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Judge Patrick Robinson
Judge Liu Daquan
Judge Andresia Vaz
Judge Bakhtyiar Tuzmukhamedov

Registrar: Mr. Pascal Besnier

Date: 4 December 2012

ICTR-99-50-A
04-12-2012
(1392/A-1384/A)

JUSTIN MUGENZI

PROSPER MUGIRANEZA

v.

THE PROSECUTOR

Case No. ICTR-99-50-A

PROSECUTION'S RESPONSE TO:

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

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A. Introduction

1. After receiving all written submissions on appeal from Mugiraneza, Mugenzi and the Prosecutor pursuant to Rules 111, 112 and 113 of the Tribunal's Rules of Procedure and Evidence, the Appeals Chamber heard the parties' oral submissions on 8 October 2012 in Arusha, and adjourned the case for deliberations. The Appeal Chamber is currently adjourned for deliberations.

2. On 27 November 2011, Mugiraneza filed a Motion[1] seeking leave of the Appeals Chamber to file post-appeal hearing submissions. Mugiraneza claims that the proposed submissions are limited to what he alleges are the effects of findings in two recent Appeals Chamber Judgements in *Gotovina* and *Gatete*[2] on the Chamber's approach to evidence, pleading and undue delay.[3] According to Mugiraneza, the two Judgements, issued since his oral arguments on appeal are relevant to the Chamber's consideration of the issues above in this appeal.[4] Mugiraneza further argues that it is in the interests of justice to consider his submissions since at the time of the appeal hearings the two Judgements were not available for oral argument.[5] He also attaches the proposed post-appeal hearing submissions to his Motion.[6]

3. The Prosecutor opposes the Motion because, as will be shown below, it does not fall within the ambit of post-appeal hearing submissions which may be exceptionally considered by the Appeals Chamber. It should thus be dismissed and expunged from the appeal record. In the totality of the circumstances, Mugiraneza's submissions constitute an abuse of process and the resources of the Tribunal. Besides dismissing and expunging the submissions from the record, the Chamber should deny Mugiraneza any fees associated with their

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[1] Prosper Mugiraneza's Motion for Leave to File Post-Submission Brief Limited to the Effects of the Appeals Chamber's Decisions in *Gatovina* and *Gatete* and Proposed Post-Submission Brief (hereinafter the "Motion"), dated 26 November 2012 but filed on 27 November 2012.
[2] *Prosecutor v. Gatovina*, Appeal Judgement, Case No. IT-06-90-A, 16 November 2006 and *Gatete v. Prosecutor*, Appeal Judgement, Case No. ICTR-00-61-A, 9 October 2012.
[3] Motion, para. 2.
[4] Motion, para. 1.
[5] Motion, para. 3.
[6] *See* Motion, Registry pages 1381/A-1370/A (hereinafter "Proposed Brief").

filing.

4. In the alternative, and without prejudice to the above, should the Appeals Chamber receive Mugiraneza's Motion and submissions, it should dismiss them on the merits. In the proposed post-appeal hearing submissions, Mugiraneza repeats the arguments he raised in both written and oral submissions, and does not demonstrate how the findings in *Gotovina* and *Gatete* represent anything new or extraordinary to justify a departure in the Tribunal's jurisprudence, and/or to support his appeal.

B. Submissions

Summary dismissal

5. Mugiraneza seeks to justify his post-appeal hearing submissions on the fact that the *Gotovina* and *Gatete* Judgements were not available at the time of the oral hearings. The Prosecutor submits that this does not justify consideration of Mugiraneza's post-appeal submissions by the Appeals Chamber. The Appeals Chamber may only consider post-appeal hearing submissions if they relate to a variation of the grounds of appeal,[7] or if the Appeals Chamber has made a specific request to the parties for further information.[8] Neither of these circumstances exists in the present case, so as to justify the granting of Mugiraneza's request. Hence the proposed brief should not be considered further by the Appeals Chamber.[9]

6. Furthermore, as the Appeals Chamber has held in the *Muvunyi* case, in preparing a Judgement, the Chamber considers all relevant jurisprudence, including decisions issued after the hearing of an appeal.[10] Therefore, Mugiraneza's request to file submissions addressing the alleged impact of the two Judgements on his appeal is without merit and redundant – because, even

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[7] *Muvunyi*, Case No. ICTR-00-55A-A, Decision on Muvunyi's Request for Consideration of Post-Hearing Submissions, 18 June 2008, para. 6. See also Rules, Rule 108.
[8] *Id.*
[9] *Muvunyi*, Case No. ICTR-00-55A-A, Decision on the Prosecutor's Motion to Expunge a Submission from the Record, 25 April 2008, para. 7.
[10] *Muvunyi*, Case No. ICTR-00-55A-A, Decision on Muvunyi's Request for Consideration of Post-Hearing Submissions, 18 June 2008, para. 6.

if the two Judgements were relevant, the Appeals Chamber would consider them without any additional submissions from the parties. As the Appeals Chamber has done in similar circumstances in the *Muvunyi* case, it should dismiss Mugiraneza's Motion and submissions, and also order that they are expunged from the record.

Unfounded on the Merits

7. If the Appeals Chamber were to receive Mugiraneza's Motion and submissions, it should in any event find that they are without any merit. The findings in the *Gotovina* and *Gatete* Judgements that Mugiraneza invokes do not represent anything new or extraordinary in the Tribunal's jurisprudence as to justify a departure in that jurisprudence; and/or they do not support Mugiraneza's appeal in any way.

Gotovina: Sufficiency of pleading and evidence

8. Whether or not there is sufficient evidence to support a conviction is a matter that lies in the discretion of a Trial Chamber.[11] No conviction can be entered in the absence of evidence.[12] Here, Mugiraneza claims that, in *Gotovina*, the Appeals Chamber's overturning of a conviction relating to the 200-metres rule due to insufficiency or absence of evidence, justify his proposed submissions, and that the finding in *Gotovina* advances his case on appeal.[13] But as shown above, Tribunal jurisprudence has consistently underscored that no conviction can stand when there is no evidence. Moreover, because a determination as to whether evidence is sufficient, is case-by-case, and is a matter that falls within a Trial Chamber's discretion, Mugiraneza's wholesale invocation of the Appeals Chamber's evaluation of the evidence in *Gotovina*, is misguided and irrelevant to his case.

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[11] *Musema* Appeal Judgement, paras. 18 and 20.
[12] *Rutaganda* Appeal Judgement, para. 22.
[13] Proposed Brief, paras. 5-9.

9. In invoking *Gotovina,* Mugiraneza's claim that there was no direct evidence to support his conviction[14] is a reflection of a serious misunderstanding of what in law constitutes evidence, and a distortion of the Trial Judgement. Evidence is not limited to direct evidence, but also extends to circumstantial or indirect evidence – indeed, a conviction can be based on circumstantial or indirect evidence.[15] As argued in the Prosecutor's Respondent Brief and oral submissions before the Appeals Chamber,[16] the Trial Chamber committed no error in relying on the totality of the evidence before it in reaching the convictions against Mugiraneza and Mugenzi.

10. Whether or not the charges against an accused are sufficiently pled is also a case-by-case inquiry that turns on the question whether the Indictment sets out the material facts of the Prosecutor's case with enough detail to inform the accused of the charges so that he may prepare his or her defence.[17] Whether a fact is "material" depends on the nature of the Prosecutor's case.[18] Defects in pleadings may be cured by the Prosecutor's communication to the accused of clear, timely and consistent information detailing the factual basis underpinning the charges, for instance, in a pre-trial brief.[19]

11. Here, Mugiraneza repeats the arguments he has already made in his written submissions,[20] claiming that unlike in *Gotovina,* where the pre-trial brief cured a defective pleading, the alleged defects in the charges against him were not cured.[21] Like the rest of his arguments, the principles detailed in *Gotovina* regarding pleading, are well settled, as shown in the cases cited above.[22] Furthermore, *Gotovina* does not advance Mugiraneza's appeal in any way. In fact, Gotovina's holding that general allegations in an Indictment may be cured by the Prosecutor's provision of further particulars and clarifications,

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[14] Proposed Brief, para. 6.
[15] *Gacumbitsi* Appeal Judgement, para. 115.
[16] Prosecutor's Respondent Brief, paras. 320-329; T. 8 October 2012, pp. 37-44.
[17] *Nahimana et al,* Appeal Judgement, para. 322; *Ntagerura et al,* Appeal Judgement, para. 21.
[18] *Ntagerura et al,* Appeal Judgement, para. 23; *Ndindabahizi* Appeal Judgement, para. 16.
[19] *Ntabakuze* Appeal Judgement, para. 30; *Ntawukuliyayo* Appeal Judgement, para. 189.
[20] Mugiraneza's Appeal Brief, para. 154.
[21] Proposed Brief, paras. 3-4.
[22] See Footnotes 17-19 above.

undermines, other than, advance, Mugiraneza's case. In deciding whether allegations in an Indictment are sufficient, a Chamber must closely and holistically construe the specific Indictment.[23] A similar approach applies to the construction of post-indictment communications.[24] Mugiraneza thus errs in seeking to invoke wholesale Gotovina's evaluation of the pleading in the particular circumstances of that case, without even demonstrating any material similarities between *Gotovina* and his case.

12. In any case, as already argued in the Prosecutor's Respondent Brief,[25] the Indictment's pleadings in paragraphs 6.43 and 6.45 (which underscore the accused's participation in the two meetings to remove the *prefect* and to incite genocide on 17 and 19 April 1994), read together with the Indictment's chapter 7, (which is the charging chapeau), clearly informed the accused of their criminal culpability for conspiracy to commit genocide and direct and public incitement to commit genocide. In any case, if there was any defect, like in *Gotovina*, where the pre-trial brief provided further details and clarifications to a generally plead allegation in the Indictment, the pre-trial brief in this case did exactly that in paragraphs 121 and 289, thereby curing any defect.

Gatete: Undue delay

13. Whether or not pre-trial or trial delay is *undue* is a case-by-case determination[26] that does not depend only or merely on the duration of the delay, but on a consideration of a totality of factors.[27] Moreover, whether or not pre-trial or trial delay is prejudicial, is similarly a case-by-case determination.[28] Here, Mugiraneza's claim that *Gatete* found that any delay is prejudicial *per se*,[29] ignores the Tribunal's well established jurisprudence just

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[23] *Simba* Appeal Judgement, para. 78.
[24] See e.g., *Ntabakuze* Appeal Judgement, paras. 46-55.
[25] Prosecutor's Respondent Brief, paras. 335-338; 372-378.
[26] *Nahimana et al.* Appeal Judgement, paras. 1074, 1076.
[27] *Bizimungu et al.*, Case No ICTR-99-50-T, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber I1 Decision of 2 October 2003 Denying The Motion To Dismiss The Indictment, Demand Speedy Trial And For Appropriate Relief, 27 February 2004, p. 3; *Gatete* Appeal Judgement, para. 238; *Nahimana et al* Appeal Judgement, para. 1074.
[28] *Nahimana et al.*, Appeal Judgement, paras. 1074, 1076.
[29] Proposed Brief, para. 11.

cited,[30] and also is a misreading of the *Gatete* Judgement. Contrary to his submissions, and regardless of whether or not the Prosecutor agrees with all the findings in the *Gatete* Judgement, the Appeals Chamber did not find that any delay, in every case must *per se* be found to be prejudicial. Instead, the Chamber found that the delay in the Gatete was prejudicial *per se* given the specific circumstances that the Chamber found to have existed in the *Gatete* case, namely, the pre-trial delay of seven years was *undue* (because the Prosecution and the relevant authorities resulted in instances of pre-trial delay that could not be explained or justified[31]) and given that the case against Gatete was not particularly complex.[32]

14. Thus, the Chamber held as follows:

> Notwithstanding Gatete's failure to demonstrate that his ability to prepare or present his defence case was prejudiced by the delay, the Appeals Chamber finds that the pre-trial delay of more than seven years was *undue given that the case was not particularly complex. In the circumstances of this case,* the Appeals Chamber considers that this protracted delay and the resulting prolonged pre-trial detention constitute prejudice per se.[33]

> In the light of the foregoing, the Appeals Chamber considers that the Trial Chamber erred in finding that the length of Gatete's pre-trial detention was not *undue* given that it explicitly noted the *conduct of the Prosecution and the relevant authorities resulted in instances of pre-trial delay that could not be explained or justified.* Moreover, the Trial Chamber erred in finding that the case against Gatete was sufficiently complex to justify, in part, a pre-trial delay of more than seven years. Notwithstanding the necessary interval for pre-trial procedure, and the selection of the case for referral to Rwanda...the Appeals Chamber considers that the extent of pre-trial delay *disproportionately exceeds* the time reasonable for a case of such relatively limited scope and scale and constitutes prejudice per se [...].[34]

It is thus clear that, in finding that the delay in the *Gatete* case was prejudicial, the Chamber considered the specific circumstances in that case, including that the delay was *undue*, and the case was not particularly complex to justify the more than seven-year pre-trial detention.

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[30] See Footnotes 26 and 27 above.
[31] *Gatete* Appeal Judgement, paras. 1923.
[32] *Gatete* Appeal Judgement, paras. 44-45.
[33] *Gatete* Appeal Judgement, para. 44. Italicization Added.
[34] *Gatete* Appeal Judgement, para. 45. Italicization Added.

15. As argued in the Prosecutor's Respondent Brief,[35] none of the above specific factors found in *Gatete* existed in the Government II case – this case was, among others, particularly complex and of a huge size, and given the totality of all the circumstances, the delay was not undue and was un-prejudicial. Therefore, the *Gatete* Judgement does not support Mugiraneza's submissions.

16. Finally, Mugiraneza claims that, unlike in *Gatete*, when dealing with the conduct of the "authorities," the Trial Chamber here did not consider together the conduct of the Prosecutor and other authorities.[36] Firstly, as argued in the Prosecutor's Respondent Brief, Mugiraneza does not substantiate any conduct of the Prosecutor, or the Judges that he alleges contributed to the delay.[37] Secondly, as is clear in paragraphs 73-79 of the Trial Judgement, and in the Chamber's interlocutory decisions on allegations of undue delay,[38] the Chamber undertook a full inquiry that holistically considered all the factors that the Appeals Chamber has identified. Mugiraneza's claims thus distort the Trial Chamber's approach.

C. Relief sought

17. For the foregoing reasons, Mugiraneza's Motion and proposed post-appeal hearing submissions should be expunged from the record, and the Appeals Chamber should deny Mugiraneza any fees associated with this Motion. In the alternative, should the Appeals Chamber received the Motion and the submissions, it should dismiss them in their entirety based on their lack of any merits.

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[35] Paras. 57-88.
[36] Proposed Brief, paras. 12-13.
[37] Prosecutor's Respondent Brief, paras. 76-81.
[38] See e.g. *Bizimungu et al*, Decision on Prosper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial Without Undue Delay, 23 June 2010, paras. 2-19; *Bizimungu et al*, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay, 29 May 2007, paras. 14; 22-39; *Bizumungu et al*, Decision on Prosper Mugiraneza's Third Motion to Dismiss Indictment for Violation of his Right to Trial Without Undue Delay, 10 February 2009, paras. 11-24.

1354/A

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Dated this 4th day of December 2012 at Arusha, Tanzania.

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