

5330

ICTR-97-21-T
27-04-2004
(1226 — 1221)

1226
mbgs



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

Registry: Mr Adama Dieng

Date: 27 April 2004

AD
JUDICIAL SECRET
2004
1 APR 27 15:00

THE PROSECUTOR

v.

Pauline NYIRAMASUHUKO

Case No. ICTR-97-21-T

**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**

Office of the Prosecutor

Silvana Arbia
Adelaide Whest
Jonathan Moses
Adesola Adeboyejo
Manuel Bouwknecht, Case Manager

Defence Counsel

Nicole Bergevin
Guy Poupart

Handwritten signature

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 “*Requête d’extrême urgence aux fins d’interdire aux parties impliquées dans le procès Gouvernement I et dans quelque autre procès devant le TPIR l’utilisation de quelque façon que ce soit de l’agenda allégué de Pauline Nyiramasuhuko et d’ordonnance de remise sous scellés*” filed on 25 November 2003 (the “Motion”);

NOTING the “Prosecutor’s response to Nyiramasuhuko’s urgent motion to forbid the parties in the Government one trial and any other trial from using the alleged diary of Pauline Nyiramasuhuko”, filed on 2 December 2003 (the “Response”);

NOTING the “Corrigendum to Prosecutor’s response to Nyiramasuhuko’s urgent motion to forbid the parties in the Government one trial and any other trial from using the alleged diary of Pauline Nyiramasuhuko”, filed on 4 December 2003 (the “Corrigendum”);

NOTING the “*Réplique à la Prosecutor’s Response to 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 8 December 2003 (the “Reply”);

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 Oral Motion Regarding Prosecution’s Use of Material Under Seal”, filed on 27 April 2004;

CONSIDERING the Statute of the Tribunal (“Statute”) and the Rules of Procedure and Evidence (the “Rules”), and, especially Rules 5, and 41;

NOW CONSIDERS the Motion based solely on the written briefs filed by the Parties, pursuant to Rule 73(A).

Submissions of the Parties

Defence

1. The Defence requests the Chamber to prevent the use of the Accused’s alleged diary (the “diary”) by any parties involved in the “Government I” trial or any other trial before the ICTR and for an order for the diary to be put back under seal.
2. The Defence submits that the diary was seized, with other items, from the Accused during her arrest in Kenya on 18 July 1997. It also submits that thereafter, the items were inventoried and put under seal in the presence of representatives of both the Prosecutor and Defence, pursuant to the 12 October 2000 Decision.
3. The Defence further submits that on 17 October 2002, the Prosecution motioned the Chamber to lift the seal on the aforesaid diary for the sole purpose of its translation. The Defence recalls that it did not raise any objection to the motion.



4. The Defence submits that it has learnt that on 3 October 2003, the Case Manager in the "Government I" trial disclosed to Defence a memorandum containing a photocopy of the diary.
5. The Defence specifies that this diary is neither owned nor controlled by the Prosecution. It contends that the diary was put under seal in furtherance of the 12 October 2000 Decision, and that it has not yet been admitted as evidence.
6. The Defence emphasizes that the lifting of the seal was granted for the sole purpose of translation. Thus, the Defence contends that the Prosecution did not have the right to either appropriate the diary or hand over a copy of the diary to other Defence teams, regardless of the Accused they represent.
7. The Defence reiterates that the Prosecution was not allowed to use the diary for any purpose other than translation, without prior leave of the Chamber. Accordingly, the Defence contends that the diary should have been put back under seal as soon as its translation was complete.
8. In conclusion, the Defence submits that the Prosecution acted illegally in photocopying and providing copies of the diary to other parties, prejudicing the Accused.
9. The Defence notes that one year has elapsed since the Chamber granted the Order for translation. Nevertheless, the Defence alleges that the Prosecution has not furnished it with a copy of the translation till date.

Prosecution

10. The Prosecution submits that the 12 October 2000 Decision was issued in accordance with Rule 41, which provides as follows:
 - A) The Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in course of his investigations.
 - 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.
11. The Prosecution notes that the 12 October 2000 Decision ordered it to retain the items necessary for prosecution, confirming that the items were in the custody of the Prosecutor. Therefore, it contends that the Defence assertion that the diary is not and should not be in the possession and the control of the Prosecutor is incorrect in law and fact.
12. The Prosecution further submits that there is nothing in the Order of 17 October 2002 preventing it either from making a photocopy of the diary or from providing it to other trial teams who may have an interest in it. The Prosecution asserts that it is perfectly entitled to do so as it has not breached any order of the Trial Chamber.

13. The Prosecution submits that the mere provision of a document to the Defence by the Prosecutor does not make the document admissible. It contends that it is in the Chamber's discretion to decide this issue at the appropriate time.

Defence Reply

14. The Defence submits that the 12 October 2000 Decision was not, as the Prosecution claims, on the basis of current Rule 41, as Rule 41 (B) did not exist on 12 October 2000.
15. Finally, the Defence submits that the Accused would be prejudiced if she was called upon to testify in another trial regarding the contents of the diary before a decision on the admissibility of the diary into evidence.

HAVING DELIBERATED

16. 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 seal the remaining property seized, and to prepare a record to be signed by the Parties pertaining to all these operations.¹

17. 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 2000.²

18. The Chamber notes that the Prosecution made duplicates of the diary when the seal was lifted for translation purposes, and subsequently distributed copies of the diary to the Defence in the "Government I" trial.³
19. For the above reasons, the Chamber considers as the primary issue the Prosecution's contended non-compliance with the 12 October 2000 Decision in duplicating and subsequently distributing copies of the diary under seal to other parties.
20. 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:

¹ *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").

² T. 17 October 2002, p. 58.

³ *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Nyiramasuhuko's Oral Motion Regarding Prosecution's Use of Material under Seal", 27 April 2004, para. 25 (the "27 April 2004 Decision on Nyiramasuhuko's Oral Motion").



[...][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[...]⁴

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.

d. The Defence agrees that the 12 October 2000 Decision sealed the material to preserve it from loss or other damage,⁵

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 2003.⁶

21. 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.

22. The Chamber notes that the Parties submissions on admissibility need to be raised before the appropriate Trial Chamber.

⁴ 12 October 2000 Decision, para. 30.

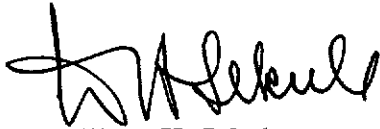
⁵ 27 April 2004 Decision on Nyiramasuhuko's Oral Motion, para. 4 and 26 (d).

⁶ *Id.* para 12.

FOR THE ABOVE REASONS, THE TRIBUNAL

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]