

ICTR-01-73-T
17-10-2006
(5506-5501)

5506
#m



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Inés Mónica Weinberg de Roca, Presiding
Khalida Rachid Khan
Lee Gacuiga Muthoga

Registrar: Adama Dieng

Date: 17 October 2006

2006 OCT 17 12:23
JUDICIAL RECORDS ARCHIVES
UNISTR
RECEIVED

THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-T

DECISION ON THE DEFENCE MOTION PURSUANT TO RULE 98 BIS

Rule 98 bis of the Rules of Procedure and Evidence

Office of the Prosecutor:
Wallace Kapaya
Charity Kagwi-Ndungu
Sylver Ntukamazina
Gina Butler
Iskandar Ismail
Jane Mukangira

Defence Counsel:
John Philpot
Peter Zaduk

INTRODUCTION

1. Protais Zigiranyirazo (the "Accused") is charged with genocide or in the alternative complicity in genocide and conspiracy to commit genocide pursuant to Article 2 of the Statute of the Tribunal (the "Statute"), and extermination and murder, as crimes against humanity, pursuant to Article 3 of the Statute.

2. After calling twenty-five witnesses, including four investigators and one expert witness, and entering 75 exhibits during a 46 trial day period, the Prosecution closed its case on 28 June 2006. The Chamber granted the Defence request for extension of time to file its motion for acquittal pursuant to Rule 98 bis. The Prosecutor was likewise granted a similar extension to respond. The Defence Motion was filed on 13 July 2006.¹ The Prosecution Response was filed on 31 July 2006.² The Defence Reply was filed on 2 August 2006,³ and the Prosecution Rejoinder was filed on 7 August 2006.⁴

DELIBERATIONS

3. Rule 98 bis provides:

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, on motion of an accused filed within seven days after the close of the Prosecution's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.

4. In the Tribunal's jurisprudence, the test under the Rule is whether a reasonable trier of fact *could* arrive at a conviction if the Prosecution evidence is accepted.⁵ 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, 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.⁶ The Chamber stresses that Rule 98 bis requires it to consider *counts*; the Chamber need not engage in a paragraph by paragraph analysis of the Indictment.⁷ The Chamber does not assess the credibility and

¹ ~~"Defence Motion Pursuant to Rule 98 bis RPP", filed on 13 July 2006 (the "Defence Motion").~~

² ~~"Prosecutor's Response to Defence Motion Pursuant to Rule 98 bis of the Rules of Procedure and Evidence" filed on 31 July 2006 (the "Prosecution Response").~~

³ "Reply to Prosecutor's Response to Defence Motion Pursuant to Rule 98 bis RPP", filed on 2 August 2006 (the "Defence Reply").

⁴ "Prosecutor's Rejoinder to the Defence Reply to the Prosecutor's Response to the Defence Motion (Pursuant to Rule 98 bis of the Rules of Procedure and Evidence)", filed on 7 August 2006 (the "Prosecutor's Rejoinder").

⁵ *Prosecutor v. Bagosora et al*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, paras. 3, 6 (the "*Bagosora 98 bis* Decision"); *Prosecutor v. Muvunyi*, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis (TC), 13 October 2005, paras. 35-36 (the "*Muvunyi 98 bis* Decision"); *Prosecutor v. Semanza*, Decision on Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment (TC), 27 September 2001, para. 15 (the "*Semanza 98 bis* Decision"). See also *Prosecutor v. Jelisić*, Judgement (AC), 5 July 2001, para. 37; *Prosecutor v. Delalić*, Judgement (AC), 30 February 2001, para. 434.

⁶ *Prosecutor v. Rwamakuba*, Decision on Defense Motion for Judgment of Acquittal (TC), 28 October 2005, para. 6.

⁷ *Bagosora 98 bis* Decision, para. 8.

reliability of the evidence unless the Prosecution 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”.⁸ The Prosecution’s evidence should be evaluated as a whole, looking to “the totality of the evidence” and making any reasonably possible inferences.⁹ A decision at the Rule 98 bis stage to accept the Prosecution’s evidence does not preclude the Chamber from ultimately finding that the Prosecution evidence fails to establish the Accused’s guilt beyond a reasonable doubt.¹⁰

5. The Defence has made two types of submissions on the nature of the Prosecutor’s evidence, namely: on the sufficiency of the evidence in relation to the crimes alleged in the counts of the Indictment,¹¹ and on the sufficiency of the evidence in relation to individual paragraphs of the Indictment.

6. The Defence requests an acquittal on Count 5 (murder as a crime against humanity). For the remaining counts of the Indictment, the Defence requests the Chamber to take a paragraph by paragraph approach with a view to striking out those paragraphs of the Indictment for which insufficient evidence has been adduced. The Chamber will therefore begin its analysis of the sufficiency of the Prosecution evidence with Count 5.

Count 5: Murder as a Crime Against Humanity

7. The Defence contends that there is insufficient evidence to prove any of the acts alleged and charged under Count 5. The Defence recognizes that if proven, each of the murder allegations in the Indictment¹² could sustain a conviction on this count.¹³ Therefore, if the Chamber finds that there is sufficient evidence of any of the murders, the Defence requests that the Chamber either acquit the Accused for the remaining murders; or, “in the alternative, find that the Accused has no case to answer on the remaining murders and strike out or indicate that the Chamber will not consider those allegations during final deliberations.”¹⁴

8. The Indictment charges the Accused with the killings of the three *gendarmes*, Stanislas Sinibagiwe (“Sinibagiwe”), and the killings of members of two Tutsi families.¹⁵ The Prosecution concedes that no evidence has been adduced in respect of the murder of the Sekimonyo and the Bahoma families,¹⁶ but contends that there is sufficient evidence on the record to prove the killing of the three *gendarmes* and Stanislas Sinibagiwe (“Sinibagiwe”).¹⁷

⁸ *Semanza 98 bis* Decision, para. 17.

⁹ *Bagosora 98 bis* Decision, para. 11; *Muvunyi 98 bis* Decision, para. 40.

¹⁰ *Bagosora 98 bis* Decision, para. 6. See also *Muvunyi 98 bis* Decision, para. 40.

¹¹ Amended Indictment of 8 March 2005 (the “Indictment”).

¹² Indictment, paras. 43, 46, 48-49

¹³ Defence Motion, para. 77.

¹⁴ Defence Motion, para. 78.

¹⁵ Indictment, paras. 43, 46, 48-49

¹⁶ Prosecution Response, para. 17; Indictment, paras. 20, 25, and 26.

¹⁷ Prosecution Response, para. 42.

9. Murder is the intentional killing of a person, or the intentional infliction of grievous bodily harm in the knowledge that such harm will likely cause the victim's death or with recklessness as to whether death will result, without lawful justification or excuse.¹⁸

10. In order to qualify as a crime against humanity, these offences must satisfy two conditions under the Statute: the crime must be committed as "part of a widespread or systematic attack"; and, the attack must be against "any civilian population on national, political, ethnic, racial or religious grounds".

11. "Widespread" is defined as massive or large-scale, involving many victims; "systematic" refers to an organized pattern of conduct, as distinguished from random or unconnected acts committed by independent actors.¹⁹ These requirements inform the *mens rea* element unique to crimes against humanity: the perpetrator must, at a minimum, know that his action is part of a widespread or systematic attack against civilians on discriminatory grounds, though he or she need not necessarily share that discriminatory intent.²⁰

12. The Chamber reiterates that *counts* are the proper focus for an enquiry under Rule 98 bis and therefore will not enquire whether evidence has been adduced in support of each paragraph of the Indictment. If there is any Prosecution evidence regarding any of the alleged killings that could sustain the count, then a judgement of acquittal is not appropriate.

13. The Defence asserts that the sufficiency of the evidence adduced from the witness testimonies does not support the charge that the Accused is responsible for the alleged murder of Sinibagiwe, nor does it support the contention that the killing of Sinibagiwe was a crime against humanity, as it was not part of a widespread or systematic attack against the civilian population, on ethnic or racial grounds,²¹ nor on political grounds.²² The Defence therefore argues that Sinibagiwe's murder was an aborted extortion attempt.²³

14. The Prosecution submits that Sinibagiwe was targeted because he was considered an accomplice of the enemy—Sinibagiwe was considered a Hutu who was opposed to the government then in power—and was therefore killed.²⁴ The Prosecution refers to Witness AVY to show that there is ample evidence, both direct and circumstantial, from which the Chamber can conclude that the Accused was fully involved in the murder of Sinibagiwe.²⁵

15. There is evidence of the Accused being present and participating at a meeting where it was decided that Sinibagiwe would not be allowed to cross *La Petite Barrière* border post²⁶ because the latter was believed to be an accomplice of the enemy, which was defined as the Tutsi.²⁷ After the meeting, Sinibagiwe was detained at *La Petite Barrière* border post until Omar Serushago, who was allegedly at the meeting with the Accused, retrieved Sinibagiwe from *La Petite Barrière* border post and drove him in the direction of the *Commune Rouge*, a

¹⁸ *Bagosora 98 bis* Decision, para. 25; *Prosecutor v. Nindabahizi*, Judgement (TC), 15 July 2004, para. 487 (the "Nindabahizi Judgement").

¹⁹ *Bagosora 98 bis* Decision, para. 24; *Nindabahizi* Judgement, para. 477.

²⁰ *Bagosora 98 bis* Decision, para. 24; *Nindabahizi* Judgement, paras. 477, 484.

²¹ Defence Motion, para. 66.

²² Defence Motion, para. 70.

²³ Defence Motion, paras. 53, 69.

²⁴ Prosecution Response, paras. 62-63; Prosecutor's Rejoinder, para. 3(x).

²⁵ Prosecution Response, para. 61.

²⁶ T. 19 October 2005, pp. 9-11; T. 8 February 2006, pp. 44-49 (Witness AVY).

²⁷ T. 8 February 2006, pp. 44, 46 (Witness AVY).

local cemetery in Gisenyi. There is also evidence that shots were heard shortly thereafter from the *Commune Rouge*. The witness later learned that Sinibagiwe had been killed.²⁸

16. The Chamber has carefully examined the record and is convinced that there is sufficient evidence, which, if believed, could lead a reasonable trier of fact to conclude that this killing was part of a widespread, if not also systematic, attack against civilians on the basis of one or more of the enumerated grounds of Article 3 of the Statute.

17. The Chamber is of the view that, if believed, the evidence described above could lead a reasonable trier of fact to conclude that the Accused is guilty of murder as a crime against humanity for aiding and abetting the murder of Sinibagiwe.

Count 1: Conspiracy to Commit Genocide, Count 2: Genocide, Count 3: Complicity in Genocide, and Count 4: Extermination as a Crime Against Humanity

18. The Accused is also charged with conspiracy to commit genocide (Count 1 of the Indictment); genocide (Count 2); complicity in genocide (Count 3), all of which are stipulated under Article 2 (3)(b) of the Statute; and extermination as a crime against humanity (Count 4), which is stipulated under Article 3(a) of the Statute.

19. Rule 98 bis requires the Chamber to determine whether the evidence is insufficient to sustain a conviction. The Chamber is not mandated to consider alleged defects in the Indictment or the sufficiency of notice to the Accused.²⁹ The Chamber, therefore, will not consider the party's submissions concerning compliance with the Chamber's 15 July 2004 decision requiring modifications to the Indictment.³⁰

20. The Chamber declines the Defence's invitation to take a paragraph by paragraph approach regarding the remaining counts of the Indictment. As the Chamber noted above, it will not take a paragraph by paragraph approach because Rule 98 bis requires it to consider the Prosecution evidence as it relates to counts. The Defence does not suggest that the lack of evidence in support of the disputed paragraphs should result in acquittal on any of the remaining counts. On the contrary, it acknowledges that some evidence has been adduced in support of these counts. Therefore, the Defence Motion as it pertains to Counts 1 through 4 of the Indictment is not well founded and must be denied.³¹

Prosecution Concessions Regarding Lack of Evidence on Allegations Contained in Paragraphs 20, 25, 26, 37, 48, 49 and 50

21. The Prosecution concedes that it has led no evidence related to the allegations in paragraphs 20, 25, 26, 37, 48, 49 and 50, of the Indictment. These paragraphs concern the alternative counts of genocide and complicity in genocide, and the counts of extermination and murder as crimes against humanity. The Chamber has examined the Indictment and notes

²⁸ T. 19 October 2005, pp. 12-15 (Witness AVY).

²⁹ Bagosara 98 bis Decision, para. 7.

³⁰ See "Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment", 15 July 2004; Defence Motion, paras. 80, 84, 86; Defence Reply, para. 48.

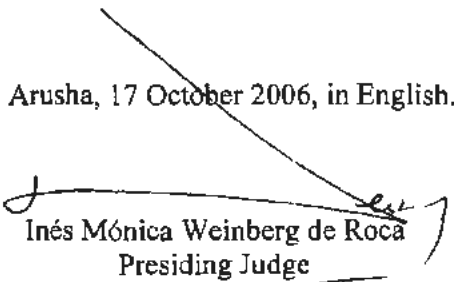
³¹ See *Prosecutor v. Mpambara*, Decision on the Defence's Motion for Judgement of Acquittal (TC), 21 October 2005, para. 6.

that these paragraphs concern, respectively, the Accused's role in ordering the digging of a mass grave known as "the pit" behind his home; the Accused's role in the deaths of some 30 members of the Sekimonyo clan, a Tutsi family; and the Accused's role in the deaths of some 18 members of the Bahoma clan, another Tutsi family. The Chamber accepts the Prosecutor's admission that no evidence has been tendered in support of these allegations and accordingly finds that the Accused has no case to answer in respect of the allegations contained in these paragraphs.

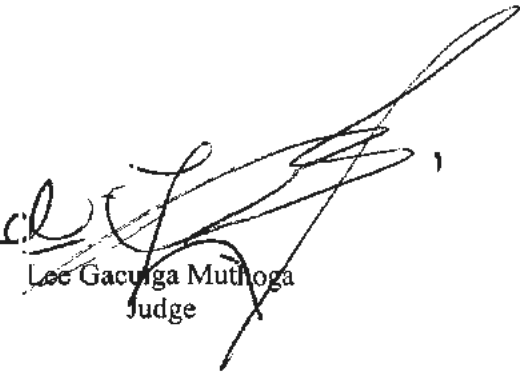
FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 17 October 2006, in English.


Inés Mónica Weinberg de Roca
Presiding Judge


Khalida Rachid Khan
Judge


Lee Gacunga Muthoga
Judge

[Seal of the Tribunal]

