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ICTR-97-21-T
15-7-2004
(1302 — 1297)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1302 *only*

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 15 July 2004

The Prosecutor

v.

Pauline NYIRAMASUHUKO

Case No. ICTR-97-21-T

2004 JUL 15 P 4:00
[Signature]

**DECISION ON PAULINE NYIRAMASUHUKO'S MOTION FOR CERTIFICATION
TO APPEAL THE ORAL DECISION OF 24 JUNE 2004 ON THE DEFENCE
MOTION ON INADMISSIBILITY OF EVIDENCE**

Office of the Prosecutor

Ms. Sylvana Arbia
Mr. Jonathan Moses
Ms. Adesola Adeboyejo
Ms. Adelaide Whest
Mr. Michael Adenuga
Mr. Manuel Bouwknecht

Counsel for Nyiramasuhuko

Ms. Nicole Bergevin, Lead Counsel
Mr. Guy Poupart, Co-Counsel

[Signature]

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

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

RECALLING the Oral Decision of 24 June 2004 on the Defence Motion on Inadmissibility of Evidence (the "Impugned Decision");

BEING SEIZED of the "*Requête aux fins de certification d'appel de la 'Décision orale du 24 juin 2004 déclarant recevables en preuves un agenda allégué appartenir à Pauline Nyiramasuhuko et les parties du rapport de l'expert Guichaoua qui reprennent ou referant à cet agenda'*", filed on 28 June 2004 ("the Motion");

CONSIDERING the "Prosecution's Response to Nyiramasuhuko's "*Requête aux fins de certification d'appel de la 'Décision orale du 24 juin 2004 déclarant recevables en preuves un agenda allégué appartenir à Pauline Nyiramasuhuko et les parties du rapport de l'expert Guichaoua qui reprennent ou referant à cet agenda'*" ("the Response"), filed on 5 July 2004;

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

NOW DECIDES the Motion, pursuant to Rule 73(B) of the Rules, on the basis of the written briefs as filed by the parties.

SUBMISSIONS OF THE PARTIES

Defence Motion

1. The Defence for Nyiramasuhuko seeks certification to appeal the Trial Chamber's oral decision of 24 June 2004, which admitted into evidence a diary alleged to belong to Nyiramasuhuko (the "Diary") and parts of a report by expert witness Guichaoua that refer to and analyse the Diary..
2. The Defence argues that its motion meets the criteria of Rule 73(B) providing certification to appeal a Trial Chamber decision that "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome 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."
3. The Applicant asserts that she has neither denied nor confirmed her ownership of the Diary and that in fact she has always referred to the Diary as "the diary alleged to be hers." The Applicant asserts her right neither to deny nor confirm her ownership of the Diary and argues that the burden of establishing ownership rests with the Prosecution.¹

¹ The Defence refers to *The Prosecution v. Delalic et al.*, Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 Into Evidence and for an Order to Compel the Accused, Zdra Vko Mucic, to Provide a Handwriting Sample, 19 January 1998, para. 33, which reads in part: "...The Prosecution argues that Mucic is the author of the letter (received by a witness and handed over to the Prosecution), yet this remains to be demonstrated to the Trial Chamber. The Prosecution has not shown that Mucic usually signs his letter as 'Pavo'".



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The Defence also points to a lack of correspondence between the reference number assigned to the Diary and the reference numbers that appear on the Evidence Register form.

4. The Defence asserts many grounds for appeal, which the Chamber need not enumerate here. In short the Defence alleges that factual and legal errors by the Chamber violated the Accused's rights to a fair and speedy trial, to silence, and not to testify against herself.
5. To show grounds for certification, the Defence first argues that ICTR and ICTY jurisprudence establishes the inadmissibility of evidence without sufficient indicia of reliability.
6. The Defence asserts that the Impugned Decision compromised the Applicant's right to a fair and speedy trial and that interlocutory appeal is the only solution to the violation of this right. According to them, the decision forces the Applicant to disprove her ownership of the admitted diary, reversing the burden of proof of ownership, which should rest with the Prosecution. This reversal is argued to compromise the Applicant's right to a fair trial.
7. The Defence argues that the admission into evidence of parts of Volume I and all of Volume II of expert witness Guichaoua's report, "*Éléments d'analyse de l'agenda de Pauline Nyiramasuhuko, 1^{er} janvier—31 décembre 1994*" compromise the Applicant's right to a speedy trial, because the Applicant, who has been detained since 18 July 1997, must cross-examine expert witness Guichaoua on the sections of his report that refer to and analyse the Diary. The length of time this cross-examination will require compromises the Applicant's right to a speedy trial. The admission of the report also violates her right to silence because it forces her to testify, consequently compromising her right to a fair trial.
8. The Defence further argues that the decision could impact upon the outcome of the trial as the Prosecution has chosen to use the report to prove all paragraphs of the Indictment against the Applicant, excluding paragraphs 6.30 through 6.33. The Defence also objects because the witnesses relied on in the report are not available for cross-examination.
9. The Defence asserts that a ruling by the Appeals Chamber would shorten the length of the trial should the Appeals Chamber conclude that the Diary and the report are inadmissible.
10. The Defence submits that the legal issues at stake—the admissibility of a document allegedly written by the Applicant, the ownership and chain of custody of which the Prosecution has not proved, and the fact that admission of the Diary and the report forces the Applicant to renounce her right not to testify—are not covered by existing ICTR jurisprudence and that a ruling by the Appeals Chamber would settle the law on these questions.

and Mucic has remained silent, asserting a right under the provisions of the Article 21 sub-paragraphs 3 and 4(g) and Rule 63."

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11. Consequently the Defence prays the Chamber to grant certification to appeal the Impugned Decision.

Prosecution's Response

12. The Prosecution asserts that the Defence has consistently challenged only the legality of the seizure of the Diary and not its authenticity. The Prosecution asserts that all seizures of items from Nyiramasuhuko's Kenyan residence were effected pursuant to Rule 40(A)(ii).² The Prosecution includes a copy of the Evidence Register Form filed on 24 June 2004 to show that the 1994 diary of Nyiramasuhuko was seized by Kenyan authorities from a table in her bedroom and given to the Office of the Prosecution on 18 July 1997. [See Annex 1 of the Response]
13. The Prosecution further asserts that, as a matter of law, an item's inadmissibility based on a break in the chain of custody requires prejudice to the Accused in addition to the break itself. The Prosecution denies any break in the chain of custody, stating that the Office of the Prosecution retained custody of the Diary from 18 July 1997 until it was placed under seal on 7 February 2001. The Prosecution further asserts that no prejudice would have accrued to the Accused by any alleged break. The Prosecution points to the fact that the Defence has not alleged a difference between the content of the copy of the Diary the Accused received on 27 November 1997 and subsequent copies received on 7 February 2001 and 17 February 2003 or the original diary the Defence later inspected and which was admitted into evidence on 25 June 2004.
14. In response to the Defence objection that 118 pages of the Diary are missing, the Prosecution explains that it did not include 107 blank pages in the copy of the Diary that it provided to Defence counsel on 27 November 1997, 7 February 2001, and 17 February 2003. The Prosecution also includes documentation that lead counsel for Nyiramasuhuko inspected the original diary on 31 January 2001. [See Annex 2 of the Response.] The Prosecution states that 11 pages are partially or completely missing from the original diary: half of page 29 April, pages 6 and 7 June, 9 and 10 July, 7 and 8 August, 27 and 28 August, and 1 and 2 October. The Prosecution suggests that the Defence allegation that the blank pages may contain exculpatory evidence implicitly admits Nyiramasuhuko's authorship.
15. The Prosecution asserts that the delay, until 23 June 2004, in producing the Evidence Register Form requested by the Defence in 2000 was not a lack of bona fides and that "diligent efforts were made in this regard."
16. Regarding the lack of matching of reference numbers, the Prosecution explains that seven seized items are indicated on the Evidence Register form: the Diary, five receipts, and a document bearing two telephone numbers. The Prosecution submits that the number on the Diary matches the first number in range of seven "K numbers" on the Evidence Register Form, and that the other six numbers on the form were assigned to the other six items seized. The Prosecution indicates that the Diary has always been assigned number K004-3686. The Prosecution includes a 25 July 1997 printout from the Information and Evidence Section's IIF database of the information regarding the seized diary. [See Annex 5 of the Response]

² Rule 40(A): "In case of urgency, the Prosecution may request any State . . . (ii) To seize all physical evidence".



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17. The Prosecution explains that when a copy of the Diary was sent to the Accused on 27 November 1997, the Diary's reference number K004-3686 was stamped on the Diary's cover [see Annex 6 of the Response] but not on the individual pages that were copied and sent to the Accused. Pursuant to the procedures of the Office of the Prosecution's Information and Evidence Section, when the document was submitted for translation following the lifting of the seal on 17 October 2002,³ a reference number was stamped on each page containing handwriting. The additional reference number KA00-0251 was assigned to a group containing the Diary and other seized items. [See Annexes 2, 3, and 5 of the Response]
18. The Prosecution agrees with the Chamber's decision to consider at this stage only the question of the Diary's admissibility and to postpone a decision on its weight to a later point. Pertaining to admissibility, the Prosecution relies on Rule 89(C)⁴ and Rule 95.⁵ The Prosecution also refers to an ICTY decision indicating that relevant evidence with probative value should be admitted unless it lacks reliability or would diminish the integrity of the trial.⁶ The Prosecution asserts that the Diary's relevance has been proven, that no doubt has been cast on its reliability, and that it was properly admitted for analysis by expert witness Guichaoua. The Prosecution further points to the *Musema* Judgement,⁷ which states that "[a]dmission requires simply the proof that the evidence has *some* probative value" and that "the determination of admissibility does not go to the issue of *credibility* [to be determined by the Trial Chamber later], but merely *reliability*."
19. The Prosecution rejects the Defence assertion of a violation of Nyiramasuhuko's right to silence because it remains the Prosecution's job to prove her guilt and not the Accused's obligation to prove her innocence.
20. The Prosecution argues that the issues raised by the Defence do not fall under the grounds established in Rule 73(B) for granting certification to appeal. The Prosecution submits that Tribunal jurisprudence has granted interlocutory appeal only when Rule 73(B) criteria are "strictly" met.⁸
21. Consequently the Prosecution prays the Chamber to dismiss the application.

³ See Transcript of 17 October 2002, pp. 57-58.

⁴ "A Chamber may admit any relevant evidence which it deems to have probative value."

⁵ "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."

⁶ See *The Prosecutor v. Delalic et al. (Celebici)*, Decision on the Tendering of Prosecution Exhibits 104-108, Case. No. IT-96-21-T, 9 February 1998, para. 19.

⁷ *The Prosecutor v. Musema*, Case No ICTR-96-13-A, Judgement and Sentence, 27 January 2000, paras. 55-57.

⁸ See *The Prosecutor v. Karemera et al.*, Case No ICTR-98-44, Decision on the Defence Request for Certification to Appeal the Decision on Accused Nzirorera's Motion for Inspection of Materials, 26 February 2004 (rejecting the application for failing to show that the issue could significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial).

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DELIBERATIONS

22. The Chamber recalls that Rule 73(B) provides for certification to appeal a decision that “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome 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.”
23. The Chamber has taken note of the Defence submissions for certification and it recalls its ruling that “[t]here is a difference between admissibility of evidence and the weight attached to it. The latter consideration is a matter of assessment to be made at the end of the case in the light of the full evidence produced by both the Prosecution and the Defence. What is at stake at this stage is the admissibility of the Diary; this depends on its possession of some relevancy and probative value.”⁹
24. Although the point of the Chamber’s decision was clearly to receive into evidence material [the Diary], upon which the expert witness based parts of his opinion, the Chamber is nevertheless of the opinion that a speedy resolution, by the Appeals Chamber, of the legal issues raised would, within the purview of Rule 73(B), materially advance the proceedings, in light of the particular circumstances of this case.
25. The Chamber emphasizes that certification to appeal will not stay the proceedings, which are continuing as scheduled. Nor does the Chamber consider this certification decision as a statement of general principle on the point.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS the certification to appeal.

Arusha, 15 July 2004



William H. Sekule
Presiding Judge



Arlette Ramaroson
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

⁹ Transcript of 24 June 2004 at p. 15

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 Judge Arlette Ramaroson
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Registrar: Mr Adama Dieng

Date: 15 July 2004

The Prosecutor

v.

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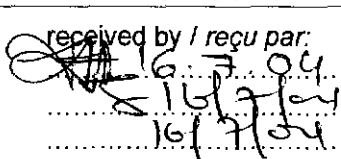
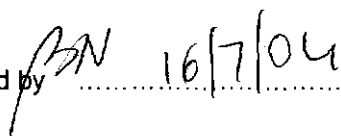
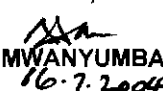
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