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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:** Judge William H. Sekule, Presiding  
Judge Arlette Ramaroson  
Judge Solomy Balungi Bossa

**Registrar:** Mr Adama Dieng

**Date:** 27 April 2004

**The PROSECUTOR**

v.

**Pauline NYIRAMASUHUKO**

*Case No. ICTR-97-21-T*

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JUDICIAL RECORDS  
ICTR  
2004 APR 27 P 3:00

**DECISION ON NYIRAMASUHUKO'S ORAL MOTION REGARDING  
PROSECUTION'S USE OF MATERIAL UNDER SEAL**

**Office of the Prosecutor**

Silvana Arbia  
Adelaide Whest  
Jonathan Moses  
Adesola Adebeyejo  
Althea Alexis  
*Manuel Bouwknecht, Case Manager*

**Defence Counsel**

Nicole Bergevin  
Guy Poupart

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (the “Tribunal”);

**SITTING** as Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge Arlette Ramaroson and Judge Solomy Balungi Bossa (the “Chamber”);

**BEING SEIZED** of Nyiramasuhuko’s Oral Motion, dated 8 April 2004, regarding Prosecution’s use of material under seal, in particular the diary of Pauline Nyiramasuhuko (the “diary”), seized during Nyiramasuhuko’s arrest on 18 July 1997 (the “Motion”);

**HAVING HEARD** the Parties on 8 April 2004;

**NOTING** the “Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized”, filed on 12 October 2000 (the “12 October 2000 Decision”);

**NOTING** the “Decision on Nyiramasuhuko’s Urgent Motion to Forbid the Parties in the “Government I” Trial and Any Other Trial from Using the Alleged Diary of Pauline Nyiramasuhuko”, filed on 27 April 2004 (the “Decision on Nyiramasuhuko’s Urgent Motion”);

**CONSIDERING** the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 5, 41, and 94 *bis*;

**NOW DECIDES** the matter on the basis of the oral submissions of the Parties pursuant to Rule 73 (A).

### **Submissions of the Parties**

#### *Defence*

#### *Prosecutor’s Use of the Nyiramasuhuko’s Alleged Diary*

1. The Defence for Nyiramasuhuko submits that by duplicating and providing a copy of the diary to Prosecution expert witness, Professor Guishaoua, the Prosecution breached the seal placed on the diary by Judge Laity Kama’s 12 October 2000 Decision. Therefore, the Defence requests the Chamber, pursuant to Rule 5 (a), (b), and (c), and Article 12.1 of the Code of Professional Conduct for Defence Counsel<sup>1</sup>, to: exclude the portion of Professor Guishaoua’s expert report containing material from the diary, charge the Prosecution with the consequent delays, and sanction the Prosecution for non-compliance with an order of the Chamber.
2. The Defence submits that the Prosecution allowed copies of the diary to be disclosed to Parties in *Karemera et al.* on 3 October 2003, as shown by a Memorandum of Submission of CDs for inspection filed by the Defence as an exhibit.
3. According to the Defence, further to the 12 October 2000 Decision, the inspection of material belonging to the Accused Nyiramasuhuko was conducted from 1 to 10 February 2001, and the material retained by the Prosecution sealed. On 17 October 2002, the Chamber granted

<sup>1</sup> The Defence for Nyiramasuhuko contends that although the Code of Professional Conduct is applicable only to Defence counsel, the Prosecution should be held to the same standard of conduct.

the Prosecution's request (unopposed by the Defence) to lift the seal on the diary so that it may be translated.

4. The Defence submits that following the sealing of the diary, pursuant to the 12 October 2000 Decision, the diary was under the control of the Trial Chamber. It argues that the purpose of the order was to preserve, from loss or other damage, the material under seal.

#### *Admissibility of Diary*

5. The Defence interprets Paragraph 29 of the 12 October 2000 Decision as explicitly allowing the issue of admissibility of material seized on 18 July 1997 to be raised and considered at trial.
6. The Defence submits that (1) the diary was seized by Kenyan authorities and representatives of the Prosecution during the allegedly unlawful arrest of Accused on 18 July 1997; (2) the search and seizure was illegal; and in the alternative, (3) the material itself lacks the required indicia of reliability required. The Defence thus requests the Chamber, pursuant to Rules 41, 89, and 95, to deem the diary inadmissible as evidence.
7. The Defence contends the Kenyan authorities were in receipt of the arrest warrant only on 22 July 1997, after the Accused Nyiramasuhuko's arrest on 18 July 1997. The Defence contends it can raise again the issue of unlawful arrest as it was not in possession of the relevant documents when it motioned the court on 8 June 2000.
8. The Defence submits that the material seized on 18 July 1997, including the diary, lacks the reliability required by Rule 95 for admissibility. It argues that there was no initial inventory or proper chain of custody for the material, and it was kept by the Prosecution without seal for three years. The Defence concludes that this lack of reliability prejudices the Accused's rights.
9. In support of its contention on lack of reliability, The Defence alleges that the Prosecution failed in its duty, outlined in Rule 41, to preserve material in its custody, prompting Judge Kama's to order the inventory and sealing of material on 12 October 2000.
10. In support of its legal reasoning, the Defence cites *Mucic*<sup>2</sup> in contending that the Chamber is not bound by the national rules of evidence. Thus, not only does Article 114 of the Kenyan Penal Code require a search warrant, but the Defence argues that the Chamber adopt the fundamental principle that "a man is master of his home."
11. Finally, the Defence submits that the Prosecution sought to introduce into evidence the diary through a "round-about" manner, prejudicing the Accused's right to silence.

#### *Prosecution*

12. On the issue of the seal, the Prosecution submits that the 12 October 2000 Decision's intent was to preserve the quality of material seized, rather than transferring control of the material to the Chamber. Pursuant to Rule 41, it argues that the material remained in its control, and it

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<sup>2</sup> *Prosecutor v. Delalic et al.*, Case No. IT-96-21, "Decision on the Motion of the Prosecution for the Admissibility of Evidence", 19 January 1998 (the "Celebici" case).

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cannot be barred from using copies of the sealed material for further investigations. In support, it alleges that the Defence sought permission of the Prosecution, and not of the Chamber, to inspect the material in March 2003, and copies of the diary were disclosed to the Defence.

13. The Prosecution points out that the diary is still under seal and duplicates of it were made when it was given leave to lift the seal for translation purposes.
14. The Prosecution submits that the 12 October 2000 Decision rendered *res judicata* any irregularities in obtaining the evidence, precluding the issues of the legality of search and seizure, and the legality of Accused Nyiramasuhuko's arrest. It notes that the 12 October 2000 Decision deferred to Kenyan judicial remedies, but the Defence did not seek redress in the Kenyan judicial system on either issue.
15. The Prosecution also submits that, pursuant to Rule 95, the Defence failed in making a threshold showing of lack of reliability required to exclude evidence. It contends that the evidence is credible, and the Defence did not show any "concrete" prejudice. The Prosecution argues that no prejudice flows from an expert analysis on subjects in the diary.
16. To support its argument, the Prosecution cites the *Kordic* Decision<sup>3</sup> and the *Stakic* Appeals Decision<sup>4</sup> to contend that evidence should only be excluded if it seriously damages the integrity of the proceedings, as any exclusion damages justice.
17. The Prosecution further submits that Professor Guishaoua was called as an expert witness only to establish facts in the interest of justice, not to circumvent admissibility of evidence.
18. The Prosecution alleges that the delay resulting from this Motion implicates the expeditious conduct of the trial, and it should be charged to the Defence.
19. Finally, the Prosecution requests that the Chamber reject the Motion in its entirety.

#### *Defence Reply*

20. In response to the Prosecution, the Defence submits that the Prosecution was in possession of items seized on 19 July 1997, including the diary, precluding redress in the Kenyan judicial system.
21. The Defence submits that the arrest of Nyiramasuhuko was not an emergency, as contended by the Prosecution, as her arrest warrant had been issued on 21 May 1997.

#### **HAVING DELIBERATED,**

22. The Chamber recalls Judge Kama's order in the 12 October 2000 Decision:

II. Order the Prosecution and the Defence to decide upon a date [ . . . ] to examine and inventory all property seized, return to the Accused any part of the said property that both parties agree is not necessary for the purposes of the Prosecution, then

<sup>3</sup> The Prosecution did not provide a citation to the decision.

<sup>4</sup> The Prosecution did not provide a citation to the decision.

seal the remaining property seized, and to prepare a record to be signed by the Parties pertaining to all these operations.<sup>5</sup>

23. The Chamber recalls the Prosecution's oral motion of 17 October 2002, uncontested by the Defence, and granted by the Chamber, which stated:

I am moving that the Trial Chamber lift the seal on the diary of Pauline Nyiramasuhuko for purposes of translation only and that the registry may have access to it. It may be returned under seal when that purpose is done, and a copy would be provided to the Defence once it is translated. And reference again, is made to your decision of 12 October 2000.<sup>6</sup>

24. The Chamber notes the Prosecution's submission that it made duplicates of the diary when the seal was lifted for translation purposes, and subsequently distributed copies of the diary to Professor Guishaoua and Parties in the *Karemera et al.* case.

25. For the above reasons, the Chamber considers as the primary issue the Prosecution's contended non-compliance, pursuant to Rule 5, with the 12 October 2000 Decision in duplicating and subsequently distributing copies of the diary under seal to the expert witness and other parties.

26. In evaluating the intent of the 12 October 2000 Decision in placing material seized, including the diary, under seal, the Chamber observes as follows:

a. The 12 October 2000 Decision does not expressly state the purpose of its order beyond stating:

[...][I]n the interests of justice as well as equity, we consider that, more than three years after the execution of [the search and seizure], the Prosecution and the Defence must agree on a date to examine, inventory, then seal said property, to which Defence has been denied access to date. If, during the examination of the said property, both parties agree that any part is not necessary for the purposes of the prosecution, such property will be immediately returned to the Accused[...]<sup>7</sup>

b. Rule 41 (b) was introduced at the 10th Plenary Session of the Tribunal on 30 and 31 May 2001, after the 12 October 2000 Decision, and states:

b. The Prosecutor shall draw up an inventory of all materials seized from the accused, including documents, books, papers, and other objects, and shall serve a copy thereof on the accused. Materials that are of no evidentiary value shall be returned without delay to the accused.

c. On 12 October 2000, the Prosecution's Rule 41 responsibilities were limited to Rule 41 (a), which stated:

a. The Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigations.

<sup>5</sup> *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized", 12 October 2000 (the "12 October 2000 Decision").

<sup>6</sup> T. 17 October 2002, p. 58.

<sup>7</sup> 12 October 2000 Decision, para. 30.

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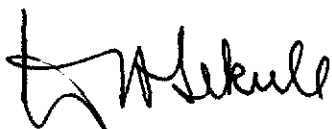
- d. The Defence agrees that the 12 October 2000 Decision sealed the material to preserve it from loss or other damage;
  - e. The Prosecution's 17 October 2002 oral motion sought to unseal the diary solely for translation purposes;
  - f. The Defence received a copy of the diary, and subsequently inspected the diary in March 2003.
27. Based on these factors, the Chamber finds that the 12 October 2000 Decision sought to preserve the integrity of the material, but did not preclude the Prosecution from continuing to use the material for the purposes of prosecution. In this regard, the Chamber notes that the Defence, on its part, in receipt of a copy of the diary, was able to use it in its preparations, and the Prosecution may not be deprived the same benefit. The Chamber thus concludes that use and distribution of copies of the diary under seal, in these circumstances, does not diminish the integrity of the diary, the original of which remains under seal.
28. The Chamber finds the Defence submission on exclusion of the portion of the expert report concerning the diary to be premature. Pursuant to Rule 94 *bis* (B), after the filing of an expert report, the opposing party has the opportunity to accept the expert report, or seek to cross-examine the expert witness. Professor Guishaoua's expert report has yet to be filed.
29. The Chamber further finds the Defence submissions on the admissibility of the diary untimely as the Prosecution has not sought to admit the diary into evidence. Without considering the merits of admissibility, the Chamber agrees with the Prosecution that the 12 October 2000 Decision renders *res judicata* Defence contentions regarding the question of the legality of the search and seizure and arrest of the Accused.

**FOR THE ABOVE REASONS,**

**THE TRIAL CHAMBER:**

**DISMISSES** the motion in its entirety.

Arusha, 27 April 2004



William H. Sekule  
Presiding Judge



Arlette Ramaroson  
Judge



Solomy Balungi Bossa  
Judge

[Seal of the Tribunal]