



AMERICAN BAR ASSOCIATION  
CENTER FOR HUMAN RIGHTS  
WASHINGTON, D.C.

**TRIAL OBSERVATION REPORT:  
THE CASE OF RAFAEL MARQUES DE MORAIS  
JUNE 2015**

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## I. INTRODUCTION

1. This report was prepared by the American Bar Association (ABA) Center for Human Rights (Center), following its missions to the Republic of Angola in 2015 for the purpose of observing the criminal trial against journalist Rafael Marques de Morais. The report is based on the Center's findings after having observed the entire proceedings of the trial.<sup>1</sup> It consolidates the findings of the Center's observers and presents preliminary conclusions on the trial's compliance to date with international fair trial standards.
2. The American Bar Association is one of the world's largest voluntary professional organizations, with nearly 400,000 members and more than 3,500 entities. It is committed to serving its members, the profession and the public by defending liberty and advancing the rule of law. The Center for Human Rights leads the ABA's efforts to address critical human rights issues and works to develop policy, projects, and educational initiatives to advance human rights both nationally and internationally.
3. The trial of Rafael Marques de Morais has generated widespread international concern due to the fact that he was charged with defamation for publishing his book "Blood Diamonds: Corruption and Torture in Angola", which purports to document human rights abuses in Angola's diamond mining region. He was also charged with slanderous denunciation of public officials for requesting that Angolan authorities investigate the criminal responsibility of high ranking current and former military officers who held an ownership interest and/or allegedly exercised control over private security forces that had engaged in the reported abuses. In light of Angola's obligation to respect the right to freedom of expression and its duty to investigate allegations of serious human rights abuses, the case against Rafael Marques de Morais raises significant legal issues. The Center for Human Rights therefore observed the proceedings to evaluate their compliance with fair trial guarantees prescribed under international human rights law.<sup>2</sup>
4. Based upon these observations, the Center found that the proceedings were marred by significant irregularities and did not comply with Angola's international treaty

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<sup>1</sup> The statements and analysis contained herein are the work of the American Bar Association's Center for Human Rights. The statements and analysis expressed are solely those of the authors, and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and do not represent the position or policy of the American Bar Association. Furthermore, nothing in this report is to be considered rendering legal advice for specific cases. The Center would like to thank Bruce Zagaris, Norman Njombe, Nambili Shipena and Luaty de Silva for serving as observers. The Center is also grateful to all those who provided valuable information about the trial and helped with the observation missions.

<sup>2</sup> While it is outside the Center's mandate to consider substantive points of Angolan criminal law, this report presents the Center's conclusions on the trial's observance of relevant international standards. The observers strictly adhered to international standards for trial observations throughout the course of the proceedings.

obligations to uphold the right to a fair trial. Throughout the proceedings, the defendant was denied the right to present a defense, induced to make a statement on the basis of false pretenses and compelled to bear the burden of proving his innocence, all in violation of international law.

## II. THE CASE AGAINST RAFAEL MARQUES DE MORAIS

5. Rafael Marques de Morais is an Angolan citizen, born in Luanda in 1971. He is a renowned journalist and human rights defender who has received several international awards in recognition of his work. In 2011, he published a book in Portugal titled “Blood Diamonds: Corruption and Torture in Angola”, that alleged that Angolan military officers were responsible for the extrajudicial killing, torture, and forced displacement of inhabitants of a diamond-mining area committed by Angolan security forces and private security companies.<sup>3</sup>
6. In November 2011, after publishing the book, Marques de Morais filed a criminal complaint in Luanda accusing several Angolan generals of crimes against humanity committed in the Lundas region.<sup>4</sup> He called on the authorities to investigate the potential criminal responsibility of the generals as the directors and shareholders of the mining and security companies and as commanders responsible for the conduct of military forces implicated in the violence and attacks upon civilians.<sup>5</sup> In response to the public attention generated by the case,<sup>6</sup> the Attorney General opened a preliminary process of inquiry, which rejected the case against the generals in November 2012.<sup>7</sup> The Attorney General found that the allegations made by Marques de Morais were unsubstantiated and allegedly lacked evidentiary support.<sup>8</sup> It is unclear from the Attorney General’s report if he conducted an independent investigation, attempted to collect statements from other witnesses or collect any other evidence.

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<sup>3</sup> Rafael Marques de Morais, “Blood Diamonds: Corruption and Torture in Angola (2011).

<sup>4</sup> allAfrica, *Rafael Marques de Morais, Criminal Complaint Lodged Charging Generals With Crimes Against Humanity*, November 14, 2011, available at <http://allafrica.com/stories/201111142158.html>

<sup>5</sup> *Id.*

<sup>6</sup> Maka Angola, *Trial of Rafael Marques de Morais to begin on December 15*, December 8, 2014, [http://www.makaangola.org/index.php?option=com\\_content&view=article&id=11507:trial-of-rafael-marques-de-morais-to-begin-on-15-december&catid=28&Itemid=230&lang=en](http://www.makaangola.org/index.php?option=com_content&view=article&id=11507:trial-of-rafael-marques-de-morais-to-begin-on-15-december&catid=28&Itemid=230&lang=en)

<sup>7</sup> Attorney General of the Republic of Angola, Preliminary Process of Inquiry by the, Registered Number 04/2012-INQ

<sup>8</sup> *Id.*

7. In November 2012, in response to Marques de Morais' criminal complaint, the accused individuals filed a complaint against him and his publisher for criminal defamation in Portugal.<sup>9</sup> According to Marques de Morais, the Portuguese Public Prosecution office dismissed the case for lack of evidence after having found that Marques de Morais had rigorously researched the book.<sup>10</sup>
8. Marques de Morais' prosecution by Angolan authorities has been widely condemned by international human rights organizations as a violation of the right to freedom of expression as protected by Article 9 of the African Charter on Human and Peoples' Rights<sup>11</sup>, Article 19 of the International Covenant on Civil and Political Rights<sup>12</sup> and Article 10 of the Universal Declaration on Human Rights<sup>13</sup>, as well as his right to a fair trial as protected by Article 7, Article 14 and Article 11 of the above instruments respectively.
9. This is not the first time that Marques de Morais has been questioned or arrested by the police in relation to his publications. In July 1999, Marques de Morais was arrested for writing an article titled "The Lipstick of Dictatorship" which criticized the Angolan president, Jose Eduardo Santos and referred to him as a "dictator".<sup>14</sup> He was later charged, tried and found guilty of defaming and injuring the President under Articles 407 and 410 of the Penal Code, as well as guilty of abuse of press under Articles 43, 44, 45, and 46 of the Media Law (21/91).<sup>15</sup> Marques de Morais was sentenced to six months in prison and ordered to pay a fine equivalent of USD 60,000.00.<sup>16</sup> In October 2000, as a result of international pressure, the Angolan Supreme Court quashed the defamation conviction under article 407 and reduced the final penalty to the equivalent of USD 17,000.00.<sup>17</sup> The United Nations Human Rights Committee later found in the case of

<sup>9</sup>See Joint Letter from Angolan and International Organizations to the African Commission on Human and People's Right's Special Rapporteur on Freedom of Expression and Access to Information, Ms. Faith Pansy Tlakula and the Special Rapporteur On Human Rights Defenders, Ms. Reine Alapini-Gansou, Letter of Allegation Concerning the Prosecution of Rafael Marques de Morais by the Government of the Republic of Angola, (August 2 2013) [Hereinafter Joint Letter of Allegation], available at <https://www.fidh.org/International-Federation-for-Human-Rights/Africa/angola/letter-of-allegation-concerning-the-prosecution-of-rafael-marques-de->

<sup>10</sup> Maka Angola, *Trial of Rafael Marques de Morais to begin on December 15, December 8, 2014*, available at [http://www.makaangola.org/index.php?option=com\\_content&view=article&id=11507:trial-of-rafael-marques-de-morais-to-begin-on-15-december&catid=28&Itemid=230&lang=en](http://www.makaangola.org/index.php?option=com_content&view=article&id=11507:trial-of-rafael-marques-de-morais-to-begin-on-15-december&catid=28&Itemid=230&lang=en).

<sup>11</sup> African Charter on Human and People's Rights, Art. 9, June 27, 1981, 21 I.L.M. 58 [hereinafter African Charter];

<sup>12</sup> International Covenant on Civil and Political Rights, art. 19, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]

<sup>13</sup> Universal Declaration of Human Rights, art. 10, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR]

<sup>14</sup> Joint Letter of Allegation, *supra* note 9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

*Rafael Marques de Morais v. Angola* that the judgment had violated Marques de Morais' rights, most notably the right to liberty and security of person, freedom of movement and freedom of expression as protected by Articles 9, 12 and 19 of the ICCPR.<sup>18</sup>

10. After Marques de Morais' November 2011 allegations were dismissed by the Angolan Attorney General, he was summoned on the 3<sup>rd</sup> of April 2013 for interrogation by the Organized Crime Unit of the National Police in Luanda, Angola.<sup>19</sup> Marques de Morais was informed at that time that he had been indicted four (4) months before in January 2013 on charges of defamation in relation to his book "Blood Diamonds: Corruption and Torture in Angola".<sup>20</sup> Prior to the interrogation, he was not informed of the indictment and was summoned without a warrant.<sup>21</sup> Marques de Morais therefore did not have legal counsel present during the interrogation. During 2013, Marques de Morais was summoned and questioned several times in which he was only informed that the charges against him were for defamation.
11. The defendant was conclusively indicted in March 2014 on eight (8) charges of slanderous denunciation, under Article 245 of the Penal Code which reads: "He who in writing with signature or without it, do share or slanderous denunciation against any person directly to the public authority, shall be punished with imprisonment of one month to one year and suspension of political rights for five years".<sup>22</sup> According to the Indictment, Marques de Morais knew that the participation of the complainants in the alleged crimes was false.<sup>23</sup>
12. Marques de Morais' trial officially began on the 23<sup>rd</sup> of March, 2015 and was presided over by Judge Adriano Baptista Cerveira. The prosecution team was led by Lucas Miguel while Fernando Oliveira, João Manuel and Antonio Caxito appeared for the complainants. Marques de Morais was represented by Luis Nascimento and David Mendes. According to the ABA observers, after dealing with preliminary issues, the judge declared the proceedings closed to the public out of concern for the reputation of the complainants. The trial was however adjourned after it was determined that in addition to the charges of slanderous denunciation of a public authority based on Marques de Morais' criminal complaint against the generals, Marques de Morais was also being charged with 15 additional charges of criminal defamation which were being

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<sup>18</sup> *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (2005); *See also* ICCPR, *supra* note 12 arts. 9, 12, and 19.

<sup>19</sup> Joint Letter of Allegation, *supra* note 9.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Attorney General of the Republic of Angola, 4<sup>th</sup> Section of the Common Crimes Court of the Luanda Provincial Court, Record no. 212/2014, [ Herein after "Indictment"], March 25 2014.

<sup>23</sup> *Id.*

pursued under private prosecution by the complainants.<sup>24</sup> The matter was postponed to the 23<sup>rd</sup> of April 2015 to enable the defense to prepare for the additional allegations.<sup>25</sup>

13. On the 23<sup>rd</sup> of April 2015, the trial resumed before Judge Baptista. The proceedings were still closed to the public, but the court allowed observers from the ABA and the United States Embassy. The attorneys for the generals then requested a postponement of the trial which was granted and the matter rescheduled to the 14<sup>th</sup> of May 2015. According to press reports, the postponement was requested as the defendant and the complainants were engaged in negotiations.<sup>26</sup>
14. The matter resumed on the 14<sup>th</sup>. Marques de Morais gave testimony in which he acknowledged he was on trial for slanderous denunciation of a public authority because of the criminal complaint he had filed. He maintained that he had researched and conducted interviews in the region and made several attempts to contact the complainants. Next, the court heard testimony from the first prosecution witnesses who denied that ITM Mining had received inquiries from Marques de Morais. After Marques de Morais and the first witness for the state were examined and cross examined for several hours, the proceedings were adjourned until the 21<sup>st</sup> of May 2015.
15. According to Marques de Morais, on the 21<sup>st</sup> of May, the parties reached a settlement, in which he understood the charges would be dropped on condition that he made a statement and that the blood diamonds book would not be republished and the copies already in circulation would be withdrawn.<sup>27</sup> Marques de Morais then proceeded to make a statement which was to the following effect:
  - i. He had never intended to offend anyone.
  - ii. Although he never spoke to the individuals directly, he had reached out to multiple companies involved in the mining operations.
  - iii. It was only through the court proceedings that he learned that his communications through other companies had allegedly never reached the intended individuals.

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<sup>24</sup> See Interview of Rafael Marques de Morais by Simon Allison, Daily Maverick, Angola in Focus: Rafael Marques, on the eve of his verdict- 'It's torture', May 27 2015, [Hereinafter Interview of Rafael] *available at* <http://www.dailymaverick.co.za/article/2015-05-27-angola-in-focus-rafael-marques-on-the-eve-of-his-verdict-its-torture/#.VW7hds9Viko>

<sup>25</sup> *Id.*

<sup>26</sup> The Guardian, David Smith, *Angolan Journalist "close to settling" with generals he accused on blood diamonds*, April 23, 2015, *available at* <http://www.theguardian.com/world/2015/apr/23/angolan-journalist-rafael-marques-de-morais-settlement-generals-blood-diamonds>.

<sup>27</sup> See Interview of Rafael, *supra* note 24.

- iv. He regrets the lack of communication which resulted in him publishing his book without the complainants' side of the story, but had they cooperated or the people contacted communicated his concerns, the result may have been different.
  - v. That the book would not be reprinted in its present form.
  - vi. The book would not be sold and those in Angolan book stores would be withdrawn.
  - vii. He concluded by saying he would continue investigating human rights violations in the area.
16. From the proceedings of the 21<sup>st</sup> of May 2015, the ABA observers also understood that the parties had come to an agreement and this was supported by each of the legal representatives of the complainants addressing the court and expressing satisfaction with Marques de Moraes' statement and indicating that their clients no longer wished to proceed with the charges.<sup>28</sup> The prosecution acknowledged the above and the matter was adjourned to the 25<sup>th</sup> of May for formalities and closing submissions.<sup>29</sup>
17. On the 25<sup>th</sup> of May, the prosecution in its closing submission surprisingly advised the court and the defendant that it was proceeding with the charge of slanderous denunciation and that the prosecution was relying on Marques de Moraes' May 21<sup>st</sup> statement as evidence of a confession which indicated malice and thus sufficient proof of the alleged charges. Based on this "confession", on the 28<sup>th</sup> of May 2015, Judge Adriano Baptista Cerveira found Marques de Moraes guilty on eight (8) charges of slanderous denunciation and sentenced him to a six (6) month imprisonment suspended for 2 years.

### III. VIOLATIONS OF THE RIGHT TO A FAIR TRIAL

18. International human rights law requires that all persons charged with a criminal offence be afforded certain due process rights that provide a proper and effective opportunity for the accused to defend himself. Angola is a party to the International Covenant on Civil and Political Rights (ICCPR)<sup>30</sup> and the African Charter on Human and People's Rights<sup>31</sup>, both of which guarantee the right to a fair trial. In addition, Article 72 of the Angolan Constitution provides for the right to a fair trial in accordance of the law.<sup>32</sup> Angola is therefore required to observe and ensure fair trial standards, including an obligation to provide a trial by an independent and impartial tribunal. The ABA's team of observers who were present throughout the trial found several significant fair trial violations.

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<sup>28</sup> ABA Trial Observation Minutes, 21 May 2015.

<sup>29</sup> *Id.*

<sup>30</sup> Angola acceded to the ICCPR on January 10, 1992.

<sup>31</sup> Angola ratified the African Charter without reservations on the 2<sup>nd</sup> of March 1990.

<sup>32</sup> Constitution of the Republic of Angola, January 21, 2010.



## A. The Right to a Public Hearing

19. Marques de Moraes' trial was closed to the public. The prosecution argued that holding public hearings would jeopardize the reputation of the complainants. The defense counsel argued that public allegations against the defendant deserved a public trial. The judge agreed with the prosecution and ordered the police to escort members of the public, including the press, out of the courtroom.<sup>33</sup>
20. The ABA observers informed the judge that Article 3(b) of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms of 1999 grants everyone the right, individually and in association with others, *inter alia*, to attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments. They were permitted to remain in the court.
21. International law guarantees the right to a public hearing except in exceptional circumstances.<sup>34</sup> A public trial guarantees that the court will be open to the general public in order to protect the accused against secretive, corrupt or unfair proceedings.<sup>35</sup> The right to a public trial is, however, not absolute. It may be lawfully constrained in limited circumstances that are in the interests of morality, national security, public order, privacy interests of the parties and potential prejudice to the judicial process due to its publicity.<sup>36</sup>
22. The ABA Center for Human Rights considers that the decision to exclude most members of the public did not satisfy the requirement of international law that proceedings be closed only where strictly necessary. While the complainants clearly have a legitimate privacy interest, the court failed to explain how closing the proceedings would protect that interest in light of the fact that the allegations against them had already been widely publicized. Nor did the judge address the possibility that the examination of the defendant's conduct in a fair and public trial would actually serve to benefit the

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<sup>33</sup> ABA Trial Observation Minutes, March 23, 2015.

<sup>34</sup> ICCPR, *supra* note 12 at art. 14(1).

<sup>35</sup> Khoroshenko v Russia, Human Rights Committee, Communication No. 1304/2004, U.N. Doc CCPR/C/101/D/1304/2004. (In this case, the public and relatives of the accused were excluded from the main trial. The committee reiterated that all trials in criminal matters must in principle be conducted orally and publicly and that the publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.)

<sup>36</sup> See ICCPR, *supra* note 12 at art. 14(1); See also Section on Public Hearing 1 (f)(1) and (2) a and b, African Commission on Human and People's Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa [Hereinafter African Commission Guidelines to a Fair Trial], 2003.

complainants or consider closing only those parts of the trial that might reveal new information. In any event, no explanation was provided for allowing some members of the public to participate while denying the right to others. Such arbitrary application of the law by the court is not permitted.

## **B. Right to be Informed of Charges**

23. Article 14(3)(a) of the ICCPR states “that an accused person should be promptly informed in detail in a language which he understands of the nature and cause of the charge against him”. This guarantees an accused person the right to be informed of the charges he or she is facing and the factual basis of such charges to ensure that the accused has sufficient information to allow for the preparation of his or her defense.
24. Marques de Moraes, was denied the right to be informed promptly of the charges against him. When he was initially summoned for interrogation in April 2013, he was advised that he had been indicted four (4) months earlier in January 2013 on charges of defamation.<sup>37</sup> It has been reported that the facts upon which he was being charged were also not made clear to him and his legal representatives.<sup>38</sup> At one point, the defendants’ counsel was informed that “the nature and content of the investigation did not need to be disclosed to the defendant or his legal counsel”.<sup>39</sup>
25. According to ABA observers, on the first day of the hearing, the prosecution orally introduced additional charges of defamation based on the publication of the book.<sup>40</sup> These new charges were being pursued through private prosecution by the complainants. Marques de Moraes and his attorneys, who were only aware of the slanderous denunciation charges, had only come prepared for those charges.<sup>41</sup> After a review of the record, the judge confirmed that the court record only listed slanderous denunciation charges.<sup>42</sup> The defense thus sought postponement of the matter in order to prepare against the new charges. The judge granted the postponement until the 23<sup>rd</sup> of April 2015.

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<sup>37</sup> Joint Letter of Allegation, *supra* note 9.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> ABA Observers Minutes, March 25, 2015.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

### C. The Right to Adequate Time and Facilities to Prepare a Defense

26. Article 14(3) of the ICCPR guarantees the accused the right “[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing” and “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him[.]”
27. At various times during the proceedings, Marques de Moraes’ ability to communicate with counsel was restricted due to the fact that he was required to stand apart from his counsel. As a result, he was unable to communicate with them privately and hence denied effective legal representation. The African Commission Guidelines to a Fair Trial have specified that an accused person has the right to effective representation throughout the legal proceedings.<sup>43</sup>
28. Marques de Moraes’ was also not provided adequate time and facilities to prepare a defense in that he was denied the opportunity to respond to new arguments and factual allegations made by the prosecution or to present evidence in his defense. On May 21<sup>st</sup>, after a period of negotiations aimed at settling the matter, the defendant made a statement in which he clarified his statement from the previous court session. After a brief adjournment, each of the complainants’ legal representatives then stood and indicated they were satisfied with the defendant’s statement and no longer wished to continue with the proceedings, giving the impression that all charges against Marques de Moraes had been dropped and that the matter was adjourned to May 21<sup>st</sup> for closing formalities.<sup>44</sup> Marques de Moraes also believed that all charges against him had been dropped.<sup>45</sup>
29. However, on May 25<sup>th</sup>, the prosecution in its closing submissions indicated that it was proceeding with the slanderous denunciation charges.<sup>46</sup> The prosecution asserted that Marques de Moraes’ statement on May 21<sup>st</sup> was an admission that his allegations were false because he acknowledged that he never spoke to the generals directly about his allegations.<sup>47</sup> At this point, the defense was not given an opportunity to review the new allegations or identify or present evidence to rebut them. Marques de Moraes’ was denied the opportunity to present to the court individuals who claimed to have personally witnessed the alleged atrocities and that Moraes had also attempted to bring these witnesses before the generals. **Rather, the defense was required to respond to the**

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<sup>43</sup> See Section on Legal AID and Legal Assistance ( G)(b)(2)(b)

<sup>44</sup> ABA Observer Minutes, May 21<sup>st</sup> 2015.

<sup>45</sup> See Interview of Rafael, *supra* note 24.

<sup>46</sup> ABA Observer Minutes, May 25<sup>th</sup> 2015.

<sup>47</sup> *Id.*

**prosecutions new theory of the case in its closing arguments, in direct contravention of the right to adequate time and facilities to prepare a defense.**

30. As a result of the court's failure to ensure the defendant's right to present a defense, evidence that may have proven that the defendant continued to believe in the veracity of his claims in good faith based on multiple eyewitness accounts or evidence that the generals were in fact informed of his attempts to contact them was never considered. Such evidence could well have been dispositive and resulted in a finding of innocence.

**D. The Right Against Self-incrimination**

31. Article 14(g) of the ICCPR explicitly provides that "no one charged of a criminal offence shall be compelled to testify against himself or to confess guilt". The right against self-incrimination is one of the most fundamental aspects of a fair trial. While some statements can be admitted into evidence, they must be made voluntarily and be informed. The accused must have been aware of his rights at the time of making the statement, nor may authorities take "undue advantage" of the situation of a detained or imprisoned person for the purpose of compelling him or her to confess, to incriminate himself or herself, or to testify against any other person.<sup>48</sup>
32. The manner by which Marques de Moraes was induced to make the May 21<sup>st</sup> statement believing it to be a condition for dropping charges calls into question whether he was properly informed that the statement might be used against him. As detailed above, during the proceedings of the 21<sup>st</sup>, the defendant was made to believe that all charges against him were being dropped as was negotiated. The prosecution withheld the information that only the defamation charges would be dropped and that the State would be maintaining the slanderous denunciation charge. The defendant was thus not made fully aware of this fact at the time of making his statement as was his right. As a result of the hasty conclusion of the trial immediately after the defendant became aware that the statement would be used against him, the defendant and his lawyers were also denied the opportunity to challenge the admissibility of the statements.

**E. Right to a Fair and Impartial Tribunal**

a. Right to a Fair Trial

33. The right to a fair trial is firmly guaranteed under Article 14(1) of the ICCPR. The African Commission's Principles and Guidelines on the Right to a Fair Trial states that

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<sup>48</sup> African Commission Guidelines to a Fair Trial, *supra* note 36,

the right to a fair trial includes “an entitlement to have a party’s rights and obligations affected only by a decision based solely on evidence presented to the judicial body”.<sup>49</sup> In the case of *Boldea v Romania*,<sup>50</sup> the European Court on Human and People’s Rights [hereinafter European Court] held that there had been a violation of the right to a fair trial under the European Convention’s Article 6(1) when a court in a defamation suit had not interpreted all the essential elements of the offence or examined the evidence adduced by the applicant. In this case, the court of first instance failed to respond to essential legal and factual arguments raised by the defense.<sup>51</sup>

34. The judgment was read in public on the 25<sup>th</sup> of May 2015. At that time, the court did not provide any reasoning for rejecting the testimony from Marques de Morais, where he stated that his complaint to the authorities was made after diligent research and interviews with victims of the abuse. Nor did it address the argument raised by Marques de Morais that he followed established journalistic practices with regards to evaluating the veracity of the witnesses’ accounts or that he had contacted ITM Mining Company on several occasions and on one occasion he had brought along a mother who had lost her two sons to tell her story.<sup>52</sup> After failing to reach the complainants, he resorted to directing his questions to the Board of the National Diamond Company of Angola (Endiama) as advised by Endiama, which would in turn notify the companies concerned.<sup>53</sup>
35. Rather than addressing any of these claims, the court adopted the prosecution’s theory without explanation. Namely, that Marques de Morais’ admission that he never spoke with the generals somehow established that he knowingly made false accusations. As the accused’s intent is a fundamental element of the alleged crime, the court was obliged to address these claims in its judgment.
36. The court neither cited any jurisprudence in support of its holding nor did it address the substantial body of jurisprudence concerning the freedom of expression and the press which was clearly relevant to the case. The prosecution of a journalist for presenting allegedly slanderous denunciations to a public authority raises very serious concerns regarding freedom of expression and of the press. The protection of these fundamental freedoms is essential to safeguarding democratic governance and the public’s right to

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<sup>49</sup> See African Commission Guidelines to a Fair Trial, *supra* note 36 at Section A, Article 2(h).

<sup>50</sup> *Boldea v Romania*, European Court of Human Rights, Application No 19997/02 (2007).

<sup>51</sup> The European Court on Human Rights embodies the same rights and obligations as the ICCPR and African Charter and hence is instructive in interpreting the provisions of both the ICCPR and African Charter.

<sup>52</sup> Trial Observation Minutes, May 14 2015 Proceedings.

<sup>53</sup> *Id.*

know the truth, especially the truth about public officials who open themselves up to such scrutiny.<sup>54</sup>

37. The UN Human Rights Committee, the body charged with authoritative interpretation and enforcement of the ICCPR, has stated that defamation laws should not serve in practice to stifle freedom of expression.<sup>55</sup> The Committee went further to state that as regards comments about public figures, states should avoid penalizing or rendering unlawful untrue statements that have been published in error but without malice.<sup>56</sup>
38. Criminal penalties are rarely, if ever, appropriate for allegations of slander. The Committee has held that imprisonment for defamation is never an appropriate penalty.<sup>57</sup> The African Court on Human and People's Rights recently held that a prison sentence is rarely, if ever, a proportional punishment for expressions of opinion.<sup>58</sup> The failure of the court to address this substantial body of jurisprudence calls into question the overall fairness of the proceedings.

b. Right to an Impartial Tribunal

39. . The principle of an impartial tribunal is enshrined in many universal and regional human rights instruments.<sup>59</sup> The right requires that neither the judiciary in general nor judges in particular be subjected to or under influence or pressure from any branch of the State or any party to the proceedings. A principle underlying the independence and impartiality of the judiciary is that “*justice must not only be done, it must also be seen to be done.*”<sup>60</sup>
40. The observers noted several incidents that gave rise to concerns regarding impartiality. On the first day of the hearing, observers witnessed the judge accompanied by the prosecutor and the complainants' lawyers enter the court together from the back, thus

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<sup>54</sup> See *Lingens v. Austria*, European Court of Human Rights, Application No. 9815/82 (1986). In the *Lingens* case, the European Court held that “the limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance”.

<sup>55</sup> United Nations Human Rights Committee, General Comment No. 34, U.N. Doc CCPR/C/GC/34 (2011).

<sup>56</sup> *Id.*

<sup>57</sup> General Comment No. 34, *supra* note 55.

<sup>58</sup> *Lohe Issa Konate v Burkina Fasso*, African Court of Human and People's Rights, Application No. 004/2013, available at <http://www.african-court.org/en/images/documents/Judgment/Konate%20Judgment%20Engl.pdf>

<sup>59</sup> ICCPR, *supra* note 12 at art. 14 (1); UDHR, *supra* note 13 at art. 10, European Convention Article 6(1), African Charter, *supra* note 11 at art. 7.

<sup>60</sup> *Micallef v Malta*, European Court of Human Rights, Application No. 17056/06 (2009).

raising concern that they may have had *ex parte* communications to which the defense did not have an opportunity to respond.

41. Furthermore the observer witnessed untoward hostility towards a member of the defense team.<sup>61</sup> In one incident at the beginning of the proceedings on the 23<sup>rd</sup> of April 2015, the judge immediately ordered that Mr. David Mendes, who had previously appeared before the judge in the first proceedings, vacate the court room on the basis that he was not listed on record as being part of the defense team. Mr. Mendes tried to address the court in response to the judge's order which request was denied by a visibly angered judge. The judge insisted that Mr. Mendes leave the defense table and was only reinstated after the defendant confirmed that he wished to be represented by both Mr. Luis Nascimento and Mr. David Mendes.

## F. Presumption of Innocence

42. Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law.<sup>62</sup> This presumption of innocence places the burden of proof on the prosecution.<sup>63</sup> The court therefore had an obligation to ensure that the burden of proof rested with the prosecution throughout the trial.
43. The defendant was charged under Article 245 of the Penal Code which provides that "*[H]e who in writing with signature or without it, do share or slanderous denunciation against any person directly to the public authority, shall be punished with imprisonment of one month to one year and suspension of political rights for five years.*"<sup>64</sup> The prosecution's indictment alleged that Marques de Morais knew that his allegations of crimes against humanity were false and thus he was guilty of slanderous denunciation under Article 245.<sup>65</sup> The burden was therefore on the state to first prove a *prima facie* case against the defendant<sup>66</sup> that is to prove beyond a reasonable doubt that the allegations were false and that Marques de Morais knew this at the time of making his complaint to the authorities.
44. At no point during the proceedings did the prosecution produce evidence that Marques de Morais knew his allegations to be false or even disregarded information that suggested

<sup>61</sup> Trial Observation Minutes, April 23, 2015.

<sup>62</sup> ICCPR, *supra* note 12 at art. 14(2).

<sup>63</sup> See African Commission Guidelines to a Fair Trial, *supra* note 36 at Section N 6 (e) (i). See also United Nations Human Rights Committee, General Comment No.32,U.N. Doc. CCPR/C/GC/32 (2007) at paragraph IV

<sup>64</sup> Unofficial Translation of the Angolan Penal Code.

<sup>65</sup> Indictment, *supra* note 22.

<sup>66</sup> *Telfner v Austria*, European Court of Human Rights, Application No. 33501/96 (2001).

that the information was false. Rather, the prosecution shifted the burden to Marques de Moraes to prove that he had tried to reach the generals for comment.

45. This shifting of the burden to the defense is particularly troubling in a case of alleged “slandorous denunciation”, as it has the effect of deterring victims from seeking redress through proper legal channels. International law guarantees the right to a remedy for human rights violations.<sup>67</sup> This right imposes upon states an obligation to investigate and prosecute allegations of human rights violations. Under the doctrine of command responsibility, which has been recognized in international law for centuries, Angolan authorities also had the responsibility to investigate allegations that the military officers had effective control of the Angolan military forces allegedly responsible for these abuses and had failed to take measures to prevent abuses about which they knew or should have known were being committed.<sup>68</sup>
46. The Angolan Constitution also unequivocally provides a right to a remedy under Article 73 which states that “everyone shall have the right to individually or collectively submit petitions, accusations, claims or complaints to sovereign bodies or any other authorities in defense of their rights, the Constitution, the laws or the general interest, and shall also have the right to be informed of the result of their consideration within a reasonable period of time.”<sup>69</sup>
47. Marques de Moraes therefore had a right to present evidence he had collected and to ask for an investigation by public authorities into widespread accounts of crimes against humanity. Only these government authorities have the full investigative powers of the State capable of ascertaining the legal responsibility of the accused. It was therefore improper for the court to effectively impose on Marques de Moraes the obligation to confront the generals before asking for an investigation. The prosecution of Marques de Moraes for exercising the right to a remedy could well have a chilling effect upon other crime victims seeking the assistance of the police. It could also give rise to State responsibility for a violation of the ICCPR.

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<sup>67</sup> ICCPR, *supra* note 12 at art. 3(a) “Each State Party to the present Covenant undertakes: “(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.”

<sup>68</sup> See section on Individual Criminal Responsibility, Article 6, Statute of the International Tribunal for Rwanda, November 8 1994; See also Article 7 (3) Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25 1993.

<sup>69</sup> Constitution of the Republic of Angola, January 21, 2010.



#### **IV. CONCLUSION**

The ABA Center for Human Rights found that the trial of Rafael Marques de Morais was marred by significant irregularities in violation of the right to a fair trial. It will continue to monitor the case of Marques de Morais, who has appealed his conviction, to determine whether these violations are remedied on appeal.