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UNITED NATIONS
NATIONS UNIES

ICTR-98-42-T
14-10-2004
(10918 — 10915)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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smm/ls

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 14 October 2004

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO et al.
Case No. ICTR-97-21-T
Joint Case No. ICTR-98-42-T

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**DECISION ON PROSECUTOR'S MOTION FOR LEAVE TO BE AUTHORISED TO
HAVE ADMITTED THE AFFIDAVITS REGARDING THE CHAIN OF CUSTODY
OF THE DIARY OF PAULINE NYIRAMASUHUKO UNDER RULE 92 BIS**

Office of the Prosecutor

Silvana Arbia
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Defence Counsel

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Pierre Boulé, Claude Desrochers for Elie Ndayambaje
Josette Kadji, Charles Tchacounte Patie for Sylvain
Nsabimana
Duncan Mwanyumba, Normand Marquis for Arsène Shalom
Ntahobali
Titinga Frédéric Pacere, Richard Perras for Alphonse
Nteziryayo
Nicole Bergevin, Guy Poupart for 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”);

BEING SEISED of the “Prosecutor’s Motion for Leave to Be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92 *bis* of the Rules of Procedure and Evidence”, filed on 11 October 2004 (the “Motion”);

CONSIDERING “Accused Nyiramasuhuko’s Response To Prosecutor’s Motion For Leave to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92 *bis* of the Rules of Procedure and Evidence”, filed on 13 October 2004 (the “Response”);¹

CONSIDERING the “Additional Submissions of the Prosecutor Regarding the Chain of Custody of the Alleged 1994 Agenda of Pauline Nyiramasuhuko”, filed on 23 June 2004 (the “23 June 2004 Additional Submissions”);

NOTING its Oral Ruling of 24 June 2004 on Nyiramasuhuko’s Oral Motion To Rule the Alleged Diary of Nyiramasuhuko Inadmissible (the “24 June 2004 Oral Ruling”);

NOTING its “Decision On Prosecutor’s Motion for Verification of the Authenticity of Evidence Obtained Out of Court, Namely the Alleged Diary of Pauline Nyiramasuhuko” rendered in the current Case on 1 October 2004 (the “1 October 2004 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 (A).

SUBMISSIONS BY THE PARTIES

Prosecution’s Motion

1. The Prosecution requests the admission of two affidavits pursuant to Rule 92 *bis*: the first affidavit, dated 6 October 2004, is signed by Mr Charles Njogu and attached in Annex 1 of the Motion; the second affidavit, dated 26 July 2004, is signed by Mr Stephen John Myall, Former Head of the Evidence Section of the Office of the Prosecutor, and attached in Annex 2 of the Motion.
2. The Prosecution submits that these affidavits are related to the chain of custody of the diary seized on 18 July 1997 in the residence of Accused Pauline Nyiramasuhuko and admitted as Prosecution Exhibit 144A. These elements may assist, in the interests of justice, the Trial Chamber to better appreciate the weight of proof to be attached to the document already admitted.

¹ Nyiramasuhuko’s Response was filed in French and titled « Réponse de l’Accusée Pauline Nyiramasuhuko à la ‘Prosecutor’s Motion for Leave to Be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92 *Bis* of the Rules of Procedure and Evidence».



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3. The Prosecution submits that these elements of proof do not go to proof of the acts nor the conducts of the Accused as charged in the Indictment.
4. The Prosecution submits that these elements of proof could not be available before 23 June 2004, the date on which the Registration Form for Evidence showing the chain of custody of the diary was found.
5. The Prosecution submits that these affidavits were disclosed to the Defence since 7 September 2004 and were disclosed again on 11 October 2004.
6. The Prosecution further submits that nothing prevents the Trial Chamber from calling Mr Myall if it deems that his presence is required to identify the chain of custody of the diary.

Nyiramasuhuko's Response

7. The Defence submits that the affidavits constitute *post facto* evidence, which was filed after a decision on the admissibility of the diary was rendered. As such, these affidavits should be declared inadmissible.
8. The Defence submits that the affidavits cannot be considered as additional evidence since the jurisprudence considers that, for additional evidence to be admissible, it must rely on new elements that were not in the Prosecution's custody at the time of its earlier submissions. The Prosecution's submission that the Registration Form was only found on 23 June 2004 does not justify the belatedness of the Motion: the Prosecution should have known that members of the Office of the Prosecutor and Kenyan policemen were able to testify on the search, seizure and custody of the diary.
9. Relying on a Trial Chamber III Decision of 20 May 2004 in the *Muhimana* Case,² the Defence submits that, should the affidavits be admitted, there are sufficient grounds to justify that their authors be cross-examined.
10. Therefore, the Defence submits that the Motion is an attempt to have two additional Prosecution witnesses called to testify before the Trial Chamber. The Defence submits that such Motion should be based on Rule 73 *bis*. The Defence further submits that the Motion is belated and, if granted, would cause undue delay as a consequence of the Prosecution's lack of diligence. The Defence recalls that it has always disputed the chain of custody of the alleged diary of Pauline Nyiramasuhuko but it is only at the end of the Prosecution Case that this Motion is filed. Therefore, granting the Motion would violate the Accused's right to be tried without undue delay.

² *Prosecutor v. Muhimana*, Case Number ICTR-95-1B-T, Decision on the Prosecution Motion for Admission of Witness Statements (Rules 89 (C) and 92 *bis*)(TC), 20 May 2004.

HAVING DELIBERATED

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11. Pursuant to Rule 92 *bis* (A), a Trial Chamber may admit, on whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment.
12. It results from the text of Rule 92 *bis* (A) that, for a statement to be admitted pursuant to this Rule, its author must be a witness. The Trial Chamber notes that Mr Charles Njogu and Mr Stephen John Myall are not mentioned on the Prosecution List of Witnesses. Yet, for these affidavits to be considered for admission under Rule 92*bis*, the Prosecution should have moved the Trial Chamber pursuant to Rule 73 *bis* (E) for leave to add their authors on its Witness List. Therefore, it is the view of the Trial Chamber that the motion for admission of these affidavits under Rule 92 *bis* is not properly brought before the Trial Chamber as the aforementioned pre-condition has not been met by the Prosecution.
13. Furthermore, the Trial Chamber notes that, pursuant to Rule 92 *bis* (A), evidence admitted in the form of a written statement in lieu of oral testimony shall go to proof of a matter other than the acts and conduct of the Accused as charged in the Indictment. In this respect, since those affidavits are aimed at assisting the Trial Chamber in weighing the diary's probative value and since the diary itself is alleged to be directly related to the acts and conduct of Accused Nyiramasuhuko as pleaded in the Indictment, the Trial Chamber would be reluctant to admit those written statements in lieu of oral testimony assuming the other conditions of Rule 92 *bis* had been met by the Prosecution.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

DENIES the Motion in its entirety.

Arusha, 14 October 2004



William H. Sekule
Presiding Judge

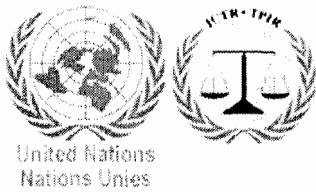


Arlette Ramarason
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]



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. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS K. K. A. Afande	<input type="checkbox"/> Appeals Chamber / The Hague R. Burriss
From:	<input checked="" type="checkbox"/> Chamber Cyril LAUCCI <small>(names)</small>	<input type="checkbox"/> Defence <small>(names)</small>	<input type="checkbox"/> Prosecutor's Office <small>(names)</small>	<input type="checkbox"/> Other: <small>(names)</small>
Case Name:	The Prosecutor vs. Nyiramasuhuko et al.		Case Number: ICTR-98-42-T	
Dates:	Transmitted: 14 October 2004		Document's date: 14 October 2004	
No. of Pages:	4	Original Language: <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda		
Title of Document:	Decision on Prosecutor's Motion For Leave to Be Authorised to Have Admitted the Affidavits Regarding the Chain of Custody of the Diary of Pauline Nyiramasuhuko Under Rule 92 bis			
Classification Level:		TRIM Document Type:		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<input type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
		<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 type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input checked="" type="checkbox"/> French	<input checked="" type="checkbox"/> Kinyarwanda

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

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III - TRANSLATION PRIORITISATION (For Official use ONLY)

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<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines:

