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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Taghrid Hikmet, Presiding
Seon Ki Park
Joseph Masanche

Registrar: Adama Dieng

Date: 9 October 2009

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-T

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**DECISION ON THE DEFENCE MOTION FOR JUDGEMENT OF ACQUITTAL
PURSUANT TO RULE 98 bis**

Office of the Prosecutor:

Holo Makwaia
Althea Alexis Windsor
Cheikh Tidiane Mara
Lansana Dumbuya

Defence Counsel:

David Jacobs
Claver Sindayigaya
Marc Nerenberg

INTRODUCTION

1. The Accused, Gaspard Kanyarukiga, is charged with genocide or, alternatively, complicity in genocide, under Article 2 of the Statute of the Tribunal ("the Statute") and extermination as a crime against humanity under Article 3 of the Statute.¹
2. The trial in this case commenced on 31 August 2009. After calling eleven witnesses over fourteen trial days, the Prosecution closed its case on 17 September 2009. The Defence case is scheduled to take place between 18 January and 12 February 2010.²
3. On 24 September 2009, the Defence filed a motion for judgement of acquittal pursuant to Rule 98 *bis* of the Rules of Procedure and Evidence ("the Rules").³ The Defence requests that the Chamber acquit the Accused of allegations contained within paragraphs 11 and 16 of the Amended Indictment.⁴
4. On 28 September 2009, the Prosecution filed a response opposing the Defence motion.⁵ The Prosecution submits that sufficient evidence has been led to withstand a motion for judgement of acquittal with respect to the counts charged in the indictment.⁶
5. On 6 October 2009, the Defence filed a reply.⁷

DELIBERATIONS

6. As a preliminary matter, the Chamber notes that the Defence reply was filed out of time. In the interest of justice, the Chamber shall nevertheless consider the Defence reply. However, the Chamber has previously held that in the future it will not accept pleadings that do not conform to the procedural requirements.⁸

7. 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 with respect of those counts.

8. The Trial Chamber shall only enter a judgement of acquittal pursuant to Rule 98 *bis* where "the evidence, assuming it is true, could not possibly sustain a finding of guilt beyond a reasonable doubt. That will only be the case where there is no evidence whatsoever which is probative of one or more of the required elements of a crime charged, or where the only such evidence is incapable of belief."⁹ The relevant question

¹ Amended Indictment, filed on 14 November 2007.

² Scheduling Order following the Status Conference held on 17 September 2009, Order 1.

³ Motion for Acquittal Pursuant to Rule 98 *bis*, filed on 24 September 2009 ("Motion").

⁴ Motion, para. 6.

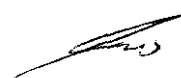
⁵ Prosecutor's Response to the Motion for Acquittal Pursuant to Rule 98 *bis*, filed on 28 September 2009 ("Response").

⁶ Response, para. 23.

⁷ Reply to the Prosecutor's Response to the Motion for Acquittal Pursuant to Rule 98 *bis*, filed on 6 October 2009 ("Reply").

⁸ Decision on Prosecutor's Motion to Vary his Witness List (TC), 11 August 2009, para 8.

⁹ *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Corrigendum to the Decision on Defence Motions Pursuant to Rule 98 *bis* (TC), 18 June 2007 ("*Ndindiliyimana et al.*, Corrigendum to 98 *bis* Decision, 18 June 2007"), para. 6; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on



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is not whether the Trial Chamber *would* in fact enter a conviction beyond a reasonable doubt but whether it *could*.¹⁰ A finding that sufficient evidence has been led to deny a Rule 98 bis motion in respect of a particular count does not preclude the Trial Chamber from ultimately entering a judgement of acquittal on that count.¹¹

9. In assessing whether there is sufficient evidence upon which a reasonable trier of fact could, at the end of trial, enter a conviction, the Trial Chamber shall “assume that the prosecution’s evidence [is] entitled to credence unless incapable of belief.”¹² Only where the Prosecution’s case has completely broken down, either on its own presentation, or as a result of defence cross-examination, may the Chamber consider that the evidence obviously lacks credibility and reliability, and therefore enter a judgement of acquittal.¹³

10. The Trial Chamber will not consider whether the Defence has had sufficient notice of charges to sustain a conviction, or whether there are other legal defects in the Indictment which could lead to acquittal.¹⁴ The examination of whether there was clear and consistent notice adequate to cure any such defect is not appropriate at this stage of the proceedings, nor is the Chamber legally authorised by Rule 98 bis to consider these matters.¹⁵

11. The Defence submits that the Prosecution evidence should be assessed not only in relation to entire counts in the Indictment but also in relation to facts specified in individual paragraphs.¹⁶ It argues that, “[a]lthough the plain meaning of the test of the Rule would appear to deal only with acquittal on specific entire counts of the indictment, there has been a clear and consistent line of jurisprudence, both at the ICTY and the ICTR, whereby *specific factual allegations* contained in the indictment, or specific paragraphs in the section on material facts, may also be stricken under such a motion, and the accused [may] thus be acquitted of those particular incidents even if the count itself that is supported by the specific allegations remains for final judgment.”¹⁷

12. In this case, the Defence submits that the Prosecution has failed to adduce any evidence in support of two specific allegations in the Indictment.¹⁸ First, while the Defence concedes that there is some evidence of the existence of the meeting alleged in paragraph 11 of the Indictment, it argues that the Prosecution has led no evidence

Motions for Judgement of Acquittal (TC), 2 February 2005 (“*Bagosora et al.*, Decision on Motions for Judgement of Acquittal, 2 February 2005”), para. 6.

¹⁰ *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Decision on Motion for Acquittal Pursuant to Rule 98 bis (TC), 5 June 2009, para. 8; *Ndindiliyimana et al.*, Corrigendum to 98 bis Decision, 18 June 2007, para. 6; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-T, Decision on the Defence Motion Pursuant to Rule 98 bis (TC), 21 February 2007 (“*Zigiranyirazo*, 98 bis Decision, 21 February 2007”), para. 8.

¹¹ *Ndindiliyimana et al.*, Corrigendum to 98 bis Decision, 18 June 2007, para. 6.

¹² *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 6.

¹³ *Ndindiliyimana et al.*, Corrigendum to 98 bis Decision, 18 June 2007, para. 7; *Zigiranyirazo*, 98 bis Decision, 21 February 2007, para. 11.

¹⁴ *Ndindiliyimana et al.*, Corrigendum to 98 bis Decision, 18 June 2007, para. 8 (citations omitted).

¹⁵ *Ibid.*, para. 8 (citing *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Decision on the Defence Motion for a Judgement of Acquittal (TC), 27 September 2001, para. 18).

¹⁶ Motion, para. 2.

¹⁷ *Ibid.*

¹⁸ Motion, paras. 5-6.

respecting the matters discussed at that meeting.¹⁹ The Defence therefore contends that the Accused should be acquitted of any contents of those discussions.²⁰ The Prosecution responds that the paragraphs in the Amended Indictment are interdependent and that a particular sentence in a paragraph should not be considered in isolation from the remainder of the Indictment.²¹ The Prosecution further contends that sufficient evidence has been led to sustain a conviction on the counts pleaded in the Indictment.²²

13. The Defence also submits that, while there is some evidence of a meeting or meetings at CODEKOKI on dates other than 16 April 1994, there is no evidence of a meeting on 16 April 1994 as alleged in paragraph 16 of the Indictment.²³ The Defence therefore requests that the Chamber enter a judgement of acquittal with respect to paragraph 16 of the Indictment.²⁴ In response, the Prosecution argues that paragraph 16 of the Indictment should be read as alleging one meeting that was part of a series of meetings at which the communal authorities, including the Accused, planned the extermination of the Tutsi at the Nyange Parish.²⁵

14. The Chamber agrees with the Rule 98 bis decision in *Bagosora*, in which Trial Chamber I stated that a paragraph by paragraph analysis of the Prosecution evidence would draw the Chamber into an “unwarranted substantive evaluation of the quality of much of the Prosecution evidence,” an exercise that is neither necessary nor appropriate when considering a Rule 98 bis Motion.²⁶ Thus, the Chamber considers it appropriate to examine the evidence in relationship to counts, without having to test the sufficiency of the evidence in respect of particular paragraphs in the Indictment.²⁷ The Chamber shall only depart from this principle where the Prosecution announces its intention to withdraw particular paragraphs of the indictment due to lack of evidence.²⁸

15. The Defence in this case does not assert that the lack of evidence in support of paragraphs 11 and 16 would result in a judgement of acquittal on any count or that the removal of these paragraphs would, in any way, alter the counts against the Accused.²⁹ Thus, the Trial Chamber in this case declines to assess the contested paragraphs in isolation.³⁰

16. Finally, the Defence requests that paragraph 16 of the Indictment be stricken due to the disagreement between the date of the meeting alleged therein and the date

¹⁹ Motion, para. 8; Reply, paras. 5-10.

²⁰ Motion, para. 8.

²¹ Response, para. 12.

²² Response, paras. 13-14.

²³ Motion, para. 10; Reply, paras. 11-18.

²⁴ Motion, para. 11.

²⁵ Response, para. 20.

²⁶ *Ndindiliyimana et al.*, Corrigendum to 98 bis Decision, 18 June 2007, para. 9 (quoting *Bagosora et al.*, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 9). See also *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-T, Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis (TC), 22 May 2007, para. 5; *Zigiranyirazo*, 98 bis Decision, 21 February 2007, para. 10.

²⁷ *Ndindiliyimana et al.*, Corrigendum to 98 bis Decision, 18 June 2007, para. 10.

²⁸ *Ibid.*

²⁹ See *Prosecutor v. Mpambara*, Case No. ICTR-2001-65-T, Decision on the Defence’s Motion for Judgement of Acquittal (TC), 21 October 2005, paras. 6, 8.

³⁰ *Ibid.*, para. 8.

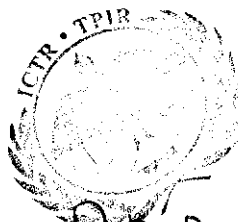
mentioned by witnesses at trial.³¹ Citing the Appeals Chamber judgement in *Muvunyi*,³² the Defence argues that paragraph 16 of the Indictment alleges different criminal conduct than that presented in the evidence and, therefore, cannot form the basis for a conviction.³³ The Prosecution responds that the instant case is distinguishable from that at issue in *Muvunyi* "because in *Muvunyi* the [Appeals] Chamber found variances of both dates and material actions between the allegations in the Indictment and the evidence led[.]"³⁴

17. The Chamber recalls that the inquiry under Rule 98 bis is limited to determining whether "the evidence is insufficient to sustain a conviction."³⁵ The Chamber is not mandated to consider whether the Defence has had sufficient notice of the charges against the Accused, or whether there are other legal defects in the Indictment, which could lead to an acquittal.³⁶ Thus, the Chamber declines to declare paragraph 16 of the Indictment inoperable at this stage.

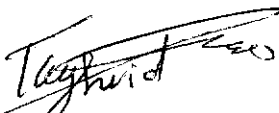
FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence motion.

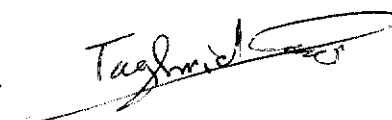
Arusha, 9 October 2009



[read and approved]


Taghrid Hikmet
Presiding Judge


Seon Ki Park
Judge


Joseph Masanche
Judge
[absent at the time of
signature]

[Seal of the Tribunal]

³¹ Motion, paras. 12-13.

³² *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008, para. 26.

³³ Motion, paras. 12-13.

³⁴ Response, para. 17.

³⁵ *Bagosora et al.*, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 7.

³⁶ *Ibid.* See also *Ndindiliyimana et al.*, Corrigendum to 98 bis Decision, 18 June 2007, para. 8.