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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Karin Hökborg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 28 October 2005

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THE PROSECUTOR

v.

André RWAMAKUBA

Case No. ICTR-98-44C-R98*bis*

DECISION ON DEFENCE MOTION FOR JUDGEMENT OF ACQUITTAL

Rule 98*bis *of the Rules of Procedure and Evidence

Office of the Prosecutor:
Don Webster
Dior Fall
Iain Morley
Adama Niane
Tamara Cummings-John

Defence Counsel
David Hooper
Andreas O'Shea

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal"),

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Karin Hökborg and Gustave Gberdao Kam ("Chamber");

BEING SEIZED of the "Motion for Judgment of Acquittal" ("Motion"), filed by the Defence for the Accused André Rwamakuba ("Defence") on 27 September 2005;

RECALLING the Chamber's Decision granting extension of time for the Prosecution to reply to the Motion;[1]

CONSIDERING the Prosecution Response to the Defence Motion filed on 7 October 2005;

HEREBY DECIDES the Motion pursuant to Rule 73 of the Rules of Procedure and Evidence ("Rules").

INTRODUCTION

1. André Rwamakuba ("Accused") is currently charged with genocide or, alternatively, complicity in genocide pursuant to Article 2 of the Statute of the Tribunal ("Statute"), and extermination and murder, as crimes against humanity pursuant to Article 3 of the Statute.[2]

2. The trial against the Accused commenced on 9 June 2005 with the presentation of the Prosecution's evidence. Eighteen witnesses, including one expert witness and one OTP investigator, were heard by the Chamber during a period of approximately eight weeks.

3. In the instant Motion, the Defence seeks a judgement of acquittal on all charges and counts in the Indictment against the Accused pursuant to Rule 98*bis* and, accordingly, the release of the Accused. The Prosecution opposes the Motion and avers that, at the close of its case, it had established a *prima facie* case against the Accused relating to all counts.

DELIBERATIONS

4. Rule 98*bis* of the Rules provides that, if after the close of the case for the Prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the Indictment, the Trial Chamber shall order the entry of judgement of acquittal in respect of those counts.

5. Pursuant to the jurisprudence of the Appeals Chamber in *Delalic et al.* and *Jelisic* cases interpreting a substantially identical provision,[3] and since then applied by the Trial Chambers of the Tribunal,[4] the scope of Rule 98*bis* is delimited in relation to the

[1] *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C, Decision Granting Extension of Time to File Response to Defence Motion for Judgment of Acquittal (TC), 3 October 2005.

[2] Amended Indictment against André Rwamakuba filed on 23 February 2005. That Indictment has been re-filed on 9 March 2005, due to typographical errors and in accordance with the Order to Re-File the Amended Indictment of 8 March 2005. The Prosecution subsequently filed amended versions of the Indictment on 1 June 2005 in compliance with the Chamber's Decision on Defects in the Form of the Indictment of 26 May 2005 and on 10 June 2005 in compliance with the Oral Orders of 6 and 9 June 2005.

[3] *Prosecutor v. Delalic et al.*, Case No. IT-96-21-A, Judgment (AC), 20 February 2001, par. 434; *Prosecutor v. Jelisic*, Case No. IT-95-10-A, Appeal Judgment (AC), 5 July 2001, par. 37.

[4] *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Defence Motion for a Judgment of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment (Article 98*bis* of the Rules of Procedure and Evidence) and Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence Motion for a Judgment of Acquittal (TC), 27 September 2001

determination of whether the evidence, if believed, is insufficient to sustain a conviction on one or more counts of the Indictment. The test applied is whether there is evidence upon which, if accepted, a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. The key concept is therefore not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it *could.*[5]

6. Accordingly, where some evidence was adduced and that evidence, if believed, could be sufficient for a reasonable trier of fact to sustain, beyond reasonable doubt, a conviction on the particular count in question, a motion for a judgement of acquittal shall be denied. Conversely, where no evidence was adduced in relation to a count, such motion shall be granted.

7. Generally, the sufficiency of the evidence shall be determined without consideration of the reliability and credibility of the available evidence, leaving those matters to the final determination on the case. However, there is one situation in which the Chamber is obliged to consider somehow such matters: "it is where the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case".[6] In this situation, a judgement of acquittal pursuant to Rule 98*bis* of the Rules should also be entered.

8. In the application of the above-mentioned test, the Chamber must evaluate the Prosecution's evidence as a whole looking to the totality of the evidence.[7] It has also been found that there is no need to look at each paragraph of the indictment. The evidence should be examined in relation to counts without also testing the sufficiency of evidence with respect to each paragraph of an indictment.[8] Rule 98*bis* does not require a substantive evaluation of the quality of much of the Prosecution evidence if it were to pronounce on the sufficiency of evidence in relation to each material fact in each paragraph of the indictment.[9]

9. Finally, when adjudicating on a motion for judgement of acquittal, it must also be assumed that the Prosecution's evidence is entitled to credence unless the Chamber determines that no reasonable trier of fact could rely upon it.[10]

10. As a preliminary matter, the Chamber notes that the Defence requests the Chamber to rule on three ancillary matters to its Motion under Rule 98*bis*. First, it invites the Chamber to decide on the admission into evidence of a statement of Witness XV produced by the Defence before deciding on this Motion under Rule 98*bis* of the Rules. Second, the Defence contends that the Chamber may take judicial notice of the fact that Joseph Nzirorera and

("*Semanza* Decision"), par. 14-15; *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence (TC), 20 August 2002 ("*Kamuhanda* Decision"), par. 18; *Prosecutor v. Nyiramasuhuko et al.*, Joint Case No. ICTR-98-42-T, Decision On Defence Motions for Acquittal Under Rule 98*bis* (TC), 16 Decembre 2004 ("*Nyiramasuhuko* Decision"), par. 70; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgment of Acquittal (TC), 2 February 2005 ("*Bagosora* Decision"), par. 6; *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Decision on Tharcisse Muvunyi's Motion for Judgment of Acquittal Pursuant to Rule 98 bis (TC), 13 October 2005 ("*Muvunyi* Decision"), par. 35.

[5] *Ibidem.*

[6] *Semanza* Decision, par. 17; *Kamuhanda* Decision, par. 19; *Nyiramasuhuko* Decision, par. 76-77; *Muvunyi* Decision, par. 37; See also *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, Decision on Defence Motions for Acquittal, 6 April 2000 (TC), par. 28.

[7] *Bagosora* Decision, par. 11 ; *Muvunyi* Decision, par. 40.

[8] *Kamuhanda* Decision; *Nyiramasuhuko* Decision; *Bagosora* Decision, par. 8 ; *Muvunyi* Decision, par. 39.

[9] *Bagosora* Decision, par. 9 ; *Muvunyi* Decision, par. 39.

[10] *Bagosora* Decision, par. 10 ; *Muvunyi* Decision, par. 43.

Mathieu Ngirumpatse were not Ministers in the Interim Government of 8 April 1994, have not been accused of crimes in Butare in any other document before the Tribunal, and, up until the testimony of Witness XV in the instant trial, have never been associated with the Accused. Finally, in the Defence's view, the Chamber could also take notice of the fact that the Kabakobwa massacre was on 22 April and that the Witness HF could not have been a victim of it as this witness testified during this trial.

11. The Chamber is of the view that there is no need to rule on these matters at this stage for addressing the Defence request for a judgement of acquittal. The Chamber will rule on the admission of the Defence exhibit at the appropriate time when assessing the evidence as a whole. In addition, a request to take judicial notice should be submitted under Rule 94 of the Rules and present the appropriate arguments to support it. The Chamber will therefore now only deal with the issue relating to the sufficiency of the evidence adduced in the course of the Prosecution case in accordance with Rule 98*bis* of the Rules.

12. In its Motion, the Defence first contends that even where evidence is capable of belief, it may nonetheless be unreliable for the purpose of establishing a fact essential to the commission of a crime. It is submitted that the Prosecution case has broken down in that fundamental questions have been raised as to the reliability and credibility of the evidence such that for the purpose of proving its case beyond reasonable doubt, the Prosecution is left without a case. The Defence second submits that there are some charges in the Indictment for which there is no or insufficient evidence to sustain a conviction.

13. The Chamber has very cautiously reviewed all the arguments of both parties as well as the transcripts in the current proceedings. The contradictions raised by the Defence with respect to the witnesses' testimony are not so irreconcilable that the Prosecution case should be considered as having completely broken down. Also, from a more general point of view, the cross-examination of the Prosecution witnesses did not leave the Prosecution without a case. In addition, without any assessment at this stage of the credibility or reliability of the Prosecution evidence, it is well-established that a reasonable trier of fact may reach findings based on uncorroborated or hearsay evidence.[11] As already stated, the evidence must be assumed to be reliable and credible unless convincing arguments have been raised that it is so obviously unbelievable, that no reasonable trier of fact could rely on it. The Defence has not persuaded the Chamber that this is the case here.

14. The Defence also contends that the Prosecution has adduced no or insufficient evidence with respect to some allegations at paragraphs 6, 7, 9, 14 and 17 under Count 2 of the Indictment. The Chamber recalls that the evidence should be examined in relation to counts without testing the sufficiency of evidence with respect to each paragraph of the Indictment. This approach is particularly appropriate when, as in the present case, many paragraphs of the Indictment are inter-dependent, narrating disparate material facts which when viewed as a whole, purport to show that the Accused committed the alleged crimes.[12]

15. Count 2 of the Indictment charges the Accused with complicity in genocide pursuant to Articles 2 and 6(1) of the Statute. The Chamber finds that the evidence adduced in the course of the Prosecution case, particularly in the light of the testimonies of Witness ALA, AVC, AVD, GAB, GAC, GII, GIN, GIT, GIQ and GLM,[13] is not insufficient to sustain a conviction on this count. Then there is no need, at this stage, to examine whether each paragraph of the Indictment is supported by the Prosecution evidence.

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[11] *Bagosora* Decision, par. 10.
[12] Compare with *Bagosora* Decision, par. 9 ; *Muvunyi* Decision, par. 39.
[13] See T. 14 to 30 June 2005 and T. 1 to 6 July 2005.

16. Having reviewed the Prosecution evidence as a whole, the Chamber is also satisfied that the Prosecution has adduced sufficient evidence which, if believed, could sustain a conviction of the Accused on the other counts of the Indictment (genocide, extermination and murder as crimes against humanity). While the Defence Motion therefore falls to be rejected, it does not follow that this will necessarily result in a conviction of the Accused on each count at the end of the trial. Even if the Defence fails to adduce exculpatory evidence, the assessment of the evidence in its totality at the end of the trial is different from the evaluation of its sufficiency under Rule 98*bis* of the Rules.[14]

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion for judgement of acquittal.

Arusha, 28 October 2005, done in English.

Dennis C. M. Byron
Presiding Judge

Karin Hökborg
Judge

Gberdao Gustave Kam
Judge

[Seal of the Tribunal]

[14] *Nyiramasuhuko* Decision, par. 71 ; *Bagosora* Decision, par. 6 ; *Muvunyi* Decision, par. 40.