

In: KSC-CC-2024-23
The Specialist Prosecutor v. Sabit Januzi, Ismet Bahtijari and Haxhi Shala

Before: Constitutional Court Panel
Judge Vidar Stensland
Judge Roumen Nenkov
Judge Romina Incutti

Registrar: Dr Fidelma Donlon

Filing Participant: Association of Defence Counsel Practising Before the International Courts and Tribunals (ADC-ICT)

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ADC-ICT Request for Leave to Appear as *amicus curiae*

Registry

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I. INTRODUCTION

1. The Association of Defence Counsel practising before the International Courts and Tribunals ('ADC-ICT'), requests leave to appear as *amicus curiae* in the matter of *Januzi et al., v. Registry of the Kosovo Specialist Chamber*,¹ pursuant to Rule 16 of the Rules of Procedure for the Specialist Chamber of the Constitutional Court ('CCR').
2. In particular, the ADC-ICT seeks to file brief submissions concerning the remuneration of defence counsel practising before international tribunals and representing accused persons charged with offences against the administration of justice.
3. Should leave be granted, the ADC-ICT will limit its observations to the often-overlooked complexities of contempt proceedings and a comparative guide of applicable remuneration rates deemed to be consistent with the rights and interests of accused persons in such matters. The ADC-ICT does not intend to repeat arguments already made by Defence counsel in the Referral.

II. STANDING TO SEEK LEAVE TO APPEAR AS AMICUS CURIAE

4. Rule 16 of the CCR empowers the Constitutional Court Panel ('Panel') to invite an *amicus curiae* to make submissions where necessary for the proper determination of the referral before it.
5. The ADC-ICT understands that the language in Rule 16 differs to the statutory provisions governing *amicus curiae* at other international tribunals,² including the Rules of Procedure and Evidence before the Kosovo Specialist Chambers,³ in that it is silent on whether the Panel may be seized of an application seeking leave to appear in contrast to an invitation to appear as *amicus curiae*.
6. There is no discernible reason for such silence from the provision itself or any of

¹ KSC-CC-2024-23/F000001, Referral by 1) Sabit JANUZI, 2) Ismet BAHTIJARI and 3) Haxhi SHALA to the Specialist Chamber of the Constitutional Court Concerning the Constitutional Validity of KSC-BD-25-Rev1 (Revised Legal Aid Regulations), 2 April 2024 ('Referral'); KSC-0CC-2024-23/F000002, Decision to Assign Judges to a Constitutional Court Panel, 5 April 2024.

² Rule 103 ICC RPE; Rule 83 MICT RPE (adopting language of Rule 74 ICTY RPE/ICTR/RPE).

³ Rule 67 of the KSC RPE.

the accompanying statutory documents of the Constitutional Court. Moreover, the ADC-ICT notes that the Constitutional Court of the Republic of Kosovo,⁴ which the Constitutional Court is mirrored on, does allow for the submission of requests to appear as *amicus curiae* before the Court under its own rules of procedure and evidence.⁵

7. As such, it is submitted that the Panel, having been conferred with the power to invite *amicus curiae* to make submissions, may equally be moved to exercise such powers granted by any organisation, state or person seeking to file submissions in accordance with Rule 16.⁶

III. EXPERTISE IN LEGAL ISSUES TO BE PRESENTED

8. The ADC-ICT is well qualified to offer submissions of assistance in relation to the question at issue as the body officially recognised by the Registrar of the IRMCT as representing all Defence Counsel practising before it, pursuant to Rule 42(A)(iii) MICT RPE.⁷

9. In its Preamble, the ADC-ICT Constitution states that it 'is a partner, along with the organs of the respective International Courts or Tribunals at which they are the recognised Association of Counsel.'⁸ A key objective of the ADC-ICT is to 'offer advice to the President, the Chambers and the Registrar of the International Courts and Tribunals in relation to the rights of the accused to a fair trial and the Rules of Procedure and Evidence'.⁹

10. The ADC-ICT considers that part of its mission is to promote the fairness of proceedings in general and as such, it has a particular role in offering views on issues affecting the rights of individuals who are subject to trial proceedings before

⁴ No. ref.: KK 67/18, Kosovo Constitutional Court RPE.

⁵ *Ibid.*, Rule 55.

⁶ ICC-01/04-168 OA3, *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 24 July 2006, para. 20.

⁷ The ADC-ICT's predecessor, ADC-ICTY, was recognised by the ICTY Registry in October 2002 see Rule 44(A)(iii) ICTY RPE.

⁸ Preamble, [ADC-ICT Constitution](#).

⁹ Article 2(3), ADC-ICT Constitution.

international criminal tribunals.

11. The ADC-ICT has also previously appeared as *amicus curiae* in international criminal cases, including before the ICTY, ICTR, IRMCT and ICC on substantive law questions,¹⁰ and procedural and administrative issues including matters regarding the impact of the allocation of resources to fair trial rights of an accused.¹¹

12. The ADC-ICT respectfully submits that the expertise it has gathered as an organisation through its individual members would assist the Panel in the proper determination of the referral before it.

IV. OBSERVATIONS WILL ASSIST IN THE PANEL'S DETERMINATION OF THE REFERRAL

13. Whilst the Constitutional Court has yet to adjudicate on the threshold to be met for the submission of *amicus curiae*, guidance may be gleaned from the jurisprudence of the *ad hoc* tribunals whereby the ICTY/ICTR Appeals Chamber held that the primary criterion for granting leave to file an amicus brief is whether the proposed submission would assist the Chamber in its consideration of the questions at issue.¹² The same standard has since been adopted by the International Criminal Court.¹³

14. The ADC-ICT notes that the context in which the Revised Legal Aid Regulations

¹⁰ IT-99-36-A, *Prosecutor v. Brđnanin*, Amicus Brief of Association of Defence Counsel – ICTY, 6 July 2005; IT-04-74-T, *Prosecutor v. Prlić et al.*, Advisory Opinion of Amicus Curiae Disciplinary Council of the Association of Defence Counsel of the ICTY, 13 August 2009; MICT-13-33, *Prosecutor v. Kamuhanda*, ADC-ICTY Amicus Curiae Observations, 10 September 2015 and ICC-02/04-01/15-A, *Prosecutor v Ongwen*, Observations of the Association of Defence Counsel Practising Before the International Courts and Tribunals (ADC-ICT) as *Amicus Curiae* Regarding Questions Posed by the Appeals Chamber in *Prosecutor v. Ongwen*, 23 December 2021.

¹¹ IT-01-47-PT, *Prosecutor v. Hadžihasanović*, Amicus Brief of the Association of Defence Counsel Practising Before the International Criminal Tribunal for the Former Yugoslavia in Support of 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, 14 July 2003; IT-03-69-T, *Prosecutor v. Stanišić and Simatović*, Association of Defence Counsel (ADC-ICTY) Motion for Leave to Appear as Amicus Curiae, 21 February 2011; and MICT-22-124, *Prosecutor v. Nzuwonemeye et al.*, Association of Defence Counsel Practising the International Courts and Tribunals (ADC-ICT) Motion for Leave to Appear as Amicus Curiae, 31 March 2022.

¹² IT-05-87-A, *Prosecutor v. Šainović et al.*, Decision on David J. Scheffer's Application to File an *Amicus Curiae* Brief, 7 September 2010, p. 3.

¹³ ICC-02/17-47, *Situation in the Islamic Republic of Afghanistan*, Decision on the 'Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence' (ICC-02/17-46), 17 June 2019, para. 7.

was adopted,¹⁴ and the remuneration therein marks a significant departure from the applicable rates provided to Defence counsel representing accused charged with offences against the administration of justice at the other international tribunals and courts.

15. The adoption of the Revised Legal Aid Regulations not only directly impacts the effective representation of Mr. Januzi, Mr. Bahtijari and Mr. Shala but has wider implications going forward in relation to the rights and interests of any future suspects or accused persons brought before the Specialist Chambers in relation to contempt proceedings.

16. The ADC-ICT is in a position to provide the Panel with a comprehensive and practical overview of the complexity and resource-consuming scope of contempt cases, drawing on experiences of its members representing accused persons charged with offences against the administration of justice before the ICTY, ICTR, IRMCT and the ICC.

17. In doing so, the ADC-ICT proposes to also provide the Panel with a comparative guide of applicable remuneration fees for Defence counsel acting in contempt proceedings before other international courts and tribunals and will demonstrate the necessity of such resources in the effective representation of accused persons and the concrete prejudicial impact of inadequate resourcing on the rights and interests of accused persons.

18. The ADC-ICT will not address the factual circumstances or allegations specific to Mr. Januzi, Mr. Bahtijari and Mr. Shala but will underscore how the current applicable rates as set out in the Revised Legal Aid Regulations are insufficient when compared to comparative rates concerning contempt proceedings before other international courts and tribunals.

19. The ADC-ICT's expertise is further necessitated in the matter before the Panel, noting that the Revised Legal Aid Regulations were adopted in the absence of any

¹⁴ *Infra.*, para. 19.

consultation process¹⁵ and following the detention of Mr. Januzi, Mr. Bahtijari and Mr. Shala and the assignment of Defence counsel.

20. Finally, the ADC-ICT intends to file any observations on an expedited timeframe should leave be granted in order not to further delay resolution of the matter before the Panel.

V. RELIEF SOUGHT

21. For the foregoing reasons, the ADC-ICT respectfully requests that the Panel grant it leave to submit observations as *amicus curiae* in the matter of *Januzi et al., v. Registry of the Kosovo Specialist Chamber*.

Word count: 1,449



Dragan Ivetic

President of ADC-ICT

15 April 2024

At The Hague, the Netherlands

¹⁵ Referral, para. 58-64.