

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° 2

Lubumbashi, 27 December 2006 – The Court adjourned the hearing until 18 January 2007 in order to consider its response to the objections raised by the lawyers representing the accused, Pierre Mercier, as to whether he was duly notified.

On Tuesday 27 December 2006 at 10:05, the Military Court of Katanga reconvened to consider the case of the Military Prosecutor versus 10 accused among them a senior military officer of the Congolese Armed Forces (FARDC) and his subordinates and three former employees of Anvil Mining Congo. The trial concerns killings and other crimes that occurred between 15th and 18th October at Kilwa, the territory of Mpweto, in the district of Haut-Katanga, in the south-east of the Province of Katanga in the Democratic Republic of the Congo (DRC).

1. Composition of the Court

The composition of the Military Court of Katanga remained the same as in the previous hearings.

2. Accused and Victims in Attendance

There are 12 accused persons facing trial. At the hearing seven military officers were in court¹ and four of the accused were not present they included two soldiers, Lieutenant MWELWA SABATA John and Adjudant KASONGO KAYEMBE, and two former employees of Anvil Mining Congo, Pierre MERCIER and Cedric KIRSTEN. Unlike the previous hearings, the accused, Peter VAN NIEKERK, was present in court represented by his lawyers, Maîtres Franck MULENDA (of Kinshasa), Serge CHUNGU, Jules TABU et Richard MATULI (of Lubumbashi). The victims (*parties civiles*) were represented by the same legal teams as at the previous hearings. Two additional lawyers joined the defence team to represent the other accused people in court.

3. Procedures

The Court's First President requested the lawyers to record their presence to the Clerk before calling upon the latter to proceed to reading out the charges against the accused. After the charges were read out, Maitre Franck MULENDA who had not taken part in the debates in the previous hearings raised an objection based on Article 231 of the Code of Military Justice concerning the explicit authorization for the use of a tape recorder or loud speaker for the security of his clients. The Court replied that such a request had already been made and that it had agreed to the use of a tape recorder.

¹ 1. Col. Adémar ILUNGA, 2.Cpt KAMBAJ MUSANS Jean-Marie, 3.Cpt SADIKA SAMPANDA, 4. Lt LOFETE MUNGITA, 5. Lt MWANZA wa MWANZA, 6. SLt MUHINDO TASE et 7. Adj. ILUNGA KASHILA.

The Court then proceeded to the formal identification of the accused Peter VAN NIEKERK in the light of which the Prosecutor asked for the annulment of the Court's earlier decision about his failure to appear in person while maintaining however that as far as the accused Pierre MERCIER was concerned, who had been duly notified by public announcement, his lawyers could not represent him in his absence. This type of attendance was against the spirit of Article 327, indent 2, of the Military Judicial Code, which stipulates that "No defence lawyer can take the place of a defaulting accused person". [*« Aucun défenseur ne peut se présenter pour le prévenu défaillant »*]. Pierre MERCIER's lawyers then asked the Court's leave to appear in their client's place arguing that it was necessary until it had been established that the notification of their client had been duly carried out. If the Court ruled that due notification had been given they would then withdraw.

The Prosecution maintained that in military jurisdictions notification takes place either directly or means of the indictment emanating from the Military Prosecutor closest to the competent jurisdiction (Art. 214 CJM) and that the Court had already given its response in its Preliminary Decision of 14th December, by means of which the procedures had been regularized and the accused Pierre MERCIER and Peter VAN NIEKERK had been summonsed to appear by public notice.

In response to the Prosecution's arguments, the lawyers representing the former employees of Anvil Mining Congo drew the Court's attention to Articles 322 and 323 which oblige the wanted agent to confirm his refusal to attend in person or, if it is impossible to obtain a signed statement from the agent, and in the absence of the intended recipient of the summons, a formal statement to this effect should be submitted to the Prosecutor.

The Prosecutor noted that on 13th October 2006, the accused Pierre MERCIER was the Director of the mining company, TIGER RESOURCES SPRL, and that the absence proscribed by Article 323 concerns the failure of an accused person who, while not having received a summons to appear in court, was in the country, whereas Pierre MERCIER had not only been summonsed but he had left the country for Canada. Furthermore, his employer, Tiger Resources, which had provided him with accommodation, had revoked his work contract. From this it would appear that Article 324² should be applied, as his contract had been terminated. The Prosecution maintained that in the case of the accused Cedric KIRSTEN who had failed to attend, Article 327 should be applied, that is to say that his default should be formally acknowledged.

The Court noted the absence of a charge specifically against Mr KIRSTEN in the trial papers, to which the Prosecution replied that a collective indictment had been notified to the accused and the Clerk had posted the charges according to Article 328 of the Military Code of Justice.

In response to the Prosecution's argument, Anvil Mining's lawyer asked whether the company was also on trial as a result of the collective indictment. The Prosecution clarified that it was Anvil Mining's agents who had been charged and not Anvil Mining as a moral person and that if the deeds for which they had been accused were established, the civil responsibility of Anvil Mining ought to be engaged.

Mr MERCIER's lawyers invoked Article 246³ to sustain their objections to the irregularities in the notification of their client which relate to the inexistence of a written statement confirming Mr Mercier's absence. The Prosecution reminded the Court that it had already made a pronouncement about the delivery of the summons in relation to the memorandum submitted by the parties concerning the propriety of the notification.

² "Whomsoever is the recipient of a summons, if his place of abode is unknown, or if he is sought without success, or if he resides abroad, the summonses, formal hearings and notifications will be made at the military prosecutor's office closest to the court which has jurisdiction over the case". Article 324, indent 3, CMJ.

³ "If the accused or the Public Prosecutor intend to make objections as to the propriety of the notification, or the nullity of the procedures prior to the court appearance, they must, on pain of inadmissibility, and before the debates on the merits of the case are entered into, submit a single memorandum." Article 246, indent 2, CMJ.

The lawyers representing the accused soldiers then took this occasion to request permission from the Court to submit their memorandum thereby allowing the Court to respond to all the objections at the same time.

The victims' lawyers, evoked jurisprudence of the High Military Court which had ruled that the jurisdiction seized with the case could verify whether the accused had truly been informed or contacted and in the case in question, had expressed the opinion that the presence of defence counsel should be taken to signify that the accused had been effectively notified. Given that the objection should be overruled, the Court should proceed to the reading of the list of witnesses in order to ascertain who was present irrespective of whether the objection was to be dismissed or sustained. The Prosecution maintained that on the basis of Article 242, which instructs the Clerk, at the request of the President of the Court, to read out the list of prosecution and defence witnesses to be heard, whereas Article 249 indent 3 only concerns the hearing of new witnesses during the debates.

To conclude, the First President of the Court asked the lawyers to propose a date for the next hearing to allow time for it to rule on the objections related to the notification raised by the lawyers defending the accused Pierre MERCIER. The hearing was adjourned until 18 January 2007.

4. Observations

The NGOs observing the trial noted, as regards Article 324, indent 3 of the Military Code of Justice, that even if the place of residence in the D R Congo of the accused Pierre MERCIER was not known and if, as it was asserted, he had been sought without success, and further that it had been established that he was living abroad, the only remaining option was to proceed by means of a summons from the military prosecutor's office in the jurisdiction with competence for the matter.

As regards the requirement to have a written statement confirming the refusal or the impossibility or the absence of the recipient of the writ enshrined in Articles 322 and 323, the victims' lawyers pointed out that it was dependant on the recipient having a designated place of abode in the DR Congo, which was not the case.

The public requested that the trial should be held in a larger chamber as space was constricted. This would permit the lawyers and the public to observe the hearings in greater comfort.

The Court was in session with the following presiding:

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

and with the participation of the Public Prosecutor, Colonel Eddy NZABI MBOMBO and the Clerk of the Court, Major Jacques KAHILU MAINA.

Lubumbashi, 27 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)