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NATIONS UNIES

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8-11-2007  
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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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**TRIAL CHAMBER III**

**Before Judges:** Inés M. Weinberg de Roca, Presiding  
Lee Gacuga Muthoga  
Robert Fremr  
**Registrar:** Adama Dieng  
**Date:** 8 November 2007

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA  
TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA

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**THE PROSECUTOR**

v.

**Fulgence KAYISHEMA**

*Case No. ICTR-2001-67-I*

**DECISION ON THE REQUEST BY HUMAN RIGHTS WATCH FOR LEAVE TO  
APPEAR AS AMICUS CURIAE IN THE PROCEEDINGS FOR REFERRAL OF THE  
INDICTMENT AGAINST FULGENCE KAYISHEMA TO RWANDA**

*Rules 11 bis and 74 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

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Bongani Majola  
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Jwani Timothy Mwaikusa  
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## INTRODUCTION

1. On 10 June 2001, the Prosecutor of the International Criminal for Rwanda ("the Tribunal") filed an Indictment ("the Indictment") against Fulgence Kayishema ("the Accused"). According to the Indictment, the Accused is charged with genocide, complicity in genocide, conspiracy to commit genocide, crimes against humanity, and serious violations of article 3 Common to the Geneva Convention and Additional Protocol II.<sup>1</sup> The Indictment was confirmed on 4 July 2001 by Judge Lloyd G. Williams.<sup>2</sup>

2. On 11 June 2007, the Prosecutor filed a request for the referral of the Indictment against the Accused to the Republic of Rwanda ("the Referral Request").<sup>3</sup> Pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence ("the Rules"), the President of the Tribunal, on 25 June 2007, designated the present Chamber to decide the motion.<sup>4</sup> The Chamber notes that the Accused is at large and is not represented in the proceedings.

3. On 25 October 2007, Human Rights Watch (hereinafter identified as "HRW") filed a request for leave to appear as *amicus curiae* ("the *amicus* Application")<sup>5</sup> in the instant case. In support of its application, HRW refers to Rule 74 of the Rules and submits that it has valuable information on the current status of the Rwandan judicial system that will assist the Chamber in making a proper determination of the case.<sup>6</sup>

4. HRW presents itself as a non-profit, non-governmental organization headquartered in New York and dedicated to investigating and exposing human rights violations around the world.<sup>7</sup> HRW contends that it is not affiliated with any party to this case.<sup>8</sup> It also asserts that it releases between 60 and 85 reports per year<sup>9</sup> and that its extensive research on human rights violations around the world is often called upon to assist International Tribunals in prosecution of war crimes, crimes against humanity and genocide.<sup>10</sup> In this regard, HRW

<sup>1</sup> Indictment, 10 June 2001.

<sup>2</sup> Decision on Confirmation of the Indictment, 4 July 2001.

<sup>3</sup> The 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.

<sup>4</sup> Designation of the Trial Chamber for the Referral of the Case Fulgence Kayishema to Rwanda, 25 June 2007.

<sup>5</sup> Request for Leave to Appear as *amicus curiae* pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence, 25 October 2007.

<sup>6</sup> *Amicus* Application, p. 1.

<sup>7</sup> *Amicus* Application, p. 1.

<sup>8</sup> *Amicus* Application, p. 1.

<sup>9</sup> *Amicus* Application, p. 1.

<sup>10</sup> *Amicus* Application, p. 1.

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explains that its researchers have testified at the *ad hoc* tribunals and have provided assistance to the International Criminal Court.<sup>11</sup>

5. HRW also submits that its work on human rights and justice issues in Rwanda is internationally acknowledged, as evidenced by the number of testimonies given before both the Tribunal and national jurisdictions by Alison Des Forges, senior advisor to its Africa Division, and other HRW researchers.<sup>12</sup> HRW further argues that it has published 15 reports on Rwanda, as of 1991 and has also established an office in Rwanda in since 1995, which is tasked with documenting violations of international humanitarian law in 1994 and with monitoring current human rights and justice issues.<sup>13</sup> HRW contends that its researchers have monitored the judicial system in Rwanda since 2005, following the wide-reaching reforms in the years 2002 through 2004.<sup>14</sup> It explains that its monitoring system, which covers both conventional and *gacaca* trials, conducts interviews of persons working in the field of justice, such as judges, prosecutors, lawyers and staff of Rwandan and international non-governmental organizations.<sup>15</sup>

6. HRW further submits that, although Rwanda has made notable progress in improving its judicial system, there remain serious obstacles to fair and credible prosecutions in Rwanda, especially for persons accused of genocide and other crimes relating to the events of 1994.<sup>16</sup> Among issues of concern, HRW alludes to the presumption of an accused person's innocence, the right of an accused to call witnesses in his or her defence and the right to be tried by a competent, independent and impartial court.<sup>17</sup>

7. Finally, HRW requests the Chamber to grant a period of three weeks from the date of this Decision to submit its supporting brief.<sup>18</sup>

8. The Prosecutor filed its Response ("the Prosecutor's Response") on 31 October 2007.<sup>19</sup> The Prosecutor submits that it does not oppose the HRW Application to appear as *amicus curiae* in the instant case.<sup>20</sup> However, the Prosecutor argues that, should the application be granted, HRW should file its *amicus* brief within seven days of the issuance of

<sup>11</sup> *Amicus* Application, p. 1.

<sup>12</sup> *Amicus* Application, p. 1.

<sup>13</sup> *Amicus* Application, p. 1.

<sup>14</sup> *Amicus* Application, p. 1.

<sup>15</sup> *Amicus* Application, pp.1 - 2.

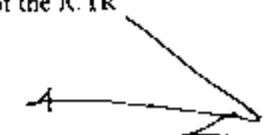
<sup>16</sup> *Amicus* Application, pp.1- 2.

<sup>17</sup> *Amicus* Application, pp.1 - 2.

<sup>18</sup> *Amicus* Application, pp.1 - 2.

<sup>19</sup> Prosecutor's Response to "Request for Leave to Appear as Amicus Curiae pursuant to Rule 74 of the ICTR Rules of Procedure and Evidence", filed by Human Rights Watch 25 October 2007.

<sup>20</sup> Prosecutor's Response, Para.2.



the present Decision to avoid undue delay in the proceedings.<sup>21</sup> In support of this request, the Prosecutor contends that HRW has had ample time to submit an Application, insofar as the Referral Request was filed on 11 June 2007.<sup>22</sup> The Prosecutor also submits that HRW has already articulated its position with respect to the issues to be addressed.<sup>23</sup> The Prosecutor further requests leave to file submissions in response to the *amicus curiae* brief, should the Application for *amicus* be granted.<sup>24</sup>

DISCUSSION

9. According to Rule 11 bis (A) of the Rules, the Chamber, shall determine whether the State concerned is adequately prepared to accept the reference of an ICTR Indictment. In the instant case, the requirement of adequate preparedness should be addressed with respect to the Judiciary of the Republic of Rwanda, the State concerned by the Referral Request.

10. The Chamber is of the view that a concerned State, such as the Republic of Rwanda in the present case, may be considered as adequately prepared to accept a referral case only if that State can guarantee that the accused will receive a fair trial and that the death penalty will not be imposed or carried out, as indicated in Rule 11 bis (C) of the Rules.

11. The Chamber notes that HRW bases its application for *amicus curiae* on several issues related to the ability of the Rwandan Judiciary to guarantee a fair trial to Mr. Kayishema. In this regard the Chamber emphasizes that the issue whether the Accused will receive a fair trial in Rwanda is vital for a proper determination of the case.

12. In determining whether a fair trial is possible, the Chamber needs to consider, amongst other matters, the rights of the Accused as enshrined in Article 20 of the Statute of the Tribunal: specifically the right to a fair and public hearing; the accused's presumption of innocence; the right to have adequate time and facilities for the preparation of a defence; the right to communicate with counsel of the accused's own choosing; the right to be tried without undue delay; the right to be present during all trial proceedings; the right to defend himself or herself in person or through legal assistance and without payment in such case if the accused does not have sufficient means; the right to examine, or have examined, the witnesses against him or her; the right to obtain the attendance and examination of witnesses on the accused's behalf under the same conditions as witnesses testifying against him or her;

<sup>21</sup> Prosecutor's Response Para. 3.  
<sup>22</sup> Prosecutor's Response Para. 3.  
<sup>23</sup> Prosecutor's Response Para. 3.  
<sup>24</sup> Prosecutor's Response, Para. 4.

the right to free assistance of an interpreter if the accused cannot understand or speak the language used in Court; and the right not to be compelled to testify against himself or herself or to confess guilt.

13. In light of HRW's submission, the Chamber is satisfied that HRW is amply qualified to undertake the role of *amicus* in the present case, pursuant to Rule 74 of the Rules.<sup>25</sup>

14. The Chamber also notes that Rule 74 of the Rules does not impose a specific deadline for an *amicus* to fulfill its mandate. The Chamber may therefore exercise its discretionary power to set a reasonable deadline for submission of the work of the *amicus*. The Chamber is not convinced that a seven day deadline for submission of the *amicus* brief, as suggested by the Prosecutor, would in any case accelerate the trial of the Accused insofar as no trial could commence until the Accused, who is at large, is arrested. In light of the issues to be addressed by the *amicus*, the Chamber is satisfied that a period of 21 days is a reasonable deadline for submission of the *amicus* brief. Upon submission of the *amicus* brief, the Prosecutor and the Republic of Rwanda may file a Response.

**FOR THE FOREGOING REASONS, THE CHAMBER:**

- I. **GRANTS** leave to HRW to appear as *amicus curiae* in the present case;
- II. **REQUESTS** HRW to address, in the form of an *amicus* brief, submissions on the following points:
  - (i) Whether the Rwandan legal system is able in practice to provide the Accused with assistance in:
    - a) Securing adequate legal representation;
    - b) Providing appropriate financial support to an indigent accused;
    - c) Facilitating travel and investigations for Defence teams;
    - d) Ensuring security for Defence teams.
  - (ii) What kind of impediments the Defence of the Accused may face in the discharge of its function?

<sup>25</sup> Rule 74 of the Rules 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.

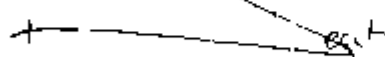
- (iii) What facilities and procedures exist for ensuring that witnesses and victims can be securely and safely accommodated and transported to the place of trial?
- (iv) What procedures exist for ensuring protection of witnesses before, during and after testifying in Court; specifically, whether Rwanda operates a witness protection programme? If so, what are the main features of the witness protection programme?
- (v) What kind of threats Prosecution witnesses and/or Defence witnesses may potentially face before, during and after giving testimony in Rwanda?
- (vi) What procedures exist for the procurement and the facilitation of safe and secure travel for witnesses, particularly for Rwandan witnesses who reside abroad? Will such witnesses be able to benefit from a safe passage to and from Rwanda?
- (vii) Whether Rwanda regulations governing the arrest and detention of an accused will afford to the Accused Fulgence Kayishema the same protection as the protection applied by the Tribunal?
- (viii) Whether the detention facilities for accused persons in Rwanda comply with internationally recognized standards.
- (ix) Any other relevant issues.

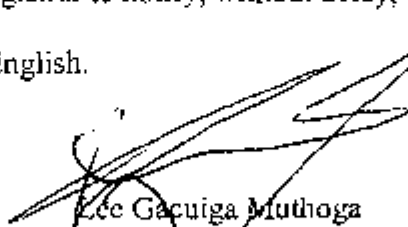
III. **DECIDES** that the *amicus* brief should be filed with the Registry of the Tribunal within 21 days from the date of the present Decision;

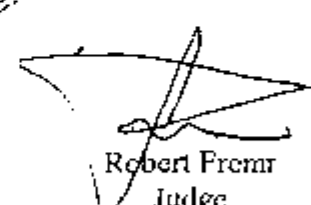
IV. **REQUESTS** the Registrar of the ICTR to provide HRW with all the documents related to the present case for a proper discharge of its *amicus* mandate;


V. **REQUESTS** the Registrar to notify, without delay, the present Decision to HRW.

Arusha, 8 November 2007, in English.

  
Inés M. Weinberg de Roca  
Presiding Judge

  
Léon Gacumba Muthoga  
Judge

  
Robert Fremr  
Judge





## 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)

<b>To:</b>	<input type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input checked="" 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. Buriss
<b>From:</b>	<input checked="" type="checkbox"/> Chamber <b>Suzanne Chenault</b> <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>
<b>Case Name:</b>	The Prosecutor vs. <b>Fulgence Kayishema</b>		<b>Case Number:</b> ICTR-2001-67-I	
<b>Dates:</b>	Transmitted: <b>08 November 2007</b>		Document's date: <b>08 November 2007</b>	
<b>No. of Pages:</b>	<b>3</b>		<b>Original Language:</b> <input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda	
<b>Title of Document:</b>	<b>Decision on the Request by Human Rights Watch for Leave to Appear as Amicus Curiae in the Proceedings for Referral of the Indictment Against Fulgence Kayishema to Rwanda</b>			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
<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
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		<input type="checkbox"/> Accused particulars		

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Reference material is provided in annex to facilitate translation.

Target Language(s):

English  French  Kinyarwanda

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Filing Party hereby submits **BOTH** the original and the translated version for filing, as follows:

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Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

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### III - TRANSLATION PRIORITISATION (For Official use ONLY)

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