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ICR-97-29-T

11/9/2000

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UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda

Original: French

**TRIAL CHAMBER II**

Before: Judge Laity Kama, Presiding  
Judge William H. Sekule  
Judge Mehmet Güney

Registrar: Agwu Ukiwe Okali

Decision of: 8 September 2000

**THE PROSECUTOR**  
v.  
**PAULINE NYIRAMASUHUKO**  
**ARSÈNE SHALOM NTAHOBALI**

Case No. ICTR-97-21-T

JUDICIAL RECORDS/ARCHIVES  
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2000 SEP 11 10 47

**DECISION ON THE DEFENCE MOTION FOR DISCLOSURE OF EVIDENCE**  
Rules 66(B), 68, 89(B) and 98 of the Rules of Procedure and Evidence

The Office of the Prosecutor:  
Japhet Daniel Mono  
Ibukunolu Alao Babajide  
Andra Mobberley

Defence Counsel:  
Nicole Bergevin  
Guy Poupart

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA  
(The "Tribunal"),**

**SITTING** as Trial Chamber II, composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, and Judge Mehmet Güney;

**BEING SEIZED** of a "Motion for Disclosure of Evidence, Rules 66(B), 68, 89, and 98 of the Rules of Procedure and Evidence" from Pauline Nyiramasuhuko for disclosure of a United Nations Memorandum, dated 1 August 1997, prepared by Mr Michael Hourigan, Investigator for the Office of Internal Oversight Services of the United Nations and Former Investigator in Chief for the Office of the Prosecutor in Kigali", (the Memorandum") filed 31 May 2000, pursuant to the provisions of Rule 73 of the Rules of Procedure and Evidence (the "Rules");

**CONSIDERING** the Prosecutor's Response to the Defence Motion, filed 23 June 2000;

**RULING**, as decided at the 7 June 2000 hearing, on the basis of the parties' written briefs filed pursuant to the provisions of Rule 73(A) of the Rules;

**CONSIDERING** the Statute of the Tribunal, notably Rules 66(B), 89(B), and 98 of the Rules;

**Submissions of the Parties**

*The Defence*

In brief, the Defence argues that:

1. The aforementioned Memorandum of 1 August 1997 contains relevant information to the defence of the Accused insofar as the Prosecution has referred to the crash of the President's air plane in Paragraphs 1.22, 1.23, and 1.26 of its Indictment and has seemingly established a link between this accident and the massacres, beginning soon after, for which the Accused is imputed to be partly responsible. According to the Defence, the Memorandum, if disclosed to the Accused, could afford a reasonable opportunity for the Defence to corroborate information presently in its possession and to obtain new information. Therefore, said Memorandum is pertinent to the preparation of the defence of the Accused and should be disclosed. The Defence argues that information, considered by the Prosecutor to be collateral, that is, the identity of the authors of the assassination of President Habyrimana, is pertinent because of its relevance to a fact in dispute: the planning and the organization of the genocide which ensued. Accordingly, the Defence requests the Chamber to transmit to the Accused a copy of said Memorandum, pursuant to the provisions of Rule 89(B) of the Rules, or to order disclosure to the Accused, under the provisions of Article 98 of the Rules.



2. Should the Chamber determine that the provisions of Articles 89(B) and 98 of the Rules are not applicable, the Defence argues that the Chamber should order the Prosecutor to disclose a copy of said Memorandum, which is under the control of or in the possession of the Prosecution. Disclosure should be made pursuant to the provisions of Rules 66(B) and 68 of the Rules.

### ***The Prosecution***

In brief, the Prosecution argues the following:

3. The Tribunal has issued three rulings regarding the disclosure of the Memorandum, notably, *Prosecutor v. Gratién Kabiligi and Aloys Ntabakuze*, ICTR-97-34-I, 8 June 2000 (Decision on Kabiligi's Supplementary Motion for Investigation and Disclosure of Evidence); *Prosecutor v. Gratién Kabiligi and Aloys Ntabakuze*, ICTR-97-34-I, 8 June 2000 (Decision on Ntabakuze's Motion for Disclosure of Material); *Prosecutor v. Ignace Baglishema*, ICTR-95-1-A-T, 8 June 2000 (Decision on the Request of the Defence for an Order for Service of a United Nations Memorandum prepared by Michael Hourigan, Former ICTR Investigator).
4. In these decisions, the Tribunal instructed the Registrar to disclose a copy of the Memorandum to the Defence and to the Prosecutor, should the Prosecutor request a copy. The Tribunal also held that the Memorandum shall be used only for purposes of trial.
5. The Prosecutor has no objection that a copy of this Memorandum be released to the Defence and requests that it also receive a copy of the document.
6. The Prosecution will not join issues with the Defence on the legal basis of the Defence Motion.

### **HAVING DELIBERATED**

7. The Chamber recalls that, on 7 April 2000, the President of the Tribunal announced that she had received an internal and confidential memorandum from Mr Hans Corell, United Nations Under-Secretary-General and Legal Counsel, regarding the circumstances of the crash of the airplane carrying Rwandan President Juvénal Habyarimana and Burundi President Cyprien Ntaryamira on 6 April 1994. The President of the Tribunal sealed said Memorandum on receipt.
8. In the instant case, the Defence requests the Chamber to release to it a copy of said Memorandum or, alternatively, to order the Prosecution to disclose a copy to the Defence.



- 9. The Chamber notes that the Prosecutor has no objection that a copy of the Memorandum be released to the Defence but also requests receipt of a copy. The Chamber concludes that the Prosecution does not possess said Memorandum and, accordingly, that the provisions of Rules 66(B), 68 and 98 of the Rules are not applicable.
- 10. The Chamber determines it to be in the interests of justice to order that said Memorandum be disclosed to the Defence. However, the Chamber finds it appropriate to point out that there is no issue, at this stage of the proceedings, of ruling on the relevance of said Memorandum, as the Defence seems to request.
- 11. In the interest of equity, the Chamber also orders that the Memorandum, in the same form, be disclosed to the Prosecutor.

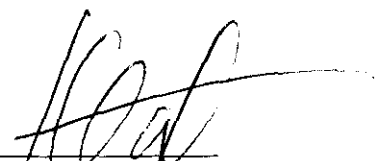
**FOR ALL THE ABOVE REASONS**

**THE CHAMBER, IN THE MAJORITY,**

**ORDERS** the Registrar to immediately release a copy of the Memorandum to the Defence and to the Prosecutor.

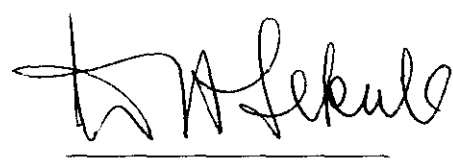
Arusha, 8 September 2000

Judge Güney submits a separate and dissenting opinion.




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Laity Kama  
Presiding Judge




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William H. Sekule  
Judge

(Seal of the Tribunal)

ICTR-97-21-I  
25/9/2000  
(134393-134390)

134393  
only

UNITED NATIONS



International Criminal Tribunal for the  
Prosecution of Persons Responsible for  
Genocide and Other Serious Violations of  
International Humanitarian Law committed  
in the territory of Rwanda and Rwandan  
Citizens responsible for genocide and other  
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4/4

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Mehmet Güney

Registry: Mr. Agwu Ukiwe Okali

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2000 SEP 25 P 4: 29 I

**THE PROSECUTOR**

vs.

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**SEPARATE AND DISSENTING OPINION OF JUDGE  
MEHMET GÜNEY TO THE DECISION ON THE DEFENCE  
MOTION FOR DISCLOSURE OF EVIDENCE**

Office of the Prosecutor:

Mr. Japhet Mono  
Ms Andra Mobberley

Counsel for the Defence:

Ms Nicole Bergevin  
Mr. Guy Poupart

1. The International Criminal Tribunal for Rwanda has before it a motion by Counsel for the defence of Nyiramasuhuko for disclosure of evidence, namely the memorandum prepared by Michael Hourigan, then an investigator with the United Nations Office of Internal Oversight Services (hereinafter "the memorandum") and a former chief of investigations with the Office of the Prosecutor in Kigali, which motion was filed on 31 May 2000 under Rule 73 of the Rules of Procedure and Evidence (hereinafter "the Rules").
2. Considering the Prosecutor's response filed on 23 June 2000, noting the three prior decisions by the Trial Chambers on similar motions for disclosure of the 1 August 1997 memorandum and after careful review of the said memorandum, I must enter the following separate and dissenting Opinion.
3. I respectfully disagree with the majority finding by Trial Chamber II on the disclosure of the memorandum to Counsel for Pauline Nyiramasuhuko and to the Prosecutor in the interests of justice.
4. My disagreement arises indeed from the lack of sufficient, precise and specific legal and factual grounds such as would justify disclosure of the memorandum for the preparation of the defence of the Applicant. Furthermore, with respect to the Prosecutor's request for disclosure of the said memorandum, I note that the Office of the Prosecutor has already received in three earlier cases a copy of the said memorandum. Therefore, the Prosecutor cannot claim that she is not in possession of the memorandum, even if there was created an unfortunate ambiguity regarding the effectiveness of such possession as a result of the direction by the Chambers that the memorandum shall be used only "for the purposes of the trial".
5. As I already stated in my separate and dissenting opinion of 8 June 2000 in the *Prosecutor vs. Bagilishema*, I note that the said memorandum was not prepared as a part of an official investigation by the United Nations into the circumstances surrounding the death of the President of Rwanda. On the contrary, according to the Press Release by the President of ICTR dated 7 April 2000 and the documents transmitted to the judges, the memorandum is a short unsolicited three page report, prepared by its author on his own initiative outside his official functions within the "Office of Internal Oversight Services" and based on admittedly unverified information. Therefore, it is my view that so uncertain a document cannot, as a matter of principle, be material to the discovery of the truth, in general, and to the defence of the accused, in particular.
6. Absent a showing of a nexus between the perpetrators of the attack and the perpetrators of the crimes alleged in the indictment, the request for leave to tender such an event as evidence in the instant case is totally misplaced. Indeed, it is neither alleged in the indictment that the crimes committed were sparked off by the crash of the Presidential plane, nor, more importantly, that the accused incurred any responsibility in such an attack. Consequently, the Defence has failed to make a *prima facie* case that such document may be exculpatory within the meaning of Rule 68 of the Rules, since none of the counts charges Pauline Nyiramasuhuko with individual criminal responsibility in the attack against President Habyarimana.
7. Lastly, should any national or international investigations into the attack yield the conclusion that members of the Rwandan Patriotic Front were the perpetrators of such attack, the discovery of a criminal hand would in no way justify or legitimize either the scale of the massacres and

the crime of genocide, or, more importantly, mitigate the individual criminal responsibility incurred by the perpetrators. True, it would establish a historical fact which would have to be accepted as such; however, to date, the circumstances surrounding the crash of the Presidential plane are still the subject of controversy.

8. Thus, a review of the reasoning behind the earlier decisions of the Trial Chambers allowing service of the memorandum on the parties concerned only for the purposes of the trial in their respective cases, shows that such disclosures on a case- by-case basis appear to have been based on specific allegations related to the cases concerned, otherwise it would be my view that restricting disclosure and use of the memorandum to those cases alone would not be justified. Now, I note that the submissions of Counsel for the Defence as to the relevance of the memorandum in question to all those cases are based on the mere reference made in the indictments to the assassination of President Habyarimana as part of the background to the massacres.
9. Thus, is clear that nowhere in the indictment is there an attempt to show a specific causation between the crash of the plane transporting President Habyarimana on its approach to Kigali airport on 6 April 1994 and the criminal acts and omissions which gave rise to the charges brought against the accused. Such an event which is recalled in the indictment against the accused, as in all the other indictments prepared by the Prosecutor, serves but as a historical and chronological background to the events which unfolded in Rwanda in April 1994. In light of the above, and without even discussing the relevance of the memorandum, any accused who relies on the mere reference in his indictment to the death of President Habyarimana should be expected to show why the memorandum should be disclosed to him. To avoid laborious and repetitive proceedings and bearing in mind the anecdotal nature of the memorandum in question, it would be advisable that such a document be made public, thus obviating also the need to rule on its materiality to the preparation of the defence of the accused. Nevertheless, in light of the reasons articulated in the earlier decisions cited *supra*, I still hold the view that counsel has failed to show that the memorandum is material to the preparation of the defence of the accused.
10. In conclusion, the Defence presumed, without sufficient evidence, that if the said memorandum were to substantiate such a contention, it would be material to the preparation of its case, for the Prosecutor presumably sought to present the attack against President Habyarimana as the trigger for the subsequent massacres, thereby suggesting that the same criminal organization was responsible for the attack. Without prejudging the possible probative value of such memorandum, I am unpersuaded by the Defence argument that the uncovering of the perpetrators of the attack might affect in any way, especially at this stage of the proceedings, the assessment of the individual criminal responsibility of the accused in the crimes alleged in the Indictment.
11. For all the foregoing reasons, I respectfully enter this separate and dissenting opinion reflecting my disagreement with the Decision of the Trial Chamber allowing disclosure of the memorandum to the Defence "in the interests of justice" and to the Prosecution out of fairness.

134390

Done in French at Arusha, on this eighth day of September 2000.

(Signed)  
Judge Mehmet Güney

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Translation certified by LCSS,  
ICTR



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**ICTR-97-21-I**  
**25/9/2000**  
**(134393-134390)**

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UNITED NATIONS



International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994

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**ICTR-97-21-I**  
**25/9/2000**  
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*mdg*

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**International Criminal Tribunal for Rwanda  
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**PROOF OF SERVICE – ARUSHA**

**PREUVE DE NOTIFICATION AUX CHAMBRES DE PREMIERE INSTANCE - ARUSHA**

<b>Date:</b> 25/09/2000	<b>Case Name / affaire:</b> The Prosecutor vs. PAULINE <b>Case No / no. de l'affaire:</b> NYIRAMASUHUKO & ARSENE NTAHOBALI ICTR- 97-21-I		
<b>To:</b> <b>A:</b>	<b>TC1</b> <input type="checkbox"/> Judge N. Pillay, President <input type="checkbox"/> Judge Møse, Vice President <input type="checkbox"/> Judge A. Gunawardana <input type="checkbox"/> E. Nahamya, Co-ordinator	<b>received by / reçu par:</b> _____	<b>ALO</b> <b>received by / reçu par:</b> <input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____
	<b>TC2</b> <input checked="" type="checkbox"/> Juge L. Kama <input type="checkbox"/> Judge W. H. Sekule <input type="checkbox"/> Judge M. Güney <input checked="" type="checkbox"/> C. Aptel, Co-ordinator	<i>Nequest 26/9/00</i> <i>26/09/00</i> <i>Kama 26/09/00</i> <i>26-9-00</i>	<input type="checkbox"/> <i>SW 26/9/00</i> <input checked="" type="checkbox"/> <i>Mwamba 26/9/2000</i> <input checked="" type="checkbox"/> <i>Kama 26/09/00</i>
	<b>TC3</b> <input type="checkbox"/> Judge L.G. Williams <input type="checkbox"/> Judge P. Dolenc <input type="checkbox"/> Judge Y. Ostrovsky <input type="checkbox"/> M. Niang, Co-ordinator	_____	<input type="checkbox"/> _____ <input type="checkbox"/> _____ <input type="checkbox"/> _____
	<b>OTP / BUREAU DU PROCUREUR</b> <input type="checkbox"/> Trial Attorney in charge of case: <u>JAPHET MONO</u> <del>KEVIN FLEMING</del>	<u>JAPHET MONO</u>	, received by <u><i>[Signature]</i></u> <i>26/09/00</i>
	<input type="checkbox"/> <b>DEFENSE</b> <input type="checkbox"/> <b>Accused / Accusé. PAULINE NYIRAMASUHUKO</b> <small>complete / remplir "CMS4 FORM"</small> <input type="checkbox"/> <b>Lead Counsel / Conseil Principal NICOLE BERGEVIN &amp; RENE SAINT- LEGER</b> <input type="checkbox"/> In Arusha / à Arusha _____ (signature) <input type="checkbox"/> by fax complete / remplir "CMS3bis FORM" <input type="checkbox"/> <b>Co-Counsel / Conseil Adjoint:</b> _____ <input type="checkbox"/> In Arusha / à Arusha _____ (signature) <input type="checkbox"/> by fax complete / remplir "CMS3bis FORM"	<u><i>[Signature]</i></u> <i>26/9/00</i>	
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<b>CC:</b>	<input type="checkbox"/> A. Okali <input type="checkbox"/> A. Miller, OLA, NY <input type="checkbox"/> BBK <input type="checkbox"/> K. Moghalu <input type="checkbox"/> WVSS-P <input type="checkbox"/> WVSS-D <input type="checkbox"/> LDFMS <input type="checkbox"/> GLSS		
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