregoire Alaye,op.cit ,p.191

\textsuperscript{64} Cristoph Gusy, Social rights are they necessarily unjustifiable; Florence Benoît-Rohmer and Constance Grewe (dir.), op.cit, p.39
case. “In this case “65 the remedy for violations by the State in respect of duties of abstention [...] or the duties of benefits [...] is to use the cancellation of all illegitimate acts of the State. Normally, the cancellation is followed by execution as a new act, this time in accordance with law or, where appropriate, a disclaimer of opinion in accordance with law. “In addition, Jo Baert66 has identified cases where the State Council treats educational institutions such as free utilities functional whose decisions are subject to its control. Applying this case law in the DRC, when these decisions come to break the content of the right to education, they would not escape the administrative magistrate.

A question remains open. Control of legality can be extended to control the conventionality? The answer is yes since the pyramid texts applied by the courts established by Article 153 of the Constitution is as follows: treaties, laws, regulatory acts, custom. The administrative judge therefore could censor decisions and executive action taken in violation of various treaties cited as the source of the right to education. We can, however, whether the legality issue which extends to constitutional legality which involved the rights recognized by the treaties.

The answer comes from a Tunisian judge67 “the Tunisian administrative court has invoked the constitution to define the theory of exceptional circumstances which has the effect of extending the powers of government by removing the illegality of administrative acts decreasing it. [...] Tunisian Administrative Court devotes the superiority of the constitutional law on the statute and a fortiori, regulations, without proceeds, it is true, to a constitutional review. It admits, by way of interpretation, or rather of appreciation, a solution giving precedence to the constitutional law on the inferior legality. ”

3. The role of the judicial court

29. Constitutional litigation as well as the bulk of administrative litigation are contentious objectives. It may happen that the applicant satisfies the cancellation of a measure or the invalidation of a standard. But more often it will need continued judicial court for relief, the judgment of the court providing the basis for its action.

The courts may invoke the African Charter in two ways; argument on legal basis applicable, opening proceedings or guide to legal interpretation68.”

For the right to education in the DRC, the question does not arise to the extent that article 153 of the constitution confers on the courts of the judicial competence to implement treaties duly ratified moreover, are placed at the top of the normative hierarchy. In this

65 Blaise Knapp, The penalty for a violation of fundamental rights; AUPELF-UREF, op.cit, p.647-648
66 Jo Baert, Qualification of administrative Authority in institutions; Bernadette Schepens (dir.) op.cit. pp.164-178
68 Franz Viljoen, The application of the African Charter on Human Rights and Peoples by the national authorities in Southern and Eastern Africa, Jean-Francois FLAUSS and Elisabeth Lambert- Abdelgawad (dir.) op. cit.p76
regard, Nigeria has an appeals court decided, based explicitly on the ACHPR, the rights contained in that Charter was incorporated into Nigerian law, every Nigerian could rely on Article 24 of the Charter enshrining the right to demand respect for environment said right to its advantage rather than relying on Article 20 of the constitution that was not relevant here.

This first option can sometimes cause difficulties to the extent that certain constitutional provisions require, for their application of laws or regulations which are only under the supervision of a judge while the control is rather the constitutionality of the constitutional court. In this case, the second option applies. Guardian of fundamental freedoms, the judicial court without engaging the control of constitutionality must apply in any case to punish violations of the rights and freedoms guaranteed by the constitution. In its mission it will be guided by the interpretation suggested by the constitution and treaties (which are part of the block of constitutionality). And in Italy, “in the ordinary courts may infer from the judgment of the court in the ordinary interpretation of the rule to be followed in this case, direct application of the constitution.

4. The question of resources, intervention of third parties and state responsibility

30. The question here is what role can the judge when the state invokes the insufficiency or lack of resources to meet its obligations. Due to the separation of powers, the judge seems ill-advised to include in the budget of the State or entity for an online education. As claimed by an American judge, ensuring the well-being is not for the courts. The judge may nevertheless ensure that in exercising its sovereignty Parliament budget does not violate state obligations regarding the rights of man. Two applications were lodged before the constitutional court against the 2008 budget for violation of the prerogatives of the provinces. It would be possible to introduce a similar claim for violation of state obligations with respect to education, especially since Prime Minister announced in Parliament that the government does not yet have the means to achieve the free primary education. We do not follow this path which seems more political than legal. We remain in the case of an individual applicant who seeks compensation following a breach of the obligations of the State educational matters. Olivier de Frouville notes that "in determining whether a State has discharged its minimum core obligation to consider the constraints on the country considered material resources. The only exception is in the specific regime of article 14 in compulsory and free primary education. The committee concludes that a State party cannot escape the unequivocal obligation to adopt an action plan on the grounds that it lacks resources. Otherwise, there is no justification for the unique requirement contained in Article 14 which applies, almost by definition, in cases where financial resources are insufficient. "The State cannot invoke the argument justifying resources without having used all those available. However, for the right to education at primary level, no justification is possible.

69 Sciotti-Lam op.cit ; p.40
70 Alessandro Pizzorusso, op.cit ; p.27
72 Olivier de Frouville, op.cit., p.244.
In addition, the resource issue does not arise at this point in the DRC. Just compare the share allocated to education budget vis-à-vis the privileges of the rulers.

**B. INTERNATIONAL MECHANISMS**

If the doctrine is an agreement on the primacy of national courts in the implementation of ESCR\(^{73}\), it is unanimous on the fact that national ownership must be evaluated\(^ {74}\). This is where by results appears elsewhere as in the principle of subsidiary.

**1. The supervisory bodies of the African Charter on Human and Peoples Rights**

31. The ACHPR does not distinguish between the three generations of rights; its mechanisms of control are exercised including the right to education. Mutoy Mubiala\(^{75}\) realizes that thanks to a dynamic interpretation of the African Commission has managed to [...] "adjudicate" on the Economic, Social and Cultural Rights. Olivier de Frouville\(^ {76}\) confirms that "the African Commission had to adopt both a principle and a method of interpretation to transcend the traditional categories of human rights. The principle is that of the justiciability of all human rights recognized by the Charter. “Thus in the case of the Ogoni People against Nigeria\(^ {77}\) shows that “the African Commission will apply any of the rights contained in the African Charter. The Commission takes this opportunity to clarify that there is no law in the African Charter that cannot be made effective. "The method is to clarify the law for each “four levels of obligations” incumbent on the State, namely the obligation to respect, protect, promote and fulfill rights. Applying the method to the case, the commission finds a violation of the right to health, right to the environment within the right of peoples to freely dispose of their natural resources, the right to adequate housing (implied right, corollary of the combination of sections of Articles 14, 16 and 18 § 1) ... ". In its finding of April 4, 1996\(^ {78}\) "the African Commission on Human Rights and Peoples found a violation of art.16 of the Charter, which guarantees the right of everyone to health, because the respondent Government had failed in its obligation to supply a village with drinking water after a water pipe break. "While the authority of the commission makes no real decisions of judicial acts, which vests in the African Court on Human Rights and Peoples. If properly managed, the court\(^ {79}\) could become a powerful bastion of human rights on a continent where these standards are often disregarded. The court may, at first, give the necessary powers to the African Charter and strengthen the work of the Commission.


\(^{74}\) Olivier de Schutter, lesson ... ibid; Remy Ngoy Lumbu, The establishment of the mechanism of individual communication before the Committee on Economic, Social and Cultural Rights: a contribution to the study of additional ways for an efficient implementation of the pact regarding these rights, Ph.D. Thesis, Catholic University of Louvain, May 2008, p.212.


\(^{76}\) Olivier de Frouville, op.cit. p261.


\(^{78}\) Giorgio Malinverni, Draft Additional Protocol on Economic, Social and Cultural Rights; Florence Benoît-Rohmer and Constance Grewe (dir.), op.cit, p.101

\(^{79}\) Christopher Heyns, The role of the future African Court on Human Rights and Peoples Jean - Francois Flauss and Elizabeth Lambert - Abdelgawad (dir.) op. cit, 245 -246.
Moreover, the law developed by the court, regarding the rights which are widely recognized in domestic legal systems of most African countries, could serve as a reference point and inspiration for powerful domestic courts, governments and civil societies in different countries, at the interpretation of these rights. At the current law, if the Commission had before it the question of "premium teachers in DRC "It is clear that no legal obstacle would prevent the review in light of the relevant provisions of the Charter and condemn the Congolese state. DRC then Zaire was condemned by the same Commission. At its 18th session in October 1995\textsuperscript{80} in Case of Free Legal Assistance Group and Others c. Zaire [African Commission on Human Rights and Peoples' Rights, Comm. No. 25/89, 47/90, 56/91, 100/93 (1995)] it decided "Article 17 of the Charter guarantees the right to education. The closure of universities and secondary schools as described in communication 100/93 constitutes a violation of Article 17. "This is the wave of closures related to the strike and other disorders dependent triggering of the democratic process that was behind the introduction of support for basic education by parents. It goes without saying that this entry of the Commission could not contradict itself.

If the issue is well settled at the regional level, it is not the same at the universal level.

2. UN mechanisms

32. There is no need to repeat here the limits of control exercised by the Committee on Economic, Social and Cultural Rights. We note, however, with the doctrine\textsuperscript{81} that "the great merit of it is to have constantly tried to disprove the dogma of the character" programmatic "and" non-justiciable "on Economic, Social and Cultural Rights. It has to do, seek to identify obligations "immediately applicable" [...] in the national legal systems. " Since actual \textsuperscript{82}"rights are not immediately applicable to the extent that they can be immediately applied by the judiciary and others in many national systems. " The Committee will then control how the application is made by the States. In doing so, the courts could rely on the findings and observations of the Committee to determine the extent of commitments of the state and appropriate steps to comply. It is certainly far from a real judicial control. The entry into force of the Additional Protocol to the International Covenant on ESCR establishing a mechanism for individual communication, when ratified by the DRC will clarify some of these reservations. But already today the existing mechanism provides an effective remedy. One can doubt the value of the findings and recommendations but it is not surprising to find the Committee's FADs (or even the judgments of the Supreme Court) remain a dead letter, at least for the case in the DRC. The willingness of the state plays an important role.

From a strictly legal, national and international justiciability of ESCR has peculiarities but it is certainly a range of modalities of implementation. As an illustration, we will indicate the violations may be punished and the way forward for the modalities of those penalties.

\textbf{C. JUSTICIABLE VIOLATIONS AND THEIR REMEDIES}

\textsuperscript{80} Library of Human Rights at the University of Minnesota \texttt{www1.umn.edu/humanrts/cedaw}
\textsuperscript{81} Olivier de Frouville, \textit{op.cit.p.236}.
\textsuperscript{82} Remy Ngoy Lumbu, \textit{op.cit.p 205}.
1. Justiciable violations

As Remy Ngoy said83 "justiciability is facilitated by the precision of state obligations that by the definition of subjective rights granted to beneficiaries." Thus "the question is whether the obligations that the Covenant requires States, departing from these rights, is sufficient clarity to enable the Committee not to indicate in detail what measures should be taken, but of identify the head of state some behaviors that are sufficiently clear violations of these obligations. It is more appropriate in this regard to consider the enforceability of the obligations that the Covenant requires States84."

1.1. Clear violation

33. The doctrine85 suggests ways of distinguishing violation of unsatisfactory performance. The unsatisfactory performance can be assessed against the criteria proposed by Olivier de Schutter86 "namely the availability, quality, economic accessibility or affordability, physical accessibility, the accessibility of information and to the acceptability ". According to Olivier de Frouville87 "violation of a law is clear when it can be determined intuitively. A clear violation can also be recognized when the obligation is sufficiently precise and the action or omission intended manifestly contrary to that obligation. "Although the doctrine as to distinguish the two, we consider the failure to a minimum of every right as a form of defiance. Progressive realization cannot be confused with the inertia; the State must undertake a departure for the obligations it has undertaken. The courts are well able to censor any of these obligations.

1.2. The adoption of retrogressive measures

34. The adoption of retrogressive measures is perfectly amenable88. On several occasions it appeared that the fact that the state take steps returning on advance that may constitute a violation that may or (must) correct the judge. The case of Mauritius is the most eloquent, or the facts under consideration actually correspond to this assumption. The judge applying the principle of standstill and can punish any regression. The option is to resolve the existing situation. Its justiciability is no longer questioned today89, there is a field open to the judge for the justiciability of social rights.

1.3. Discrimination in the implementation of rights

83 Remy Ngoy Lumbu, op.cit.p.15.
85 Giorgio Malinverni, op.cit.p.113.
86 Olivier de Schutter, Protocole ...op.cit.
87 Olivier de Frouville, op.cit ; p.241.
88 Giorgio Malinverni, op.cit.p.111
89 Read Sebastian Van Drooghenbroeck, Social security is it a human right? The logic of the "third" in the service of the effectiveness of Article 23, 2nd paragraph, constitution and Isabelle Chop, in C. Note A., No. 137/2006, 14 September 2006. when Arbitration and standstill Court meet ...
35. A court is well able to determine whether the principle of non discrimination in the exercise of these rights is respected.\(^9^0\) It will ensure both the active discrimination and passive discrimination\(^9^1\) by punishing any differential treatment - without acceptable justification, two categories of persons in a situation comparable or identical treatment of the two persons in non-comparable situations. The gap between cities and villages, the disparity between the number of girls and boys in school ... illustrates the need for control of passive discrimination. The Congolese legal system with regard to equality before the law and equality in the enjoyment of rights, the judge found there by a way to punish violations of the rights to education.

2. Possible measures (sanctions procedures)

2.1. Finding of the violation with freedom left to States

36. According to Olivier de Schutter\(^9^2\), "it will not for the Committee to indicate positively that the state must do to fulfill the obligations imposed by the Covenant, it will be for him to see that his attitude is or is not consistent with these obligations. The state will always have the choice of means by which to fulfill the obligations imposed by the Covenant. If the result of a finding of violation such way it is closed, it can explore other avenues within the limits imposed by the requirements of the Covenant ". This approach shares a dominant doctrine which allows the state to use the means most suitable for this purpose. In the domestic, it allows in particular to guarantee the separation between the judicial function and that function to govern or legislate.

2.2. Cancellation of contrary measures (that violate)

37. We admitted that social rights are part of domestic law of each State and thereby constitutes a violation of any illegality that has to get the judge. For the case of DRC treaties include the block of constitutionality and occupy the top of the hierarchy of the courts to enforce. It follows that the actions of the margins of treaties guaranteeing the right to education may be canceled by the judge as the case been as unconstitutional or illegal. In many cases of cancellation will be sufficient to end the violation and its consequences.

2.3. The issue of affirmative action, injunctions to the State

38. Positive measures are unrelated to social rights litigation. Just refer to the positive steps that the European Court has taken under Articles 6 and 8 to make it possible to order the State to be provided or to provide. Regarding the right to education, the Belgian linguistic judgments and especially Cyprus c. Turkey accredit this thesis.

\(^9^0\) Giorgio Malinverni, op.cit.pp.103-104

\(^9^1\) Sebastien Van Drooghenbroeck, Lesson of collective dimensions of human rights, Masters Degree in Human Rights, FUSL-UCL-FUNDP.2007-2008, unpublished

\(^9^2\) Olivier de Schutter, Protole...op.cit.
In this respect the bodies of the American Convention on Human Rights\textsuperscript{93} are showing great originality. The application of the Charter by the courts actually lends itself to this technique and with full jurisdiction to offer such administrative judge this possibility, and the judicial court guardian of fundamental freedoms can not help to indicate the remedial measures required.

CONCLUSION

At the end of our reflection, we can say with Sebastian van Droonghenbroeck\textsuperscript{94} that "the direct effect of a standard would be less tied to the un-conditionality of it as" relative proximity talks "with the existing legal system with the result postulated by this international standard. "Indeed starting from the analysis of so-called" premium teachers in South Kivu in the DRC, we found that the right to education guaranteed by international treaties was received in the Congolese legal system integrating the power of the constitutionality and occupying the top of the hierarchy. Therefore, the aforementioned practice of enrolling in the margin obligations inherent in this law, victims have remedies in the domestic courts of the constituent who received the mission to apply primarily to conventional standards but also in the International courts who control the action of national courts. It is true that the right to education, mainly at primary level has the magnanimity of the detractors of ESCR not in terms of its nature but its social significance. What is already enough to relativist the gap maintained between the two categories of rights. This study assumes that social rights are justiciable in the DRC by the will of the constituent parts but also to the ACHPR. From there some jurisdictions have come to recognize individual rights to private individuals and even in regimes that fail at this level of protection, we realized that individuals under the jurisdiction of a State were creditors (beneficiaries) obligations of the State allowing them to justify their interest to act before the Courts. This conclusion emerges from the particular analysis of the role of treaties in the trial lens. Even when the text would not be called immediately, it appeared that the judge will have to limit to ensure that the state holds the fixing of the existing situation and work to say the right in accordance with objectives that the state is committed to achieve. The judge not only intervenes in cases of apparent violations, but also to regressive measures or implementing discriminatory.

When the measures, it is required to adopt, there are cases where it is limited to the cancellation action violating the law guarantees, sometimes it will be limited to a finding of violation by leaving the choice of means to repair its State and in some cases it will be well empowered to issue directions to summon the state. Thus, the theory is true of the direct context. The question of the justiciability of international solidarity in particular is left open.

\textsuperscript{93} Julie Ringelheim, System lesson on protection of Human rights, Masters Degree in Human Rights, FUSL-UCL-FUNDP, 2007-2008, unpublished

\textsuperscript{94} Sebastian van Drooghenbroueck, citing the theory of the direct context of Olivier de Schutter, Guidance notes of the seminar on the effectiveness of social rights, Masters Degree in Human Rights, FUSL-UCL-FUNDP, 2007-2008, unpublished.
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