**Advocacy Brief/ Public document – October 2011 (revised 11.01.12)**

# Democratic Republic of Congo: "Chebeya-Bazana" Case:

# The initial proceedings did not manage to establish the whole truth

## Introduction and statement of the facts

On 23 June 2011, i.e. a year after the events, and 36 hearings later, the Kinshasa-Gombe Military Court handed down its decision in the case of those charged with the killing of Floribert Chebeya and the disappearance of Fidèle Bazana – human rights defenders and, respectively, Executive Director and member of the NGO "La Voix des Sans Voix" (VSV).

On 2 June 2010, Floribert Chebeya was found dead in his car in Kinshasa. The day before, he and his driver, Fidèle Bazana, had gone to the office of the Inspector General of the Congolese National Police (known by the French initials PNC), General John Numbi, in accordance with their appointment with the latter, fixed by the Principal Inspector of the PNC, Colonel Daniel Mukalay, and had not been seen since. The body of Fidèle Bazana has not been found to date. On 16 November 2010, the Kinshasa-Gombe District Civil Court handed down a declaratory judgement of death for the latter.

In its decision, the Military Court ruled that Floribert Chebeya had been assassinated and declared that five members of the PNC were responsible. As to Fidèle Bazana, the Court ruled only that he had been arbitrarily arrested and detained, to the exclusion of murder or assassination.

The Court sentenced five of the eight police officers accused. It sentenced to death for the assassination of Floribert Chebeya: Mr Daniel Mukalay, Principal Inspector of the PNC and assistant director in charge of operations and intelligence of the Department of Intelligence and Special Services (known by the French initials DRGS), Mr Christian Ngoy Kenga Kenga, inspector of the PNC (fugitive), Mr Jacques Mugabo, Deputy Commissioner (fugitive) and Mr Paul Milambwe, inspector of the PNC (fugitive). For his part, Commissioner Michel Mwila was sentenced to life imprisonment. The first four were likewise given a five-year prison sentence for the arbitrary arrest and detention of Fidèle Bazana. Three other of the

accused police officers[1] were acquitted of charges of assassination and of arbitrary arrest and detention.

While we may welcome the fact that this trial was held and that the court had the courage to hold police officials responsible (the sentencing of high-ranking police officers being significant in this regard), considerable uncertainties nonetheless remain in this case, both as to the exact circumstances of the death of Floribert Chebeya and Fidèle Bazana, and the responsibility of all the parties involved in the case, and in particular the sponsor or sponsors. Furthermore, some convicts are still at large.

Observers at the trial, including Protection International, noted a very tense atmosphere around this case and cited various shortcomings during the pre-trial procedure and the trial itself. The latter are violations of the right to a fair trial and obstacles to the disclosure of the truth.

## Atmosphere around the case and the trial

As soon as the body of Floribert Chebeya was discovered, an atmosphere of tension and intimidation became perceptible. For instance, anonymous threats forced relatives of the two victims to seek refuge abroad. Some demonstrations about this case were initially banned by the authorities, such as in Bukavu, on 7 June 2010, for instance.
This atmosphere persisted throughout the entire trial.

The large majority of the hearings took place in the central prison of Makala, as it provided more extensive space than the usual courtrooms, which enabled many observers to attend. The trial was nonetheless held in a venue ill suited for the orderly conduct of the proceedings and not adapted for compliance with the procedural rules for the isolation of the defendants and "informants"[2]. More specifically, the prison is organised in such a way as to allow a great deal of movement, including by the defendants, which could thus be *de facto* in free and direct contact with the parties to the trial, the witnesses, lawyers and observers.
Furthermore, the sound system and movements of the observers were managed by detainees or by accused persons awaiting trial. Moreover, observers were denied access to the courtroom with cameras by unauthorised prison staff, whereas only the court could authorise or prohibit photos, recordings and films during the proceedings. The President of the Court had for that matter authorised them without restriction[3].

The observers moreover noted that the defendants were not isolated whilst incarcerated. They were thus able to get out of the box after the hearing and chat with the audience. This in particular led to excessive closeness between the defendants and the lawyers of the victims.

In addition, during the hearing of General John Numbi, suspected of being the sponsor, members of the Simba[4] battalion were seated near the lawyers of the victims, before being

[1] Deputy Inspector François Ngoy Mulongoy, Inspector Georges Kitungwa Amisi and Deputy Commissioner Blaise Mandiangu
[2] Under Congolese law, an "informant" is a person who testifies, without being required to take oath before the court or tribunal.
[3] Cf. page 8 of the Court's decision
[4] Battalion composed of former members of the Congolese Regular Army (known by the French initials FARDC), with a PC under the exclusive and direct command of General John Numbi, which until very recently

ordered by the Court to go to the back of the courtroom at the request of the latter who decried an attempt at intimidation.

It is also important to point out that after his appearance, one of the key "informants"[5], Martel Gomer, received anonymous threats on several occasions, and was also paid a visit by unknown armed civilians during the night, at the house of a family member where he was staying. Although a connection between these events and the trial deserved serious consideration because of several testimonies which tally, it is disquieting to note that the Court did not order protective measures, in spite of being requested to do so by the person concerned at the hearing of 31 January 2011. This turn of events in particular obliged certain international actors to take protective measures in the place and stead of the Court in order to guarantee the safety of the informant.

## Brief analysis of the proceedings before the Kinshasa-Gombe Military Court and the decision of the Court

The following shortcomings were noted by the observers:

- **A military Court is not competent to rule on violations of ordinary law and on serious human rights violations**

The Military Court declared itself competent to hear this criminal case, whereas according to international standards[6], only civilian Courts should be competent to rule on violations of ordinary law and on serious human rights violations such as extra-judicial executions and enforced disappearances, even if committed by police or military personnel.
The Congolese Constitution, which, in Article 156, provides that *"military tribunals shall hear violations perpetrated by members of the armed forces and the national police,"* turns out to run contrary to the afore-cited international standards, as do the provisions of the Military Justice Code which go in the same direction[7]. More specifically, the competence of the military courts should be limited to purely military violations, such as breach of military rules[8] by members of the armed forces and the national police.
Military courts should consequently not judge police officers accused of murder, assassination or enforced disappearance.

- **Composition of military courts and principle of independence of magistrates**

The magistrates of military courts are statutorily subject to the line of command, which does not respect the principle of independence of magistrates, thereby constituting a violation of the right to a fair trial.

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did not appear in the organisational chart of the police. It was recently integrated officially in the Rapid Intervention Unit (known by the French initials PIR).

[5] Cf. definition in the footnote *supra*

[6] Cf. in particular the Decaux Principles adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, Principle n° 9; Set of updated principles for the promotion and protection of human rights through action to combat impunity, Principle n° 29.

[7] Article 76, paragraph 2 of the Military Justice Code provides that military tribunals shall be competent for violations of all forms committed by military personnel and punished in accordance with the provisions of the Ordinary Criminal Code.

[8] For example: desertion, breach of rules, destruction of weapons, insubordination, etc.

Furthermore, the presence of a member of the Police (PNC) in the composition of the Military Court also raises questions in this case where police officers are accused of serious human rights violations.

- **Absence of referral to a court able to judge generals**

Given the existence of serious suspicions about the involvement of generals in this case - one of the principal suspects being General John Numbi – it is curious to note that the military tribunal to which the case was referred was the Military Court, since the latter is in no way able to judge generals, because of the inferior rank of its constituent judges, whereas the High Military Court was competent to do so. The choice of this Military Court *de facto* precludes any possibility of charging and taking generals to court in the course of proceedings.

- **Confusion around the referral of the case to the Military Court**

A disturbing confusion surrounds the referral to the Court, the several contradictory decisions of referral to different courts (Military Court and High Military Court) having been taken in this same case by the Higher Military Prosecutor's Office, then by the General Military Prosecutor's Office, and at times in contradiction with their respective competences. It is moreover noted that some decisions which referred the case to the High Military Court were corrected, with the world "High" being erased.

The increasing number of such decisions blurred the referral to the Court and gave rise to many discussions as to the validity of said referral. This led some to see a determination to protect General John Numbi by avoiding any referral before the High Military Court, in particular given the decisions to refer the case to the High Military Court dated 13 October 2010 from the General Military Prosecutor's Office, which were corrected and in the end, curiously enough, referred the case to the Military Court.

It is also curious to note that the referral decision on which the Kinshasa-Gombe Court bases its competence does not specify before which military Court the case is to go, although both Courts are situated in Kinshasa.

This overall situation created an atmosphere of suspicion of manipulation from the outset of the trial, which is scarcely appropriate for an orderly conduct of the proceedings.

Furthermore, the incompetence of the Military Court was raised by the complainants for those reasons, but rejected by an interlocutory decision of the same Court[9]. The civil parties appealed against this decision. Following the appeal, the Court did not defer ruling and wait for the decision of the High Military Court -which would have avoided any and all ambiguity on this issue- and preferred to continue to hear the case despite the appeal. As a result, the appeal against the judgement handed down on the lack of jurisdiction will probably be heard at the same time as the appeal on the merits of the case by the High Military Court.

[9] Hearing of 16 December 2010

- **Failure to act on the complaint lodged by Chebeya's widow against General John Numbi**

The Inspector General of the Congolese National Police John Numbi, who was suspended from duty on 5 June 2010 because he was under suspicion – which was reinforced during the inquiry and investigation at the hearing - was nonetheless never prosecuted; no decision was taken to refer his case to the High Military Court to be judged, and he was heard only as an "informant" by the Military Court to which the case was referred. No action has to date been taken on the complaint for assassination lodged against him by Chebeya's widow (no dismissal nor proceedings).
For its part, the Court opined that there was not sufficient proof to indict John Numbi, and that in any way it did not have the power to turn an informant or a witness into a defendant.

- **Lack of prosecution of General Jean de Dieu Oleko**

Throughout this case, during the investigation and the trial, the Inspector General of the Kinshasa Province police, General Jean de Dieu Oleko, was likewise heard only as an "informant," and was not investigated nor prosecuted, in spite of being under suspicion. Such suspicion arose from the fact that on 2 June 2010, he signed a press release in the name of the Kinshasa police, attesting that the body of Floribert Chebeya bore no visible traces of violence, contrary to every subsequent indication.

- **Disappearance of objects placed under the seals and removal of the seals**

Certain objects that were found in Floribert Chebeya's car when his body was discovered, which were placed under the seals, disappeared mysteriously from the police premises. The first photos of the mortal remains of Floribert Cherbeya also disappeared, while different versions were given by different police services about the state of the body and the causes of death. The Court moreover indicated in its ruling that in spite of its repeated requests, it was not able get the seals produced during the Court investigation[10].

It is moreover noted that the Court ordered that part of the seals be restored (including the vehicles involved). This will cause a decline of evidence, which will prove detrimental when trying to clarify what happened during a future appeal.

- **Arbitrary refusal of the Court to explore certain credible leads**

Certain leads were not explored nor examined in depth: certain confrontations and appearances were refused by the Court, in particular as regards General John Numbi. Many additional investigations requested by the complainants were not carried out, for instance as regards the National Intelligence Agency (known by the French initials ANR) and the circumstance of the disappearance and death of Fidèle Bazana, a point on which the responsibilities of each party involved remain totally obscure at this state of the case.

[10] Cf. page 31 of the ruling of the Kinshasa-Gombe Military Court

- **Non-compliance with the rules to isolate "informants" in court**

The procedural isolation rules entail that the "informants" are confined in a room other than the one in which the proceedings are held, and that they cannot talk to other "informants" before they are heard (and even less so to the defendants), so as not to come under any influence. Even though the "informants" were presented in an isolated manner in the court, it is noted that they waited close to the courtroom, without be isolated from each other. They were thus able to follow the conduct of the proceedings and the debates. It is therefore clear that they had the opportunity, on several occasions, to talk to each other, before and after being heard, and that they could also have been influenced by the debates.

- **No prosecution of "informants" for false statements**

All the persons heard during the trial were interrogated by the Court as "informants"[11] and not as witnesses. This dispensed them from having to give testimony under oath.

Some informants were suspected of making false statements - which constitutes a violation punishable by the Congolese ordinary penal code[12]. The complainants asked during the hearings that they be prosecuted, but in vain. The Court specified that it was up to the Prosecution Service to investigate such cases and to prosecute where necessary, but the Prosecution Service took no action. This is detrimental to the disclosure of the truth and to the proper conduct of the proceedings, inasmuch as each "informant" knew that he could provide erroneous information without running any judicial risk.

- **No measures taken by the authorities and the Court to apprehend a defendant at large**

One of defendants[13], declared a fugitive, judged in absentia and ultimately sentenced to death, was purportedly seen in police premises in Kinshasa during the trial, without being brought to justice, however. In spite of the request by the civil parties during the hearing of 5 May 2011 to have him apprehended so that he could be brought before the court, no such measure was taken by the Court, the Prosecution Service or the police.

[11] Cf. footnote on page 2
[12] Article 130 of the Congolese Criminal Code
[13] Inspector of the PNC, Paul Mwilambwe

## Recommendations

Particularly concerned about these shortcomings and by the fact that doubts remain about the disclosure of the truth in this case, Protection International, like the Congolese Non Governmental Organisations, is particularly surprised that:

- The Court did not rule that Fidèle Bazana had been murdered or assassinated, but only the victim of arbitrary arrest and detention, and did not delve further into the circumstances of his disappearance, in spite of the serious concerns of a crime, and the declaratory judgement of death handed down by the Kinshasa-Gombe District Civil Court of 16 November 2010;
- The Court dismissed the offence of criminal association;
- The Court handed down death sentences against 4 defendants (three of whom were tried in absentia), whereas the affirmation of the right to life in the Congolese constitution of 18 February 2006 should have precluded a death sentence (Articles 16 and 61) [14] ;

It moreover regrets:

- The atmosphere of intimidation and anonymous threats prevailing before and after the trial;
- The tense atmosphere during certain hearings as well as the intimidation of certain lawyers of the complainants and witnesses[15];
- The absence of protective measures ordered by the court, in spite of the request by a key witness who had received death threats;
- The fact that the trial was held on the Makala prison grounds, in the midst of detainees "on other grounds" who moved about freely, which could prove intimidating, and shows that security measures were insufficient.

In light of the foregoing, the appellate proceedings will prove decisive in providing all the necessary answers.

**Accordingly, Protection International:**

- **<u>Supports the demands of the Congolese NGOs that want their authorities:</u>**

*In the Chebeya-Bazana case, to:*

- Guarantee an appeal procedure that is compliant with national and international standards relating to a fair trial; to guarantee that this case is reviewed by an impartial and independent court, after in-depth investigations that do not overlook any leads, including that of sponsors;
- Ensure that every means is deployed so that no individual evades his criminal responsibilities, regardless of his rank;
- Ensure that every means is deployed to apprehend fugitive offenders;

[14] The DRC has moreover ratified the International Covenant on Civil and Political Rights which urges the abolition of the death penalty. As to the interpretation of Article 61 of the Constitution, it is regrettable that the Supreme Court of Justice, sitting in constitutionality matters, declared in a decision of 28 January 2011 that this article did not repeal the death penalty: it specified that the prohibition of overriding the right to life simply means that except in cases provided by law, the right to life is protected under all circumstances.

[15] Cf. in particular VSV's press release of 23 January 2011

- Take all actions necessary to prevent any interference with the proper conduct of the proceedings.

*In general, to:*

- Conduct at once independent and effective investigations on assaults and threats against human rights defenders (HRDs) so as to prosecute the perpetrators;
- Take all necessary measures to shed light on the crimes committed against HRDs[16], in particular against Pascal Kabugunlu, Serge Maheshe, Didace Namujimbo and Bruno Koko Cirambiza, in accordance with the international commitments undertaken by the DRC.

- **<u>Calls on the MONUSCO[17] (Justice and Protection Units of the Human Rights Division - BCNUDH) to:</u>**

  - Remind the Congolese authorities of their primary obligation to protect HRDs, in accordance with the UN declaration of 9 December 1998 on the protection of human rights defenders[18], as wells as to provide assistance thereto, by making every effort to guarantee impartial proceedings in cases concerning HRDs;
  - Support the adoption of a national law and a provincial edict in South-Kivu on the protection of human rights defenders, both of whom are currently in bill form, as well implementing mechanisms;
  - Continue to observe the appeal procedure in the Chebeya-Bazana case, and publish the observation report on the initial trial and the appeal;
  - Demand that the appeal procedure in the Chebeya-Bazana case comply with national and international standards relating to a fair trial; demand that the case be reviewed by an impartial and independent court, after in-depth investigations that do not overlook any leads, including that of sponsors;
  - Reiterate that military tribunals are not competent to decide on serious violations of human rights by virtue of international standards, and ask that such cases be transferred to civilian courts.

- **<u>Calls on the EU delegation and on the diplomatic missions of the EU Member States to:</u>**

  - Continue to observe the appeal procedure in the Chebeya-Bazana case, in accordance with the local implementation strategy of the the EU Guidelines on HRDs[19], adopted by the Embassies on 20 March 2010 and revised in August 2011;
  - Demand that the appeal procedure in the Chebeya-Bazana case comply with national and international standards relating to a fair trial; demand that the case be reviewed by an impartial and independent court, after in-depth investigations that do not overlook any leads, including that of sponsors;
  - Reiterate that military tribunals are not competent to decide on serious violations of human rights by virtue of international standards, and ask that such cases be transferred to civilian courts;

[16] HRDs: Human Rights Defenders
[17] United Nations Organisation Stabilisation Mission in the Democratic Republic of the Congo
[18] United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, adopted by consensus
[19] European Union Guidelines on Human Rights Defenders, adopted by the EU Council on 9 June 2004

- Give high priority to the situation of human rights defenders (who are victims of assassinations, assault, intimidation, threats, unfair trials, etc.) in the dialogue with the Congolese authorities, in particular during the pre- and post-electoral period;
- Remind the Congolese authorities of their obligations to protect HRDs and to assist them through programmes financed by the EU;
- Encourage the adoption of a national law and a provincial edict in South-Kivu on the protection of human rights defenders, both of whom are currently in bill form, as well implementing mechanisms.

PI finally again points out, in support of the action of Congolese NGOs, that the impunity enjoyed by the perpetrators or sponsors of the crimes against human rights defenders constitutes a danger for Congolese society as a whole. It is essential that the judicial system prove exemplary to put an end to impunity, to promote a safe working environment for HRDs, in particular during this pre- and post-electoral period.

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