ICTR-99-50-A
27-11-2012
(1383/A - 1370/A)

1383/A

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

IN THE APPEALS CHAMBER

NO. ICTR-99-50-A

BEFORE: The Hon. Theodor Meron, Presiding
The Hon. Patrick Robinson
The Hon. Liu Daqun
The Hon. Andresia Vaz
The Hon. Bakhtiyar Tuzmukhamedov

Acting Registrar: Pascal Besnier

Date: 26 November 2012

JUSTIN MUGENZI AND
PROSPER MUGIRANEZA

VS.

THE PROSECUTOR

PROSPER MUGIRANEZA'S MOTION FOR LEAVE TO FILE POST-SUBMISSION BRIEF LIMITED TO THE EFFECTS OF THE APPEALS CHAMBER'S DECISIONS IN *GOTOVINA* AND *GATETE* AND PROPOSED POST-SUBMISSION BRIEF

FOR THE PROSECUTION:

Mr. Hassan Bubacar Jallow
Mr. James R. Arguin
Mr. George W. Mugwanya
Ms. Evelyn Kamu
Mr. Michael Mihary Andrianaivo

FOR THE DEFENCE:

Kate Gibson and Christopher Gosnell, for Justin Mugenzi
Tom Moran and Cynthia J. Cline for, Prosper Mugiraneza

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1. Since Mugiraneza's oral arguments on appeal on October 8, the Appeals Chambers of the ICTR and the ICTY have issued two opinions which are relevant to the Chamber's consideration of the issues raised in this appeal. The decisions are *Prosecutor v. Gotovina*, Judgment, No. IT-06-90-A (16 November 2012), and *Gatete v. Prosecutor*, Judgment, No. ICTR-00-61-A (9 October 2012).

2. Mugiraneza moves the Appeals Chamber for leave to file a post-submission brief limited to the effects of these decisions on applicable issues in his case. The Appeals Chamber's analysis in *Gotovina* on review of Trial Chambers' factual determinations is relevant to the issues raised in his appeal challenging the sufficiency of the evidence to support convictions on Counts 1 and 4 which were based on circumstantial evidence. In addition, the Appeals Chamber's analysis of the indictment and the possibility of convicting under other theories also are relevant to his appeal. The sole issue decided in *Gatate* relevant to Mugiraneza's appeal is the Appeals Chamber's consideration of the right of trial without undue delay.

3. Both of these decisions were returned after oral argument and were not available for argument. In the interests of justice, Mugiraneza seeks leave to file the attached post-submission brief discussing the issues set out in paragraph 2 and their implications to his appeal.

Word Count: 219

Tom Moran

Cynthia J. Cline

1381A

Annex A
Proposed Post-Submission Brief

13801/A

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

IN THE APPEALS CHAMBER NO. ICTR-99-50-A

BEFORE: The Hon. Theodor Meron, Presiding
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FOR THE DEFENCE:

Kate Gibson and Christopher Gosnell, for Justin Mugenzi
Tom Moran and Cynthia J. Cline for, Prosper Mugiraneza

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I. INTRODUCTION

1. In his appeal, Mugiraneza asserted, among other issues, that there was insufficient evidence to support his conviction under either Count 1 or Count 4, that the inferences of guilt accepted by the Trial Chamber were not the only reasonable inferences and that there was no evidence that Mugiraneza was aware of the contents of the president's 19 April 1994 speech in Butare. He also asserted his right to a trial without undue delay was violated. The ICTY Appeals Chamber decision in *Prosecutor v. Gotovina*, Judgment, No. IT-06-90-A (16 November 2012), and the ICTR Appeals Chamber decision in *Gatete v. Prosecutor*, Judgment, No. ICTR-00-61-A (9 October 2012),[1] are relevant to these issues.

II. *GOTOVINA*

2. Read as a whole, the Appeals Chamber's judgment in *Gotovina* found the Trial Chamber's findings insufficient as to membership in a JCE to expel Serbs and the unlawfulness of artillery attacks due since they were based in an arbitrary 200-meter standard for errors in artillery shell impact points. In the instant case, the Trial Chamber's convictions on Counts 1 and 4 were based on Mugiraneza's presence at the 17 April 1994 cabinet meeting, a finding that he voted to remove the Butare prefect for genocidal reasons and membership in a JCE with the president to incite genocide within the meaning of Count 4 of the indictment. It follows that the reasoning in *Gotovina* is relevant to whether the Trial Chamber erred in convicting Mugiraneza on either Count 1 or Count 4 of the indictment. *Gotovina* also is relevant as to whether the Trial Chamber erred in determining that indictment error had been rendered harmless or cured.

A. Notice of the Charges in the Indictment – Cure

3. The *Gotovina* indictment alleged simply that Croatian forces shelled civilian areas. The Appeals Chamber called this allegation "somewhat general" but found it was rendered harmless by the Prosecutor's pre-trial brief which specifically listed the four towns in

[1] All citations to *"Gotovina"* or *"Gatete"* are to the Appeals Chambers' judgments unless otherwise stated.

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question and alleged it was part of "an indiscriminate shelling campaign."[2] Therefore, the Appeals Chamber correctly found that the indictment error was cured or rendered harmless by the Prosecutor's pretrial brief.

4. In the instant case, the applicable paragraphs of the indictment charged Mugiraneza with being a member of the Interim Government which removed the prefect and with not contradicting the president's purportedly genocidal speech. As pointed out in paragraph 13 of Mugiraneza's Reply Brief, the Prosecutor's pretrial brief alleges simply that Mugiraneza participated in meetings and did not publicly disavow actions taken, did not object to actions taken and attended the Butare speech with knowledge of the contents of the president's speech.[3]

   a. Unlike the Prosecutor's pretrial brief in *Gotovina*, the pretrial brief in the instant case does not allege any acts by Mugiraneza other than attending the Butare speech with actual knowledge of the contents of the president's speech.[4] Therefore, in the absence of both pleadings charging him with affirmative acts of agreeing to the prefect's removal and attending the president's speech with intent to encourage his incitement to genocide the indictment was insufficient and not cured.

   b. In *Gotovina*, the indictment alleged indiscriminate artillery fire and that general allegation was fleshed out in the Prosecutor's pretrial brief. In the instant case, the indictment does not charge Mugiraneza with the acts for which he was convicted: agreeing to the prefect's removal and attending the speech with to encourage the president's incitement to genocide. Therefore, unlike *Gotovina*, Mugiraneza was convicted of acts not alleged in the indictment even in general terms.

B. The 200-Meter Standard – Sufficiency of the Evidence

5. The *Gotovina* Trial Chamber's adoption of the 200-meter standard was based on the

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[2]*Gotovina* Judgment, para. 46.

[3]RP 958/A.

[4]It also alleged certain omissions such as failure to disassociate himself from the Interim Government's purported genocidal policy of removing officials to promote genocide and failure to contradict the president's speech or to disassociate himself from it.

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testimony of two witnesses concerning the accuracy of artillery.[5] Based on that standard, the Trial Chamber uniformly found that artillery landing within 200 meters of a legitimate target could be justified as part of an attack for legitimate military advantage while impact strikes further than 200 meters were considered indiscriminate attacks.[6]

a. The Appeals Chamber majority held that the Trial Chamber's 200-meter rule was not supported by the evidence or calculations from evidence before the Trial Chamber. The majority wrote:

> The Appeals Chamber finds that there was a need for an evidentiary basis for the Trial Chamber's conclusions, particularly because these conclusions relate to a highly technical subject: the margin of error of artillery weapons in particular conditions. However, the Trial Chamber adopted a margin of error that was not linked to any evidence it received; this constituted an error on the part of the Trial Chamber. The Trial Chamber also provided no explanation as to the basis for the margin of error it adopted; this amounted to a failure to provide a reasoned opinion, another error.[7]

6. In the *Government II* case, there was no direct evidence other than testimony rejected by the Trial Chamber as to what occurred related to the discussions and Mugiraneza's actions during the 17 April 1994 Cabinet meeting . Nonetheless, the Trial Chamber found that the only reasonable inference was that Mugiraneza assented to the removal of the Butare prefect, thereby joining the Count 1 conspiracy. This in turn led the Trial Chamber to the conclusion that Mugiraneza attended the 19 July ceremony changing prefects in Butare as part of a JCE to incite genocide and that he was aware of the general nature of the president's speech.

7. Like the 200-meter rule adopted by the *Gotovina* Trial Chamber, the *Government II* Trial Chamber's required what the Appeals Chamber called "an evidentiary basis for the Trial Chamber's conclusion." It had none supporting its finding that Mugiraneza assented to the prefect's removal. To the contrary, the only evidence – albeit rejected by the Trial Chamber

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[5] *See generally, Gotovina* Judgment, paras. 52-56.

[6] *Id.*, para. 57.

[7] *Id.*, para. 61.

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– was that he did not object and abstained. Therefore, the Trial Chamber lacked an evidentiary basis for its finding that Mugiraneza was part of the Count 1 conspiracy based on his purported assent to the prefect's removal.

8. This finding, unsupported by the evidence, was subsequently used to "bootstrap" a conviction on Count 4 on a JCE theory that Mugiraneza and others were members of a JCE with the president. Stated simply, the Count 4 conviction is based on the Count 1 conviction. Without the conspiracy conviction, there would be no evidence that Mugiraneza attended the 19 April speech with the knowledge that 1) the president would incite genocide and 2) that his presence would aid or encourage the president. This is similar to the *Gotovina* Appeals Chamber's finding as to the JCE to expel Serbs. The Appeals Chamber wrote:

> The Appeals Chamber observes that the Trial Chamber's conclusion that a JCE existed was based on its overall assessment of several mutually-reinforcing findings, but that its findings on the JCE's core common purpose of forcibly removing Serb civilians from the Krajina rested primarily on the existence of unlawful artillery attacks against civilians and civilian objects in the Four Towns. Having reversed the Trial Chamber's findings related to unlawful artillery attacks, the Appeals Chamber, Judge Agius and Judge Pocar dissenting, cannot affirm the Trial Chamber's conclusion that the only reasonable interpretation of the circumstantial evidence on the record was that a JCE aiming to permanently remove the Serb civilian population from the Krajina by force or threat of force existed.[8]

9. Just as the *Gotovina* Trial Chamber's findings were reversed because they were based on a factual finding unsupported by the evidence, the Count 4 conviction against Mugiraneza is based on the Count 1 conviction which is not supported by the evidence. The two convictions are intertwined. There is no direct evidence that Mugiraneza either voted to remove the Butare prefect or that he attended the 19 April meeting with the knowledge that the president make a direct and public incitement to genocide. As discussed in Mugiraneza's opening and reply briefs, the evidence raises inferences other than his guilt. The ICTY Appeals Chamber's reasoning in *Gotovina* only reinforces those arguments. The Appeals Chamber should apply its reasoning in *Gotovina* and enter judgments of acquittal for

[8] *Gotovina* Judgment, para. 91 (citations omitted).

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Mugiraneza on both Count1 and Count 4.

III. *GATETE*

10. As applied to Mugiraneza's appeal, the most important holdings in *Gatete* are the recognition that lengthy pretrial incarceration standing alone can constitute prejudice *per se* and the Chamber's analysis including the Prosecutor with the "authorities" in evaluating causes for delay. These analyses are relevant to Mugiraneza's claim of violation of his right to a trial without undue delay.

A. Delay Constituting Prejudice *Per Se*

11. The *Government II* Trial Chamber did not consider lengthy delay *per se* prejudice.[9] In *Gatete,* this Chamber found length of delay prejudicial *per se.*[10] This is a recognition that Mugiraneza can be prejudiced simply by the 13-year time since his arrest. As he argued during oral arguments, he is prejudiced by lengthy incarceration and the loss of both his ability to provide for his family and to be with them. The Appeals Chamber should find that the length of delay standing alone constitutes prejudice to Mugiraneza (and presumably Mugenzi).

B. Considering the Actions of "the Authorities" and the Prosecutor Together

12. This Chamber in *Gatete* analyzed the actions of the Prosecutor and other authorities together in determining that the delay was undue.[11] In the instant case, the Trail Chamber always analyzed the actions of the Prosecutor separately from those of the other authorities. Mugiraneza asserts the Trial Chamber's analysis was clearly incorrect as a matter of law.

13. The Prosecutor is one of the three statutory arms of the Tribunal, along with the Judiciary and the Registry. It is the engine which drives the Tribunal.

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[9]*See e.g. Prosecutor v. Biimungu,* Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay;, No. ICTR-99-50-T (23 June 2010), paras. 17-18; *Prosecutor v. Bizimungu,* Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance, No. ICTR-99-50-T (14 June 2007), para. 21; *Prosecutor v. Bizimungu,* Decision on Prosper Mugiraneza's Second Motion to Dismiss Indictment for Deprivation of His Right to Trial Without Undue Delay, No. ICTR-99-50-T (29 May 2007), paras. 27-28.

[10]*Gatete,* para. 44.

[11]*Id.,* at 21, 23.

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a. Cases do not begin until the Prosecutor files an indictment. It is the Prosecutor who decides the contents of the indictment and the number of accused. The indictment itself constitutes the roadmap for the trial and appeal. So, for example, in *Gatete* this Chamber looked at the fact that it was a one-accused case.[12]

b. If trials are prolonged and judgment writing delayed for years due to the large number of accused in a case, that is not the fault of the accused. The Prosecutor made the strategic choice in the instant case (and numerous others) to try multiple accused in one trial. It chose the number of counts to include in the indictment and the full breadth and depth of the allegations therein. In the instant case, the Prosecutor alleged multiple counts covering much of Rwanda with some counts applicable only to one accused. The Prosecutor's strategic decisions unduly lengthened the trial with the presentation of both defence and prosecution evidence on counts which did not effect the majority of the accused.

c. The conduct of the authorities other than the Prosecutor also caused undue delay of proceedings in the Tribunal in both the *Government II* case and others. Mugiraneza already has cited to several United Nations reports from the auditors and others showing that internal disputes between the Prosecutor and the Registrar caused delays. One need only look at the reports on completion strategy to see that other decisions made by UN and Tribunal authorities caused delays. For example, there are several reports of difficulty in retaining staff due to downsizing and the inability to offer staff long term contracts.[13] The ICTY has reported similar problems.[14] The

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[12] *Id.*, para. 29.

[13] *See e.g.*, U.N. Doc S/2011/317, Report on Completion Strategy of the International Criminal Tribunal for Rwanda (as of 12 May 2011) (18 May 2011), paras. 44-46; U.N. Doc S/2010/574, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as of 1 November 2010) (5 November 2010), paras 45-46.

[14] *See e.g.*, U.N. Doc S/2012/354, Assessment and Report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 (continued...)

applicable completion strategy reports, cited in Mugiraneza's earlier briefs, show completion of his judgment was delayed due to staffing problems at the Tribunal. These delays can be called the fault of the General Assembly for failure to appropriate sufficient funds, the Security Council for pushing closure of the Tribunal or the Registry for failure to properly budget and retain staff. What is clear is that Mugiraneza is *not* responsible for this type of delay.

d. Finally, both pretrial delays and delays during trial were caused by limitations on the number of Judges at the Tribunal, the number of courtrooms and the number of crucial staff, namely interpreters.[15] Stated simply, more cases were prosecuted than could be tried expeditiously. Again, this is caused by the Security Council's limitation on the number of Judges and creation of *ad litem* positions until long after they were created for the ICTY, failure to provide sufficient courtrooms for numerous trials and/or failure of the Registry and Chambers to effectively use available courtroom space[16] and other factors. What is clear is that whatever the reason, it was not Mugiraneza's responsibility.

IV. CONCLUSION

14. The *Gotovina* appeal judgment is based on a simple proposition. Convictions cannot be sustained in the absence of evidence forming the basis of a Trial Chamber's inferences and conclusions. Recognition of this crucial proposition is the basis of the ICTY Appeals Chamber's decision to vacate the convictions in that case.

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[14](...continued)
November 2011 to 22 May 2012) (23 May 2012), paras. 47-48, U.N. Doc S/2011/716, Assessment and Report of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May to 15 November 2011) (16 November 2011), paras. 43-48.

[15]While other staff members are crucial to trials, they can readily be hired if funds are available. However, there are a limited number of competent interpreters.

[16]The Registry and Chambers could have "double shifted" the courtrooms and lengthened the court day so that two cases could be tried in one courtroom before different Trial Chambers with one shift in the morning and the other in the afternoon.

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a. In the instant case, the Trial Chamber's convictions of Mugiraneza on Counts 1 and 4 are based on the unsupported conclusion that he supported the removal of the Butare prefect for genocidal reasons.

b. There is no evidence supporting that conclusion. To the contrary, all of the direct evidence presented at trial was that Mugiraneza attended the meeting and did not object to the prefect's removal. His own testimony was that the decision was based on both a decision by party leaders to remove the prefect – a power within their discretion under the multi-party system in Rwanda at that time – and intelligence that the prefect was cooperating with the RPF.

15. Once the conclusion that Mugiraneza assented to the prefect's removal for genocidal reasons is rejected based on lack of evidence, there is nothing to support the Trial Chamber's Count 4 conclusion that Mugiraneza was part of a JCE with the president and others and knew at least in general that the president's speech was to be genocidal.

16. *Gatete* shows that the factors in determining whether there is a violation of the right to trial without undue delay cannot be looked at separately. Rather, the five factors interact and they must be viewed as a whole. The Trial Chamber's error on this issue was to isolate the factors instead of looking at them as a package.

Word Count: 2,745

Tom Moran

Cynthia J. Cline

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