

## **Proceedings of the Military Court of Katanga in the case of the Congolese Public Prosecutor and *Parties Civiles* versus Colonel Adémar ILUNGA and associates – Rôle Pénal 010/2006/ RMP 0065/2005**

### **Legal Update N° 1**

**Lubumbashi, 14 December 2006 – The court calls for an adjournment before giving its view on objections raised by the lawyers representing Anvil Mining and its three ex employees**

#### **I. Hearing of 12 December 2006**

The trial opened in the Military Court of Katanga in Lubumbashi, on Tuesday 12 December 2006 in the case of the Military Prosecutor versus 10 defendants including a senior officer and his subordinates of the Congolese Armed Forces (Forces Armées de la République Démocratique du Congo - FARDC) and three former employees of Anvil Mining Congo.

The trial concerns a series of extra-judicial executions and other crimes that took place between 15 and 18 October 2004 in Kilwa, in Pweto Territory, in the District of Haut-Katanga, in the southeast of the Province of Katanga in the Democratic Republic of the Congo.

#### ***1. Composition of the Court:***

The Military Court of Katanga comprises five members:

- 2 senior military officers (Colonel Joseph MOKAKO MAYAMA, the First President, and Colonel SHABANI LUSUNA, an assistant judge - *juge assesseur*)
- Monsieur Placide KAZADI, a member (*conseiller*) of the Lubumbashi Court of Appeal
- 2 senior officers of the Congolese National Police Force (*Police Nationale Congolaise* -PNC): Colonels MASSIALA NGUMA and Séguin SENDELWA (assistant judges - *juges assesseurs*).

#### ***2. Attendance of the Accused and Victims***

Of the 12 accused men, three of whom are former employees of Anvil Mining Congo, sent for trial by the Military Prosecutor, only seven were present in court among them the main defendant, Colonel Ilunga Ademar, the former Commander of the 62nd FARDC Brigade. He was not able to give his military identification number nor to express himself in French.

The other defendants are:

- Capitain KAMBAJ MUSANS Jean-Marie
- Capitain SADIKA SAMPANDA
- Lieutenant LOFETE MUNGITA
- Lieutenant MWANZA wa MWANZA
- Sub-lieutenant MUHINDO TASE et
- Adjudant ILUNGA KASHILA.

- Two soldiers were not present: Lieutenant MWELWA SABATA John Adjutant KASONGO KAYEMBE.

The above mentioned defendants are represented by lawyers from the Lubumbashi Bar: Maîtres MONGA MUTOKE, Blaise TUMBA LETA MAKABU, Roger LOSALA, Hugo NKULU NGOIE, Arsène NKULU, Francis KYUNGU, Damien MUBIKAYI, Cléophas MPANGA and MUKEN KALALA (the latter three are court appointed lawyers also from the Lubumbashi Bar).

Anvil Mining and 2 of its former employees, the South Africans, Peter van Niekerk and Cedric Kirsten, are represented by Maîtres Jean-Claude KAKUDJI and Nadine KABU, both lawyers at the Court of Appeal in Lubumbashi; while the third former employee, the Canadian, Mr Pierre Mercier, is represented by Maître Richard MATULI, also of the Lubumbashi Bar.

The victims who have constituted themselves as *parties civiles* in the proceedings, are represented by six lawyers: Maîtres Tshinkwela of the Kinshasa/Gombe Bar and Gabriel MUNUNGA SHABANI, of the Lubumbashi Bar, at the request of the Belgian NGO, *Avocats Sans Frontières* (ASF); and Maîtres Georges KAPIAMBA, Jean-Pierre KUBOYA, BADIANIAMA et Freddy KITOKO, all of the Lubumbashi, Bar at the request of the Katanga branch of the Congolese human rights NGO, Association africaine de défense des Droits de l'Homme, (ASADHO/Katanga).

### 3. Procedures

The lawyers for the accused requested a two-month adjournment in order to allow them time to study the trial papers in depth given their volume and the gravity of the charges against their clients.

Pierre Mercier's lawyer raised an objection claiming that his client had not been duly notified. One of Anvil Mining's lawyers also drew to the attention of the Court the fact that the company had not received due notification, for the writ was delivered to the offices of a law firm and not to the company headquarters which is well known.

The Military Prosecutor, for his part maintained that the notifications had been duly served pointing out that it was Mr Pierre Mercier himself who had given the address of the law firm as his place of abode and communicated that decision to the judicial authorities. As for Mr CEDRIC KIRSTEN, a South African national, he had left the DRC and his place of abode and residence were unknown. The prosecutor stressed that once it had been established that the defendants had failed to present themselves, the Court should take steps to try them *in absentia* and their lawyers would no longer be allowed to speak on their behalf.

The Court decided to deliberate before taking a position on the objections raised by the defendants. The trial was adjourned until 14<sup>th</sup> December 2006.

## II. Hearing of 14 December 2006

At 9:45 the hearing of 14th December 2006 was declared in session by the President of the Military Court Colonel Joseph MOKAKO MAYAMA JO. The clerk of the court proceeded to read extracts from the indictment before the President read the decision concerning the objections put forward by the defence lawyers.

- The Military Court of Katanga;
- Given the Code on Judicial Organisation and Competence;
- Given the Military Penal Code;
- Given the Military Judicial Code;
- ...

- The Court having received the single memorandum from the legal representatives of Mr Pierre Mercier and Mr Peter Van Niekerk, finds their objections partially sustained:

Therefore:

- The Court is of the opinion that in the case of these two defendants they were not duly notified of the proceedings;
- It orders the clerk to issue a writ in conformity with the law.

The decision was issued on 14 décembre 2006

The Court was in session with the following presiding:

- Colonel MOKAKO: First President
- Consellor Placide KAZADI: President
- Colonel SHABANI LUSUNA: assistant judge
- Colonel MASSIALA NGUMA: assistant judge
- Colonel SENDELWA Seguin: assistant judge

In the presence of the Public Prosecutor, Colonel Eddy NZABI MBOMBO, and the Clerk, Major Jacques KAHILU MAINA.

### III. Observations

The decision upheld the objection of the lawyers representing Pierre Mercier and Peter Van Niekerk about the failure to give due notification to the defendants as a justification for their non- appearance in court.

The Court however did not accept the defence lawyers' argument that their clients should not have to appear in court in person « à titre conservatoire ». It did however uphold the objection concerning due notification accepting that the writs should not have been delivered to their lawyers.

Thus, given that the addresses of the three former Anvil Mining employees in the Democratic Republic of Congo and abroad are not known, the Court considered that they should be notified according to the relevant articles of the Judicial Penal Code<sup>1</sup>:

- 238, first indent, which states that «*for infractions punishable by at least one year penal servitude, the accused[once] duly notified must appear in court in person*»;
- 324, indent 3, which stipulates, that «*whomsoever receives a writ, if their place of abode is unknown, or if they are sought without success, or if they reside abroad, the summonses, formal hearings and notifications, will be made at the military court closest to the court which has jurisdiction over the case*».

The Court has ruled that the defendants will be summonsed by public notice. If they then fail to present themselves at the next hearing, fixed for the 27 December 2006, they were to be tried *in absentia*.

The lawyers representing the victims and their families (*parties civiles*) made known that the First President of the Court had given them leave to hand over to the Clerk a list of witnesses. The list of witnesses includes well known political figures who allegedly may have some personal responsibility for the serious crimes committed in Kilwa.

By virtue of Article 27 of the Rome Statute establishing the International Criminal Court (which was ratified by the DRC Government), the Court must apply the law equally to all, without distinction based on an individual's official position.

In particular, holding an official position as Head of State or of the government, or member of a government, or member of parliament, or elected representative, or agent of the State, shall not exonerate in any case the criminal responsibility of this

<sup>1</sup> Loi 023/2002 du 18 novembre 2002 portant Code Judiciaire Militaire.

Statute, neither shall it constitute a motive for reducing the sentence. Furthermore, the immunities or special rules of procedure that might attach to a person holding an official position, by virtue of domestic or international law, shall not prevent the Court from exercising its competence with regard to that person.

The four NGOs note the failure of the state owned media to give any coverage to the trial, and expressed the fear that the authorities might be imposing an official news black out.

Lubumbashi, 14 December 2006

Action Contre l'Impunité pour les Droits Humains (ACIDH)

Association Africaine de défense des Droits de l'Homme (ASADHO/Katanga)

Centre des Droits de l'Homme et du droit humanitaire (CDH)

Rights and Accountability in Development (RAID)