



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

63606
PM

OR: EN

BEFORE TRIAL CHAMBER II

Before: Joseph Asoka Nihal de Silva, Président
Taghrid Hikmet
Seon Ki Park

Registrar : Mr. Adama Dieng

Date : 15 January 2006

ICTR-00-56-T
15-01-07
(63606-63581)

THE PROSECUTOR

v.

François-Xavier NZUWONEMEYE

Case No. ICTR-2000-56-T

JUDICIAL RECORDS/ARCHIVES
RECORDED
2007 JAN 15 11:08
DIRECTOR

MOTION FOR ACQUITTAL PURSUANT TO RULE 98bis

Office of the Prosecutor:

M. Ciré Aly Bâ
M. Moussa Sefon
M. Segun Jegede
Ms. Felistas Mushi
M. Aboubacar Tambandou

Counsel for the Defence :

Mr. Charles Taku
Ms. Coralie Colson
Mr. Tharcisse Gatarama
Mr. Joseph Holmes

Introduction

1. On 23 August 2004, the Prosecutor filed an amended Indictment against the Accused François-Xavier Nzuwonemeye charging the five following Counts : Conspiracy to Commit Genocide (Count 1), Crime Against Humanity (Murder) (Count 4), Crime Against Humanity (Rape) (Count 6), Violations of Common Article 3 to the Geneva Conventions and Protocol II (Murder) (Count 7) and Violations of Common Article 3 to the Geneva Conventions and Protocol II (Rape, humiliating and degrading treatment) (Count 8).
2. From 21 September 2004 to 7 December 2006, the Prosecutor presented his evidence. The Trial Chamber heard 72 witnesses, including one expert witness.
3. On 7 December 2006, the Prosecutor officially closed his Prosecution case and the Trial Chamber instructed the Defence to file their Motions pursuant to Rule 98bis on 15 January 2007.
4. The Defence for François-Xavier Nzuwonemeye hereby files its Motion for Acquittal pursuant to Rule 98bis of the Rules of Procedure and Evidence.

Applicable Law with respect to Rule 98bis

5. Article 98bis reads as follows:

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 Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgment of acquittal in respect of those counts.

6. The Trial Chamber of the ICTY held in the case of *The Prosecutor v. Slobodan Milosevic*, that the degree of proof necessary in Rule 98bis Motion is whether the evidence is insufficient to sustain a conviction and "whether there is evidence (if accepted) upon which a tribunal of fact *could* be satisfied beyond a reasonable doubt of the guilt of the accused on the particular charge in question...; thus the test is not whether the trier of fact would in fact arrive at a conviction beyond a reasonable doubt on the Prosecution evidence if accepted, but whether it could; or to put it as the Appeals Chamber later did, in the same case, a Trial Chamber should only uphold a Rule 98bis Motion if it is "entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction beyond reasonable doubt".¹
7. In the case of *the Prosecutor v. Slobodan Milosevic*, the Trial Chamber laid down six bases on which the application could be considered. The most relevant of these are:

- (1) Where there is no evidence to sustain a charge, the Motion is to be allowed.

¹ *The Prosecutor v. Slobodan Milosevic*, ICTY, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para 9. (See also, *The Prosecutor v. Jelusic*, ICTY, Case No. IT-96-21-A, Judgment, 5 July 2001, para. 37; *The Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21-T, Judgment, 20 February 2001, para. 434).

Although Rule 98 *bis* speaks of the sufficiency of evidence to sustain a conviction on a charge, the Trial Chamber has, in accordance with the practice of the Tribunal, considered the sufficiency of the evidence as it pertains to elements of a charge, whether set out in separate paragraphs or schedule items;

(2) Where there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it, the Motion is to be allowed. This will be the case even if the weakness in the evidence derives from the weight to be attached to it, for example, the credibility of a witness. This is in accordance with the exception to the general principle in common law jurisdictions that issues of credibility and reliability must be left to the jury as the tribunal of fact.

(3) Where there is some evidence, but it is such that its strength or weakness depends on the view taken of a witness's credibility and reliability, and on one possible view of the facts a Trial Chamber could convict on it, the Motion will not be allowed. This accords with the general principle in common law jurisdictions that a judge must not allow a submission of no case to answer because he considers the prosecution's evidence to be unreliable, since by doing that he would usurp the function of the jury as the tribunal of fact.

(4) The determination whether there is evidence on which a tribunal could convict should be made on the basis of the evidence as a whole.

(5) Whether evidence could lawfully support a conviction must obviously depend on the applicable law of the Tribunal and the facts of each case. The common law cannot be relied on to rule evidence as incapable of supporting a conviction if on the basis of Tribunal jurisprudence the evidence is to be considered as having that capacity. Thus hearsay evidence, generally inadmissible in common law jurisdictions, is, pursuant to Rule 89(C), admissible, the principal factor determining admissibility being the reliability of the evidence. Once admitted, it is for a Trial Chamber to determine the weight to be attached to hearsay evidence.

(6) In view of the peculiarly common law origin of Rule 98*bis*, and the well known difficulties to which its application has given rise in the work of the Tribunal, the Trial Chamber considers it important to stress the point made both in *Prosecutor v. Kordic* and *Prosecutor v. Jelusic* that a ruling that there is sufficient evidence to sustain a conviction on a particular charge does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge; that is so because the standard for determining sufficiency is not evidence on which a tribunal *should* convict, but evidence on which it *could* convict. Thus if, following a ruling that there is sufficient evidence to sustain a conviction on a particular charge, the Accused calls no evidence, it is perfectly possible for the Trial Chamber to acquit the Accused of that charge if, at the end of the case, it is not satisfied of his guilt beyond reasonable doubt.

(7) When, in reviewing the evidence, the Trial Chamber makes a finding that there is sufficient evidence, that is to be taken to mean that there is evidence on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the accused.²

8. These criteria are in accordance with the exception to the general principle in common law jurisdictions that issues of credibility must be left to the jury as the tribunal of fact. In the case of *The Prosecutor v. Laurent Semanza*, the Trial Chamber held that "all that is the required of the Prosecution is to establish a *prima facie* case against the Accused".³

9. The Defence submits that the evidence must be such that a reasonable trier of fact *could* convict, not that it *would* or *should* convict. In the case of *The Prosecutor v.*

² *The Prosecutor v. Slobodan Milosevic*, ICTY, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004, para 13. (footnotes omitted)

³ *The Prosecutor v. Laurent Semanza*, ICTR, 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, 27 September 2001, para. 15.

Kordic and Cerkez, it was held that if this standard “is not met by any evidence, there must be some evidence which could properly lead to a conviction”.⁴ The Defence for Nzuwonemeye wishes also to draw the attention of the Trial Chamber to the case of *The Prosecutor v. Bagosora et al.*, where it was emphasized that “in determining whether there is such evidence, the Trial Chamber must assess whether the Prosecution evidence is actually probative of the elements of crimes charged in the indictment”.⁵

10. The Defence for Nzuwonemeye agrees with the finding of the Trial Chamber in the case of *The Prosecutor v. Muvunyi*.⁶ The Defence is of the opinion that sufficiency of the Prosecution evidence is the key to determining whether a Rule 98 *bis* motion should be granted, and a judgment of acquittal will only be entered where the Prosecution evidence, if believed, is insufficient to sustain a conviction on a particular count of the indictment.

The jurisprudence suggests three scenarios under Rule 98 *bis*. First, where the Prosecution brings some evidence in support of a count that, if believed, could allow a reasonable trier of fact to convict beyond a reasonable doubt on a particular count, then the motion should be denied as to that count. Generally, sufficiency of evidence should be determined without assessing its credibility and reliability; assessment of credibility and reliability is to be made at the end of trial, in light of all the evidence.⁶

The second scenario arises where the Prosecution has adduced some evidence, but it is so incapable of belief that a reasonable trier of fact could not rely upon it to sustain a conviction. The Chamber notes that this is an exception to the general rule against assessing credibility and reliability under Rule 98 *bis*, and only arises where the Prosecution's case can be said to have “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. In such circumstances, a judgment of acquittal pursuant to Rule 98 *bis* should be entered. Under the third scenario, where no evidence has been adduced in support of a count, a judgment of acquittal should be entered for that count. The Chamber notes that it must determine which scenario applies to each count of the Indictment.

11. The Defence for François-Xavier Nzuwonemeye submits that the three scenarios identified by the Trial Chamber take place in this instant case and that the Trial Chamber should acquit on the counts in dispute at this stage of the proceedings.

Rule 98bis: Counts and paragraphs of the indictment

12. Major Nzuwonemeye is charged with 5 separate Counts in the Indictment, counts supported by a certain number of material facts. Certain allegations pleaded in the Indictment under certain paragraphs involve facts which standing alone could lead to a criminal liability. Many of the elements raised in the instant Motion are not interrelated and are totally autonomous.

⁴ *The Prosecutor v. Kordic and Cerkez*, ICTY, Case No. IT-95-14/2-T, Decisions on Defence Motions for Judgment of Acquittal, 6 April 2000, para. 26.

⁵ *The Prosecutor v. Bagosora et al.*, ICTR, Case No. ICTR-98-41-T, Decision on Motions on Judgment of Acquittal, 2 February 2005, para. 10.

⁶ *The Prosecutor v. Muvunyi*, ICTR, Case No. ICTR-2000-55A-T, Decision on Tharcisse Muvunyi's Motion for Judgment of Acquittal Pursuant to Rule 98bis, 13 October 2005, paras. 35-38.

13. With respect to Count 1, the Prosecutor alleges the existence of an agreement (paragraph 22), that Major Nzuwonemeye hid armoured vehicles and jeeps belonging to the Reconnaissance Battalion in Gisenyi and at certain of President Habyarimana's residences (paragraph 34), that on 7 April 1994 elements of the reconnaissance Battalion killed the Prime Minister and the 10 Belgian UNAMIR soldiers who had been assigned to escort her (paragraph 38) and that shortly before those murders were committed, Major Nzuwonemeye had assembled his troops at Kigali Camp and informed them of the death of the President, identified the RPF as the enemy and called on his troops to eliminate all its accomplices within the country before taking on the enemy (paragraph 40).
14. With respect to Counts 4 and 7 (murder), the indictment alleges that in the morning of 7 April 1994, elements of the Reconnaissance Battalion killed the Prime Minister and three members of her entourage (paragraph 103), that on the same day, ten Belgian UNAMIR Belgian peacekeepers were arrested by members of the Reconnaissance Battalion and killed subsequently (paragraph 105) and that in April 1994, soldiers from the Reconnaissance Battalion guarded the CHK and that soldiers killed several Tutsi staff members from the CHK (paragraph 108).
15. Finally, with respect to Counts 6 and 8 (Rape and humiliating and degrading treatment) only one paragraph, namely 112, is mentioned in support of the counts.
16. In the case of *The Prosecutor v. Mpambara*⁷, the court held that, notwithstanding the general standard applied pursuant to Rule 98bis, the Trial Chamber may make a finding that the Accused has no case to answer on particular factual allegations and may strike out or indicate that it has no intent to consider those specific allegations during final deliberations. Furthermore, in the case of *The Prosecutor v. Nyiramasuhuko et al.*,⁸ some of the accused were acquitted of paragraphs where no evidence was adduced under those specific paragraphs.
17. It is very clear from the indictment that most of the paragraphs of the Indictment against Major Nzuwonemeye if viewed alone could lead to a conviction if facts alleged were proven beyond a reasonable doubt. In such circumstances, the sufficiency of such paragraphs should be tested at the end of the Prosecution case.⁹ It should also be noted that the "paragraph approach" has been adopted and applied by the Trial Chambers of the International Criminal Tribunal for the former Yugoslavia on several occasions.¹⁰
18. As a matter of right to a fair trial, the Defence cannot be expected to present evidence on paragraphs and allegations that were not supported by any prosecution evidence. Furthermore, in light of the increasing length of trials and in order to meet the

⁷ *The Prosecutor v. Mpambara*, ICTR, No. ICTR-2001-65-T, Decision on the Defence's Motion for Judgment of Acquittal, 21 October 2005, paras 6 and 8.

⁸ *The Prosecutor v. Nyiramasuhuko et al.*, ICTR, Case No. ICTR-98-42-T, Decision on the Defence Motions for Acquittal under Rule 98bis, 16 December 2004, paras 169, 178 and 183.

⁹ *The Prosecutor v. Zigiranyirazo*, ICTR, Case No. ICTR-2001-73-T, Protais Zigiranyirazo's Application for Certification to Appeal the Decision on the Defence Motion Pursuant to Rule 98bis, 24 October 2006, paras 17-20.

¹⁰ *The Prosecutor v. Milosevic*, ICTY, Case No. IT-02-54-T, Decision on Motion for Acquittal, 16 June 2004, para. 13. See also *The Prosecutor v. Kordic and Cerkez*, ICTY, Case No. IT-95-14/2-T, Decision on Defence Motions for Judgment of Acquittal, 6 April 2000, paras 29-36.

deadlines set out for the completion strategy, it would be a waste of court resources to force the Defence to defend itself against allegations without any proper foundation.

19. Therefore, it is the Defence' submission that the approach to a Motion for acquittal should be on a paragraph basis and that the Defence is entitled to a legal determination and evaluation of the Prosecution case by the Trial Chamber before it is requested to present its defence' case.
20. The Defence for Major Nzuwonemeye challenges the following counts and moves the Trial Chamber to acquit him on Count 1: Conspiracy to Commit Genocide, Count 4: Crimes Against Humanity (Murder) pursuant to Article 6 (3) of the Statute, Counts 6 and 8: Crimes Against Humanity (Rape) and Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (Rape, humiliating and degrading treatment) (paragraphs 110, 112 and 119) pursuant to Article 6 (3) of the Statute

Count 1: Conspiracy to Commit Genocide pursuant to Article 6 (1) of the Statute

21. The Trial Chamber in *The Prosecutor v. Musema* defined conspiracy to commit genocide as "the agreement between two or more persons to commit the crime of genocide"¹¹
22. Paragraph 22 of the Indictment reads:

The Prosecutor of the International Criminal Tribunal for Rwanda charges **Augustin Bizimungu, Augustin Ndindiliyimana, Francois-Xavier Nzuwonemeye and Innocent Sagahutu with Conspiracy to Commit Genocide**, an offence punishable under Art 2(3) of the Statute, in that, before 6 April 1994, and, after the tragic death of President Juvenal Habyarimana, between 6 April and July 1994, in Rwanda, **Augustin Bizimungu, Augustin Ndindiliyimana, Francois-Xavier Nzuwonemeye and Innocent Sagahutu** executed a common scheme with some or all of the following: Presidents Juvenal Habyarimana and Theodore Sindukwabo, Prime Minister Jean Kambanda, Defence Minister Augustin Bizimana, General Deograits Nsabimana, Colonels Theodore Bagosora, Gratién Kabiligi and the officials, Mathieu Ndirumpatse, Joseph Nzirorera and Juvenal Kajelijeli, *Prefet-Colonel Tharcisse Renzaho*, Nyaruhengeri *Bourgmestre* Charles Kabeza, Joseph Kanyabashi from Butare, and numerous other administrators, soldiers and civilians who espoused their cause to destroy, in whole or in part, the Tutsi ethnic group which was one of the component elements of the Rwandan population.

Pursuant to Article 6(1) of the Statute: either by *their acts or obstinate refusal to mobilise the Forces armées rwandaises* to fulfil their legal mandate to maintain and safeguard public peace, the Accused, in concert with other actors mentioned above, planned incited, ordered, committed, or otherwise aided and abetted the planning, preparation or execution of the planned extermination of the Tutsi ethnic group.

23. The Defence recalls that the Prosecution is bound by its indictment. As such it is submitted that the Prosecution is required to prove the existence of an agreement between the accused and the alleged co-conspirators as named in paragraph 22 of the indictment.

¹¹ *The Prosecutor v. Musema*, ICTR, Case No. ICTR-T, Judgment, 20 January 2000, para 191.

- 24. The Trial Chamber in *Ntakirutimana* acquitted on the count of conspiracy to commit genocide. In the Mugonero Indictment the two co-accused were alleged to have conspired together with a third party (Charles Sikubwabo) to commit genocide. It was the Trial Chamber’s view that the Prosecutor was bound to establish the existence of an agreement as between those parties named on the indictment. It concluded that: “the Chamber is unable, based on the evidence, to draw any inference that the two Accused were part of a plan, together with Charles Sikubwabo, to commit genocide.”¹²
- 25. Furthermore, in the context of a motion for acquittal the Trial Chamber in *Kamuhanda* found that insufficient evidence establishing the existence of an agreement between the accused and alleged co-conspirators as named on the indictment was adequate grounds to allow the motion.
- 26. The Prosecutor submitted that as the indictment incorporated the allegation that the accused conspired “with others” then it was sufficient to prove the existence of an agreement with any other party, not necessarily a party named on the indictment.¹³ The Trial Chamber rejected their contention on the ground that, “[T]he naming of some of the alleged conspirators is in line with the jurisprudence of the Tribunal with regard to the Count of Conspiracy. “In this regard, therefore, the Chamber finds that the Count of Conspiracy should be read as a whole including the paragraphs in the Indictment cited in support of the Conspiracy charge. Having considered the evidence provided by the Prosecution for Count 1, taken together with the referred paragraphs which name some of the alleged conspirators, the Chamber is not satisfied that the evidence is sufficient to sustain a conviction on the charge of Conspiracy to Commit Genocide. The Chamber thus grants the Motion for Judgement of Acquittal with respect to Count 1: Conspiracy to Commit Genocide.”¹⁴
- 27. The Prosecution has led no evidence that Major Nzuwomemeye entered into an agreement to commit genocide with any of the parties named in paragraph 22 of the indictment. The factual allegations levied against Nzuwomemeye are contained within paragraphs 34, 38 and 39 of the indictment and paragraphs 105 to 113 of the pre-trial brief. None of the foregoing paragraphs allege the existence of an express agreement to commit genocide. In respect of paragraph 39 precisely, the prosecution did not any time whatsoever call a single witness to testify to the allegation contained therein.
- 28. The Defence concedes that an agreement maybe inferred from concerted of coordinated action on the part of a group of individuals.¹⁵ However, the Defence submits that the Prosecution has failed to lead any evidence from which a reasonable trier of fact could infer an agreement.

¹² *The Prosecutor v. Ntakirutimana*, ICTR, Case No. ICTR-T, Judgment, 21 February 2003 (Mugonero and Biseseo Indictments), para 800.

¹³ *The Prosecutor v. Kamuhanda*, ICTR, Case No. ICTR-99-54A-T, Prosecutor’s Response to Defence motion for Partial Acquittal- Rule 98bis of the Ruls of Procedure and Evidence, 18 July 2002, para 8.

¹⁴ *The Prosecutor v. Kamuhanda*, ICTR-99-54A-T, Decision on Kamuhanda’s Motion for Partial Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence, 27 September 1999, para 22-23.

¹⁵ *The Prosecutor v; Nahimana et al.*, ICTR, Case No. ICTR-99-52-T, Judgment, 3 December 2003, para 1045. See also *Nyiramasuhuko et al.*, ICTR, ICTR, Case No. 98-42-T, Decision of Defence Motion for Acquittal under Rule 98bis, 16 December 2004, para 95.

29. In light of the foregoing reasons, the Defence submits that no reasonable trier of act could find the evidence sufficient to sustain a conviction beyond a reasonable doubt and that Major Nzuwonemeye should be acquitted of conspiracy to commit genocide as alleged in the indictment pursuant to Article 6(1) of the Statute.

Counts 4: Crimes Against Humanity (Murder) pursuant to Article 6 (3) of the Statute

Paragraphs of the Indictment

30. Count 4 of the Indictment charges Major Nzuwonemeye with Crimes against Humanity (Murder) in the following way:

78. The Prosecutor of the International Criminal Tribunal for Rwanda charges **Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu** with Murder, as a Crime against Humanity, an offence punishable under Article (3) (a) of the Statute, in that, in 1994, in Rwanda, **Augustin Bizimungu, Augustin Ndindiliyimana, François-Xavier Nzuwonemeye and Innocent Sagahutu** were responsible for several murders committed against Rwandan Nationals, as part of widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds; in that also, at the same time and place, **François-Xavier Nzuwonemeye and Innocent Sagahutu** were responsible for the murder of ten UNAMIR peacekeeping troops, whose mandate did not include combat and who were, moreover, disarmed, during the same attacks led against the victims on national, racial or ethnic grounds;

Pursuant to Article 6(1) of the Statute: by their individual acts, the Accused planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of the crimes referred to in paragraphs ... 103 and 107 below;

and

Pursuant to Article 6(3) of the Statute: because the Accused knew or had reason to know that soldiers under their command or civilians obeying their orders had committed or were about to commit the crimes referred to in paragraphs ... 103 to 108 below and did not take the reasonable measures to prevent such crimes or to punish the perpetrators thereof.

31. Paragraph 108 read as follows:

108. In Kigali, as soon as the massacres began in April 1994, the Centre Hospitalier de Kigali (CHK) took in many Tutsi who were injured or simply refugees from the various districts of the city. Soldiers from the Reconnaissance Battalion under the command of **François-Xavier Nzuwonemeye** and belonging to the A squad led by **Innocent Sagahutu** guarded the hospital. On several occasions, those soldiers selected patients or refugees and killed them there. Moreover, a list of Tutsi staff members was drawn up and several of them were killed.

Counts 4 and 7: Murders at the CHK (paragraph 108 of the Indictment) pursuant to Article 6 (3) of the Statute

Discussion of the Evidence

32. With respect to the alleged events of the CHK in April 1994, the Prosecutor only called four witnesses, namely, DAR, DCJ, ZA and DY.

Witness DCJ

33. Witness DCJ, who testified on 2 and 3 May 2006, never went into Camp Kigali during the events of April 1994 and therefore didn't testify about alleged killings having taken place at the CHK.

Witness DAR

34. Witness DAR, who was allegedly at the CHK during April 1994 testified on 3, 4 and 10 May 2006. He acknowledged that he didn't see any murder being committed at the CHK, just that a certain Jean-Paul told him. The Trial Chamber regarded this as hearsay in an oral ruling.¹⁶ He also testified that he saw dead bodies at the morgue but didn't know where or who killed those people or even if they were murdered. He even added that a certain Lieutenant Pierre together with a woman called Stéphanie allegedly had a list of Tutsi to be killed.¹⁷ He was apparently told that a certain girl, called Chantal, was killed by Lieutenant Pierre and the said Stéphanie, but again that only constitutes hearsay and the witness himself admitted that he didn't witness it.¹⁸

Witness ZA

35. Witness ZA, a Tutsi woman, was also allegedly at the CHK in April 1994. She testified on 24 May 2004. She stated in her testimony that some pregnant women were being asked their identity cards by some soldiers and that they would not be in their bed anymore some days after. She didn't know what happened to them.¹⁹ According to her, the soldier in charge was a certain Lieutenant Pierre from the Unit No 33 reporting to the Ministry of Defense.²⁰ She was unable to identify the unit the soldiers guarding the CHK belonged to.²¹

Witness DY

36. Witness DY testified between 23 and 26 January 2006. He testified that he saw roadblock at the entrance of the CHK manned by the soldiers²². When asked to which unit the soldiers belonged, his answer was very clear. The soldiers belonged to the Unit Quartier General and the Commander of the Quartier General Unit on 6 April 1994 was Lieutenant Colonel Jean-Marie Vianney Ndahimana²³. Witness DY did not mention the occurrence of any murder taking place at the CHK.

Factual Conclusions

37. The Defence for Major Nzuwonemeye has no information as to whether or not murders occurred at the CHK. The Prosecutor failed to adduce any direct evidence

¹⁶ Transcripts of 3 May 2006, p. 73.

¹⁷ Transcripts of 3 May 2006, p. 74.

¹⁸ Transcripts of 3 May 2006, p. 76.

¹⁹ Transcripts of 24 May 2006, p. 20.

²⁰ Transcripts of 24 May 2006, pp. 42 and 43.

²¹ Transcripts of 24 May 2006, p. 15.

²² Transcripts of 24 January 2006, p. 51.

²³ Transcripts of 24 January 2006, p. 51.

with respect to paragraph 108 of the indictment. The only witness who heard something about alleged murder at the CHK is Witness DAR, who acknowledged that he never witnessed any killing.

Applicable Law

38. The only issue at stake in the present case, is that Major Nzuwonemeye is charged with command responsibility pursuant to Article 6 (3) of the Statute. Article 6 (3) reads as follows:

The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

39. According to the Appeals Chamber of the ICTY, the elements required for responsibility under Article 6 (3) of the Statute are:
- i. The existence of a superior-subordinate relationship
 - ii. The superior knew or had reason to know that the criminal act was about to be or had been committed
 - iii. The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof²⁴

40. The burden of proof is at all times upon the prosecution.²⁵ It is clear that there is no burden on the accused, who is entitled to be acquitted (and must be) if the prosecution fails to prove the case to the required standard. The principle was enunciated in the Judgment in *Delalic and al.* “the general principle to be applied by the Trial Chamber is clearly... that the Prosecutor is bound in law to prove the case against an alleged accused beyond a reasonable doubt”.²⁶

41. It shall be recalled that the “superior-subordinate relationship lies in the very heart of the doctrine of a commander’s liability for the crimes committed by his subordinates”.²⁷ No evidence has been adduced as to the subordinate-superior link.

General Conclusions

42. The Prosecutor has failed to demonstrate the occurrence of any murder at the CHK. The fact that there were dead bodies at the morgue cannot reasonably mean that people were killed at this particular location. It is very clear from the record that no evidence, other than a vague hearsay, was adduced in that respect.

²⁴ *The Prosecutor v. Kordic and Cerkez*, ICTY, Case No. IT-95-14/2-A, Judgment, 17 December 2004, para. 839.

²⁵ *Flick Case*, VI NMT, at 1189. *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10* (Oct. 1946-Apr. 1949)

²⁶ *The Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21-T, Judgment, 16 November 1998, para. 601. (emphasis added)

²⁷ *The Prosecutor v. Limaj et al.*, ICTY, (TC), Judgment, 30 November 2005, para. 521. See also *The Prosecutor v. Strugar*, ICTY, IT-01-42-T, Judgment, 31 January 2005, para. 359.

43. The Prosecutor's allegation that members of the Reconnaissance Battalion guarded the entrance of the CHK is not supported by any evidence. Witness DCJ only testified that he thought he recognized some former member of the Reconnaissance Battalion, while Witness DY affirmed, under oath, that the soldiers around the CHK belonged to the Unit Quartier General.
44. Further, it has never been submitted, in the Indictment or at trial, that Major Nzuwonemeye had any control on Unit Quartier General and that he was in a position to exercise effective control. The Prosecutor failed to adduce evidence as to the superior-subordinate relationship. Clearly, the alleged responsible within the CHK was, according to two Prosecution witnesses, a certain Lieutenant Pierre belonging to Battalion No 33 which was under the command of the Ministry of Defense. Again, it was never submitted that Major Nzuwonemeye had any control over the units belonging to the Ministry of Defense.
45. As Major Nzuwonemeye is only charged with Command Responsibility pursuant to Article 6 (3) of the Statute with respect to paragraph 108, the Defence does not need to discuss Article 6 (1). For the above-mentioned reasons, the Defence for François-Xavier Nzuwonemeye submits that he should be acquitted on Count 4 (murder) with respect to the material facts mentioned in paragraph 108 of the indictment pursuant to Article 6 (3) of the Statute.

Counts 6 and 8: Crimes Against Humanity (Rape) and Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (Rape, humiliating and degrading treatment) (paragraphs 110, 119 and 112) pursuant to Article 6 (3) of the Statute

Rape and Violations of Article 3

Discussion of the evidence

46. The Accused François-Xavier Nzuwonemeye is charged in paragraphs 110, 112 and 119 with Crimes Against Humanity (Rape). The paragraphs of the Indictment reads as follows:

110. The Prosecutor of the International Criminal Tribunal for Rwanda charges **Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu** with Rape, as a Crime against Humanity, an offence punishable under Article (3) (g) of the Statute, in that, in 1994, in Rwanda, **Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu** were responsible for several rapes committed against Tutsi civilians by soldiers under their command or by civilians over whom they had authority, as part of widespread and systematic attacks against a civilian population, on national, racial, ethnic, or political grounds, as follows:

Pursuant to Article 6 (3) of the Statute: in that the Accused knew or had reasons to know that their subordinates had committed or were about to commit the rapes referred to in [...] paragraph 112 in respect of **François-Xavier Nzuwonemeye and Innocent Sagahutu**, and did not take the necessary measures to prevent such crimes or to punish the perpetrators thereof.

[...]

112. During the months of April, May and June 1994, soldiers from the A squad of the Reconnaissance Battalion, led by **Innocent Sagahutu** and under the command of Major **François-Xavier Nzuwonemeye**, who guarded the *Centre hospitalier de Kigali*, and their Interahamwe accomplices abducted several Tutsi women from the hospital who had come to seek treatment or simply to seek refuge; they raped them or mistreated them. Those rapes took place inside the kiosks at the entrance of the hospital.

[...]

119. The Prosecutor of the International Criminal Tribunal for Rwanda charges **Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu** with Rape and other humiliating and degrading treatment, an offence punishable under Article 3 Common to the Geneva Convention and Additional Protocol II, under Article 4 (e) of the Statute, in that, in 1994, in Rwanda, soldiers from the Rwandan Army, under their authority, in concert with militiamen, raped several Tutsi civilian women, in the context of a non-international armed conflict inasmuch as those Rwandan civilians were categorized by their tormentors as being virtual members of the RPF or accomplices of that movement.

Pursuant to Article 6 (3) of the Statute: in that the Accused knew or had reasons to know that their subordinates had committed or were about to commit the rapes referred to in [...] paragraph 112 in respect of **François-Xavier Nzuwonemeye and Innocent Sagahutu**, and did not take the necessary measures to prevent such crimes or to punish the perpetrators thereof.

[...]

47. The Defence for Nzuwonemeye will now review the evidence adduced at trial. The Prosecutor solely called four witnesses in support of this allegation, namely, Witnesses DCJ, DAR, ZA and DY.

Witness DCJ

48. Witness DCJ testified on 2 and 3 May 2006. He stated that he was trained with the Music Company in Kigali for 12 years. His training started in January 1981. During that period, he was residing at Camp Kigali with the Music Company. In 1993, he left the Music Company and joined battalion 91, which was based in Rushashi.²⁸ During his residency in Camp Kigali between 1991 and 1993, he witnessed the existence of several roadblocks around Camp Kigali. One was at the entrance of Camp Kigali, one at the entrance of the Etat-Major. There was another roadblock between the CHK and the Hotel Diplomates.²⁹

49. Witness DCJ went to the CHK between 10 and 15 April 1994. He reached the roadblock between the CHK and the Hotel des Diplomates, but couldn't reach the other roadblocks.³⁰ At the CHK he allegedly saw a soldier from the Reconnaissance Battalion who forbid him to go on and enter the camp. He was of the opinion that they were members of the Reconnaissance Battalion as he had lived with them for 12 years

²⁸ Transcripts of 2 May 2006, pp. 13-14 (Closed session).

²⁹ Transcripts of 2 May 2006, pp. 23-24.

³⁰ Transcripts of 2 May 2006, pp. 25-26.

and at the roadblock, he met Sergeant Augustin Kalimunda, who told him to go back to town.³¹

50. Witness DCJ left Camp Kigali in February 1993.³² He testified that the roadblocks were already in place before 6 April 1994. The roadblocks were in fact installed after the attack of 1 October 1991 in order to prevent the enemy to enter Camp Kigali and protect the city.³³ They were manned alternatively by soldiers from Quartier General, from the Rwandan Army, students from the ESM...³⁴ In April 1994, he thought he recognized soldiers who used to belong to the Reconnaissance Battalion, but he also stated that he wasn't aware whether or not they had been transferred to another unit.³⁵ Furthermore, he didn't ask the soldiers which unit they belonged to or what they were doing here and he acknowledged that he left immediately.³⁶ Finally, Witness DCJ confirmed under re-examination by the Prosecutor, that he didn't obtain any information whatsoever as to where the soldiers at the roadblocks were coming from or which battalion they belonged to.³⁷

Witness DAR

51. Witness DAR testified on 3, 4 and 10 May 2006. He was working in the laundry room at the CHK and when he arrived at the hospital on 7 April 1994, at around 8 a.m., he noticed a roadblock at the entrance of the CHK and that people wishing to enter the hospital were requested to show their ID.³⁸ On 8 April, when he was leaving the hospital, he witnessed the presence of Interahamwe and lots of soldiers around and inside the CHK. Again people willing to enter had to show their ID.³⁹ There were two types of soldiers in the CHK. The wounded ones and others who were moving freely, like Lieutenant Pierre. Lieutenant Pierre was the commander of the other soldiers at the CHK. He was also in charge of the soldiers at the entrance. He was very often accompanied by Stephanie, who was the chief of nursing. They had a list of Tutsis who were supposed to be killed.⁴⁰
52. He recalled that certain events involving girls occurred at the CHK. He did not know what happened and when asked, his answer was: "*At nightfall, soldiers used to come and look for these persons. And when those girls returned, it could be seen that they were very sad, and we were not in a position to put any questions to them*".⁴¹ The soldiers would come at night and take away the women who didn't have their ID.⁴² Although he spent 5 weeks within the premises of the CHK, he saw the alleged events taking place 4 times only. Furthermore, when asked the identity of the soldiers who came to look for the girls, the unit to which they belonged, if he could identify any of

³¹ Transcripts of 2 May 2006, p. 25.

³² Transcripts of 2 May 2006, p. 38.

³³ Transcripts of 2 May 2006, p. 41.

³⁴ Transcripts of 2 May 2006, p. 42.

³⁵ Transcripts of 3 May 2006, p. 23.

³⁶ Transcripts of 3 May 2006, p. 27.

³⁷ Transcripts of 3 May 2006, p. 61.

³⁸ Transcripts of 3 May 2006, p. 63.

³⁹ Transcripts of 3 May 2006, p. 71.

⁴⁰ Transcripts of 3 May 2006, p. 74.

⁴¹ Transcripts of 4 May 2006, p. 3.

⁴² Transcripts of 4 May 2006, p. 11.

them or he knew who mandated them, the witness answered each time by the negative.⁴³

Witness ZA

53. Witness ZA, a Tutsi woman, testified on 24 May 2006 before this Trial Chamber. She testified that, according to her, soldiers were guarding the entrance of the CHK but didn't know the unit they belonged to.⁴⁴ They were wearing camouflage uniforms, green berets and a rifle.⁴⁵ She witnessed a lot of soldiers within the CHK, who once came and asked the patients to show their ID.⁴⁶ She stated in her testimony that some pregnant women were being asked their identity cards by some soldiers and that they would not be in their bed anymore some days after. She didn't know what happened to them.⁴⁷ She didn't give any evidence as to whether rapes or any sexual assaults occurred at the CHK nor did she mention anything with respect to the alleged rapes at the kiosk at the entrance of the CHK, as alleged in paragraph 112 of the indictment. Although she mentioned the presence of soldiers within the premises of the CHK, she testified that the soldiers were under the supervision of a certain Lieutenant Pierre Nsanziimana, who belonged to a Unit No 33 and reported to the Minister of Defence.⁴⁸

Witness DY

54. Witness DY testified between 23 and 26 January 2006. He testified that he saw roadblocks at the entrance of the CHK manned by the soldiers.⁴⁹ When asked to which unit the soldiers belonged, his answer was very clear. The soldiers belonged to the Unit Quartier General and the Commander of the Quartier General Unit on 6 April 1994 was Lieutenant Colonel Jean-Marie Vianney Ndahimana.⁵⁰ Witness DY did not mention the occurrence of rapes at the CHK.

Factual Conclusions

55. The Defence for Nzuwonemeye does not know whether rapes occurred or not at the CHK. As Major Nzuwonemeye or any of the members of the Reconnaissance Battalion were not present, the Defence has no information to that respect and is not in a position to make any comment on that issue. Furthermore, the fact that the rapes happened as part of a widespread and systematic attack against the Tutsi population (Count 6) or in the context of a non-international armed conflict is irrelevant in this particular case. Nevertheless, none of the witnesses called by the Prosecutor testified on the alleged occurrence of rapes. The testimony of Witness DAR is utterly vague and cannot support the allegation that any rape occurred at the CHK.

56. The testimony of Witness ZA, a Tutsi woman who spent five months at the CHK with her sisters is very clear in that respect. She did not witness any rape. One could only

⁴³ Transcripts of 10 May 2006, p. 50.

⁴⁴ Transcripts of 24 May 2006, pp. 14-15 (Closed session).

⁴⁵ Transcripts of 24 May 2006, p. 15 (Closed session).

⁴⁶ Transcripts of 24 May 2006, p. 19 (Closed session).

⁴⁷ Transcripts of 24 May 2006, pp. 19-20 (Closed session).

⁴⁸ Transcript of 24 May 2006, pp. 41-42 (Closed session).

⁴⁹ Transcripts of 24 January 2006, p. 51.

⁵⁰ Transcripts of 24 January 2006, p. 51.

agree that if rapes had occurred and considering the length of time she has spent in the premises, she would have known or heard something and said so. She did not.

Applicable Law

57. The Defence recalls the definition of rape given by the ICTY Appeals Chamber in the case of *The Prosecutor v. Kunarac et al.* and subsequently adopted by the ICTR and ICTY in their respective jurisprudence:

[...] the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.⁵¹

58. The Defence agrees with the definition at this stage of the proceedings and will not challenge it in this Motion.

59. Not a single prosecution witness linked the people allegedly responsible for the alleged rapes with the Reconnaissance Battalion or Major Nzuwonemeye. No link has been established between Lieutenant Pierre and Captain Sagahutu, Major Nzuwonemeye or any member of the Reconnaissance Battalion. The Prosecutor failed to demonstrate the superior-subordinate relationship between the people present at the CHK, which is the very core issue to be proven.

General Conclusions

60. The Defence therefore submits that there is no connection that was established by the Prosecutor between the events at the CHK and Major Nzuwonemeye. The Prosecutor has not demonstrated the relationship with the people committing the offence and especially Lieutenant Pierre, that Major Nzuwonemeye knew or had reasons to know that the criminal acts were about or had been committed and that Major Nzuwonemeye failed to take the necessary and reasonable measures to prevent the criminal acts or to punish the perpetrators thereof. The Prosecutor had the burden of proof of the link and he failed to do so. Considering his very specific position within the army and his limited powers, Major Nzuwonemeye cannot be held responsible for

⁵¹ *The Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T, Judgment, 10 December 1998, para. 387; *The Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T, Judgment, 12 June 2002 para. 128 ("The Appeals Chamber concurs with the Trial Chamber's definition of rape"); *The Prosecutor v. Semanza*, ICTR, Case No. ICTR-97-20-T, Judgment, 15 May 2003, para. 345 ("While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in *Kunarac* to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber"); *The Prosecutor v. Kajelijeli*, ICTR, Case No. ICTR-97-20-T, Judgment, 12 January 2002, para. 915 ("Given the evolution of the law in this area, culminating in the endorsement of the *Furundzija/Kunarac* approach by the ICTY Appeals Chamber, the Chamber finds the latter approach of persuasive authority and hereby adopts the definition as given in *Kunarac*"); *The Prosecutor v. Kamuhanda*, ICTR, Case No. ICTR-99-54A-T, Judgment, 22 January 2004, para. 709; *The Prosecutor v. Bagosora et al.*, ICTR, Case No. ICTR-98-41-T, Decision on Motions for Judgment of Acquittal, 2 February 2005, par. 30.

any misbehavior of any soldier in any part of Rwanda during the tragic events of 1994.

- 61. The Prosecutor did not lead any evidence to implicate Major Nzuwonemeye with any alleged rape at the CHK. The witness testimonies did not provide the elements of the occurrence of rape or a link between the Accused and the soldiers present at the CHK so as to establish a superior-subordinate relationship. Finally the record does not show that Major Nzuwonemeye knew or had reasons to know that rapes occurred at the CHK.⁵²
- 62. Therefore, following the jurisprudence developed by both Tribunals with respect to Rule 98bis of the RPE, it is the Defence' submission that Major Nzuwonemeye must be acquitted on Counts 6 and 8 of the indictment on the ground that the Prosecutor has failed, first to demonstrate the occurrence of rapes or degrading treatments and second the subordinate-superior relationship between Lieutenant Pierre and the soldiers acting at the CHK and Major Nzuwonemeye or the Reconnaissance Battalion.

For the above-mentioned reasons, the Defence for Major François-Xavier Nzuwonemeye moves the Trial Chamber to:

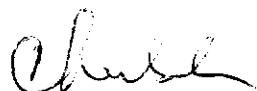
ACQUIT the Accused of Count 1, Conspiracy to Commit Genocide,

ACQUIT the Accused of Count 4, Crimes against Humanity (Murder) pursuant to Article 6 (3) of the Statute with respect to paragraph 108 of the Indictment,

ACQUIT the Accused of Count 6, Crimes against Humanity (Rape),

ACQUIT the Accused of Count 8, Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (Rape, humiliating and degrading treatment),

Arusha, 15 January 2006



Charles Taku, Lead Counsel

⁵² *The Prosecutor v. Casimir Bizimungu et al.*, ICTR, Case No. ICTR-99-50-T, Decision on Defence Motions Pursuant to Rule 98bis, 22 November 2005, para. 89.



TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION

(Art. 27 of the Directive for the Registry)

I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

To:	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input checked="" type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fornété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS M. Diop	<input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
From:	<input type="checkbox"/> Chamber (names)	<input checked="" type="checkbox"/> Defence Chief Charles A. Taku (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
	Case Name: The Prosecutor vs. Prosecutor Vs Nzuwonemeye			Case Number: ICTR-2000-56-T
Dates:	Transmitted: 15 January 2007		Document's date: 15 January 2007	
No. of Pages:	17	Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
Title of Document:	Motion of acquittal pursuant to Rule 98 bis			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Ex-Parte		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input type="checkbox"/> Confidential		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
		<input type="checkbox"/> Submission from non-parties	<input type="checkbox"/> Submission from parties	
		<input type="checkbox"/> Accused particulars		

II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

CMS SHALL take necessary action regarding translation.

Filing Party hereby submits only the original, and **will not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English French Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input type="checkbox"/> English <input type="checkbox"/> French <input checked="" type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda

CMS SHALL NOT take any action regarding translation.

Filing Party **will be submitting the translated version(s)** in due course in the following language(s):

English French Kinyarwanda

KINDLY FILL IN THE BOXES BELOW

<input type="checkbox"/> The OTP is overseeing translation. The document is submitted for translation to: <input type="checkbox"/> The Language Services Section of the ICTR / Arusha. <input type="checkbox"/> The Language Services Section of the ICTR / The Hague. <input type="checkbox"/> An accredited service for translation; see details below: Name of contact person: Name of service: Address: E-mail / Tel. / Fax:	<input type="checkbox"/> DEFENCE is overseeing translation. The document is submitted to an accredited service for translation (fees will be submitted to DCDMS): Name of contact person: Name of service: Address: E-mail / Tel. / Fax:
---	--

JUDICIAL RECORDS SECTION
 2007 JAN 15 11:08
 RECEIVED

III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	COMMENTS	<input type="checkbox"/> Required date:
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: