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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Inés M. Weinberg de Roca, Presiding
Lee Gacuiga Muthoga
Robert Fremr

Registrar: Adama Dieng

Date: 14 September 2007

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THE PROSECUTOR

v.

Fulgence KAYISHEMA

Case No. ICTR-2005-87-I

DECISION ON THE *AMICUS CURIAE* REQUEST OF THE DEFENCE OF
GASPARD KANYARUKIGA

Rule 74 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Hassan Bubacar Jallow
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James Stewart
George Mugwanya
Inneke Onsea
François Nsanzuwera
Florida Kabasinga

Defence Counsel for Gaspard Kanyarukiga:
Pr. Ernest Midagu Bahati
Camille Yuma

INTRODUCTION

1. On 11 June 2007, the Prosecutor filed a motion for a Referral of the Indictment against the Accused *Fulgence Kayishema* to the Republic of Rwanda¹ pursuant to Rule 11 bis of the Rules of Procedure and Evidence (the "Rules"). Subsequently, the President of the Tribunal designated this Trial Chamber to decide on that motion.²
2. On 25 June 2007, the Defence for *Gaspard Kanyarukiga* (the "Applicant") an accused before the Tribunal, filed an application for leave to appear as an *amicus curiae* in the Rule 11 bis proceedings as above initiated by the Prosecutor (the "Motion")³. The Defence submits that its intention is to defend the interests of its client⁴. The Defence argues that in the event the case of *Fulgence Kayishema*, an accused still at large, would be transferred to Rwanda, it is likely that its client *Gaspard Kanyarukiga*, an accused in the custody of the Tribunal, will be prosecuted *in absentia* as the co-author or accomplice of *Fulgence Kayishema*. Such a move, in the opinion of the Applicant, would be contrary to Article 14-5 of the International Covenant on Civil and Political Rights and Article 20-4(d) of the Statute of the Tribunal⁵.
3. In its response filed on 29 June 2007 (the "Prosecutor's Response")⁶, the Prosecutor, the Prosecutor submits that the Motion of *Gaspard Kanyarukiga* does not satisfy the requirements for admission as *amicus curiae* and should be dismissed⁷. The Prosecutor argues notably that the primary criterion for a Chamber in determining whether to grant leave for *amicus curiae* is whether such submissions would assist the Chamber in its consideration of the questions at issue⁸. The Prosecutor submits that the Defence for *Gaspard Kanyarukiga* has not explained how his submissions would be relevant to the Rules 11 bis proceedings in the present case and how the said submissions would assist the Trial Chamber⁹. Finally, the Prosecutor is of the view that the applicant is seeking the status as *amicus curiae* only to

¹ Prosecutor's Request for Referral of the Case of *Fulgence Kayishema* to Rwanda pursuant to Rule 11 bis of the Tribunal's Rules of Procedure and Evidence, 11 June 2007.

² Designation of Trial Chamber under Rule 11 bis (President), 25 June 2007.

³ Requête de la Défense de Kanyarukiga Gaspard tendant à obtenir l'autorisation de se constituer «Amicus Curiae», 25 June 2007.

⁴ Motion, page 4.

⁵ Motion, pages 3 and 4.

⁶ Prosecutor's Response to "Requête de la Défense de Kanyarukiga Gaspard tendant à obtenir l'autorisation de se constituer «Amicus Curiae» (Art 74 de Règlement)", (the 'Prosecutor's Response'), filed on 29 June 2007, 29 June 2007.

⁷ Prosecutor's Response, Paras. 3 and 5.

⁸ Prosecutor's Response, Para. 9.

⁹ *Ibidem*

protect his own interest and thereby looking also for a *locus standi* in another trial of a separated accused, for which there is no basis in law¹⁰.

DISCUSSION

- Preliminary observations

4. The Chamber notes that the applicant's Motion has been filed in the Registry as confidential¹¹. The Prosecutor requests the lifting of that confidential status on the grounds that the applicant's motion does not disclose information that needs to be kept from public knowledge¹². After reviewing the content of the Motion, the Chamber agrees with the Prosecutor that it doesn't contain any information which could be treated as confidential as provided for in the Rules applicable before the Tribunal. Therefore, the Chamber is of the view that the Motion doesn't qualify for the status of confidential filing. Hence, it considers that the confidential status given to the Motion must be lifted and the Motion merely considered as a public document.

- The amicus curiae application

5. The Chamber recalls Rule 74 of the Rules which reads as follows:

A Chamber may, if it considers it desirable for the proper determination of the case invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

6. It follows from the above mentioned provisions that the role of an *amicus curiae* is not to defend any interests other than to assist the Chamber for the proper determination of a case. This implies that the *amicus curiae* is not a party to the trial and should therefore remain impartial in the discharge of its duties as indicated by the Trial Chamber in the *Milosevic case*¹³. In the present instance, the Defence has acknowledged in its submissions that its

¹⁰ Prosecutor's Response, Para. 12.

¹¹ As mentioned on the "Fiche de transmission pour dépôt de documents à la Section de l'Administration des Chambres", Document of the Court Management Section dated 25 June 2007.

¹² Prosecutor's Response, Para. 4.

¹³ *Prosecutor v. Slobodan Milosevic*, Case No : IT-02-54-T, Oral Decision, 10 October 2002. In rendering the decision, Judge May, the presiding Judge, stated: "The Chamber has considered this matter very carefully, and has concluded that the statements made by Mr. Wladimiroff, even with the explanations accepted, raise serious questions about the appropriateness of his continuing as *amicus curiae*. The Chamber observes that not only did he comment on parts of the case in respect of which evidence has been given, but that he also made an assessment of parts in respect of which evidence had not yet been adduced, and in both instances he appears to have formed a view of the case unfavourable to the accused. Of particular concern is the view expressed that the accused must be convicted of at least, some of the charges. The statements taken as a whole, would, in the Chamber's view, give rise to a reasonable perception of bias on the part of the *amicus curiae*. Implicit in the concept of an *amicus curiae* is the trust that the court reposes in "the friend" to act fairly in the performance of his duties. In the circumstances, the Chamber cannot be confident that the *amicus curiae* will

intervention will be focused on the defence of the interests of its client. The Chamber is of the view that the defence of such interests is incompatible the impartiality expected of an *amicus curiae*.

7. The Chamber further recalls that pursuant to Rule 74 as above detailed, the decision to grant leave for *amicus curiae* is at the sole discretion of the Trial Chamber which shall satisfy itself that the proposed intervention will help the Chamber for the proper determination of the case. That criterion "for the proper determination of the case" is the standard for admission as *amicus curiae* as enshrined in Rule 74 and consolidated by the jurisprudence of this Tribunal¹⁴. By only expressing its concern that its client *Gaspard Kanyarukiga* may be tried *in absentia*, should the case against the Accused *Fulgence Kayishema* be transferred to Rwanda, the Defence doesn't provide any satisfactory answer as to how its admission as *amicus curiae* in the present proceedings will assist the Chamber for the proper determination of the case at issue.

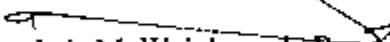
FOR THE FOREGOING REASONS, THE CHAMBER

ORDERS the confidential status of the Motion to be lifted;


REQUIRES the Court Management Section to take appropriate action to this regard;

DISMISSES the Motion in its entirety.

Arusha, 14 September 2007, done in English


Inés M. Weinberg de Roca
Presiding Judge


L. Gacumba Muthoga
Judge


Robert Fremr
Judge

[Seal of the Tribunal]



discharge his duties (which include bringing to its attention any defences open to the accused) with the required impartiality..."

¹⁴ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on the Admissibility of the Amicus Curiae Brief filed by the "Open Society Justice Initiative" and on its Request to be heard at the Appeals Hearing, 12 January 2007, p.3; See also *Laurent Semanza v The Prosecutor*, Case No. ICTR-97-20-A, Decision on Amicus Curiae Application of Paul Bisengimana, 30 March 2004, p.3; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Amicus Curiae Request by African Concern, 23 March 2004, Para. 4; *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Decision on an Application by African Concern for Leave to Appear as Amicus Curiae, 17 March 1999, Para. 2.