



UNITED NATIONS  
INTERNATIONAL  
CRIMINAL TRIBUNAL FOR RWANDA

ICTR-2001-67-I  
1-7-2008  
(722 - 717)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER III**

**Before:** Inés M. Weinberg de Roca, Presiding  
Lee Gacuga Muthoga  
Robert Fremr  
**Registrar:** Adama Dieng  
**Date:** July 2008

JUDICIAL SECTION  
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**THE PROSECUTOR**

v.

**Fulgence KAYISHEMA**

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

**DECISION ON THE REQUESTS OF THE REPUBLIC OF RWANDA  
TO BE SERVED WITH THE AMICUS BRIEFS OF HUMAN RIGHTS WATCH AND  
THE INTERNATIONAL CRIMINAL DEFENCE ATTORNEYS ASSOCIATION  
(ICDAA) AND TO PREPARE A WRITTEN RESPONSE**

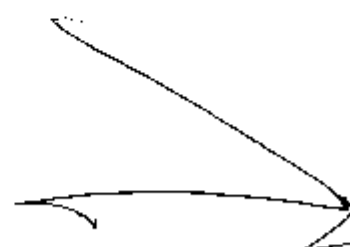
*Rules 11 bis and 74 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Hassan Bubacar Jallow  
Bongani Majola  
Alex Obote-Odora  
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**Defence Counsel:**

Jwani Timothy Mwaikusa



## 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 Referral Request.<sup>4</sup>

3. On 14 September 2007, the Chamber granted the *amicus* request of the Republic of Rwanda<sup>5</sup> (in 8 November 2007 and 6 December 2007, the Chamber granted the *amicus* requests of Human Rights Watch ("HRW"),<sup>6</sup> and the International Criminal Defence Attorneys Association ("the ICDDA") respectively.<sup>7</sup>

### *Rwanda's Requests*

4. On 5 February 2008, the Republic of Rwanda filed two requests to be served with the *amicus* briefs of HRW and the ICDDA, and for time to prepare responses to the briefs ("Requests").<sup>8</sup> In their Requests, the Republic of Rwanda stated that it had

<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 11bis 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> Decision on the Request of the Republic of Rwanda for Leave to Appear as *Amicus Curiae*, 14 September 2007.  
<sup>6</sup> 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, 8 November 2007.  
<sup>7</sup> Decision on the Application by the International Criminal Defence Attorneys Association (ICDDA) for Leave to File a Brief as *Amicus Curiae*, 6 December 2007.  
<sup>8</sup> Request of the Republic of Rwanda to be served with (sic) *Amicus Brief of the International Criminal Defense Attorneys Association (ICDDA)* for the Referral of the above case to Rwanda pursuant to Rule 11bis and to prepare a written response, 5 February 2008, and the Request of the Republic of Rwanda to be served with (sic) *Amicus Brief of Human Rights Watch for the Referral of the above case to Rwanda pursuant to Rule 11bis and to prepare a written response*, 5 February 2008. As these requests are identical in substance, they will be referred to as the "Requests".

720

become aware that HRW and the ICDA had filed *amicus* briefs which included allegations against Rwanda.<sup>9</sup> The Republic of Rwanda requested that the Chamber allow it to respond to those “issues and concerns”,<sup>10</sup> as this response would be vital in enhancing a proper determination of the referral application.<sup>11</sup> The Republic of Rwanda stated that it had neither been formally served with the *amicus* brief of the ICDA, nor been given time to file the response.<sup>12</sup>

### **Response**

5. On 8 February 2008, the ICDA filed a Response.<sup>13</sup> Although the ICDA had no objection to the Republic of Rwanda being served with their *amicus* brief,<sup>14</sup> they objected to the Republic of Rwanda’s request to respond to the *amicus* brief.<sup>15</sup>

6. The ICDA advocated a literal construction of Rule 74 of the Rules,<sup>16</sup> submitting that Rule 74 does not “open the door” to responses and replies between *amici*.<sup>17</sup> In support of this proposition, the ICDA cited Rule 103 of the International Criminal Court (“ICC”) Rules of Procedure and Evidence which explicitly allows the Prosecutor and Defence the opportunity to respond to *amicus* observations.<sup>18</sup> The ICDA submitted that while “it seems logical that a party in a case, the Prosecutor or the Defence, have the possibility to react to the brief of an *amicus*”,<sup>19</sup> that allowing the Republic of Rwanda to give more information than its initial *amicus* brief would risk confusing the roles of the Parties and the role of an independent *amicus* in the case.<sup>20</sup>

7. In the alternative, however, the ICDA requested that were the Chamber to allow the Republic of Rwanda to respond to its *amicus* brief, that the ICDA be permitted to file a reply to the Prosecutor’s and Republic of Rwanda’s responses to

<sup>9</sup> The Requests, paras. 1, 2.

<sup>10</sup> *Ibid.*, para. 3.

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

<sup>12</sup> *Ibid.*, para. 3.

<sup>13</sup> Response of Amicus Curiae International Criminal Defense Attorney’s Association (ICDA) regarding the Request of the Republic of Rwanda to file Submissions on the Brief of the ICDA, 8 February 2008 (the “Response”).

<sup>14</sup> The Response, para. 4.

<sup>15</sup> *Ibid.*, para. 8.

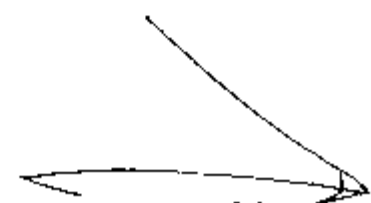
<sup>16</sup> *Ibid.*, para. 12.

<sup>17</sup> *Ibid.*, para. 11.

<sup>18</sup> *Ibid.*, paras. 13-16.

<sup>19</sup> *Ibid.*, para. 17.

<sup>20</sup> *Ibid.*, para. 23.



719

their *amicus* brief, as well as file responses to all the other *amicus* briefs submitted in the present case.<sup>21</sup>

8. HRW did not file a Response.

## DISCUSSION

### *Moot Requests*

9. On 8 November 2007, the Chamber issued a Decision granting HRW's application to file an *amicus* brief.<sup>22</sup> In that Decision, the Chamber stated that "Upon submission of the *amicus* brief, the Prosecutor and the Republic of Rwanda may file a Response."<sup>23</sup>

10. On 6 December 2007, the Chamber issued a Decision granting the ICDA's application to file an *amicus* brief.<sup>24</sup> In that Decision, the Chamber stated that "The Prosecutor and Republic of Rwanda may file a Response to the *amicus* brief within 15 days of receipt of same."<sup>25</sup>

11. On 2 May 2008, the Chamber issued a Decision instructing the Registrar to appoint Defence Counsel.<sup>26</sup> On 15 May 2008, the Registrar sent Mr. Jwani Timothy Mwaikusa a letter appointing him as Fulgence Kayishema's Defence Counsel. On 1 July 2008, the Chamber issued corrigenda adding the Defence to those who could respond to the *amicus* briefs of HRW and the ICDA.<sup>27</sup>

12. The Chamber therefore considers that the Republic of Rwanda's Requests are moot, as the right to be served with, and to respond to, the *amicus* briefs of HRW and of the ICDA was granted in the Chamber's Decisions of 8 November 2007 and 6 December 2007.

<sup>21</sup> *Ibid.*, paras. 25, 27.

<sup>22</sup> 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, 8 November 2007.

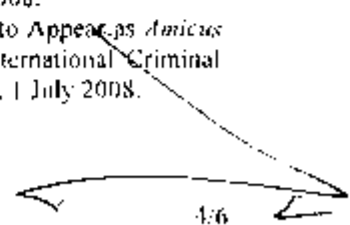
<sup>23</sup> *Ibid.*, para. 14.

<sup>24</sup> Decision on the Application by the International Criminal Defence Attorney's Association (ICDA) for Leave to File a Brief as *Amicus Curiae*, 6 December 2007.

<sup>25</sup> *Ibid.*, para. 15.

<sup>26</sup> Decision on the Referral of the Application to Appoint Defence Counsel, 2 May 2008.

<sup>27</sup> Corrigendum to the Decision on the Request by Human Rights Watch for Leave to Appear as *Amicus Curiae*, 1 July 2008; Corrigendum to the Decision on the Application by the International Criminal Defence Attorneys Association (ICDA) for Leave to File a Brief as *Amicus Curiae*, 1 July 2008.



718

### *Differentiation between Amici*

13. Although the Chamber has determined that the Republic of Rwanda's Requests are moot, the Chamber wishes to clarify the position of other *amici* with respect to the *amicus* Referral State.

14. The Chamber granted the Parties and the Referral State the right to respond to the *amicus* briefs, as the Chamber is of the view that the Referral State has a unique position as an *amici*. This differentiation among *amici* may be read into the Rules, and is supported by the jurisprudence.

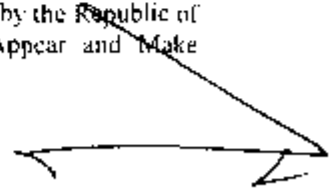
15. The Chamber notes that Rule 74 provides that "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions *on any issue specified by the Chamber*."<sup>28</sup> The Chamber is of the view that this wording allows the Chamber wide discretion with respect to inviting *amici* to provide submissions on *any issue* specified, and that "any issue" would not only include *amicus* briefs and oral submissions, but may also include responses to *amicus* briefs, if the Chamber considers such responses would assist in the proper determination of an issue before it.

16. The Chamber also notes that there is authority in the Tribunal jurisprudence for this interpretation. In the *Bagaragaza* referral, the Parties and the Netherlands were granted the right to respond to each others' submissions.<sup>29</sup> In the *Hategekimana* referral, the Referral State's *amicus* request was granted, but the remaining three *amicus* applicants (including the ICDDA) were left pending, as the Referral Bench held "it will be better able to determine whether and precisely how the remaining applicants may assist it after receiving the submissions of the Defence and the Republic of Rwanda."<sup>30</sup>

<sup>28</sup> Emphasis added.

<sup>29</sup> *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-11bis, Order for Further Submissions Concerning the Request for Referral of the Indictment to the Kingdom of the Netherlands, 31 January 2007, the disposition read "FOR THE FOREGOING REASONS, THE CHAMBER [I] INVITES the Parties and the Netherlands to respond to each others' submissions on the questions within 21 days from the date of the present Order."

<sup>30</sup> *Prosecutor v. Hategekimana*, Case No. ICTR-2000-55B-1, Decision on the Request by the Republic of Rwanda, the Kigali Bar Association, the ICDDA, and ADAD for Leave to Appear and Make Submissions as Amici Curiae, 4 December 2007

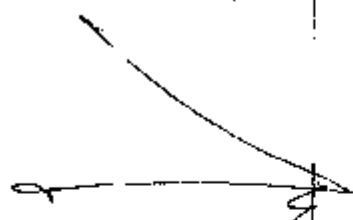


17. This differentiation between the Referral State and other *amici* is therefore within the discretion of the Chamber. The Chamber is of the view that it is essential for the proper determination of the case to receive as much information as possible from the Referral State on its willingness and capacity to grant the Accused a fair trial.

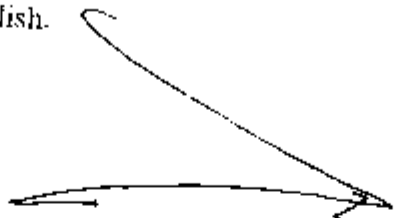
**FOR THE FOREGOING REASONS, THE CHAMBER:**

- I. **DETERMINES** the Republic of Rwanda's Requests to be served with the *amicus* briefs of HRW and the ICDA as moot;
- II. **DETERMINES** the Republic of Rwanda's Requests to prepare written responses to the *amicus* briefs of HRW and the ICDA as moot;
- III. **CLARIFIES** that Rule 74 allows a Chamber to request or grant the right to a Referral State to file a response to any *amicus* brief filed; and
- IV. **DIRECTS** the Registrar of the ICTR to notify the Republic of Rwanda, HRW, and the ICDA of this Decision without delay.

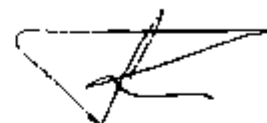
Arusha, 1 July 2008, in English.



Ime M. Weinberg de Roca  
Presiding Judge



With the consent and on behalf of  
Lee Gacuiga Muthoga  
Judge  
(Absent during signature)



Robert Fremr  
Judge

[Seal of the Tribunal]

