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

**Registrar:** Adama Dieng

**Date:** 13 December 2007

**THE PROSECUTOR**

v.

**Fulgence KAYISHEMA**

*Case No. ICTR-2001-67-1*

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**DECISION ON THE MOTION BY ADAD  
(THE ORGANIZATION OF ICTR DEFENCE COUNSEL)  
FOR LEAVE TO APPEAR AS *AMICUS CURIAE*  
*Rules 11 bis and 74 of the Rules of Procedure and Evidence***

**Office of the Prosecutor:**  
Hassan Bubacar Jallow  
Bongani Majola  
Silvana Arbia  
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Richard Karegyesa  
George Mugwanya  
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François Nsanzuwera  
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**Defence Counsel:**

[Signature]

## 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.<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 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.<sup>4</sup> The Chamber notes that the Accused is at large and is not represented in the proceedings.

*Amicus Application*

3. On 23 November 2007, ADAD filed an application for leave to appear as *amicus curiae* ("the Amicus Application").<sup>5</sup> In support of its application, ADAD refers to Rule 74 of the Rules and submits that its appearance as *amicus curiae* will "uniquely" assist the Trial Chamber in its determination of the Referral Request.<sup>6</sup>

4. ADAD presents itself as an unincorporated voluntary association that has been the sole organized voice of the Defence at the ICTR for almost 10 years.<sup>7</sup> ADAD submits that its objectives include the promotion of fair trials and the establishment of a sound foundation of international jurisprudence.<sup>8</sup> ADAD notes that it has attended ICTR plenaries at the request of the Judges and President and of its own initiative.<sup>9</sup> It states that it has previously filed *amicus curiae* briefs relating to the transfer of cases to Rwanda in 2004.<sup>10</sup> It further asserts that it has played a consultative and representative role in resolving many issues where the

<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 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.

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

<sup>5</sup> Motion by ADAD (the Organization of ICTR Defence Counsel) for Leave to Appear and Make Submissions as *Amicus Curiae* in Opposition to the Prosecutor's Rule 11 bis Request to Refer the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 74, 23 November 2007 ("the Amicus Application").

<sup>6</sup> Amicus Application, p.5, 6.

<sup>7</sup> Ibid., p.4.

<sup>8</sup> Ibid., p.5.

<sup>9</sup> Ibid., p.4.

<sup>10</sup> Ibid., p.4.

Tribunal has found ADAD to be a useful interlocutor.<sup>11</sup> ADAD submits that the majority of Defence attorneys at the ICTR are either formal members or voluntary associates of ADAD whose meetings are open to all Defence teams.<sup>12</sup>

5. ADAD submits that it is particularly well situated to provide the Chamber with specific, detailed evidence and analysis as its members and associates have more than a decade of professional experience with proceedings at the ICTR and with the Rwandan Government, both within Rwanda and without.<sup>13</sup> ADAD notes that its members, unlike any other prospective *amici*, are obliged, under the Tribunal's Rules, to assist it in performing justice and upholding the integrity of the Tribunal process whilst representing the interests of the Accused.<sup>14</sup> ADAD further notes that a government or non-governmental organisations not responsible for the defence of cases at the ICTR can have no more interest in the outcome of proceedings than the only organisation of Defence Counsel representing parties appearing before the Tribunal. ADAD notes that "both Defence counsel and their clients stand to suffer immediate, direct and irreparable harm on the order of a threat to life, itself, in the event of an adverse decision."<sup>15</sup>

6. ADAD submits that it opposes the Referral Request and wishes to put before this Chamber and on the public record "matters relating to foundational questions relating to International Jurisprudence and the 'legacy' of the Tribunal, all of which are related to fair trials in the international arena, and concepts of fundamental fairness."<sup>16</sup>

7. ADAD submits that it is willing, should the Trial Chamber consider it necessary, to appear and make oral submissions before the Trial Chamber.<sup>17</sup> ADAD requests that if leave is granted, there be a full evidentiary oral hearing of its submissions with fact and expert witnesses together with documentary submissions to establish the circumstances and conditions in Rwanda in respect of fair trials and the impossibility of a meaningful defence in cases involving former opponents of the Rwandan Government in particular.<sup>18</sup>

<sup>11</sup> *Ibid.*, p.4.

<sup>12</sup> *Ibid.*, p.4.

<sup>13</sup> *Ibid.*, p.6.

<sup>14</sup> *Ibid.*, p.6.

<sup>15</sup> *Ibid.*, p.7.

<sup>16</sup> *Ibid.*, p.8.

<sup>17</sup> *Ibid.*, p.8.

<sup>18</sup> *Ibid.*, p.8.

*Prosecutor's Response*

8. The Prosecutor filed its Response on 30 November 2007,<sup>19</sup> requesting that the Trial Chamber consider various factors militating against granting the *Amicus* Application.<sup>20</sup>

9. First, the Prosecutor submits that it may not be appropriate to allow ADAD, as an association, to appear as *amicus curiae* whilst at the same time each member of ADAD has a specific individual whose interests he/she is bound to protect.<sup>21</sup> The Prosecutor notes that each counsel's duty is limited to protecting the specific individual he or she is assigned to protect, and does not extend to every individual charged before the Tribunal.<sup>22</sup> In this context, the Prosecutor notes that the Accused has counsel assigned to him to represent his interests.<sup>23</sup>

10. Secondly, the Prosecutor submits that as counsel for the Accused are, or might be members of ADAD, the request by ADAD to make submissions would involve a duplication of submissions as well as a waste of the resources of the Tribunal.<sup>24</sup>

11. The Prosecutor further submits that should the Trial Chamber grant the *Amicus* Application, it be allowed the opportunity to respond to the merits contained within it.<sup>25</sup>

*Defence Reply*

12. On 5 December 2007, ADAD filed a Reply to the Prosecutor's Response to the *Amicus* Application.<sup>26</sup> ADAD submits that as the ICTR, unlike the ICTY, has not created a formal bar association through which the collective interests of the Defence can be expressed, ICTR defence counsel are required to act individually or through a voluntary organisation.<sup>27</sup> In addition, ADAD submits that in the absence of an undertaking that none of the accused, other than Fulgence Kayishema will face transfer to Rwanda under any circumstances, the Prosecutor cannot deny that the decision of the Chamber with respect to this Accused will, or may affect other accused not before this Chamber.<sup>28</sup>

<sup>19</sup> Prosecutor's Response to "Motion by ADAD (the Organization of ICTR Defence Counsel) for Leave to Appear and Make Submissions as Amicus Curiae in Opposition to the Prosecutor's Rule 11 *bis* Request to Refer the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 74", 30 November 2007 ("the Prosecutor's Response").

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

<sup>21</sup> *Ibid.*, p.2.

<sup>22</sup> *Ibid.*, p.2.

<sup>23</sup> *Ibid.*, p.2.

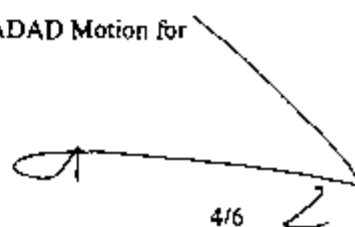
<sup>24</sup> *Ibid.*, p.2.

<sup>25</sup> *Ibid.*, p.3.

<sup>26</sup> ADAD (the Organization of ICTR Defence Counsel) Reply to Prosecutor's Response ADAD Motion for Leave to Appear as Amicus Curiae, 5 December 2007, ("ADAD's Response").

<sup>27</sup> ADAD's Response, p.2.

<sup>28</sup> *Ibid.*, p.2.



13. As a result, ADAD submits that the only fair alternative to ADAD appearing as *amicus* representing the collective interest of the Defence would be to permit counsel for all Accused to intervene as *amici*.<sup>29</sup>

14. In conclusion, ADAD alleges that there is ample evidence that the Prosecutor has, or may have, interests beyond the outcome of this matter which create a much greater conflict of interest than that of which ADAD is accused by the Prosecutor.<sup>30</sup>

15. ADAD attached a number of documents to its Reply.<sup>31</sup>

### DISCUSSION

16. 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.

17. It follows from Rule 74 of the Rules that the role of an *amicus curiae* is not to defend the interests of the accused, but rather, to assist the Chamber in a proper determination of a case. An *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.<sup>32</sup> ADAD presents itself as the "only entity charged with representing the collective voice of the Defence Counsel".<sup>33</sup> Its members are defence counsel who are assigned to represent the interests of individuals who have been indicted by the Tribunal. As a result, and notwithstanding the fact that the Accused does not have defence counsel, the Chamber is of the view that the interests of an organisation such as ADAD are incompatible with the impartiality expected of an *amicus curiae*.

18. The Chamber further recalls that pursuant to Rule 74, the decision to grant leave for *amicus curiae* is at the sole discretion of the Chamber which shall satisfy itself that the proposed intervention will help the Chamber in a proper determination of the case. For the reasons stated above, specifically ADAD's lack of impartiality, this Chamber is not satisfied

<sup>29</sup> *Ibid*, p.3.

<sup>30</sup> *Ibid*, p.3.

<sup>31</sup> Including the affidavit of former ICTR Prosecutor Michael Hourigan, Q.C., an excerpt from Peace and Punishment: The Secret Conflict between Politics and International Justice by Ms. Florence Hartmann, as well as a copy of a 17 May 1994 UNHCR Report.

<sup>32</sup> *Prosecutor v. Slobodan Milosevic*, Case No.: IT-02-54-T, Trial Chamber Decision, Reasons of the Trial Chamber for Revoking Mr Wladimiroff's Appointment as an Amicus Curiae, 10 October 2002, "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 discharge his duties (which include bringing to its attention any defences open to the accused) with the required impartiality..."

<sup>33</sup> *Amicus Application*, p.7.

that an *amicus curiae* brief by ADAD would assist the Chamber in a proper determination of the case.

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

- I. **DISMISSES** the *Amicus* Application in its entirety.
- II. **REQUESTS** the Registrar to notify, without delay, the present Decision to ADAD.

Arusha, 13 December 2007, in English.

Inés M. Weinberg de Roca  
Presiding Judge

Lee Gacunga Muthoga  
Judge

With the consent and on  
behalf of  
Robert Fremr  
Judge  
(Absent during signature)

[Seal of the Tribunal]

