

077

SCSL-2003-07-PT-077  
(1141-1158)

1141

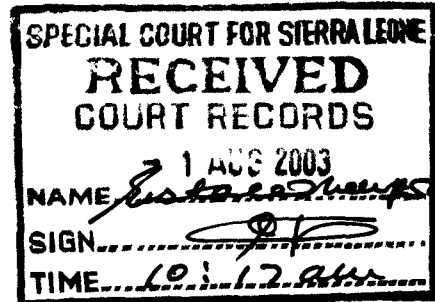
**SPECIAL COURT FOR SIERRA LEONE  
OFFICE OF THE PROSECUTOR  
FREETOWN - SIERRA LEONE**

**IN THE TRIAL CHAMBER**

**Before:** Judge Bankole Thompson  
Judge Pierre Boutet  
Judge Benjamin Mutanga Itoe

**Registrar:** Robin Vincent

**Date:** 31 July 2003



**THE PROSECUTOR**

**Against**

**MORRIS KALLON**

(CASE NO SCSL-2003-07-PT)

---

**PROSECUTION RESPONSE TO APPLICATION BY THE REDRESS TRUST AND  
LAWYERS COMMITTEE FOR HUMAN RIGHTS FOR LEAVE TO FILE *AMICUS*  
*CURIAE* BRIEF AND TO PRESENT ORAL SUBMISSIONS**

---

**Office of the Prosecutor:**

Desmond de Silva, QC, Deputy Prosecutor  
James C. Johnson, Acting Chief of Prosecutions  
Walter Marcus-Jones, Senior Appellate Counsel  
Abdul Tejan-Cole, Appellate Counsel  
Thomas S. Perriello, Appellate Advisor

**Defence Counsel:**

Richard Hermer

**SPECIAL COURT FOR SIERRA LEONE  
OFFICE OF THE PROSECUTOR  
FREETOWN – SIERRA LEONE**

**THE PROSECUTOR**

**Against**

**MORRIS KALLON**

(Case No SCSL-2003-07-PT)

---

**PROSECUTION RESPONSE TO APPLICATION BY THE REDRESS TRUST  
AND LAWYERS COMMITTEE FOR HUMAN RIGHTS FOR LEAVE TO  
FILE *AMICUS CURIAE* BRIEF AND TO PRESENT ORAL SUBMISSIONS**

---

**I. INTRODUCTION**

1. The Prosecution files this response to the Rule 74 Preliminary Motion entitled "Application by the Redress Trust and Lawyers Committee for Human Rights for Leave to File *Amicus Curiae* Brief and to Present Oral Submissions," filed on behalf of Morris Kallon (the "**Accused**") on 24 July, 2003 and served on the Prosecution on 25 July 2003.
  
2. The Rule 74 Preliminary Motion requests leave to file an *amicus curiae* brief and to present oral arguments in the case of the Accused, Morris Kallon on the following issues (1) an analysis as to whether the Lomé amnesties apply to crimes under consideration by the Special Court; (2) an analysis as to whether the Court has power to review the legality of the amnesty; (3) an analysis of the status of the Lomé amnesties in international law, including a review of the process of negotiation and victim's rights; and (4) analysis of the Lomé amnesties in the

rule of law in post-conflict societies<sup>1</sup>. For the reasons given below, the Rule 74 Preliminary Motion should be denied in its entirety.

## II. ARGUMENT

### **A. This is an attempt by the Defence to use an *amicus curiae* brief to create new issues and broaden those issues already presented in the First Preliminary Motion**

3. The Defence, in the First Preliminary Motion “Based on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord,” of June 16, 2003, has already fully presented issues on which they rely relating to the Lomé Accord and amnesties granted thereunder<sup>2</sup>. Defence Counsel will have an opportunity to make oral submissions on this Motion should the Special Court be so inclined. As such, the Accused will have had ample opportunity to litigate this issue before the Special Court.
4. The First Preliminary Motion argued the following: (1) the Special Court lacks jurisdiction to prosecute crimes pre-dating the date of signature of the Lomé Agreement (7 July 1999), as Article IX of the Lomé Agreement granted an amnesty for these crimes, and (2) that it would be an abuse of process of the Special Court to permit the prosecution of the Accused for the crimes pre-dating 7 July 1999 for which he had been granted an amnesty.<sup>3</sup> As such, the Defence, in its First Preliminary Motion, clearly limited the issues to those set forth therein as summarized above.
5. The Prosecution’s Response to the First Preliminary Motion on Amnesty directly countered those arguments set forth by the Defence in that Motion and raised no

---

<sup>1</sup> Registry Page (“RP” 1105) Application by the Redress Trust and Lawyers Committee for Human Rights for Leave to File *Amicus Curiae* Brief and to Present Oral Submissions

<sup>2</sup> RP 625-635 – Preliminary Motion based on lack of jurisdiction/abuse of process: Amnesty provided by Lomé Accord

<sup>3</sup> *Ibid.*

additional issues<sup>4</sup>. Therefore, there is no basis in law for adding to or broadening the issues already presented in the Defence’s First Preliminary Motion on Amnesty.

**Via the medium of an *amicus brief* the Defence attempts to raise issues additional to those already raised in the First Preliminary Motion on Amnesty following the Special Court’s denial of Application for Extension of Time to File Reply**

- 6. The Defence filed “Application For Extension of Time to File Reply To ‘Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement)’” on 30 June, 2003<sup>5</sup>.
- 7. The Special Court made an “Order on the Defence Application For Extension of Time to File Reply to Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement)” on the 16<sup>th</sup> July 2003 in which the Special Court dismissed the Defence Application in its entirety<sup>6</sup>.
- 8. In its Order, the Special Court noted that the Defence Application for an extension “seeks indiscriminately to open the door for the Defence to introduce new elements or issues that the Defence failed to address in its Preliminary Motion on Amnesty. This could possibly amount ... to a new motion rather than a reply.”<sup>7</sup>
- 9. Now, attempting to achieve the same goal under a new guise, the instant Rule 74 Application on behalf of the Defence seeks to broaden the issues in ways which the Defence did not rely on in its First Preliminary Motion on Amnesty.

**The instant motion attempts to broaden the issues already raised in the First Preliminary Motion on Amnesty**

- 10. The instant Rule 74 Application on behalf of the Defence seeks to broaden those issues already addressed by the Defence in its First Preliminary Motion on Amnesty.

---

<sup>4</sup> RP 669-679, Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement)  
<sup>5</sup> RP 1007-1015, Application for Extension of time to file Reply to Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement)  
<sup>6</sup> RP 1081-1086, Order on the Defence Application for Extension of time to file Reply to Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement)  
<sup>7</sup> RP 1085-1086 – Paragraph 16 of Order on the Defence Application for Extension of Time to File Reply to Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement)

Should the instant Motion be granted, the result is that the Defence is permitted to circumvent the Special Court's Order of 16 July 2003.

11. The First Preliminary Motion on Amnesty presented very specific issues. The Defence argued that (1) the Special Court lacks jurisdiction to prosecute crimes pre-dating the date of signature of the Lomé Agreement (7 July 1999), because Article IX of the Lomé Agreement granted an amnesty for these crimes, and (2) that it would be an abuse of process of the Special Court to permit the prosecution of the Accused for the crimes pre-dating 7 July 1999 for which he had been granted an amnesty<sup>8</sup>.
12. The Applicants in their Rule 74 Application seek to provide the Court with an analysis as to whether the Lomé amnesties apply generally to crimes under consideration by the Special Court. However, the Defence in its First Preliminary Motion on Amnesty addressed only the Court's competence to try the Accused for crimes *pre-dating 7 July 1999*. The Applicants would like to explore the Court's competence to try any crimes over which the Special Court has jurisdiction without regard to date on which the crimes are alleged to have occurred, that is, *whether pre-dating or following 7 July 1999*. This is a clear attempt to litigate an issue which was not presented by the Defence in its First Preliminary Motion.
13. The Applicants also seek to provide an analysis of the Court's competence generally to review the legality of the amnesty, an issue not raised by the Defence in their First Preliminary Motion on Amnesty. Additionally, Applicants seek leave to provide an analysis of the status of the Lomé amnesties in international law, including a review of the process of negotiation and victim's rights and an analysis of the Lomé amnesties in the context of international and domestic public policy, for example, the impact on the rule of law in post-conflict societies. Again, neither of these issues was advanced in the First Preliminary Motion on Amnesty which was limited to questions related to the Special Court's competence to try the Accused for crimes pre-dating 7 July 1999.

---

<sup>8</sup> RP 625-635 – Preliminary Motion Based on Lack of Jurisdiction/Abuse of process: Amnesty Provided by Lomé Accord

**B. The Special Court has already denied application for leave to submit *amicus curiae* briefs by the Defence Office**

14. Further, the Defence Office has already sought leave to submit an *amicus curiae* brief on the jurisdictional issues raised in the First Preliminary Motions (including that on amnesty) on behalf of this Accused. The Special Court denied the Application<sup>9</sup>.
15. The Prosecution submits that for the proper and expeditious determination of a Motion that parties address all arguments in support of a motion within the Motion itself in order that the responding party may contest all of those arguments in its response.
16. In denying the Application of the Defence Office at paragraph 8, the Special Court noted that Rule 74 confers on the Special Court a discretionary authority to invite or grant leave to make submissions to the Court which authority should not be exercised lightly<sup>10</sup> and only where the Special Court has determined that *amicus curiae* submissions are desirable for the proper determination of the case.
17. In its Decision at paragraph 9 the Special Court set forth the criteria which should govern whether leave to appear as *amicus curiae* should be granted. They are:
- (a) that one has strong interests in or views on the subject matter before the Court<sup>11</sup>  
[and]
- (b) that it is desirable to enlighten the Tribunal on the events that took place<sup>12</sup> [and]

---

<sup>9</sup> RP 1081 – Order on the Defence Application for Extension of Time to File Reply to Prosecution Response to the First Defence Preliminary Motion (Lomé Agreement)

<sup>10</sup> RP 1079

<sup>11</sup> Citing *Prosecutor v. Akayesu* (Order Granting Leave for *Amicus Curiae* to Appear), Trial Chamber, 12 February 1998, ICTR-96-4-T.

<sup>12</sup> Citing *Prosecutor v. Semanza* (Decision on the Kingdom of Belgium's Application to File an *Amicus Curiae* Brief on the Defence Application to Strike out the Observation of the Kingdom of Belgium Concerning the Preliminary Response by the Defence), Trial Chamber, 9 February 2001, ICTR-97-20-T.

(c) that it may be useful to gather additional legal views with respect to the legal principles involved, not with respect to the particular circumstances of this or any other case.<sup>13</sup>

18. In their Rule 74 Preliminary Motion, the Applicants do not acknowledge the Decision of the Special Court of July 17 2003, or the criteria set out by the Special Court. The Applicants set forth no information or documentation tending to show what their interest in or views on the subject matter before the Special Court may be. Nor do the Applicants suggest that *amicus curiae* briefs will enlighten the Tribunal to an extent that the Accused's Defence Counsel has not done. Finally, the Applicants offer no indication of what, if anything, the Special Court may find useful in their submissions toward the end of having for its consideration additional legal views dealing with the specific legal principles involved. Indeed, the Applicants request to examine legal principles not raised by this Defence and to examine public policy implications which fall far outside of the scope of issues and events currently before the Court. (See paras. 11-13 supra).

19. Additionally, there has been no written submission by the Applicants for the Court's consideration so that it might properly determine the parameters of the proposed *amicus curiae* brief. In the absence of a more comprehensive explanation of the Applicant's interest in these proceedings and the specific parameters of the legal position which the Applicant's seek to endorse, the Court is deprived of the very material it needs to determine whether this *amicus curiae* application satisfies the test of relevancy, namely, whether it assists in the proper determination of the case.

20. Indeed, much like in its Application for an Extension of Time to File a Reply, the instant Motion seeks to introduce new issues which the Defence failed to advance in its First Preliminary Motion, and/or to broaden those already addressed by the Defence in its First Preliminary Motion on Amnesty. Again, the instant Motion should not be granted with the result that it becomes a means by which the Defence is


permitted to circumvent the Special Court's Order of 16 July 2003 and Decision of 17 July 2003.

**II. CONCLUSION**

21. The Court should therefore dismiss the Rule 74 Preliminary Motion in its entirety.

31 July 2003, Freetown

For the Prosecution



---

James C. Johnson  
Acting Chief of Prosecutions

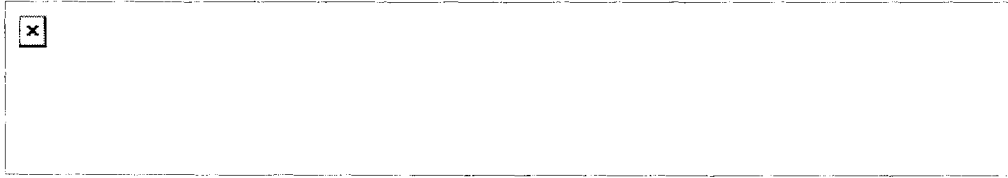


## **PROSECUTION INDEX OF AUTHORITIES**

1. *Prosecutor v. Akayesu* (Order Granting Leave for Amicus Curiae to Appear), ICTR-96-4-T, Trial Chamber, 12 February 1998.
2. *Prosecutor v. Semanza* (Decision on the Kingdom of Belgium's Application to File an Amicus Curiae Brief on the Defence Application to Strike out the Observation of the Kingdom of Belgium Concerning the Preliminary Response by the Defence), ICTR-97-20-T, Trial Chamber, 9 February 2001.

**PROSECUTION INDEX OF AUTHORITIES****ANNEX 1.**

*Prosecutor v. Akayesu* (Order Granting Leave for Amicus Curiae to Appear), ICTR-96-4-T, Trial Chamber, 12 February 1998.



**CHAMBER I - CHAMBRE I**

**OR : ENG**

**Before:**

Judge Laïty Kama: Presiding Judge  
Judge Lennart Aspegren  
Judge Navanethem Pillay

**Registry:**

Mr. Lars Plum

**Decision of:** 12 February 1998

**THE PROSECUTOR  
VERSUS  
JEAN-PAUL AKAYESU**

*Case No. ICTR-96-4-T*

---

**ORDER GRANTING LEAVE  
FOR AMICUS CURIAE  
TO APPEAR**

---

**The Office of the Prosecutor:**

Mr. Pierre-Richard Prosper  
Mr. James Stewart

**Counsel for the Accused:**

Mr. Nicolas Tiangaye  
Mr. Patrice Monthé

**Other Representatives:**

Ms. Daphna Shraga  
Legal Officer, Office of Legal Affairs,

Secretariat-General of the Organisation of the United Nations

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),**

SITTING as Trial Chamber I of the Tribunal, composed of Judge Laïty Kama as Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay;

CONSIDERING the order issued by the Tribunal on 19 November 1997 whereby Major-General Roméo Dallaire was summoned to appear as a witness for the Defence in the present case;

HAVING TAKEN COGNIZANCE of the request of the Legal Counsel to the Secretary-General of the Organisation of the United Nations to appear as Amicus Curiae before the Tribunal in this case;

**AFTER HAVING DELIBERATED,**

WHEREAS, by the summons issued by the Tribunal on 19 November 1997, it was requested *inter alia* that the Secretary-General of the United Nations waive the immunity of Major-General Dallaire he enjoys by virtue of his position as former Commander-in-Chief of the UNAMIR force;

WHEREAS the Legal Counsel to the Secretary-General of the Organisation of the United Nations requests to be heard as Amicus Curiae so as to explain the scope of the lifting of the immunity of Major-General Dallaire;

WHEREAS, in accordance with Rule 74 of the Rules of Procedure and Evidence of the Tribunal, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organisation or person to appear before it and make submissions on any issues specified by the Chamber;

WHEREAS, in the opinion of the Defence, the testimony of Major-General Dallaire will enlighten the Tribunal on the events that took place in Rwanda in 1994 inasmuch as he was Commander-in-Chief of UNAMIR, a multinational force created by Resolution 872 of 5 October 1993 of the Security Council;

WHEREAS therefore, the Tribunal considers it desirable for the proper determination of the case that a representative of the Secretariat of the Organisation of the United Nations appear before the Tribunal for the purposes of making submissions on the scope of lifting the immunity enjoyed by Major-General Dallaire as former Commander-in-Chief of UNAMIR;

**FOR ALL THE ABOVE REASONS,****THE TRIBUNAL,**

**INVITES** a representative of the United Nations Secretariat to appear before the Tribunal as Amicus Curiae to make a statement on the lifting of the immunity of Major-General Dallaire he enjoys by virtue of his position as former Commander-in-Chief of UNAMIR;

**DECIDES** that the said statement will be made before the Tribunal prior to the testimony of Major-General Dallaire and in his presence.

Arusha 12 February 1998,

Laïty Kama: Presiding Judge

1153

Lennart Aspegren: Judge

Navanethem Pillay: Judge

(Seal of the Tribunal)

**PROSECUTION INDEX OF AUTHORITIES****ANNEX 2.**

*Prosecutor v. Semanza* (Decision on the Kingdom of Belgium's Application to File an Amicus Curiae Brief on the Defence Application to Strike out the Observation of the Kingdom of Belgium Concerning the Preliminary Response by the Defence), ICTR-97-20-T, Trial Chamber, 9 February 2001.

1155



**TRIAL CHAMBER III**

Original: ENGLISH

**Before:**

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

**Registrar:** Dr. Agwu U. Okali

**Date:** 9 February 2001

**THE PROSECUTOR**  
v.  
**LAURENT SEMANZA**

*Case No. ICTR-97-20-T*

---

**DECISION ON THE KINGDOM OF BELGIUM'S APPLICATION TO FILE AN *AMICUS CURIAE* BRIEF AND ON THE DEFENCE APPLICATION TO STRIKE OUT THE OBSERVATIONS OF THE KINGDOM OF BELGIUM CONCERNING THE PRELIMINARY RESPONSE BY THE DEFENCE**

---

**Office of the Prosecutor:**

Chile Eboe Osuji  
Frédéric Ossogo  
Patricia Wildermuth

**Defence Counsel for Semanza:**

Charles Achaleke Taku  
Sadikou Alao

**Representative of the Belgian Government:**

Professor Eric David

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Tribunal),**

**SITTING** as Trial Chamber III (Chamber) composed of Judges Lloyd George Williams presiding, Yakov Ostrovsky, and Pavel Dolenc;

1156

**BEING SEISED** of the Application to File an *Amicus Curiae* Brief in the *Semanza* Case by the Government of the Kingdom of Belgium represented by Professor Eric David, filed on 15 August 2000 (Belgian Government's Request);

**CONSIDERING** the Prosecutor's response to the Belgian Government's Request, filed on 25 August 2000;

**CONSIDERING** the Defence response to the Belgian Government's Request filed on 1 September 2000;

**HAVING HEARD** the parties on 16 October 2000[1];

**CONSIDERING** the Belgian Government's brief filed on 13 November 2000;

**CONSIDERING** the Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response by the Defence to the *Amicus Curiae* Application of the Kingdom of Belgium, filed on 15 November 2000;

**CONSIDERING** the Belgian Government's reply to the Defence submissions, filed on 21 November 2000;

**NOW CONSIDERS** the matter.

#### **SUBMISSIONS OF THE BELGIAN GOVERNMENT**

1. The Belgian Government through its representative submits that the Kingdom of Belgium was affected particularly by the events that took place in Rwanda from April to June 1994. This explains its special interest in following certain cases before the Tribunal and in filing an *amicus curiae* brief in the *Bagosora* and *Ntuyahaga* cases on certain points of international law.
2. Informed that Trial Chamber III will be dealing with the *Semanza* case, the Belgian Government wishes to make submissions about the scope of Article 3 common to the four Geneva Conventions and Additional Protocol II. Belgium is of the opinion that these two texts were too restrictively applied in the Tribunal's judgements in the cases of *Akayesu*, *Kayishema et al.*, and *Rutaganda*.
3. As to the admissibility of its request, the Belgian Government posits that the only relevant test for granting leave for an *amicus curiae* submission, is the proper determination of the case. That is Belgium's purpose in proposing to the Chamber its view on the applicability of Article 4 of the Statute. Mindful that Rule 74 gives the Chamber discretion to rule on *amicus curiae* applications, Belgium prays the Chamber to allow it to file an *amicus curiae* brief on the applicability of Article 4 of the Statute.

#### **SUBMISSIONS OF THE PROSECUTOR**

6. The Prosecutor submits that, without prejudice to the Prosecutor's right to respond to the brief, she consents to the Belgian Government's Request in view of the continuing need for the development of international humanitarian law.

#### **SUBMISSIONS OF THE DEFENCE**



1157

7. The Defence contends that the Belgian Government's Request is *res judicata* at this point in time since the same issues have already been raised by way of motion before the Chamber by the former Lead Defence Counsel. The motion was disposed of and the decision appealed. The Appeals Chamber refused to list the issue for hearing on the grounds that it was not one of the issues on which an appeal could lie. The Defence submits that granting the Belgian Government's Request when no issue has arisen in the cause of the proceedings so as to enable the Chamber to revisit the issue, would be tantamount to reopening the issue without just cause.

8. The Defence therefore, prays the Chamber to hold that either the Belgian Government's Request is *res judicata* or premature, and consequently to reject it. In the alternative, should the Chamber grant the Belgian Government's Request, which has been taken as a preliminary matter of law, the Defence would wish to reply to it.

## FINDINGS

### *Basis of the amicus curiae application*

9. Rule 74 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 any issue specified by the Chamber." Pursuant to this Rule, the Chamber has discretion to grant an *amicus curiae* application, provided it deems it useful for the proper determination of the case.

10. The Chamber is of the view that it may be useful to gather additional legal views on the scope of the applicability of Article 3 common of the four Geneva Conventions and Additional Protocol II. The Chamber determines that the Belgian Government's submission is maintainable with respect to the legal principles involved, and not with respect to the particular circumstances of this or any other case.

11. As to the *res judicata* objection raised by the Defence, the Chamber finds it to be without merit. The issue of *res judicata* arises only when there is an identity of parties, identity of issues, and a final determination of those issues in the previous decision by a court competent to decide them. In the instant case, Belgium is not a party, nor was it involved in the proceedings which, according to the Defence, give rise to the *res judicata* issue. Consequently, there is no identity of parties. Further, the Chamber's Decision of 29 September 1999 that the Defence refers to, pertained to a different issue. Indeed the Defence asked the Chamber to dismiss from the indictment the counts of violations of Article 3 common to the Geneva Conventions for lack of evidence. Here, the Belgian application seeks to make submissions showing that the scope of Article 4 of the Statute should be wider. Therefore, there is no identity of issues.

### *Debarment*

12. The Chamber turns now to the issue of debarment raised by the Defence in its submissions of 15 November 2000, with regard to the submissions of Belgium in which it argues that the *res judicata* issue does not arise in the instant case. The Chamber first notes that the Defence did not invoke any provision of the Rules in support of its request to strike out the Belgian submissions. There is no prohibition in the Rules on admitting these submissions and it is appropriate to take them into consideration, since there is no dispute that the Representative of Belgium, absent from the Court during the hearing of 16 October 2000, received the Defence submissions relating to the admissibility of the request of *amicus curiae* only ten days after the hearing. Therefore, the Chamber denies the Defence request to strike out the Belgian submissions of 13 November 2000.

1158

*Appropriate time to make submissions on amicus curiae*

13. The only issue before the Chamber now is whether it should invite the Belgian Government to make its submissions on the legal scope of Article 4 of the Statute at a later stage of the proceedings. There is no reason for the Chamber to find the Belgian Government's Request premature. The Chamber finds that the appropriate time for Belgium to make its submissions will be after the presentation of evidence by the parties and before they present their closing arguments.

14. For these reasons, the Chamber:

- (a) **DENIES** the Defence application to strike out the Belgian submissions of 13 November 2000;
- (b) **GRANTS** the Belgian Government's Request to appear before the Chamber as *amicus curiae* and to make submissions about the legal scope of Article 3 common to the four Geneva Conventions and Additional Protocol II; and
- (c) **DECIDES** that the Belgian Government may make such submissions after the presentation of evidence by the parties and before they present their closing arguments.

Arusha, 9 February 2001.

Lloyd George Williams

Yakov Ostrovsky

Pavel Dolenc

Judge, Presiding

Judge

Judge

Seal of the Tribunal

---

[1] By a letter dated 7 September 2000, the Presiding Judge of Trial Chamber III called upon the representative of the Kingdom of Belgium to be present at the hearing scheduled for 16 October 2000 in order to submit his brief. By a fax dated 13 October 2000, Professor Eric David informed the Chamber that he could not be present at the hearing. He however joined to his fax his written brief on the admissibility of the Belgian Government's Request.