



Executive summary and recommendations

from the trial observation report of the
Maheshe proceedings before the military
Court in South-Kivu (DR-Congo) and
monitoring of the appeal lawsuits

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Executive Summary

Protection international (PI) recently carried out a trial observation of the presumed killers and individuals alleged to be behind the killing of the Okapi Radio journalist Serge Maheshe, who was killed on the 13th June 2007 in Bukavu; the first instance of the proceedings took place before a Military Garrison Tribunal in Bukavu and the appeal hearings took place before the Military Court of South-Kivu in Bukavu.

The Military Tribunal sentenced to death, in the first instance, 4 civilians: Freddy Bisimwa Matabaro and Mugisho Rwezangabo alias Mastakila, that had confessed to being the authors of the crime, along with two friends of the journalist, Alain Mulimbi and Serge Muhima, the only eyewitnesses to the crime, who had been denounced by the former as being the individuals behind the killing.

The Court confirmed on appeal the sentencing to death of Freddy B.M. and Mugisho R. alias Mastakila, despite the two having retracted their initial confessions of guilt and having admitted from prison, and throughout the appeal proceedings, that they had in fact confessed to the killing and identified the two individuals as being behind the killings under pressure from two military examining magistrates who had promised them monetary rewards and guaranteed their liberation, if they confessed. The Court, on the other hand, acquitted the two friends of the victim, on the basis of these retractions and as a result of an absence of evidence of their implication. Moreover, the Court also condemned to death a third civilian, Bisimwa Sikitu Patient, who had been acquitted in the first instance.

Freddy B.M. and Mugisho R. alias Mastakila subsequently made an application for annulment before the Military High Court, and lodged a further appeal before the Supreme Court of Justice. The decision of the Court, both regarding the sentences as well as the acquittals, is therefore at present by no means definitive.

PI, along with numerous NGOs, MONUC¹ and the European Union, observed that the appeals process failed to adhere to fair trial standards.

In fact, the trial observers identified a significant number of violations of national and international norms, including violations of procedural guaranties established under article 14 of the International Covenant on Civil and Political Rights (ICCPR)². The main violations that were observed related to the right to a defense, violations of the adversarial principle, violations in the taking of evidence, as well as the refusal by the Court to hear certain witnesses and the failure to seal exhibits. The Court failed to explore certain leads notably relating to the Republican Guard, and neglected to look into the question of the involvement of the FARDC militaries whose arms had in fact been seized. Furthermore, the Court did not carry out sufficiently in-depth investigations into the allegations of subornation made by Freddy B.M. and Mugisho R. alias Mastakila against the military magistrates. It refused to call for certain key investigations to be carried out, notably an autopsy and ballistics expertise (necessary in order to be able to compare the bullet(s) which remained in the victim's body with the 3 weapons which had been seized, that belonged to different individuals, including one weapon that was presented as the one that was used to commit the crime) and this in spite of the repeated proposal by MONUC to offer logistical support which would guarantee that these investigations would be carried out by an independent forensic science laboratory, possibly abroad, of the Court's choosing³.

These two military jurisdictions also violated article 156 of the Congolese Constitution of the 18th February 2006, by declaring themselves to have jurisdiction over civilians, basing this competence on provisions of the Military Judicial Code that predates the Constitution, a Code which should at this point be repealed and can, in the meantime, clearly no longer be legitimately applied.

1 MONUC : The United Nations Mission in the D.R.Congo.

2 The ICCPR and its 1st protocol on individual communications have been ratified by the DRC and came into force on the 1st November 1976. The DRC has however not ratified the 2nd Protocol which calls for the abolishment of the death penalty.

3 See Press Statements by MONUC from 2007 and of the 12th May 2008, and the letter sent by MONUC to the President of the Court on the 29th February 2008 and added in the judicial file.

Furthermore, the Court violated the right to life which is guaranteed both by the Congolese Constitution and by article 6 of the ICCPR by sentencing three civilians to death.

At this stage in the investigations, the truth has yet by no means emerged and significant doubts around this case remain. Therefore, PI regrets that the Court failed to guarantee the presumption of innocence and its corollary according to which “the accused has the benefit of the doubt” which govern both general Congolese criminal law and international standards, and thereby deplores the handing out of three capital punishment sentences following an investigation which contains serious failings and major risks of miscarriages of justice.

Furthermore, an intimidating environment and behaviour directed towards the attorneys and towards the trial observers was felt throughout the hearings. The trial observers were even threatened with legal proceedings for “contempt of court” as a result of the comments and concerns they had voiced and shared with the press regarding the violations they had observed. Furthermore, certain of the defense attorneys have received anonymous threats via telephone (SMS) and certain trial observers, both Congolese nationals and international observers, were equally intimidated and some received death threats by SMS. Criminal complaints were lodged against unknown individuals but the investigations have not been carried forward. PI therefore calls on the authorities to respect their responsibilities notably by: ensuring that these inquiries are opened up and made effective and by sanctioning those found responsible, publicly condemning these acts and taking every necessary measure to ensure the protection of the victims.

Freddy B.M. and Mugisho R. alias Mastakila made an application for annulment before the Military High Court of Justice, and also lodged an appeal before the Supreme Court of Justice, that currently and temporarily serves as the Court of Cassation, with the aim of rescinding the decision of the Military Court and of having the case thoroughly reexamined by a civilian court (ordinary criminal court).

First and foremost, the appeal must be examined without delay by the Supreme Court, which is within its jurisdiction pursuant to the new Constitution; this would first require the Military High Court to declare itself incompetent and transfer the case and the file which it alone presently holds. The case may however be blocked as a result of a systematic conflict of competence between the two jurisdictions. Following the rescinding of the decision of the Military Court by the Supreme Court, whose intervention is necessary as a result of the numerous legal violations which have taken place in this case, the case should be transferred to a civilian court (ordinary criminal court) for reexamination.

In light of the persisting doubts surrounding this case and the serious violations of the rights to a fair trial which have taken place, in the name of the fight against impunity, for the protection of journalists and Human Rights Defenders and for the family of the victim, who has a right to know the truth and to be given access to compensation, PI calls for the reexamination of the Maheshe case by an impartial and independent civilian jurisdiction.

Recommendations

To the Congolese authorities (executive, legislative, judicial according to their respective roles):

With regards to the Maheshe case:

- To ensure that all international and national fair trial norms are respected during the current and forthcoming hearings
- To ensure that the Military High Court relinquishes this case in favour of the Supreme Court of Justice, serving as a Court of Cassation, in line with the Congolese Constitution (art. 153) and transfers thereafter the case currently in its possession
- To ensure that the further appeal that has been lodged be judged without undue delay, in accordance with international standards, by the Supreme Court of Justice
- To ensure that the case will be reexamined in depth by an impartial and independent civilian jurisdiction, following significant investigations (that will include an autopsy and ballistic expertise, obtained with the logistical support of MONUC)
- To carry out an independent and impartial investigations into the claims made by Freddy Bisimwa Matabaro et Mugisho Rwezangabo Mastakila concerning the alleged pressure placed on them by the two magistrates of the Military Prosecutor's Office and the agreement that was made between them (investigation that will be carried out by magistrates that are not implicated or do not have any links with the aforementioned magistrates)
- To carry out an independent and in-depth investigation into the circumstances surrounding the evasion of Freddy Bisimwa Matabaro whilst looking into the responsibility of the penitentiary institution in this matter, and to guarantee the security of all suspects in this case
- To promptly carry out effective and concrete investigations into the intimidations and threats received by the trial observers and the attorneys (notably by ensuring that the necessary funds are made available). To sanction the authors. To take the necessary measures to ensure the protection of the victims. To publicly condemn these events

More generally:

- To implement effective policies aimed at challenging and combating impunity surrounding violations committed against Human Rights Defenders, including journalists
- To promulgate a law on the protection of Human Rights Defenders, including journalists, highlighting their key role in the establishment of the rule of law, and to incorporate into domestic law different international standards
- To offer the Ministry of Justice, investigators and magistrates, the necessary human and logistical resources and forensic science expertise and means to carry out high quality criminal investigations
- To carry out independent and effective investigations
- To ensure that civilians, members of the military, police, magistrates, members of the security services, civil servants, both non commissioned officers and others, that are implicated in crimes, acts of torture or poor treatment are judged and sanctioned

- To take every necessary measure to prevent governmental agents from interfering in the course of justice
- To guarantee in practice, in line with the Congolese Constitution, the right to life, the incompetence of military jurisdictions to try civilians and the incompetence of the Military High Court to make rulings on further appeals lodged against military decisions
- To carry out a reform of the Codes, including the Code of Military Justice, in order to ensure that it complies with the provisions of the 18th February 2006 Constitution
- To pass the organic laws, planned by the Constitution, that define the organisation, functioning and competence of the jurisdictions of the judicial order, made up of both civil and military Courts and Tribunals (art. 153), of the administrative order (art.155), of the military jurisdictions (art.156) and of the Constitutional Court (art. 169)
- To accelerate the initiation of the judicial reform plan
- To recall the rights of human rights defenders guaranteed by the 9th December 1998 United Nations Declaration on Human Rights Defenders, both amongst governmental departments and publicly, in particular the right to observe trials and to make public the findings of such observations
- To put in place effective protection mechanisms for human rights defenders in line with the aforementioned Declaration
- To recall the right of freedom of press and freedom of expression, and to take every measure necessary to ensure their respect
- To recall the right of attorneys to carry out their legitimate work, to fulfill their duties in peace of mind and to take every necessary measure to ensure the respect of this right
- To immediately carry out effective investigations into the intimidations and threats received by the trial observers, attorneys and journalists, and to sanction the authors disciplinarily and / or judicially
- To promptly respond to the communications sent by the United Nations Human Rights Council and of the African Commission on Human and People's Rights' Special Rapporteurs on the situation of human rights defenders
- To promptly respond to the communications sent by the Rapporteurs and Special Representatives of the United Nations, notably regarding the independence of judges and attorneys; on arbitrary arrests; on extrajudicial, summary or arbitrary executions; on the promotion and protection of the right to freedom of opinion and expression; on human rights and international solidarity; on torture and other inhumane and degrading treatment ...
- To publicly support the re-establishment of the mandate of the UN Independent Expert on Human Rights in the DRC that has recently been discontinued

In the cases of Pascal Kabungulu and Didace Namujimbo:

- To reopen without delay the trial of the presumed assassins and individuals behind the killing of Pascal Kabungulu, human right defender assassinated in August 2005 (whose case was transferred to the Supreme Court of Justice at the end of 2008 after having been blocked by the military jurisdiction of Bukavu)
- To carry out an effective and independent in-depth investigation into the assassination of the journalist Didace Namujimbo, killed in Bukavu on the 21st November 2008, and to accept the support, notably of technical and forensic science assistance, offered by the MONUC and EUPOL

To the international community:

To the Embassies present in the DRC, members or non-members of the European Union, and to the European Commission delegation in Kinshasa:

- To re-enforce their policies and programs aimed at the protection of human rights defenders, and for EU member States, to make public the EU's local implementation strategy and plans aimed at defenders in the DRC
- To ensure that the situation of human rights defenders (notably the assassinations, assaults, fair trials, intimidations and threats against human rights defenders is made a top priority in all discussions with the Congolese authorities, placing particular emphasis on the need for concrete and effective measures and changes to be put in place, in order to ensure positive bilateral relations
- To closely follow the Maheshe, Kabungulu and Namujimbo cases, to support the resumption of proceedings of the two first cases and to observe the trials
- To offer support to the NGOs and media that carry out trial observations and that monitor criminal investigations
- To call on the Congolese authorities to immediately respect the new constitutional provisions such as the incompetence of military jurisdictions to judge civilians, the incompetence of the Military High Court to have jurisdiction over further appeals against decisions made by military jurisdictions, and to respect the right to life when capital sentences are pronounced
- To offer support to the legislative reforms which are to take place (notably the revision of the legislations to ensure their compliance with the new constitution, the passing of organic laws on the functioning and organization of the jurisdictions aforementioned)
- To extend programs such as REJUSCO to the rest of the country and to accelerate the initiation of the judicial reform plan to which international donors are currently contributing

To the MONUC (Justice and Protection Units of the Human Rights Division, the Rule of Law Division, according to their respective roles):

- To elaborate and put forward strategies aimed at enhancing the protection of human rights defenders and to ensure follow-up of these recommendations
- To raise awareness of the key role of human rights defenders and to promote the implementation of the UN Declaration on human rights defenders as has been recommended by the Special Rapporteurs
- To enhance monitoring of cases of defenders that are threatened by the relevant authorities, to implement concrete protection measures and to publicly condemn, immediately after the events have taken place, all threats and intimidations that occur
- To closely follow the Maheshe, Kabungulu and Namujimbo cases, to obtain the resumption of the proceedings of the two first cases, to observe these trials and to make public in a prompt manner the reports which are drawn-up following the trial observations
- To offer assistance to the Congolese authorities in order to ensure that they fully comply with their responsibilities regarding protection
- To call on the Congolese authorities to immediately respect the new constitutional provisions such as the incompetence of military jurisdictions to judge civilians, the incompetence of the Military High Court to have jurisdiction over further appeals against decisions made by military jurisdictions, and to respect the right to life when capital sentences are pronounced)

- To offer support to the legislative reforms which are to take place (notably the revision of the Codes to ensure their compliance with the new constitution, the passing of organic laws on the functioning and organization of the jurisdictions aforementioned) and assist the competent authorities to do so
- To offer support to the NGOs and media that carry out trial observations and that monitor the criminal investigations (notably in terms of financial, logistical and training assistance)
- To train magistrates on the rights of human rights defenders, guaranteed by the UN Declaration of the 9th December 1998, notably the right to observe trials and to render public their observations, and the right to a fair trial

To REJUSCO (*Restoration of Justice Program in Eastern DRC*):

- To increase support to jurisdictions in order to normalize their functioning, as well as assistance to attorneys intervening pro deo
- To train magistrates on the rights of human rights defenders, guaranteed by the UN Declaration of the 9th December 1998, notably the right to observe trials and to render public their observations, and on the right of a fair trial
- To support the Congolese police and judiciary in order to ensure that they fully comply with their obligations in terms of protection towards human rights defenders at risk
- To offer support to the NGOs and media that carry out trial observations and that monitor the criminal investigations (notably in terms of financial, logistical and training assistance)

Excerpt from the trial observation report of the Maheshe proceedings before the military Court in South-Kivu (DR-Congo) and monitoring of the appeal lawsuits. Reference points both of the jurisdictional framework of the trial observation and of the protection of human rights defenders .

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March 2009

This report can be ordered at the office of Protection International in Brussels. It is also on line on the website <http://www.protectionline.org/spip.php?article8277>

