



UNITED NATIONS
NATIONS UNIES

ICTR-2001-67-I
6-12-2007
(496 - 491)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

496
Jury

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 6 December 2007

OFFICIAL RECORDS ARCHIVED
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2007 DEC - 6 P 4: 16

THE PROSECUTOR

v.

Fulgence KAYISHEMA

Case No. ICTR-2001-67-I

**DECISION ON THE REQUEST FOR PERMISSION TO FILE AN AMICUS CURIAE
BRIEF, INTERNATIONAL CRIMINAL DEFENCE ATTORNEYS ASSOCIATION
(ICDAA) CONCERNING THE PROSECUTOR'S REQUEST FOR REFERRAL OF
THE CASE OF FULGENCE KAYISHEMA TO RWANDA PURSUANT TO RULE 11
Bis OF THE RULES**

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

Office of the Prosecutor:

Hassan Bubacar Jallow
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INTRODUCTION

1. On 10 June 2001, the Prosecutor of the International Criminal Tribunal for Rwanda ("the Tribunal") filed an Indictment ("the Indictment") against Fulgence Kayishema ("the Accused"). The Indictment charges the Accused with genocide, complicity in genocide, conspiracy to commit genocide, and extermination as a crime against humanity.¹ The Indictment was confirmed on 4 July 2001 by Judge Lloyd G. Williams.²

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

3. On 19 November 2007, the International Criminal Defence Attorneys Association ("the ICDAAC") filed a request for permission to file an *amicus curiae* brief ("the Amicus Application")⁵ in the present case. In support of its application, the ICDAAC refers to Rule 74 of the Rules and submits the Trial Chamber may, if it considers it desirable for the proper determination of the case, invite any State, organisation or person to appear before it and make submissions on any issue specified by the Chamber.⁶

4. The ICDAAC presents itself as an international non-governmental organization based in Montreal, Quebec, Canada with members in more than 30 countries.⁷ It has international alliances partnerships with well established associations such as national and regional bars.⁸ It is recognized as a non-governmental association ("NGO") with special consultative status with the Economic and Social Council of the United Nations.⁹ It is also an NGO registered as

¹ Indictment, 10 June 2001.

² Decision on Confirmation of the Indictment, 4 July 2001.

³ The Prosecutor's Request for the 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.

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

⁵ Request for Permission to file an Amicus Curiae Brief, International Criminal Defense Attorney's Association (ICDAAC) Concerning the Prosecutor's Request for Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 Bis of the Rules, 19 November 2007 ("the Amicus Application").

⁶ Amicus Application, p.2.

⁷ Amicus Application, p.2.

⁸ Amicus Application, p.2.

⁹ Amicus Application, p.2.

a civil society organisation ("CSO") with the Organisation of American States, an NGO registered as a non governmental international organisation and as a CSO with the Organisation Internationale de la Francophonie.¹⁰

5. The ICDAF states that it "focuses on advocacy for fair trial rights in international and national criminal proceedings around the world and the organisation of a global network of defence counsel, legal associations, legal educators and other professionals in related fields."¹¹ Its objectives include ensuring a highly professional defence for persons accused of war crimes and crimes against humanity who will be tried before national and international tribunals, and to organise a full, thorough and structured defence whose independence is crucial to bolstering the legitimacy of the international judicial process for prosecuting international crimes.¹²

6. The ICDAF submits that it is not affiliated with any party in the present case and does not seek leave to protect the rights of the Accused.¹³ It submits that it has a real interest in the issue at hand and could help the Trial Chamber in considering the questions raised by the case.¹⁴

7. The ICDAF states its field of expertise is to assist in guaranteeing the fairness of criminal proceedings for people accused of international crimes and to secure a full, thorough, structured and independent defence.¹⁵ The ICDAF notes that as it is composed of defence lawyers who practice before national and international tribunals such as the ICTR and ICTY, it is well qualified to express its views on defence matters.¹⁶ In addition, the ICDAF believes that its views would be useful in helping to monitor the fairness of proceedings in Rwanda.¹⁷

8. As a result of its expertise, the ICDAF states that it would like to submit an *amicus curiae* brief on the issue of whether the Accused would receive a fair trial in Rwanda.¹⁸

9. In addition, the ICDAF would like to make submissions on the possibility of transferring accused persons to other national jurisdictions under Rule 11 bis, taking into

¹⁰ Amicus Application, p.2.

¹¹ Amicus Application, p.2.

¹² Amicus Application, p.2.

¹³ Amicus Application, p.3.

¹⁴ Amicus Application, p.3.

¹⁵ Amicus Application, p.4.

¹⁶ Amicus Application, p.4.

¹⁷ Amicus Application, p.4.

¹⁸ Amicus Application, p.4.

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account the experience of previous transfers of accused persons from an international tribunal to a national jurisdiction such as from the ICTY to Bosnia Herzegovina.¹⁹

10. The Prosecutor has not responded to the Amicus Application.

DISCUSSION

11. Rule 11 *bis* (A) of the Rules provides that the Chamber shall determine whether the State concerned is adequately prepared to accept the ICTR Indictment. In this determination, pursuant to Rule 11 *bis* (C), the Chamber is required to satisfy itself that the accused will receive a fair trial in the courts of the State concerned.

12. The Chamber is of the view that in determining whether a fair trial is possible, it must consider 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 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 by him or her in any 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 against him or her; the right to the 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. The Chamber recalls that pursuant to Rule 74 of the Rules, it may grant leave to a State, organisation, or person to make submissions on any issue if it considers it desirable for the proper determination of the case.

14. In light of ICDAF's submissions on their experience with the issues to be determined, as well as their objectivity as an *amicus*, specifically their lack of affiliation with any party in the case, including the Accused, the Chamber is of the view that granting the ICDAF leave to file an *amicus* brief will assist it in a proper determination of the case.

15. The Chamber notes that Rule 74 does not impose a specific deadline for an *amicus* to fulfil its mandate. The Chamber may therefore exercise its discretion to set a deadline within

¹⁹ Amicus Application, p.4.

which the mandate is to be executed. 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. The Prosecutor and Republic of Rwanda may file a Response to the *amicus* brief within 15 days of receipt of the same.

FOR THE FOREGOING REASONS, THE CHAMBER:

I. GRANTS leave to the ICDAA to file an *amicus* brief;

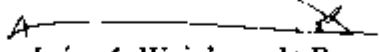
II. REQUESTS the ICDAA to address, in the *amicus* brief, the following matters:

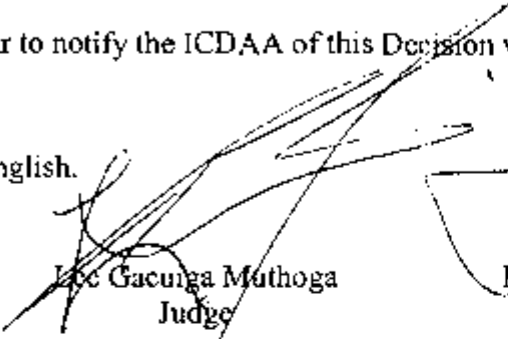
- a. Whether the Rwandan legal system stipulates provisions providing an Accused person with assistance in:
 - i. Securing adequate legal representation;
 - ii. Providing appropriate financial support to indigent accused;
 - iii. Facilitating travel and investigations for Defence teams;
 - iv. Ensuring security for Defence teams.
- b. Whether persons accused of serious crimes in Rwanda actually enjoy these facilities?
- c. What kind of impediments the Defence of the Accused may face in the discharge of its function, including specifically the accessibility of the Accused to Defence Counsel?
- d. Whether foreign counsel may represent accused persons before Rwandan courts, and if so, whether there are any restrictions on their practice?
- e. What facilities and procedures exist for ensuring that witnesses and victims can be securely and safely accommodated and transported to the place of trial in Rwanda?
- f. What procedures exist for ensuring protection of witnesses before, during and after testifying in Court, specifically, whether Rwanda operates a witness protection program? If so, what are the main features of the witness protection program?
- g. What kinds of threats Prosecution witnesses and/or Defence witnesses may potentially face before, during and after giving testimony in Rwanda?
- h. 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?
- i. Whether the detention facilities for accused persons in Rwanda comply with internationally recognized standards.

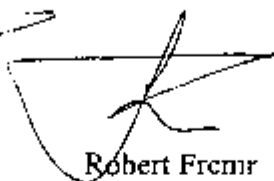
Any other relevant issues.

- III. **DECIDES** that the *amicus* brief should be filed with the Registry of the Tribunal within 21 days from the date the ICDAAC receives all the relevant documents from the registrar.
- IV. **REQUESTS** the Registrar of the ICTR to provide the ICDAAC with all relevant documents for a proper discharge of its *amicus* mandate;
- V. **REQUESTS** the Registrar to notify the ICDAAC of this Decision without delay;

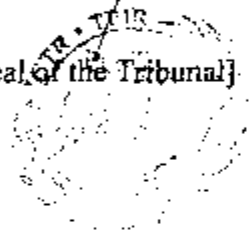
Arusha, 6 December 2007, in English.


Inés M. Weinberg de Roca
Presiding Judge


J. Gacumba Muthoga
Judge


Robert Fremr
Judge

[Seal of the Tribunal]





TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

COURT MANAGEMENT SECTION
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I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

| | | | | |
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| To: | <input type="checkbox"/> Trial Chamber I N. M. Diallo | <input type="checkbox"/> Trial Chamber II R. N. Kouambo | <input checked="" type="checkbox"/> Trial Chamber III C. K. Homelouu | <input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon |
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| Case Name: | The Prosecutor vs. Fulgence KAYISHEMA | | | Case Number: ICTR-2001-87-I |
| Dates: | Transmitted: 6 December 2007 | | Document's date: 6 December 2007 | |
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| TRIM Document Type: | <input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Correspondence <input type="checkbox"/> Submission from non-parties <input checked="" type="checkbox"/> Decision <input type="checkbox"/> Affidavit <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Submission from parties <input type="checkbox"/> Disclosure <input type="checkbox"/> Order <input type="checkbox"/> Appeal Book <input type="checkbox"/> Accused particulars <input type="checkbox"/> Judgement <input type="checkbox"/> Motion <input type="checkbox"/> Book of Authorities | | | |

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☒ Filing Party hereby submits only the original, and will not submit any translated version.

☐ Reference material is provided in annex to facilitate translation.

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

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