

ICTR-99-46-T
25-5-2001
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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER III

Before: Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Mr. Adama Dieng

Date: 24 May 2001

Original: English

JUDICIAL RECORDS ARCHIVES
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ICTR

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THE PROSECUTOR

v.

ANDRE NTAGERURA EMMANUEL BAGAMBIKI and SAMUEL IMANISHIMWE

Case No. ICTR-99-46-T

**DECISION ON THE APPLICATION TO FILE AN *AMICUS CURIAE* BRIEF
ACCORDING TO RULE 74 OF THE RULES OF PROCEDURE AND EVIDENCE
FILED ON BEHALF OF THE NGO COALITION FOR WOMEN'S HUMAN
RIGHTS IN CONFLICT SITUATIONS**

The Office of the Prosecutor

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Defence Counsel for the Accuseds

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber III, composed of Judge Lloyd George Williams, Presiding, Judge Yakov Ostrovsky and Judge Pavel Dolenc (the “Chamber”);

BEING SEISED of the Application to File an *Amicus Curiae* Brief According to Rule 74 of the Rules of Procedure and Evidence on behalf of the NGO Coalition for Women’s Human Rights in Conflict Situations and proposed *Amicus* Brief, filed 9 March 2001 (hereinafter, the “*Amicus* Application”);

CONSIDERING the Direction on Resumption of Trial and *Amicus* Brief filed by the Prosecutor on 20 April 2001 (hereinafter, the “Direction”);

CONSIDERING, the Response of the Defence of Samuel Imanishimwe to *Amicus Curiae* Application Filed by the NGO Coalition for Women’s Human Rights in Conflict Situations, filed 30 April 2001 (French version). (hereinafter, the “Imanishimwe Reply”);

CONSIDERING the Response by the Defence for André Ntagerura to the Application Filed by the NGO Coalition for Women’s Human Rights in Conflict Situations Seeking Leave to File an *Amicus Curiae* Brief Pursuant to Rule 74 of the Rules of Procedure and Evidence, filed 2 May 2001(French version); and the Réponse de la Defense un Mémoire de la Coalition des ONG pour les Droits Humains des Femmes sur la Nécessité d’Inclure des Charges de Violence Sexuelle dans l’Acte d’Accusation de André Ntagerura, filed 3 May 2001 (collectively hereinafter, the “Ntagerura Response”);

CONSIDERING the Response by Emmanuel Bagambiki’s Defence to the *Amicus Curiae* Brief Filed by the NGO Coalition for Women’s Human Rights in Conflict Situations, filed 4 May 2000 (French version)(hereinafter the “Bagambiki Response”);

CONSIDERING the Prosecutor’s Response to Application for Leave to File an *Amicus* Brief, filed on 8 May 2001 (hereinafter the “Prosecutor’s Response”);

RECALLING the Record of the Trial Proceedings of 13 February during which the Defence raised an objection pursuant to Rule 89 of the Rules of Evidence and Procedure (hereinafter, the “Rules”) on grounds of relevance to the Prosecutor’s admission of evidence of rape where the Indictment contains no such charge; and the Chamber’s Oral Decision rendered on the Record of the Trial Proceedings 14 February 2001 sustaining the Defence objection to the admission of evidence of rape (hereinafter, the “Oral Decision”). *See* 13 February 2001 Trial Transcript 89:6-94:9. *See* 14 February 2001 Trial Transcript 94:5-109:13; 139:4-140:2.

NOW DECIDES the matter solely on the basis of the written submissions of the *amicus curiae* applicant, the NGO Coalition for Women’s Human Rights in Conflict Situations, and of the parties pursuant to Rule 73(A) of the Rules.

I. SUBMISSIONS

A. SUBMISSIONS OF THE WOMEN'S NGO COALITION

1. Under the umbrella title, "NGO Coalition for Women's Human Rights in Conflict Situations (hereinafter, the "Women's NGO Coalition"), a coalition comprised of lawyers, legal scholars and women's rights activists and non-governmental organizations concerned with international justice, whose mandate is to ensure that crimes against women are adequately investigated and prosecuted, asks the Chamber for leave to appear as *amicus curiae*. The Women's Coalition is principally interested in this case because it believes that the Prosecutor erroneously omitted a charge for rape and other sexual violence in the Indictment as amplification for the crime of genocide, which is charged in the current Indictment pursuant to which the three Accused are being tried in this case.
2. The Women's NGO Coalition seeks leave to appear as *amicus curiae* pursuant to Rule 74 in order to tender a Brief (a copy of which is attached to the *Amicus* Application). The Brief provides legal and factual arguments for the Chamber to exercise its alleged "supervisory authority under the Tribunal [sic] Statute and Rules to call upon the Prosecutor to review the evidence and where appropriate to amend the indictments against [the Accused] to charge rape or other serious acts of sexual violence as crimes of genocide, crimes against humanity, and grave breaches of common Article 3 of the Geneva Conventions." *See Amicus* Application at p. 4.
3. In support of its application to appear as *amicus curiae*, the Women's NGO Coalition invokes various legal and public policy arguments. Quoting passages of trial testimony of witnesses known by the pseudonyms LAM and LBI, two women who have recounted evidence of sexual violence they allegedly suffered, the Women's NGO Coalition argues that the Chamber should order the Prosecution to seek leave to amend the Indictment where evidence of rape has already been presented at trial because to do otherwise would constitute a violation of the principles of non-discrimination in the administration of justice as well as discourage victims of sexual crimes from participating in investigations and prosecutions of such crimes. Such an eventuality, argues the Women's NGO Coalition, would fail to "normatively establish that rape, enslavement and any form of sexual violence are egregious and unacceptable conduct."
4. In addition, the Women's NGO Coalition, referring to the Oral Decision of 14 February 2001, claims that a "grave injustice is being committed in not prosecution the Defendants for egregious crimes of sexual violence despite the availability of evidence." Moreover, referring to the Judgement in *Prosecutor v. Akayesu*, the Women's NGO Coalition submits that rape and other forms of sexual violence were an "integral part" and "tool" of the genocide committed in Rwanda in 1994.
5. Finally, the Women's NGO Coalition remonstrates that the core relief it seeks, namely, an order directing the Prosecutor to seek leave to amend the Indictment to add a count for rape, is necessary where the injustice to the victims of rape is so great as to dwarf any potential negligible and remediable degree of prejudice that may be visited upon the Accused.

6. At the introductory paragraph to the proposed *Amicus Curiae* Brief it seeks leave to file, the Women's NGO Coalition asks for an order including the following relief: (i) Pursuant to the alleged authority of Rules 50 and 54 to: "call upon the Prosecutor to reassess the facts of the instant case and to determine the feasibility of adding sexual assault charges to the indictment; (ii) grant leave to the Prosecutor to amend the indictment so as to include sexual violence charges as envisioned by Articles 2 (a), (B) and (d) of the Tribunal's Statute." In essence, the Women's NGO Coalition asks that the Chamber treat sexual assault as a constituent act of genocide, crimes against humanity (Article 3 (c), (f), (g), and (i)), and grave breach of Common Article 3 of the Geneva Conventions (Article 4(A) and (e)).

B. SUBMISSIONS OF THE PROSECUTOR

7. In the Direction, the Prosecutor seeks direction from the Chamber with respect to the scheduling of the decision on the *Amicus* Application. In addition, the Prosecutor seeks a scheduling order requiring the parties to file formal written responses to the *Amicus* Application by 27 April 2000. Finally, referring to the significance of the issues raised in the *Amicus* Application, the Prosecutor requests that the Chamber schedule the issue for oral argument rather than a determination on written submissions.

8. In the Prosecutor's Response, she asks that the Chamber deny the *Amicus* Application and the orders sought therein on the ground that they are rendered superfluous at this stage by virtue of the Oral Decision, which effectively rendered rape an issue irrelevant to the current proceedings. Accordingly, the Prosecutor submits that, pursuant to the provisions of Rule 74, the Trial Chamber should not exercise its discretion in favour of permitting leave to file the Brief attached to the *Amicus* Application.

9. More significantly, argues the Prosecutor, the *Amicus* Application cannot be granted because to do so would require the Chamber to reverse the Oral Decision as well as transgress upon the exclusive province of the Prosecutor to determine the propriety of seeking leave to amend an indictment. In this regard, the Prosecutor reminds the Chamber that she, in the exercise of her discretion, withdrew an earlier motion to amend the Indictment to add charges of rape.

10. Finally, the Prosecutor alerts the Chamber of her intention to file a new indictment against the Accused Bagambiki and Imanishimwe alleging the crime of rape.

C. SUBMISSIONS OF THE DEFENCE FOR NTAGERURA

11. In the Defence Letter, the Defence for the Accused, André Ntagerura expresses that it intends to file an objection to the appearance of the Women's Coalition as *amicus curiae* upon the receipt by the Accused of a French translation of the *Amicus* Application.¹ The Defence for Ntagerura also requests that a public hearing be scheduled after the completion of the Prosecutor's evidence so that the issues raised in the *Amicus* Application may be orally argued.

12. In the Ntagerura Response, however, there are a panoply of arguments leveled at both the impropriety of granting leave to the Women's NGO Coalition to appear as *amicus curiae*

¹ A French translation of the *Amicus* Application was filed with the Registry on 19 April 2001. Therefore, that portion of the Defence request for a translation is now moot.

and arguments attacking the soundness of the legal arguments advanced in support of the *Amicus* Application in the proposed Brief appended to it. Principal among these arguments are the following. At the outset, noting that the Oral Decision was one rendered by the Chamber applying the Rules during the normal course of the trial proceedings, the Defence for Ntagerura argues that the Women's NGO Coalition impermissibly insinuates itself in the trial proceedings raising the issue of amendment of the Indictment, a matter of which the Chamber is not seized since the indictment contains no charge for sexual violence. Such an *amicus* intervention must be denied the Defence argues, because the Provisions of Rule 74 do not envision it.

13. Moreover, observes the Defence, Article 15(1), (2) of the Tribunal's Statute and Rule 50, when fairly construed, reserve the decision and the responsibility to pursue an amendment of the Indictment exclusively for the Prosecutor, who has an affirmative duty to act independently, neither receiving nor soliciting instruction from any government or any other source. Stating the matter more emphatically, the Defence submits, the Statute of the Tribunal confers no right whatsoever on the Chamber to intervene in the Prosecutor's investigation and indictment in connection with a case.

14. On the basis of the foregoing arguments, among others, concludes the Ntagerura Response, the *Amicus* Application is not receivable and must be denied in its entirety.

D. SUBMISSIONS OF THE DEFENCE FOR BAGAMBIKI

15. Reminding the Chamber that the Indictment does not contain a charge for sexual violence and referring to Rule 74, the Defence for the Accused Bagambiki submits that the *Amicus* Application should be denied because it requests the Chamber to consider the addition of sexual violence charges, an issue that is no longer being considered by the Chamber. Moreover, argues the Bagambiki Response, the jurisprudence of *Prosecutor v. Akayesu* provides no authority to grant the relief sought by the Women's NGO Coalition since the amendment of the indictment in that case was the result of the Prosecutor's free exercise of her prerogative to seek an amendment rather than a reaction to public pressure.

16. In addition, the Bagambiki Defence submits that Articles 15 and 17 provide that it is the exclusive province of the Prosecutor to determine which acts she will or will not prosecute. Finally, invoking Article 19(1) of the Statute, which charges the Chamber to "[] insure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused . . .," the Bagambiki Response expostulates that an amendment of the Indictment at this stage in the proceedings would result in irreparable prejudice to the rights of the Accused.

E. SUBMISSIONS OF THE DEFENCE FOR IMANISHIMWE

17. The Defence for the Accused Imanishimwe submits that the *Amicus* Application should be denied because pursuant to Rules 50 and 73 only the Prosecutor may request leave to amend the Indictment. Moreover, argues the Imanishimwe Defence, if the Prosecutor does not exercise or relinquishes her right to seek amendment of the Indictment, as she did in this case by withdrawing her Motion to Amend filed in December 1999, no other entity may seek leave to amend it. Concluding its arguments, the Defence for Imanishimwe submits that the

Amicus Application may not be received because Rule 74 accords no right to a third party to call upon the Chamber to issue an order as requested by the Women's NGO Coalition.

II. DELIBERATIONS AND FINDINGS

18. It should be noted that the Chamber in an oral ruling issued on the record of the proceedings of 2 May, 2001 declared that it would render a decision on the *Amicus* Application solely on the basis of the written submissions. See 2 May 11, 2001 Transcript 102:9-17. The Chamber now acts accordingly.

19. Addressing the merits of the instant *Amicus* Application, the Chamber will first consider Rule 74 which provides: "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 an issue specified by the Chamber."

20. The responses of Ntagerura and Bagambiki as well as that of the Prosecutor indicate that the *Amicus* Application raises an issue that is not under consideration by the Trial Chamber and is not a live issue in the case. Further, the Prosecutor has indicated that she intends to file a new indictment against the Accused Bagambiki and Imanishimwe alleging acts constituting rape. For these and other reasons to which reference will be made later the Chamber does not consider it desirable for the proper determination of the case to grant leave to the Women's NGO Coalition to appear as *amicus curiae*.

21. In view of the peculiar nature of the principal relief sought by the Women's NGO Coalition, i.e., an order directing the Prosecutor to seek leave to amend the Indictment to add a count for rape, the Chamber would be remiss if it failed to consider the mandate of Article 15 of the Tribunal's Statute which fairly describes the responsibilities of the Prosecutor and the nature of her relationship with the other organs of the Tribunal and all other entities, including the various Trial Chambers. Article 15 provides:

1. **The Prosecutor shall be responsible for the investigation and prosecution** of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994.
2. **The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.**

(Emphasis added).

22. Article 15(2), in abundantly clear and unequivocal language, places the Prosecutor under an affirmative obligation to act independently and refrain from seeking or taking instruction from any source whatsoever in the performance of her duties. In light of this bedrock principle requiring the complete independence of the Prosecutor, the Chamber is wholly without authority to grant the relief sought in the *Amicus* Application, as a matter of

law. To do so would be tantamount to transgressing upon the independence of the Prosecutor and impugning the integrity of the Tribunal as an arbiter of international criminal law.

23. Although no additional rule of law need be invoked to support the Chamber's decision, additional buttress may be found in a well settled common law principle which, for the sake of forestalling the possibility of prejudice, forbids the prosecution from leading evidence on a crime that is not charged in the indictment at issue. The authoritative treatise, Cross and Tapper on Evidence, p. 372 (8th Ed. 1995), states the principle in unequivocal and categorical terms: "It would be quite wrong to adduce evidence of the commission of other uncharged crimes simply as background information without satisfying the normal conditions of admissibility for evidence of discreditable conduct or disposition." Furthermore, Cross and Tapper, at p. 372, f.n. 9 (citing to R. v. Accused (CA 247/91) (1992), further cautions that it is of no legal consequence whether the prosecution tenders such evidence of uncharged crimes under the rubric "similar fact" or "res gestae," because the admission of such evidence requires the same exclusionary rule to be administered in either instance.

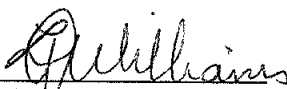


24. The offence of rape is a grave matter that must be treated with the seriousness it deserves. The Chamber is mindful of the consequences that flow from the offence of rape and the many issues raised in the *Amicus* Application in this regard. The concerns of the applicant are fully appreciated. However, it must be understood that the Trial Chamber must act within the constraints of the law and abide by the Statute and Rules of Procedure and Evidence by which the Tribunal is bound.

25. Under the current circumstances, the Chamber is constrained as a matter of law to refuse the *Amicus* Application in its entirety, given the legal impossibility of granting the relief sought by the Women's NGO Coalition.

For the foregoing reasons, the Tribunal:

DENIES the Application to File an *Amicus Curiae* Brief According to Rule 74 of the Rules of Procedure and Evidence filed on behalf of the NGO Coalition for Women's Human Rights in Conflict Situations in its entirety.

Arusha, 24 May 2001

 Lloyd George Williams Judge, Presiding	 with a reservation, Yakov Ostrovsky Judge see the separate opinion which is annexed	 Pavel Dolenc Judge
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Seal of the Tribunal

SEPARATE OPINION OF JUDGE YAKOV OSTROVSKY

1. In paragraph 21 of the Decision, Article 15 of the Tribunal's Statute is quoted in connection with the idea of the Women's NGO Coalition to amend the Indictment. In my opinion, such an interpretation and application of Article 15 is erroneous because this Article has nothing to do with the Indictment and its amendment.

2. In paragraph 22 of the Decision it is recognized that Article 15(2) confirms the duty of the Prosecutor to act independently as a separate organ of the Tribunal in the performance of her duties. Article 15(2) should be read in the context of Article 15(1) which emphasizes the obligation of the Prosecutor to act independently in her investigation and prosecution. However, with regard to an indictment, the situation is different. Once an indictment is prepared, it should be transmitted to a Judge for review and confirmation. Article 17(4) and Rule 47(B). The Judge may adjourn the review so as to give the Prosecutor the opportunity to modify the indictment (Rule 47(F)(iv)) or dismiss each count (Rule 47(F)(iii)) or even dismiss the entire indictment if he is not satisfied that a prima facie case has been established by the Prosecutor (Article 18(1)). Moreover, pursuant to Rule 50, after confirmation of an indictment, the Prosecutor is not free and independent to amend it. She has to seek the leave of a Judge or a Trial Chamber in order to be able to amend the indictment.

3. It is obvious that with regard to an indictment a number of issues should be settled by a Judge or a Trial Chamber. In these circumstances, the reference to Article 15 is out of order since the Article emphasizes the responsibility of the Prosecutor for the investigation and prosecution and states that the Prosecutor should act independently as a separate organ of the Tribunal which is not seeking or receiving instructions from any government or any other source.

4. The Statute and the Rules delimit and determine the rights and obligations of the organs of the Tribunal. Pursuant to Article 17, the Prosecutor prepares an indictment. It is the exclusive prerogative of the Prosecutor to decide what counts should be included in the indictment. A Judge is entitled only to confirm these counts or to dismiss all or some of them. Pursuant to Rule 50, it is the exclusive prerogative of the Prosecutor to seek to amend the indictment. The Trial Chamber, in this respect, is entitled only to grant or not grant leave to amend the indictment.

5. Therefore, the resolution of issues in respect of the Indictment should be based on the above-mentioned articles and rules and not on Article 15 which is inapplicable to our case and the reference to which in the present circumstances is inappropriate.

Arusha, 24 May 2001.



Yakov Ostrovsky
Judge

[Seal of the Tribunal]

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PROSECUTOR

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**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

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**PROOF OF SERVICE – ARUSHA
PREUVE DE NOTIFICATION - ARUSHA**

Date: 25 May, 2001	Case Name / affaire: The Prosecutor v	ANDRE NTAGERURA EMMANUEL BAGAMBIKI SAMUEL IMANISHIMWE																																																																											
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Nahamya, Co-ordinator</td> <td style="border: none;"><i>[Signature]</i> 25/5/01</td> <td style="border: none;"><input type="checkbox"/></td> </tr> <tr> <td style="border: none;"><input type="checkbox"/> TC2</td> <td style="border: none;"></td> <td style="border: none;"></td> </tr> <tr> <td style="border: none;"><input type="checkbox"/> Judge L. Kama</td> <td style="border: none;"><i>[Signature]</i> 25/5/01</td> <td style="border: none;"><input type="checkbox"/></td> </tr> <tr> <td style="border: none;"><input type="checkbox"/> Judge W. H. Sekule</td> <td style="border: none;"><i>[Signature]</i> Pamela - 25/5/01</td> <td style="border: none;"><input type="checkbox"/></td> </tr> <tr> <td style="border: none;"><input type="checkbox"/> Judge M. Güney</td> <td style="border: none;"><i>[Signature]</i></td> <td style="border: none;"><input type="checkbox"/></td> </tr> <tr> <td style="border: none;"><input type="checkbox"/> C. 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**DECISION ON THE APPLICATION TO FILE AN AMICUS CURIAE BRIEF
ACCORDING TO RULE 74 OF THE RULES OF PROCEDURE AND EVIDENCE
FILED ON BEHALF OF THE NGO COALITION FOR WOMEN'S HUMAN
RIGHTS IN CONFLICT SITUATIONS**

Date Filed / Date enregistrée Pages
25/5/2001 **8**