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**Observation report on the appeal proceedings against the presumed perpetrators
of Serge Maheshe's assassination**

6 February – 21 May 2008

Case: Prosecutor vs. Bokungu Bokombe at al, RPA 060



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I. Executive Summary

1. Serge Maheshe, an editor of Radio Okapi in Bukavu and a member of MONUC's national staff, was killed on 13 June 2007 in Bukavu in South Kivu Province. Following this assassination, lower court trial proceedings were held before the *Tribunal Militaire de Garnison* of Bukavu (Military Garrison Court) and appeal proceedings were held before the South Kivu Military Court.
2. The United Nations Joint Office for Human Rights (UNJHRO)¹ observed these two proceedings and, after the lower court trial, published an observation report on 29 January 2008 on the action against the alleged perpetrators of this assassination².
3. At the end of the appeal proceedings which were held from 6 February to 21 May 2008, the South Kivu Military Court acquitted two civilian friends of Serge Maheshe and sentenced three other civilians to death, two of whom had already been sentenced to death at the lower court trial³.
4. During its observation of the appeal proceedings, the UNJHRO noted that all the guaranties for a just and fair trial were not respected by the South Kivu Military Court. In spite of some positive points that were noted, the appeal proceedings were generally marked by irregularities similar to those observed during the lower court trial, principally:
 - the Military Court's refusal to investigate other credible leads and motives likely to shed more light on Serge Maheshe's murder;
 - the persistent inadequacies in the criminal inquiry;
 - the absence of an independent and impartial inquiry into subornation charges brought against two military magistrates;
 - a climate of intimidation and threats against the defence lawyers and observers of the lawsuit;
5. This report formulates recommendations for the attention of Congolese authorities and the International Community. Some of the recommendations are specific to the case of Serge Maheshe's assassination, while others, of a more general nature, relate to military courts.

II. Introduction

6. Serge Maheshe, an editor of Radio Okapi in Bukavu and a member of MONUC's national staff, was shot on 13 June 2007 on Avenue Saio in the Commune of Ibanda in Bukavu while he was in the company of two of his friends. The following day, the national police arrested two soldiers suspected of having committed the assassination.

¹ The United Nations Joint Office for Human Rights (UNJHRO), created on 27 April 2006, consists of the Human Rights Division of the Mission of the United Nations Organisation in the Democratic Republic of the Congo (MONUC) and of the United Nations Office of the High Commissioner for Human Rights in the Democratic Republic of the Congo (OHCHR DRC).

² Observation Report on the lower court trial against the alleged perpetrators of Serge Maheshe's assassination (14 June – 28 August 2007).

³ Decision of the Military Court of South Kivu, RPA 060 given in Bukavu on 21 May 2008 (hereinafter "the decision").

Two civilians were also arrested after verification of phone calls made from the SIM card that belonged to the victim. Serge Maheshe's two friends who were with him at the time of the events were also arrested.

7. In accordance with an accelerated procedure, the Bukavu Garrison Court was immediately convened with charges of assassination against all the suspects and dissipation of war ammunition against one of the military defendants. The first hearing was held the day following the assassination. The lower court trial took place from June to August 2007. On 28 August 2007, the Court pronounced death sentences against the four civilian defendants, including Serge Maheshe's two friends, the only eye witnesses to the assassination. One of the military defendants was acquitted while the second was sentenced not for the assassination, but for the destruction of a weapon.
8. Both the defendants and the prosecution appealed and the appeal proceedings occurred from 6 February to 21 May 2008 before the South Kivu Military Court. At the end of the appeal proceedings, the South Kivu Military Court acquitted Serge Maheshe's two friends and sentenced three civilians to death, two of whom had already been sentenced to death at the lower court trial. These civilians retracted their accusations against Serge Maheshe's two friends, while raising serious allegations against two magistrates of the military prosecutor's office at the Garrison Court who were pressing them to claim Serge Maheshe's two friends were the people behind the assassination.
9. The UNJHRO observed the whole process from the lower court trial through the appeal proceedings to verify that international, regional, and national human rights norms guaranteeing the right to a fair trial, and the principles ensuring the protection of human rights defenders, were respected. These principles are notably included in Article 14, Paragraphs 1 and 2 of the International Covenant on Civil and Political Rights⁴.

"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (...)

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
10. The lower court trial as well as the appeal proceedings were marked by numerous breaches of the fundamental guarantee of the right to a fair trial. The observation report on the appeal proceedings highlighted the Court's refusal to investigate other credible leads and motives for the assassination, the Court's refusal to order further investigation, and the Court's refusal to order an autopsy or a ballistics test. These refusals occurred in spite of MONUC's repeated offers of facilitation. The report also noted the absence of an independent and impartial inquiry into subornation charges brought against two magistrates by the alleged perpetrators and noted a violation of the principle of equality of means between the parties.

⁴ The International Covenant on Civil and Political rights was ratified by the Government of the DRC on 1 November 1976.

11. In addition to the breaches and irregularities pertaining to the right to a fair trial, the NGOs that observed the trial were threatened and intimidated by military magistrates who prohibited the NGO's from making any press declarations by threatening legal proceedings. Some observers from the NGOs alleged that they were victims of security incidents although they were not able to identify the perpetrators of those incidents. Moreover, during the trial the defence lawyers alleged that they had received threats by SMS after the hearing in which the two military defendants accused the magistrates of subornation.
12. When the verdict was announced, Mr. Alan Doss, the Special Representative of the United Nations Secretary General in the Democratic Republic of the Congo, stated that "*MONUC notes that there remain many questions to resolve regarding Serge Maheshe's assassination and asks the Congolese justice system to shed light on this crime in accordance with the laws of the country and with international norms commonly accepted in the exercise of justice.*"⁵
13. The publication of this report occurs more than one year after the closure of the appeal proceedings against the alleged perpetrators of Serge Maheshe's assassination. Since this trial, two other journalists have been killed. Consequently, the publication of this report on these appeal proceedings was warranted because an in-depth study of this case may be useful to improve the judiciary's response to the murders of other journalists.

III. Main observations on the appeal proceedings

3.1. The Military Court's refusal to conduct investigations into other credible leads and motives for the assassination

14. The Military Court did not seriously consider other credible leads and motives for the assassination. In particular, the Court did not explore the initial theory that Serge Maheshe's assassination was the result of an armed robbery committed by the two FARDC soldiers arrested on 14 June 2007, nor the theory that it involved Republican Guard officers with whom Serge Maheshe had an altercation one month earlier. The Court admitted that it had refused to explore other credible leads implicating other possible defendants but invoked the "*respect for the devolving effect of the appeal*"⁶.
15. The appeal proceeding was marked by the failure of the two accused soldiers to appear before the Court. Following repeated requests by the defence counsel, the Chief Judge of the Court indicated that he had issued summons orders against the soldiers. The 10th FARDC Military Region's intelligence officer (T2) appeared at the 16 and 21 April 2008 hearings. He declared that the Commanders of the Units, who had received the summons orders, had not executed them because of hierarchical hindrances and affirmed that he had sent a note to the 10th Military Region's Commander (this note would, according to his declarations, nonetheless have been lost in the administrative

⁵ Joint MONUC and OHCHR press release: "*The UN condemns the absence of just and fair trial in the case of Maheshe*" of 22 May 2008, MONUC/OSMR/CP0016/2008.

⁶ See page n° 31 of the decision: "*The Court, in session as appeal jurisdiction, is bound by the respect for the devolving effect of the appeal. It may not therefore consider new facts not submitted to the first judge even if the introduction of new means or a different legal foundation is allowed.*"

bureaucracy). The Court relied on the compelling force of its summons orders and threatened suit against any person creating obstacles to their execution. Thereafter, the Chief Judge indicated that the two soldiers could not be found⁷. Nevertheless, it is clear that the two soldiers were present and available at the beginning of the trial. One of them had been personally notified by the Military Court and signed his summons to appear⁸, whereas the other appeared at the 9 April 2008 hearing without having been summoned to appear⁹ by anybody. However, he did not appear again during the appeal proceedings. Furthermore, the two soldiers apparently received their pay of March 2008¹⁰.

16. Moreover, it was observed that the defence lawyers were systematically interrupted by the Court when they attempted to allude to the military defendants and to their involvement in the assassination. Several defence lawyers received threats in the evening after the 21 April 2008 hearing during which they particularly insisted on this lead.

3.2. Persistent inadequacies in the criminal inquiry

17. The inadequacies observed in the criminal inquiry at the lower court trial persisted during the appeal proceedings because of the Court's refusal to order an additional investigation into Serge Maheshe's assassination or to carry out a ballistics test.
18. The defence counsel at several times raised the issue of the need for additional investigation, including the need to carry out forensic testing, to conduct ballistics tests on the three weapons that had been seized, and to explore certain leads more in depth¹¹. The Court did not however find the defence recommendations useful with the regard further investigation.
19. Moreover, it is not surprising that MONUC's offer to facilitate the ballistics test was publicly rejected by the Military Court. The Military Court initially claimed MONUC could not perform the test in an impartial way because the victim was a member of its staff. Later, the Court expressed doubt on the reliability of any ballistics test¹².

⁷ Indeed, during the 23 April hearing, the Court declared that the defence could raise the contradictions appearing in the minutes by repeating the declarations made by the two military defendants during the lower court trial, but in any case the military defendants remained "*not to be found*." The release by the South Kivu NGOs on the 23 April 2008 hearing (published on 25 April 2008 and covering the 16, 21 and 23 April 2008 hearings) equally underlines this point: "With regret, the NGOs note the disappearance of the military defendants, but also the disappearance of the "Bijodo" camp soldiers who had rushed up to the place of the crime whom the Court had summoned to appear for information purposes."

⁸ The accused person concerned is Bokungu Bokombe prosecuted for the "*spiteful destruction of his weapon*" (Article 112 and 113 of the Criminal Code) and condemned to 6 months' imprisonment (5 March hearing – declarations of the Military Court's clerk)

⁹ This is Katuzela Mboo.

¹⁰ Press release by the South Kivu NGOs on the 21 April hearing, published on 25 April and covering the 16, 21 and 23 April hearings.

¹¹ During the 5 May 2008 hearing, the defence requested the Court to conduct a ballistics test; to review the contradictions stemming from certain declarations on record such as those of Corporal Katuzelo; to obtain explanations from the 10th Military Region on the current position of the soldiers connected with the case, their orders, and their command; and to reinterview those who saw the white Pajero connected with the persons allegedly behind the assassination.

¹² 21 April 2008 hearing.

3.3. Absence of an independent and impartial inquiry into subornation charges brought by the alleged perpetrators against two examining magistrates

20. The two civilians sentenced as perpetrators of the crime retracted their confessions in a letter dated 8 September 2007 and alleged that two magistrates of the Garrison's military prosecutor's office exerted pressure on them at different stages of the pre-trial investigation in order to obtain their confessions. The two civilians claimed that they had confessed to the crime and implicated Serge Maheshe's two friends in exchange for a large sum of money and a trip to South Africa. This exchange was promised, according to them, by the two magistrates. No independent and impartial inquiry covering these allegations has taken place. Such serious charges should have been the subject of an independent disciplinary or criminal inquiry launched by the General military prosecutor's office¹³.
21. During its initial closing argument presented on 12 May 2008, the Prosecution argued that the confessions made by the alleged perpetrators were corroborated by other elements and should be retained in spite of their being subsequently withdrawn. It also called into question the validity of the confession withdrawal letter by pointing to the uncertain conditions under which it was drafted in prison. Nonetheless, during its final closing argument, the Prosecution partially reversed itself. It admitted the reliability of the confession withdrawal letter with respect to the two friends of the victim, while continuing to express doubt on its reliability with respect to the subornation charges against the magistrates.
22. In its 21 May 2008 decision, the Military Court concluded that the defendants' withdrawal of confessions was divisible and recognized it to be sincere with regard to the innocence of Serge Maheshe's two friends, but granted "*no credit to the defendants' allegations against Magistrates Musilimu Katamea and Kambala Mukendi*"¹⁴, "assistant prosecutors of the Bukavu Garrison's military prosecutor's office.
23. The Prosecution tried to restrict the reach of the appeal proceedings by requesting that the Court reject on technical grounds the appeal of the two civilians sentenced to death, even though the Prosecution itself had filed a general appeal. The Military Court did not grant the Prosecution's petition. Nonetheless, such an approach from the Prosecution at the beginning of a trial aroused numerous questions about the Prosecution's willingness to reconsider the facts and the ruling given during the trial, and to take into account the confession withdrawal letter.
24. The inequality between the parties was particularly emphasized by the position adopted by the counsel for the plaintiff who upheld the Prosecution throughout the trial. The plaintiff's counsel went even farther than the Prosecution by calling for the death sentence against the victim's two friends in its 7 May 2008¹⁵ argument.

¹³ The Bukavu magistrates were indeed not in a position to impartially assess their colleagues' involvement, a principle acknowledged by the higher military prosecutor himself during the trial. The fact, that only the South Kivu Military Court examined this question and did so without any preliminary inquiry, raises a serious problem of professional ethics and conflict of interest.

¹⁴ See page N° 26-29 of the decision.

¹⁵ During their 7 May 2008 speech, the lawyers requested the confirmation of the trial verdict for the 4 civilians and 1 million US dollars in damages. They pleaded that Serge Maheshe had been intentionally led to the place of

Moreover, by doing this, the attorneys ignored the interests of their client, Serge Maheshe's widow, who explicitly stated that she did not believe her husband's friends were culpable, and that she wanted that the truth be established through the investigation of other leads. In a letter on 9 May 2008 to the Chief Judge of the Military Court¹⁶, written immediately after her attorney's speech, the widow denounced her attorneys' breach and indicated that she had not been consulted on this defence strategy. She also wrote that her attorney's argument reflected only his views and not hers, and that she no longer trusted him. She also wrote that "*there are still other leads, including the military lead, and a charge against two magistrates, that your Court unfortunately seems to ignore and treat with negligence.*"

25. The Chief Judge, who acknowledged receipt of this letter at the 12 May hearing, refused to add it to the file because it was not authenticated. Although it bore the name, contact details and signature of its author, the widow had never personally appeared at the appeal hearings, and the letter was not addressed to the Chief Judge but to a "certain Judge." In spite of the protests of the defence counsel, who requested that the letter be read and shared with all the parties, the Chief Judge refused to take the widow's letter into consideration. Moreover, the Chief Judge not only authorized the plaintiff's counsel to continue their presence at the hearings but also allowed them to present a reply on the widow's behalf during the 14 May 2008 hearing. On that occasion plaintiff's counsel again called for the death sentence against the four defendants and re-affirmed the direct and premeditated involvement of Serge Maheshe's two friends in the assassination.

3.4. Climate of intimidation and threats against the defence counsel and observers of the lawsuit

26. The trial was in part characterized by a climate of intimidation expressed in different ways through the physical assault of one of the alleged perpetrators in detention, intimidation of observers of the lawsuit, a strained atmosphere during the hearings, and threats reported by certain members of the NGOs that had observed the trial. Likewise, several defence lawyers alleged that they had received threats.

IV. Worrying developments at the end of the action on appeal

27. After the appeal, the court-appointed lawyer of two of the civilians sentenced to death by the South Kivu Military Court filed a quashing appeal with the Kinshasa High Military Court. Regrettably, however, as of 16 June 2008 the South Kivu Military Court had not yet transmitted the case file to the Kinshasa High Military Court, thus creating obstacles to the appeal proceedings being examined within a reasonable time.

28. In the appeal filed on 26 May 2008, the attorney focused in particular on the unconstitutionality of military jurisdiction over civilians, the violation of the rights of the defence provided for by Article 19 of the Constitution, and certain irregularities of

the crime by his friends who had planned his assassination. They ignored all the other leads, including the military lead, and did not recognize the value of the confession withdrawal letter which they considered "*an insult to the memory of Serge Maheshe and an effort aiming at soiling Congolese justice and consequently the [military] magistrates*" accused of subornation.

¹⁶ Copied to the President of the Bar of Bukavu, as well as to MONUC, the press and NGOs protecting human rights.

prescribed forms which could lead to nullification, including the failure to place under seal objects that had been seized and used as pieces of evidence.

29. The lawyer also appealed on 26 May 2008 on the same grounds by invoking Article 153(2) of the Constitution: "*The Court de Cassation considers appeals against final decisions and rulings given by civilian and military courts and tribunals.*" Article 223 provides in effect that the Supreme Court performs the function of the *Court de Cassation until it is created*, thus allowing in practice the lodging of an appeal to the Supreme Court of Justice against the decision of a military court.

V. Conclusion: a judicial process interspersed with several irregularities suggesting that the judiciary authorities lack the will to establish the truth regarding Serge Maheshe's assassination

30. On the basis of all the observations presented in this report, the UNJHRO concludes that the South Kivu Military Court did not demonstrate its will to independently and impartially do justice in compliance with international, regional and national norms with respect to a fair trial. Like the Office of the High Commissioner for Human Rights, the UNJHRO, in its 22 May 2008 release, reproves "*the practice of the military courts which continue to prosecute and try civilians in violation of relevant international norms and in violation of the Congolese Constitution.*"
31. The UNJHRO welcomes nonetheless the Military Court's acquittal of the two civilians, who were eye witnesses to the crime and friends of the victim, but sentenced to the death at the trial. The UNJHRO also welcomes the efforts by the Military Court to ensure the presence of an interpreter at the hearings during the appeal. The first hearings had been marked by the absence of an interpreter.
32. Finally, the UNJHRO remains very troubled by the intimidation of, and threats against the defendants, the defence lawyers, and independent observers that were reported during the trial. It reaffirms the principle that hearings should be public, that the right to the freedom of expression is established by the Congolese Constitution, and that Congolese citizens and human rights defenders in particular have a fundamental right to protection by the State. Moreover, the UNJHRO regrets that the military judiciary authorities publicly disapproved of the work of the observers of the trial and threatened them with prosecution. The UNJHRO notes that the presence of independent observers is of fundamental importance in order to assess compliance with international norms as far as a fair trial is concerned.
33. Human rights defenders who observe trials must be protected. The United Nations 1998¹⁷ Declaration provides that [human rights] defenders must be protected within the framework of their activities. Article 12 provides that the State may take all necessary measures in order to ensure that the competent authorities protect any person, individually or in association with others, against any violence, threat, reprisal, de facto and de jure discrimination, pressure or other arbitrary action in the framework of the legitimate exercise of the rights concerned in the Declaration.

¹⁷ Declaration on human rights defenders, adopted by the General Assembly of the United Nations on 9 December 1998.

34. The State in particular has the responsibility to protect human rights defenders and to see that human rights defenders may freely perform their duty without risk of interference, discrimination, threat, or reprisal.
35. In addition to State responsibility, other international mechanisms work for the protection of human rights defenders. Since 2000, there has been a special rapporteur on the situation of human rights defenders. He works with others to improve the protection of human rights defenders.
36. As indicated at the end of the verdict by Mr. Alan Doss, the Special Representative of the United Nations Secretary General, “*MONUC notes that there remain many questions to resolve regarding Serge Maheshe’s assassination and asks the Congolese justice system to shed light on this crime in accordance with the laws of the country and with international norms commonly accepted in the exercise of justice.*”¹⁸

VI. Recommendations

37. Considering the fact that certain violations noticed in the Maheshe case are frequently observed in other trials before military courts, this report formulates recommendations that go beyond the Maheshe case and relate to the Congolese Military Courts’ rules of competence and procedure.¹⁹ These recommendations are intended for the DRC’s executive, legislative and judiciary authorities.

6.1. Specific recommendations relating to the case of Serge Maheshe’s assassination

38. To the judiciary authorities

- To examine, in a reasonable time frame and in compliance with international norms, the 24 May 2008 quashing appeal to the High Military Court and the 26 May 2008 appeal to the Supreme Court of Justice;
- To conduct an independent and impartial inquiry into the alleged extortion of confessions perpetrated by the two examining magistrates on the alleged perpetrators;
- To conduct, if necessary, a conclusive ballistics test of the weapon that would have been used to commit the crime by the civilians sentenced to death; performed by a foreign scientific laboratory with sufficient expertise.
- To investigate and prosecute any authors of the alleged threats against the defence lawyers and observers of the trial and punish the authors in conformity with the law;

¹⁸ MONUC and OHCHR’s press release “*The UN condemns the absence of just and fair trial in the case of Maheshe*” of 22 May 2008, MONUC/OSMR/CP0016/2008.

¹⁹ These recommendations do not predict what might be the conclusions of a future systematic discussion which could take place in DRC on the necessity of military courts in times of peace or in times of war.

- To immediately arrest the soldier sentenced in absentia so that his prison sentence may be executed;
- To guarantee the protection of lawyers and human rights defenders;
- To conduct a judicial inquiry into the circumstances of the escape of one of the convicts from the Bukavu Central Prison and determine whether the prison director is responsible.

39. To the South Kivu Bar

- To take disciplinary measures against the lawyers for the plaintiff who deliberately pleaded a position contrary to the interests expressed by their client.

6.2. General recommendations relating to military courts

40. To the executive authorities

- To publicly condemn assassinations and other serious violations of human rights perpetrated against human rights defenders, as recommended on 3 June 2009²⁰ by the Special Rapporteur on the situation of human rights defenders;
- To ensure the independence of the judicial power, including the military judiciary, by eliminating any undue influence, by ensuring reasonable remuneration to the magistrates; and by equipping courts and tribunals as well as the Prosecutors' offices with the financial and logistical means necessary for their function.

41. To the legislative authorities

- To amend the legislation on military courts by restricting their jurisdiction to only offences committed by the military or the police;
- To adopt a law on the protection of human rights defenders, including journalists, taking into account international norms for the protection of human rights defenders.

42. To the Higher Council of the Magistracy

- To reinforce control procedures and, in particular, conduct automatic disciplinary and criminal inquiries any time serious charges of subornation, corruption, collusion, or other interference in the judicial process are made against civilian or military magistrates.

43. To the International Community

- To reinforce technical and logistical support to the judicial institutions and provide to investigators the logistical and forensic means necessary for quality

²⁰ The 3 June 2009 press release of the Independent Expert on the situation of human rights defenders, as she concluded her visit in the Democratic Republic of the Congo.

investigations, in particular modern means of criminal investigation and forensics, such as equipment for sampling finger and biological prints, shot residue kits, microscopes, cameras, and videos cameras;

- Support operational capacity building for all the members of the judiciary, civilian and military, in order to ensure that they can actually contribute to a quality criminal investigation, and that they respect and protect the right to a fair trial and effective recourse. Provide for the training of magistrates and lawyers in professional ethics;
- Pursue, with political and judiciary authorities, the independence and integrity of justice, the strict compliance with the principle of the right to a fair trial, and the explicit abolition of the death sentence in the criminal code;
- Pursue the adoption of a law for the protection of human rights defenders, including journalists, that complies with relevant international norms.
