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June 2014

Case Against Callixte Mbarushimana and Sylvestre Mudacumura

Introduction

Callixte Mbarushimana is considered to be one of the main leaders of the Democratic Forces for the Liberation of Rwanda (Forces Démocratiques pour la Libération du Rwanda, Forces Combattantes Abacunguzi — FDLR-FCA, FDLR), an armed group responsible for committing numerous crimes in North Kivu and South Kivu, in the Democratic Republic of Congo (DRC). On September 28, 2010, Pre-Trial Chamber I of the International Criminal Court (ICC) issued an arrest warrant against him for five counts of crimes against humanity and six counts of war crimes. This was the first case before the ICC regarding crimes committed in the DRC's Kivu regions. It, therefore, had a particular significance for the affected populations.

On December 16, 2011, however, Pre-Trial Chamber I refused to confirm the charges. As a result, Mbarushimana was released on December 23, 2011, and after an appeal from the prosecutor, the Appeals Chamber issued a judgment upholding the Pre-Trial Chamber's decision. Nevertheless, the prosecutor is not prevented from requesting confirmation of charges against Mbarushimana at a later time, as long as the request is supported by additional evidence.

On July 13, 2012, Pre-Trial Chamber I issued an arrest warrant against Sylvestre Mudacumura, the alleged supreme commander of the FDLR, for nine counts of war crimes (attacks against the civilian population, murder, mutilation, cruel treatment, rape, torture, destruction of property, looting, and attacks on human dignity) committed in the Kivu regions from January 20, 2009, to the end of September 2010, pursuant to Article 25(3)(b) of the Rome Statute of the ICC. The arrest warrant has yet to be executed and he is currently at large.

The purpose of this paper is to provide a description of the brief proceedings against Callixte Mbarushimana and Sylvestre Mudacumura before the ICC.

Context and Facts

Over the course of two decades, numerous crimes have been committed, and continue to be committed, in the Kivus, many of which can be considered crimes against humanity and war crimes. However, it was only in 2008 that the ICC Prosecutor announced that he would seek to prosecute violations committed in these regions. Until this date, cases regarding the DRC before the ICC related to crimes committed in Ituri, such as those against Thomas Lubanga and against Germain Katanga and Mathieu Ngudjolo.

The FDLR is an armed group established in the DRC after the 1994 Rwandan genocide, comprising Hutu refugees who are still fighting the Rwandan government. It is made up of military and political wings. Until recently many of its officials resided in Europe. The criminal actions of the FDLR constitute one of the major sources of insecurity in eastern DRC today.

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The case against Mbarushimana involved crimes he allegedly committed as Executive Secretary of the FDLR from 2007, presumably reflecting his intentional and personal contribution to organizing an offensive against the civilian population of the Kivus. This major offensive component, described as a humanitarian catastrophe by the prosecution, was intended to eventually obtain political concessions and was orchestrated through an international media campaign.

The Proceedings

Arrest Warrant

On September 28, 2010, Pre-Trial Chamber I issued a sealed arrest warrant against Mbarushimana for five counts of crimes against humanity (murder, torture, rape, inhumane acts, and persecution) and six counts of war crimes (attacks against the civilian population, murder, mutilation, torture, rape, inhumane treatment, destruction of property, and looting) pursuant to article 25(3)(d) of the Rome Statute. The crimes were allegedly committed between January 2009 and August 20, 2010, the date of the prosecution's request for the arrest warrant. The arrest warrant was unsealed on October 11, 2010.¹ Mbarushimana was arrested by the French authorities on October 11, 2010, and transferred to The Hague on January 25, 2011.

Decision Not to Confirm Charges

The confirmation of charges hearing was held from September 16-21, 2011, before Pre-Trial Chamber I. On December 16, 2011, the Pre-Trial Chamber decided not to confirm the charges.² The presiding judge, Justice Sanji Mmasenono Monageng, issued a dissenting opinion, in which she stated that Mbarushimana should be committed to trial for part of the charges. A total of 132 victims participated in the proceedings.



Callixte Mbarushimana, behind his lawyers, at the opening of the confirmation of charges at the International Criminal Court, The Hague, September 16, 2011. © ICC-CPI/ANP Jerry Lampen/ POOL

War Crimes. The Pre-Trial Chamber stated that from as early as January 20, 2009, to December 31, 2009, a noninternational armed conflict had taken place in North and South Kivu between the FDLR and the Armed Forces of the DRC, which were supported on occasion by the Rwanda Defense Force (RDF). The Pre-Trial Chamber found that these troops

¹ ICC-01/04-01/10-2.

² ICC-01/04-01/10-465-Red.

had committed war crimes in different locations and at different times, in particular in (a) Busurungi and neighboring villages in March 2009 (murder) as well as approximately from May 9-12, 2009 (attacks on civilians, murder, mutilation, rape, cruel treatment, destruction of property and looting); (b) Manje or thereabouts on July 20, 2009 (attacks on civilians, murder, cruel treatment, and destruction of property); (c) Malembe from approximately August 11 to 16, 2009 (attacks on civilians and destruction of property) ; and (d) Mianga or thereabouts on April 12, 2009 (attacks on civilians, murder, and destruction of property). The Pre-Trial Chamber further stated that acts constituting war crimes had been committed in 5 of the 25 incidents identified by the ICC Prosecutor.

Crimes Against Humanity. The majority of the Pre-Trial Chamber found that the prosecution had not proven the contextual elements of crimes against humanity to the required legal threshold, namely, that the acts had occurred in the context of “an attack against the civilian population” pursuant to or in furtherance of a state or organizational policy to commit such an attack within the meaning of Article 7(2)(a) of the Rome Statute. Consequently, the majority concluded that the prosecution had failed to prove that there were substantial grounds to believe that the FDLR had committed crimes against humanity.

Mbarushimana’s Responsibility Pursuant to Article 25(3)(d) – a group acting with a common purpose. Further, the Pre-Trial Chamber found that the two cumulative elements of the mode of liability outlined in Article 25(3)(d) were not met. Regarding the first condition, that is, the existence of “a group of persons acting with a common purpose,” the majority, finding that there were no substantial grounds to believe that the FDLR had carried out a policy to attack the civilian population, concluded that there were also no substantial grounds to believe that the FDLR acted with a common purpose. Despite the absence of this first condition, which would relieve the majority from examining the second condition (whether Mbarushimana had contributed “in any other way” to the FDLR crimes), the majority proceeded to its analysis,³ and concluded that Mbarushimana had not contributed to the alleged crimes. The majority added, however, that had this contribution existed, it should “at least be significant” to generate responsibility under article 25(3)(d).⁴ Monageng dissented.

Prosecutor’s Investigative Techniques. The Pre-Trial Chamber expressed concern regarding techniques frequently used by some investigators of the Office of the Prosecutor. These techniques seemed inappropriate in light of the objective set forth in Article 54(1)(a) of the Rome Statute, namely, to establish the truth by “investigat[ing] incriminating and exonerating circumstances equally.” According to the Pre-Trial Chamber, the investigator, convinced of his theory and hypothesis, formulated his questions in a leading manner and expressed his dissatisfaction, his impatience, or his disappointment when the witness’ response did not entirely hold up to his expectations.

Dissenting Opinion of the Presiding Judge. As noted above, Monageng did not agree with the majority’s assessment of the evidence presented by the prosecutor. She concluded that the evidence showed substantial grounds to believe that an attack was launched pursuant to an organizational policy against the civilian population and that this attack was of a systematic nature. She also concluded that there were substantial grounds to believe that Mbarushimana knowingly facilitated the criminal activity and the criminal purpose of the FDLR leadership within the terms of Article 25(3)(d). As a result, she considered that Mbarushimana should have been committed to trial for seven counts of war crimes (at-

³ The Rome Statute, Article 25(3) states: “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:: (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or ii) Be made in the knowledge of the intention of the group to commit the crime.” [Emphasis added].

⁴ ICC-01/04-01/10-465-Red, para 279–283. In doing so, a judge will perhaps embellish a qualifying element regarding the contribution, adding a piece of information that is not in the text but is interpretable in light of international jurisprudence, especially that of the Special Tribunal for the former Yugoslavia.

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Acknowledgments

ICTJ is grateful to the Swedish International Development Cooperation Agency for the support it provided for this research.



tacks launched against the civilian population, murder, mutilation, cruel treatment, rape, destruction of property, and looting) and three counts of crimes against humanity (murder, inhumane acts, and rape).

The Judgment of the Appeals Chamber⁵

The prosecution appealed the majority’s decision on the grounds that, first, it was not the role of the Pre-Trial Chamber to evaluate the reliability of each piece of evidence, but that of the Trial Chamber when the case is committed to trial; and second, Article 25(3)(d) does not require that the contribution to committing the offence be “significant.”

On the first issue, the Appeals Chamber found that even at this stage in the proceedings the Pre-Trial Chamber could assess the ambiguities, incoherencies, contradictions, and doubts affecting the witnesses’ credibility. However, given that the Pre-Trial Chamber has a different function from the Trial Chamber, the decisions concerning witnesses were only presumptive.

On the second issue, the Appeals Chamber considered the prosecutor’s argument irrelevant because the Pre-Trial Chamber had ruled that there was no group with a common purpose and that no contribution whatsoever was made. Judge Silvia Alejandra Fernández de Gurmen-di appended a separate opinion in which she maintained that the Appeals Chamber should have ruled on this last question. According to her, the expression “in any other way” in Article 25(3)(d) does not require a minimum degree of contribution⁶ and includes any form of contribution that would not fit in other categories of Articles 25(3).⁷

⁵ ICC-01/04-01/10-514 OA4.

⁶ ICC-01/04-01/10-514 OA4, para 7–9. See note 3. Paragraph (d) of Article 25(3) states that the person in charge “In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.”

⁷ Article 25(3): In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: : a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (...) e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.