



Mechanism for International Criminal Tribunals

Case No: MICT-13-33

Date: 03 August 2015

Original: English

Before: Judge Vagn Joensen (Single Judge)

Registrar: Mr. John Hocking

THE PROSECUTOR

v.

JEAN DE DIEU KAMUHANDA

**PROSECUTOR'S CONSOLIDATED RESPONSE TO ADAD-ICTR AND
ADC-ICTY MOTIONS FOR LEAVE TO SUBMIT AMICUS CURIAE
OBSERVATIONS**

Office of the Prosecutor

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The Applicants

ADAD-ICTR
ADC-ICTY

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Prosecutor's Consolidated Response to the ADAD-ICTR and ADC-ICTY Motions for leave to file Amicus Curiae Observations

Introduction

1. ADAD-ICTR and ADC-ICTY (the Applicants) filed motions on 14 and 23 July 2015 respectively¹ seeking leave to submit *Amicus Curiae* observations in this matter², pursuant to Rule 83 of the MICT Rules of Procedure and Evidence (the Rules).

2. Neither Applicant articulate, in their respective motions, the specific point of law on which intervention is sought, nor do they establish how they otherwise meet the standard for being granted leave to be heard as *amici*. In the result, their applications for leave should be dismissed for want of meeting the requisite standard.

The Law Applicable

3. MICT Rule 83, which replicates the provisions of Rules 74 of both the ICTR and ICTY Rules of Procedure and Evidence, confers upon a Judge or Chamber discretion to invite or grant leave to an applicant to appear as *amicus curiae* and make submissions “...if it considers it desirable for the proper determination of the case,... on any issue specified by the Chamber”. In the construction of this provision the ICTY Appeals Chamber has been guided by and made reference to the practice direction on the submission of *amicus curiae* briefs, which requires that, in general, “...amicus submissions shall be limited to questions of law,...”.³

4. For leave to be granted, an Applicant is required to properly articulate the question(s) of law it seeks to address, and establish that the proposed intervention is both useful and desirable for the proper determination of the case.⁴

¹ *Prosecutor v Kamuhanda* MICT -13-33, Motion for Leave to Appear as Amicus Curiae by the Association of Defence Lawyers at the International Criminal Tribunal for Rwanda (ADAD) in Support of the Motion for Decision on Contact with Persons Benefitting from Protective Measures, 14 July 2015, (ADAD Motion) and Association of Defence Counsel (ADC-ICTY) request for leave to submit *Amicus Curiae* observations, 23 July 2015 (ADC-Motion)

² *Prosecutor v. Kamuhanda*, MICT-13-33, Motion for Decision on Contact with Persons Benefitting from Protective Measures, 1 July 2015 (the Kamuhanda Motion)

³ Information Concerning the Submission of *Amicus Curiae* Briefs, IT/122, March 1997, para 5 (b) (IT/122)

⁴ *Prosecutor v Prlic et al*, IT-04-74-T, Decision on Request by the Government of Croatia for Leave to Appear as Amicus Curiae, 11 October 2006 p. 4; *In the Case Against Florence Hartmann*, IT02-54-R77.5-A, Decision on Application for Leave to File Amicus Curiae, 5 February 2010, para. 5;

The Prosecutor's Submissions

5. The Prosecutor submits that the Applicants, individually and collectively, do not meet the above standard for the following reasons:-

- a. Failure to properly articulate the point(s) of law for which intervention as *amici* is sought;
- b. Failure to establish how useful and desirable the proposed intervention is for the proper determination of the case.

The Applicants do not indicate the question(s) of law to be addressed by the Amici should leave be granted

6. The Prosecutor submits that neither Applicant sufficiently articulates the question(s) of law which their proposed interventions seek to address. The ADAD application simply "endorses all legal arguments" in the underlying Kamuhanda motion⁵, while the ADC application supports the request that all potential witnesses be contacted by WISP as a matter of policy.⁶ What is abundantly clear from the applications is that, beyond issues germane to the Kamuhanda motion, the applicants seek a decision reforming all the ICTR and ICTY witness protection orders currently in force to conform to a single standard.

7. *First*, the Applicants provide no legal basis or establish the jurisdiction of the Single Judge to grant the relief sought beyond the Kamuhanda case before him. As rightly underscored by the MICT Registrar, variation of protective measures is done on a case by case basis⁷ and, as such, there is no provision in the Statute or Rules of the Mechanism that confers jurisdiction on a Chamber or Judge to "dictate policy" affecting all ICTR/ICTY cases as requested by the Applicants.⁸

8. Indeed, in an analogous situation where ADAD had applied for leave to submit an *amicus curiae* brief, the Appeals Chamber denied the request noting that it was only seized of the case before it and not other cases before the Tribunal.⁹ On this ground alone the extant applications should be dismissed.

⁵ ADAD Motion, para 9

⁶ ADC Motion, paras 1,3 and 7

⁷ *Prosecutor v Kamuhanda* MICT-13-33, Registrar's Rule 31(B) Submission Following the Order for Submissions of 8 July 2015, filed 23 July 2015, para 11

⁸ ADC Motion, paras 1 and 7

⁹ *Prosecutor v Bagosora et al*, ICTR-98-41-A Decision on the ADAD Motion for Leave to File Amicus Curiae Submissions, 29 June 2010, p.2

9. *Second*, the Applicants seek to impermissibly make submissions on a contentious question of fact concerning the practical difficulties encountered by defence counsel as a result of existing protective measures¹⁰, without any effort to establish exceptional circumstances why leave should be granted to proffer evidence from the bar in the form of *amici* submissions.

10. The jurisprudence of the Tribunals generally limits *amicus* participation to clearly articulated and focussed questions of law, and not questions of fact.¹¹ According to the relevant practice direction, *amici* can neither call witnesses nor be cross-examined.¹² In such circumstances it follows, therefore, that *amici* are precluded too from proffering evidence from the bar through their submissions – which cannot be tested through cross-examination.¹³ If indeed the Applicants have factual information believed to be relevant to this case, but not available to the parties or the Chamber, the appropriate avenue would have been to give that information to Kamuhanda's defence counsel for consideration. In denying the application in *Prlic* the Appeals Chamber found that the points in the request for leave were factual and should have been submitted by the parties and not by the applicant.¹⁴

11. In sum, Applicants not only fail to articulate the question(s) of law to be addressed or establish the legal basis for the requested relief, but also impermissibly attempt to use the opportunity to address questions of fact and should be denied leave to submit *amicus curiae* briefs.

The Applicants do not demonstrate how useful or desirable the proposed amicus intervention is for the proper determination of the case.

12. The applicants have failed to demonstrate how their proposed interventions as *amici* are useful and desirable, or how they will otherwise assist the Single Judge in his determination of the issues at bar. Beyond supporting Kamuhanda's motion and suggesting that they can provide useful information to the Judge based on their

¹⁰ ADAD Motion para 15

¹¹ See fn 3 and 4 *supra*

¹² IT/122 para 5(e)

¹³ In exceptional circumstances, and without opposition, leave has been granted to *amici* to provide "useful information" based on experience and unique standing to the Chamber in the context of Rule 11bis Referrals to Rwanda. See for example: *Prosecutor v Uwinkindi*, ICTR-2001-75-I, Decision, 24 February 2011 and Decision, 8 April 2011 granting leave to IADL and KBA respectively. In contrast, see *Prosecutor v Kayishema* ICTR-2001-67-I, Decision, 1 July 2008, para 15 where ADAD was denied leave however for not adding anything of value but duplicating the role of defence counsel.

¹⁴ *Prlic* *supra* p.4

unique expertise¹⁵ no attempt is made to show any deficiency or inability of Kamuhanda's counsel – a member of both ADAD and ADC- to adequately address the legal and factual issues he raises in his motion.

13. *First*, by deliberately failing to identify the question(s) of law to be addressed by the *amici*, should leave be granted, the Judge is in no position to determine how useful or desirable the proposed intervention would be.

14. *Second*, the Applicants merely support the Kamuhanda motion in circumstances that amount to a duplication of Kamuhanda Counsel's role, without adding anything of value for a proper determination of the issues. An analogous application by ADAD for leave to appear as *amicus curiae* in the Kayishema 11bis Referral Application was denied by the Trial Chamber for precisely the same reason.¹⁶ Additionally, as noted above, the appropriate avenue for channeling any useful factual information to the Judge is through the parties, in this case, through Kamuhanda's counsel.¹⁷

15. *Third*, the three ICTY cases in which ADC was allowed to participate as *amicus* can be distinguished from the case at bar and do not otherwise rectify the failings of the Applicants herein.

16. In the *Prosecutor v. Brdnanin*, the ADC was invited to make submissions on a question of substantive law which the Appeals Chamber considered to be of "considerable significance to the Tribunals jurisprudence".¹⁸ The issue in the present case is neither a question of law nor have the Applicants demonstrated that it is of "considerable significance to the Tribunal's jurisprudence" to warrant *amici* intervention.

17. In the *Prlic* case, the Trial Chamber *proprio motu* solicited an "enlightened opinion" on three technical issues from the ADC Disciplinary Council concerning the ethical behavior and conduct of ADC members, to assist it resolve an issue in trial.¹⁹ While it is conceded that ADC was requested to provide an advisory opinion as an *amicus*, the factual scenario bears little analogy with the extant case: Neither has the Judge solicited the opinion of the Applicants on technical issues, nor do the

¹⁵ ADAD Motion para 10 and 16; ADC Motion paras 4 and 7

¹⁶ *Prosecutor v. Kayishema* ICTR-2001-67-I, Decision, 1 July 2008, para 15

¹⁷ See para 10 Supra

¹⁸ *Prosecutor v. Radoslav Brdjanin, Case No. IT-99-36-A.*, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005

¹⁹ *Prosecutor v. Prlic et al.*, Case No. IT-04-74-T, Transcripts of 6 July 2009.

issue(s) at bar concern the ethical conduct of Counsel Kamuhanda Counsel, or indeed ADC/ADAD members.

18. Finally, the unsolicited ADC intervention as *amicus curiae* in the case of *Hadzihasanovic* concerning the issue of the allocation of resources to the Defence and its impact on the fair trial rights of the accused was inconsequential to the underlying motion for reconsideration and does not assist the Applicants herein.²⁰ In that case, a defence motion had been dismissed as inadmissible on the grounds, *inter alia*, that it sought to challenge the complete legal aid system of the Tribunal.²¹ It only bears comparison with the extant Applications to the extent they seek to reform the witness protection regime prevailing at the ICTR and ICTY and should be similarly denied as inadmissible.

Conclusion

19. For the reasons set out above the Prosecutor requests that the leave to participate as *amici curiae* be denied.

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DATED at Arusha this 3rd day of August, 2015



Richard Karegyesa
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²⁰ *Prosecutor v. Enver Hadzihasanovic and Amir Kubura, Case No. IT-01-47-PT*, Decision on Joint Defence Oral Motion for Reconsideration of "Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences thereof for the Rights of the Accused to a Fair Trial, 18 July 2003.

²¹ *Hadzihasanovic supra*, Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences thereof for the Rights of the Accused to a Fair Trial, 17 June 2013



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