



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER I**

**Before:**

Judge Erik Møse, Presiding  
Judge Asoka de Z. Gunawardana  
Judge Mehmet Güney

**Decision of:** 8 June 2000

**THE PROSECUTOR  
VERSUS  
IGNACE BAGILISHEMA**

*Case No. ICTR-95-1A-T*

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**DECISION ON THE REQUEST OF THE DEFENCE FOR AN ORDER FOR  
SERVICE OF AN UNITED NATIONS MEMORANDUM PREPARED BY  
MICHAEL HOURIGAN, FORMER ICTR INVESTIGATOR**

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**The Office of the Prosecutor:**

Ms Anywar Adong  
Mr. Wallace Kapaya  
Mr. Charles Adeogun Phillips

**Counsel for the accused:**

Mr. François Roux  
Mr. Maroufa Diabira

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

**SITTING** as Trial Chamber I, composed of Judge Erik Møse, Presiding, Judge Asoka de Z. Gunawardana and Judge Mehmet Güney;

**BEING SEIZED** of a motion filed by the Defence on 26 April 2000, requesting that the Trial Chamber serve upon the Defence the United Nations Memorandum prepared by a former investigator of the Office of the Prosecutor while he was working at the Office of Internal Oversight Services (hereinafter the “memorandum”);

**CONSIDERING** the brief in response of the Prosecution, dated 10 May 2000;

**HAVING HEARD** the parties on 30 May 2000;

**The submissions of the parties**

1. Referring to a statement of 7 April 2000 from the President of the Tribunal, the Defence is requesting that the Chamber serve upon it a memorandum prepared by a former investigator of the Office of the Prosecutor while he was working at the Office of Internal Oversight Services. According to the Defence, this document contains pertinent indications as to the situation in Rwanda in April 1994, including the circumstances surrounding the plane crash of 6 April 2000 in which, amongst others, President Habyarimana, the former President of Rwanda, was killed.
2. The Defence argues that the information contained in the memorandum is relevant to the defence of Ignace Bagilishema. Paragraphs 4.7 and 4.8 of the Indictment of 17 September 1999 make direct references to the plane crash. The Prosecutor’s witnesses have testified on events following the death of the President. The memorandum would appear to be indispensable for the manifestation of the truth. The Defence reserves the right subsequently to file this memorandum as an exhibit.
3. The Prosecution in its written brief contends that it has a direct interest in the matter. The memorandum is not relevant in the ongoing case against the accused, because the references in the Indictment to the plane crash are merely matters of historical fact and of public record. The Indictment itself and the witnesses who have testified for the Prosecution during the trial have at no time, according to the Prosecutor, blamed the accused for the plane crash and the death of the President.
4. The Prosecutor also referred to her disclosure obligations pursuant to Rule 68, and stated that she is not in possession of the memorandum. Even if she were, the Defence has not presented a prima facie case which would make probable the exculpatory nature of the material sought. Furthermore, the Prosecutor indicates that a French Magistrate is undertaking an official investigation on the plane crash. She has, in the exercise of her functions under Article 15 of the Statute, authorized the conduct a Commission Rogatoire

and is awaiting the outcome of this investigation to determine the requirements of any follow up action that might be needed by her office.

### **The Chamber**

5. On 7 April 2000, the President of the Tribunal, having received the memorandum from United Nations Headquarters in New York, made the following statement:

“On Monday 27 March 2000 I received by fax a letter dated 24 March from the Under-Secretary-General and Legal Counsel, Mr Hans Corell. The letter states that, following a request by a number of defence attorneys working at the ICTR, a memorandum had been located concerning the circumstances of the shooting down on 6 April 1994 of the aeroplane carrying President Juvenal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi.

The 3-page memorandum had been prepared by Mr Michael Hourigan, formerly a leader of one of the investigation teams of the Office of the Prosecutor investigating the 1994 genocide in Rwanda, on his own initiative. At the time he wrote it Mr Hourigan was working for the Office of Internal Oversight Services (OIOS). The memo was therefore an internal and confidential matter for the OIOS and it was not sent to ICTR.

Mr Corell’s letter further states that:

“The Secretary-General has decided to transmit this document to the Tribunal so that if this matter is raised before the Tribunal, the appropriate Trial Chamber could decide if the document is relevant for the defense of any of the cases on which the attorneys are working and, if so, determine under what circumstances and conditions the document can be released.”

The fax transmission did not include a copy of the document itself which arrived by pouch with the original of Mr Corell’s letter on Wednesday 29 March.

Having been made aware that the document related to issues which might in future be raised before a Trial Chamber, and after consultation with the other judges, I directed that Mr Corell’s letter with accompanying correspondence and the original of the document be placed under seal in the President’s Chambers immediately upon its arrival. Neither I nor any of the other judges has read the document.”

6. In deciding upon the question whether the memorandum should be made available to the Defence, the Chamber will consider whether the memorandum is relevant to the proceedings at hand, namely to the case of Ignace Bagilishema. The Chamber, in considering the submissions of the parties, has limited itself to considering the argument of the Defence that the document is relevant to its case. The evidential weight, if any, to be attached to the memorandum, are matters for the Trial Chamber to consider at a later stage, should the need arise.

7. The accused is charged with genocide, complicity in genocide, crimes against humanity and serious violations of article 3 common to the Geneva Conventions and of Additional Protocol II. The Indictment does not contain any statement to the effect that the accused was implicated in the plane crash. Paragraphs 4.7 and 4.8 read as follows:

4.7 On 6 April 1994, the plane transporting President Juvenal Habyarimana of Rwanda crashed on its approach to Kigali airport, Rwanda. Attacks and killings of civilians began soon thereafter throughout Rwanda.

4.8 Following the news of the death of President Habyarimana, Ignace Bagilishema between 9-13 April 1994, attended several meetings with the prefet of Kibuye, Clement Kayishema and other local authorities including the Commanding officer of the Gendarmerie Nationale stationed in Kibuye Prefecture.

8. The Chamber notes that the Prosecution has introduced the incident of the plane crash as the starting point of the subsequent events, viz the attacks on the civilian population, the movement of persons seeking refuge in Mabanza and meetings of the accused with other local authorities in Kibuye Prefecture. These subsequent events are relevant to the case against the accused.

9. The Prosecutor has submitted that the plane is a mere historical fact, being of common knowledge, the Defence has argued that the Prosecution's case was presented on the basis that the plane crash triggered the subsequent massacres that took place in April–July 1994 in Rwanda, including those for which the accused is charged. This is evidenced by the testimony of Prosecution witnesses at trial, for example:

**Testimony of Prosecution witness AC;**

Q. Now on the 6th April, 1994, the President of Rwanda died in a plane crash. Did you hear of that death?

A. Yes, I heard it.

(18 November 1999, transcript at page 13 lines 17-21).

Q. Good, now, following that death what was the situation in your sector?

A. The situation was serious given the fact that Hutus were beginning to raise against Tutsi.

(18 November 1999, transcript at page 22 lines 15-19).

**Testimony of Prosecution witness B;**

Q. Witness B, would I also be correct in saying that like many others in Rwanda you became aware of the death of the president on the 6th April 1994?

A. Yes.

Q. And that following news of the president's death you witnessed some disturbances in your area where you were living at the time. Would I be correct in saying that?

A. Yes.

(24 January 2000, transcript at page 55 lines 4-14).

**Testimony of Prosecution witness K;**

Q. [...] you heard of the downing of the president – of the president’s plane in April, 1994

A. Yes.

Q. Is it correct also to say that that incident was followed by an escalation of ethnic violence and tensions in various parts of Rwanda including Mabanza commune? (25 January 2000, transcript at page 46 lines 3-10).

**Testimony of Prosecution witness AB;**

Q. Now what happened in your locality between the 7th and the 8th of April following the news of your President’s death, can you tell the court please?

A. On 7th April at about 12 midday, people started attacking saying that since the President was dead they were going to kill all the Tutsi. (16 November 1999, transcript at page 21 lines 19-24).

**There are other Prosecution witnesses who testified in a similar manner.**

10. It is apparent from the above testimony of the Prosecution witnesses that the plane crash allegedly triggered for the events in Kibuye Prefecture, for which the accused is charged in this case.

11. Furthermore, at the hearing on this motion on 30 May 2000, the Prosecuting Counsel, in answer to questions by the Bench, responded as follows:

Q. Is not the second sentence [of paragraph 4.7 of the indictment] a matter of historical fact according to your reasoning?

A. No, it triggered a set of events. It struck as a set of events for which – which are relevant to Mr. Bagilishema. (30 May 2000, transcript at page 76 lines 22-24 to page 77 lines 1-3).

Q. Would it be in the interest of the Defence to ascertain who the actual perpetrators of the crimes of downing the plane of the President; would it not affect their defence?

A. That, Mr. - - Your Honour, will affect their defence and would also affect our case, because I think the Prosecutor may wish to take certain action on the basis of that, and that is why there is already an investigation.

Q. My question is not that. I asked you the relevance of the incident to the Defence, not the Prosecution. We are not talking – there is no application by the Prosecution for the report. We are considering an application by the Defence, and we are considering the relevancy of the document to the Defence. So in that context, I am asking you: Isn’t there an interest for the Defence to know who the actual perpetrators are of the downing of the plane?

A. It may be in their interest, Mr. President, but as we are saying, we are not in possession of that document, so we don't know actually whether it says who caused the plane crash. It may be in their interest.

Q. So, if it is in their interest then it is relevant for their defence, isn't that true?

A. Yes, but they've got to prove, Your Honour, that it is relevant. We are now assuming that, assuming it is relevant, but they haven't shown that it is relevant." (30 May 2000, transcript at page 79 line 1 to page 81 line 1).

12. It is clear from the submissions of the Prosecuting Counsel that the memorandum may be relevant to the defence.

13. Irrespective of whether the memorandum will in the event have a bearing on the outcome of the case, the Chamber is of the opinion that, to deprive the Defence, at this stage of the trial, of access to specific documentation, which is now in the possession of the Tribunal, may affect the right of the accused in the presentation of the case fully and fairly. Reference is made to article 20 of the Statute, which guarantees the right of the accused to a fair trial.

14. Any questions as to the admissibility of the memorandum is at this stage premature, and will be considered, only if and when the memorandum is sought to be presented as evidence by the Defence.

15. In order to facilitate the proper consideration of this motion, the President of the Tribunal has made a copy of the memorandum.

16. In the circumstances, this Chamber is of the view that this motion be granted and the memorandum served on the Defence. Since the Chamber decides to serve a copy of the memorandum on the Defence, it is only fair that the Prosecution will be entitled to obtain a copy of the memorandum, if they so desire.

**THEREFORE,**

**FOR ALL THE ABOVE REASONS,**

**THE TRIAL CHAMBER BY MAJORITY,**

**HEREBY**

**DIRECTS** the Registrar to serve a copy of the memorandum to the Defence forthwith and make available a copy of the memorandum to the Prosecution, if they so desire.

**FURTHER DIRECTS** that the parties shall the memorandum only for the purposes of this trial.

Signed in Arusha on 8 June 2000.

Erik Møse  
Presiding Judge

Asoka de Z. Gunawardana  
Judge

**Judge Mehmet Güney appends a [Separate and Dissenting Opinion](#) to this Decision.**

(Seal of the Tribunal)