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(1254 — 1250)

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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 Ramarason
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 20 May 2004

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO

Case No. ICTR-97-21-T

2004 MAY 20 PM 3:38
JUDICIAL SECRETARIAT
ICTR

**DECISION ON NYIRAMASUHUKO'S MOTION FOR CERTIFICATION
TO APPEAL THE "DECISION ON NYIRAMASUHUKO'S ORAL
MOTION REGARDING PROSECUTOR'S USE OF MATERIAL UNDER
SEAL" AND "DECISION ON NYIRAMASUHUKO'S URGENT MOTION
TO FORBID THE PARTIES IN THE "GOVERNMENT I" TRIAL AND
ANY OTHER TRAIL FROM USING THE ALLEGED DIARY OF
PAULINE NYIRAMASUHUKO"**

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

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

RECALLING the “Decision on Nyiramasuhuko’s Oral Motion Regarding Prosecutor’s Use of Material Under Seal” of 27 April 2004 (the “Impugned Decision I”);

RECALLING 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” of 27 April 2004 (the “Impugned Decision II”);

BEING SEISED of “Nyiramasuhuko’s Motion for Certification to Appeal the “Decision on Nyiramasuhuko’s Oral Motion Regarding Prosecutor’s Use of Material Under Seal” and “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 28 April 2004 (the “Motion”);¹

CONSIDERING the “Prosecutor’s Response to the *Requete en certification d’appel de la “Decision on Nyiramasuhuko’s Oral Motion Regarding Prosecutor’s Use of Material Under Seal’ et de la “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 5 May 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”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”);

NOW DECIDES the matter, pursuant to Rule 73, on the basis of the written submissions of the Parties.

SUBMISSIONS OF THE PARTIES

Defence

1. The Defence submits that the two impugned decisions raise issues that will affect the fair and expeditious conduct of the proceedings. Thus, the Defence requests that the Chamber grant certification on the Impugned Decisions I and II, and suspend the filing of Professor Guichaoua’s report, and its subsequent disclosure, until a decision on this motion, or until the final resolution of the issues raised in the two impugned decisions.
2. In support of its reasoning, the Defence argues that it need only convince the Chamber that certification may affect the fair and expeditious conduct of the proceedings. It further

¹ The Motion was filed in French and originally entitled: « *Requête en Certification d’Appel de la ‘Decision on Nyiramasuhuko’s Oral Motion Regarding Prosecutor’s Use of Material Under Seal’ and ‘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’* ».



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submits that an appellate review may materially advance the proceedings by finally resolving the rights of any party to use material placed under seal, and the admissibility of this material – both unresolved issues.

3. The Defence contends that the Chamber, in the two impugned decisions, has erred in law and fact, as it:
 - a. mistook the conservation of the material with its admissibility;
 - b. noted that the Defence received the translation of the Diary in March 2003; and
 - c. pursuant to the 12 October 2000 Decision, allowed the Prosecutor to use the copy of the diary for purposes other than translation.
4. The Defence contends that the Accused would be compelled to testify to explain certain extracts in Professor Guichaoua's report if her alleged diary (the "Diary") is admitted into evidence. It argues that this would violate the Accused's right to silence, not only in the course of her own trial, but also in that of others.
5. The Defence alleges that the Prosecution's use of the material under seal, the admissibility of which is still undecided, was unfair.
6. The Defence submits that it knew of Professor Guichaoua's report only on 8 April 2004, and orally argued the Motion on the same day.
7. Finally, the Defence submits that the Chamber breached the 12 October 2000 Decision's order in issuing the two impugned decisions.

Prosecution

8. The Prosecution submits, while agreeing with the Defence's factual submissions, that the certification to appeal the two impugned decisions would delay the proceedings. It submits that the Defence has both failed to show any prejudice to the Accused; and failed to show any significant affect to the fair and expeditious conduct of the trial or outcome of the trial. The Prosecution also contends that there is no demonstrable showing of how the appeal will materially advance the proceedings in this case. Thus, pursuant to Rule 73 (B), the Prosecution prays that the Chamber dismiss the Motion in its entirety.
9. In support of its reasoning, the Prosecution interprets Rule 73 (B) as requiring a showing that the appeal will significantly affect on the fair and expeditious conduct of the trial, and not, as argued by the Defence, a mere showing that an appellate resolutions of the issues raised may affect the fair and expeditious conduct of the trial.
10. The Prosecution submits that the Chamber, constituted of professional judges, will not be prejudiced by the use of the Diary in other trials.
11. The Prosecution submits that, as stated in the two impugned decisions:
 - a. the 12 October 2000 Decision did not preclude use of the Diary for purposes of the Prosecution;
 - b. the Prosecution, like the Defence, was equally entitled to use the Diary; and
 - c. inclusion of the Diary in Professor Guichaoua's report did not compromise the integrity of the Diary.

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12. The Prosecution submits that the issues of admissibility is not ripe for appeal, as the appropriate Chambers have not adjudicated the issues completely. It further notes paragraph 29 of the Impugned Decision I, which stated that the 12 October 2000 rendered *res judicata* the legality of the search and seizure and arrest of the Accused.
13. The Prosecution further cites the Impugned Decision I in arguing that the exclusion of the portion of the expert report concerning the Diary is raised prematurely.
14. The Prosecution also seeks to adopt both its submissions in the "Response to Nyiramasuhuko's urgent motion to forbid the parties in the Government I trial and any other trial from using the alleged diary on Pauline Nyiramasuhuko" filed on 2 December 2003 and a corrigendum filed on 4 December 2003; and the Impugned Decision I and Impugned Decision II. The Prosecution also submits that it filed Professor Guichaoua's report, referring extensively to the Diary, in compliance with Impugned Decision I, on 28 April 2004.

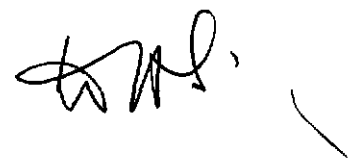
DELIBERATIONS

15. The Chamber notes Rule 73 (B), which stipulates:

Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the Decision involves an issue that would significantly affect the fair and expeditious conduct of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

16. The Chamber recalls the jurisprudence that decisions rendered on Rule 73 motions are without interlocutory appeal, except on the Chamber's discretion for the very limited circumstances stipulated in Rule 73 (B). The Chamber may grant certification to appeal if both conditions of Rule 73 (B) are satisfied. First, the applicant must show how an appellate review would significantly affect (a) a fair and expeditious conduct of the proceeding, or (b) the outcome of the trial. This condition is not determined on the merits of the appeal. Second, the applicant has the burden of convincing the Chamber that an "immediate resolution by the Appeals Chamber may materially advance the proceedings". Both of these conditions require a specific demonstration, and are not met through a general reference to the submissions on which the impugned decision was rendered.²
17. The Chamber finds no support for the Defence contention that it need only show that an appellate review may, instead of would significantly, affect the fair and expeditious conduct of the trial.
18. The Chamber notes that the Impugned Decisions I and II only interpret the 12 October 2000 Decision's order sealing of the material seized from the Accused. Contrary to the

² *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 (the "19 March 2004 Decision"), paras. 12 – 16; also *Prosecutor v. Ntahobali and Nyiramasuhuko*, Case No. ICTR-97-21-T, "Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 18 March 2004 (the "18 March 2004 Decision"), paras. 14 – 17.



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Defence submission, the Chamber finds that appellate review of the two impugned decisions will not resolve the rights of all parties to use any material under seal.

19. In regard to the Defence submissions on admissibility of Professor Guichaoua report, and its alleged effect on the Accused's right to silence, the Chamber reiterates that these issues are "premature".³ The Chamber notes that pursuant to Rule 94 *bis* (B) the Defence has 14 days, from the filing of Professor Guichaoua's report on 28 April 2004, to seek to cross-examine the Witness, or accept the report.
20. Similarly, the Chamber reiterates that the admissibility of the Diary would either be untimely, as the Prosecution has not sought to introduce the Diary into evidence, or inappropriate, as its use by another Chamber must first be raised before the appropriate Chamber⁴ which will decide this matter.
21. The Chamber notes that the Defence submissions on the Chamber's alleged errors in law and fact, in Impugned Decisions I and II, are not relevant at the certification stage.
22. The Chamber thus concludes that the Defence submissions do not meet the requirements of Rule 73 (B) for the certification of the Impugned Decisions.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DISMISSES the motion in its entirety.

Arusha, 20 May 2004



William H. Sekule
Presiding Judge



Arlette Ramarason
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

³ See Impugned Decision I, para. 28.

⁴ See Impugned Decision I, para. 29; also Impugned Decision II, para. 22.