



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr Adama Dieng

Date: 29 August 2005

ICTR-98-42-T
29-8-2005
(11486 - 11482)

The PROSECUTOR

v.

Pauline NYIRAMASUHUKO and Arsène Shalom NTAHOBALI

Case No. ICTR-97-21-T

Sylvain NSABIMANA and Alphonse NTEZIRYAYO

Case No. ICTR-97-29-T

Joseph KANYABASHI

Case No. ICTR-96-15-T

Élie NDAYAMBAJE

Case No. ICTR-96-8-T

Joint Case No. ICTR-98-42-T

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ICTR
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DECISION ON THE PROSECUTOR'S MOTION TO UNSEAL DOCUMENTS
SEIZED FROM PAULINE NYIRAMASUHUKO

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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 SEISED of Prosecutor’s Motion to Unseal Documents Seized from Pauline Nyiramasuhuko,” filed on 2 August 2005 (the “Motion”);

CONSIDERING the “Réponse de l’Accusée Pauline Nyiramasuhuko à la ‘Prosecutor’s Motion to Unseal Documents Seized from Pauline Nyiramasuhuko,’” filed on 16 August 2005 (the “Nyiramasuhuko’s Response”); **AND** “Prosecutor’s Rejoinder to the Defence Response – Prosecutor’s Motion to Unseal Documents Seized from Pauline Nyiramasuhuko,” filed on 18 August 2005 (the “Prosecution’s Reply”); **AND** “Duplique de l’Accusée Pauline Nyiramasuhuko à la “Prosecutor’s Rejoinder to the Defence Response – Prosecutor’s Motion to Unseal Documents Seized from Pauline Nyiramasuhuko,”” of 23 August 2005 (“Nyiramasuhuko’s Rejoinder”); **AND** “Prosecutor’s Response to the Defence Response to his Rejoinder – Prosecutor’s Motion to Unseal Documents Seized from Pauline Nyiramasuhuko, of 24 August 2005 (the “Prosecution Rejoinder”);

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

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 (A), on the basis of the written briefs filed by the Parties.

SUBMISSIONS OF PARTIES

Prosecution Submissions

1. The Prosecution requests the Chamber to order the lifting of the seals on the property of the Accused Nyiramasuhuko seized during her arrest in Kenya on 18 July 1997, so that it may study it with a view to determining what use it may make of it during the cross-examination of the Accused. It maintains that the seized property was sealed in order to secure its safe-keeping and therefore it was never the intention of the Chamber to exclude either party in the proceedings from using it.¹ The Prosecution additionally submits that it is aware of its duties under Rule 41 and that at this stage it is not making any submissions as to the authenticity of the documents under seal, and that it reserves its rights to make submissions on the admissibility and/ or authenticity of the documents, should the need arise.

Defence Submissions

¹ *Prosecution v. Nyiramasuhuko et al*, Case No. ICTR-98-42-T, Decision on Nyiramasuhuko’s Oral Motion Regarding Prosecution’s Use of Material Under Seal, of 27 April 2004, (the “Nyiramasuhuko Decision in the Butare Trial”) at pp. 27; *Prosecution v. Nyiramasuhuko et al*, Case No. ICTR-98-42-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, of 27 April 2004, (the “Nyiramasuhuko Decision in the Government I Trial”) at pp. 21



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2. The Defence for Nyiramasuhuko objects to the Motion and requests the Chamber to reject the sealed property that does not appear on the Proposed Modified Prosecutor's Exhibit List of 27 September 2001 and 12 October 2001. It essentially argues; following the inventory of the seized property made between 30 January and 9 February 2001, there were irregularities that resulted in both the Defence and the Prosecution not signing a record of the proceedings. Because the Prosecution added some of the seized material to its List of Exhibits of 27 September 2001, the Defence was thus not put on notice regarding the other documents which the Prosecution did not include on its List of Exhibits, particularly as some of it was in Kinyarwanda. In the Defence's view, the Prosecution cannot now seek to use indirectly the seized property during cross-examination when it should have been diligent and added them to its list of exhibits. It will cause irreparable damage to the Accused, as well as the other Accused who do not have any knowledge of it, should the said seized property be unsealed and used in cross-examination. The Defence maintains that had it known that the Prosecution intended to use the sealed material, it would have prepared itself by interrogating witnesses as to the said seized property and asked its experts to analyse them.

Prosecution Reply

3. The Prosecution, maintaining its application, further submits that the Defence Response be denied because it was filed out of time in violation of the provisions of Rule 73(E). It argues, relying on the Chamber's Oral Ruling of 7 June 2005 at page 23, that the onus of disclosure at the cross-examination stage differs from that at the Prosecutor's case-in-chief, which is governed by Rules 66 and 73*bis*. It submits that Rule 90(G)(i) – (iii) governs the cross-examination of witnesses before the Trial Chamber. The Prosecution maintains that some of the documents currently sealed will fall within the provisions of Rule 90(G). Notwithstanding the above submissions, the Prosecution maintains that given that the Defence for Nyiramasuhuko inspected the sealed documents between 30 and 31 January 2001 and 5 and 9 February 2001, its submissions regarding the prejudice it would suffer were the Prosecution to use the documents are without merit.

Nyiramasuhuko's Rejoinder

4. In its rejoinder, the Defence explains that it was unable make a timely Response to the Motion due to circumstances beyond its control. The Defence rejects the Prosecution's submissions at paras. 7 to 9 regarding Rule 90(G) (i) – (iii) and makes reference to the text by the late Judge R. May² and an ICTY Decision in the Case of *Krstic*.³ The Defence submits that it is not in possession of the seized property, which is presumed to belong to the Accused, because it was confiscated from Nyiramasuhuko's home and later on sealed. The Defence submits that the seized property should be given back to the Accused. The Defence argues that even if these "inventory proceedings" took place, this cannot be relied upon to have been proceedings that informed the Defence of the various documents the Prosecution intended to use during the trial. Finally, the Defence stresses the fact that the "inventory proceedings," which were oral, were never signed by the Parties. The Defence also adds that after having verified the transcripts of the "inventory proceedings," it has found that certain

² Judge R. May, M. Wierda, International Criminal Evidence: International and Comparative Law Series, Transnational Publishers, Inc, New York, 2002, par. 5.25, pp. 151.

³ *Prosecutor v. Krstic*, Case No. IT-98-33-T, Decision on Defence Motions to Exclude exhibits in rebuttal and motion for continuance, of 4 May 2001 at paras. 25 - 26



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envelopes which were on the Prosecution's list of exhibits contained only documents that had been given back to the Accused.⁴

Prosecution's Rejoinder

5. In its Rejoinder, the Prosecution mainly submits with regard to the ICTY *Krstic* Decision relied upon by the Defence, that the issues in the instant Motion are distinguishable from those that gave rise to the Decision in *Krstic* because in that Decision the request was for admission of evidence during the rebuttal stage of the proceedings.

HAVING DELIBERATED

6. The Chamber has, in the interests of justice, considered all the submissions of the Parties, in this Motion.

7. The Chamber notes, that in its Motion, the Prosecution requests that the seals on the property seized from the Accused during her arrest in Kenya be lifted so that it may examine it with a view to determining what use it can make of it during the proposed testimony of the Accused Nyiramasuhuko.

8. In the Chamber's opinion, the only issue for consideration, at this stage, is whether or not it should grant the Prosecution request to have the seals lifted off the seized property.

9. The Chamber recalls that it made rulings⁵ concerning the unsealing of at least one of the properties seized from the Accused during her arrest – the diary allegedly belonging to the Accused Nyiramasuhuko.

10. In its Decisions,⁶ the Chamber recalled the Decision of 12 October 2000, which ordered the Defence and the Prosecution to, “[e]xamine, 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.”⁷

11. Following the above-mentioned order, the Chamber notes that proceedings were held between 30 January and 9 February 2001 wherein the Parties examined, inventoried, returned to the Accused the unnecessary property and then sealed the remaining property.⁸

12. The Chamber recalls that the seized property was sealed in the presence of the Parties during the inventory proceedings and that the purpose of the seals was to preserve it from loss or damage⁹ and thereby preserve its integrity.

⁴ This concerns in particular the envelopes numbered KA00-0262 (pages 65 etc in the transcript of 30 January 2001) and KA00-0263 (pages 78-80 of the transcript of 30 January 2001)

⁵ See the Nyiramasuhuko Decision in the Government I Trial and the Nyiramasuhuko Decision in the Butare Trial

⁶ See Nyiramasuhuko Decision in the Government I Trial and the Nyiramasuhuko Decision in the Butare Trial

⁷ See the Nyiramasuhuko Decision in the Government I Trial and the Nyiramasuhuko Decision in the Butare Trial which were issued on 27 April 2004

⁸ Herein the referenced proceedings will be called the “inventory proceedings”

⁹ See Nyiramasuhuko Decision in the Butare Trial at para. 4, and 20(d) and 21; Nyiramasuhuko's Decision in the Government I Trial at para. 26 (d) and 27



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13. The Chamber notes that the lifting of the seals is to enable the Prosecution to study the seized property with a view to determining what use to make of any of it during cross-examination of the Accused Nyiramasuhuko. At this stage, no item has been identified and it is not indicated what use the Prosecution will put to it during cross-examination of the Accused. The Chamber therefore finds that all the submissions regarding use of the said property, its admissibility and alleged irregularities, are premature. Such submissions can only be raised at an appropriate time, for the Chamber's determination, as and when the need arises.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Prosecution Motion; and

ORDERS that the seals be lifted from the seized property;

DIRECTS the Registry to, as soon as is practicable;

- I. Facilitate the arrangements for the lifting of the seals on the seized property in the presence of the Prosecution and the Defence, including any other Defence Counsel in the case who wishes to be present;
- II. Make an inventory of the unsealed seized property;
- III. Make copies of the unsealed seized property, where possible, and provide these to all the Parties;
- IV. If the unsealed seized property cannot be copied, facilitate the Parties to study them;

ORDERS the re-sealing of the originals of the unsealed property, in the presence of the Parties in order to preserve their integrity.

Arusha, 29 August 2005



William H. Sekule
Presiding Judge



Arlette Ramarison
Judge



Solomy Balungi Bossa
Judge

[Seal of the Tribunal]

