

UNITED
NATIONS



Mechanism for International Criminal Tribunals

Case No.: MICT-12-17-R108.1

Date: 20 November 2017

Original: English

BEFORE A SINGLE JUDGE

Before: Judge Graciela Susana Gatti Santana
Registrar: Mr. Olufemi Elias
Decision: 20 November 2017

PROSECUTOR

v.

GÉRARD NTAKIRUTIMANA

PUBLIC

DECISION ON ALLEGATIONS OF FALSE TESTIMONY

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Richard Karegyesa

Counsel for Gérard Ntakirutimana:

Mr. Vincent Courcelle-Labrousse

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1. I, GRACIELA SUSANA GATTI SANTANA, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Single Judge in this case,¹ am seized of the final report filed by the *Amicus Curiae* in relation to his investigation concerning possible false testimony in connection with the case of *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10 and ICTR-96-17-T.²

I. BACKGROUND

2. On 21 February 2003, Trial Chamber I of the International Criminal Tribunal for Rwanda (“Trial Chamber” and “ICTR”, respectively) convicted Gérard Ntakirutimana of genocide and murder as a crime against humanity and sentenced him to 25 years of imprisonment.³ On 13 December 2004, the Appeals Chamber of the ICTR quashed, in part, his conviction for murder as a crime against humanity, affirmed the remainder of his conviction for that crime, affirmed his conviction for committing and aiding and abetting genocide, entered additional convictions for aiding and abetting genocide and extermination as a crime against humanity, and affirmed his sentence of 25 years of imprisonment.⁴

3. On 18 December 2013, Ntakirutimana filed a confidential motion seeking the appointment of an *amicus curiae* to investigate allegations of false testimony pursuant to Rule 108(B) of the Rules of Procedure and Evidence of the Mechanism (“Rules”).⁵ According to Ntakirutimana, it follows from observations made in a judgement issued by a domestic court in a criminal trial related to the Rwandan genocide that a witness attested to having lied during his testimony in the *Ntakirutimana* case before the ICTR.⁶ On this basis, Ntakirutimana filed the Motion and further

¹ Order Assigning a Single Judge, 11 March 2016, p. 1.

² *Amicus Curiae’s Confidential, Ex Parte Final Report and Conclusions of the Investigation*, 28 August 2017 (confidential and *ex parte* with confidential and *ex parte* annexes); *Amicus Curiae’s Confidential, Ex Parte Corrigendum to Final Report and Conclusions of the Investigation*, 23 October 2017 (confidential and *ex parte* with confidential and *ex parte* annexes) (collectively, “Final Report”).

³ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10 and ICTR-96-17-T, Judgment and Sentence, 21 February 2003 (filed on 24 February 2003) (“Trial Judgement”), paras. 878, 922, 924.

⁴ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 (“Appeal Judgement”), p. 188.

⁵ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Motion to Appoint an *Amicus Curiae* to Investigate the Apparent Recantation of a Witness Testifying before the ICTR pursuant to Rule 108(B), 18 December 2013 (confidential) (“Motion”), paras. 4, 5, 11, 14. See also *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Reply to the Prosecution’s Response to Gérard Ntakirutimana’s Motion to Appoint an *Amicus Curiae* to Investigate the Apparent Recantation of a Witness Testifying before the ICTR pursuant to Rule 108(B), 30 December 2013 (confidential), paras. 2-4.

⁶ Motion, paras. 1, 8-11.

requested that the Mechanism ascertain the identity of this witness and obtain the witness's statements and testimony from the domestic trial.⁷

4. On 7 January 2014, the President assigned Judge Vagn Joensen to the matter.⁸ Between January 2014 and October 2015, Judge Joensen issued orders and decisions related to: (i) identifying the witness;⁹ (ii) facilitating the access of material and information to Ntakirutimana's counsel;¹⁰ and (iii) the composition of Ntakirutimana's legal team.¹¹ The relevant witness was identified as Prosecution Witness HH in the *Ntakirutimana* case,¹² and full access to the relevant material was provided to Ntakirutimana's new counsel.¹³

5. On 13 October 2015, Judge Joensen invited Ntakirutimana to make further submissions demonstrating how Witness HH had knowingly and wilfully provided false testimony before the ICTR with relevant references from the domestic trial as well as Ntakirutimana's own trial,¹⁴ which Ntakirutimana filed on 17 November 2015.¹⁵ The Prosecution filed a supplementary response on 3 December 2015.¹⁶

6. On 2 March 2016, Judge Joensen concluded that, notwithstanding the possibility that Witness HH's recantation of his ICTR testimony might have been fabricated, strong grounds existed for believing that Witness HH knowingly and wilfully gave false testimony in the

⁷ Motion, para. 13.

⁸ *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Order Assigning a Single Judge, 7 January 2014 (confidential), p. 1.

⁹ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Preliminary Order in relation to the Motion to Appoint an *Amicus Curiae* to Investigate the Apparent Recantation of a Witness Testifying before the ICTR pursuant to Rule 108(B), 30 January 2014 (confidential), p. 4.

¹⁰ See *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Decision on the Urgent Motion for the Transmission of the Case File and Disclosed Material to Counsel and for an Extension of Time and Response to the "Registrar's Submission pursuant to Rule 31(B) in connection with the 'Order for Submission in relation to the Motion to Appoint an *Amicus Curiae* to Investigate the Apparent Recantation of a Witness Testifying before the ICTR pursuant to Rule 108(B)'" , 2 December 2014 (confidential), para. 18; *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Order for Submissions, 13 October 2015 (confidential) ("Order of 13 October 2015"), para. 9, p. 3.

¹¹ See *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Decision on Prosecution Motion for a Stay of Decision and for Disqualification of Counsel, 5 December 2014 (confidential), pp. 1, 2; *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Decision on Motion for Reconsideration of 2 December 2014 Decision or for Certification to Appeal, 9 September 2015 (confidential), p. 3.

¹² *In Re. The Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17, Registrar's Submission in connection with the "Preliminary Order in relation to the Motion to Appoint an *Amicus Curiae* to Investigate the Apparent Recantation of a Witness Testifying before the ICTR pursuant to Rule 108(B)", 25 February 2014 (confidential and *ex parte*), paras. 3, 4.

¹³ Order of 13 October 2015, paras. 5-8, p. 3.

¹⁴ Order of 13 October 2015, para. 10, p. 3.

¹⁵ *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Mr. Gérard Ntakirutimana's Response to Order of Single Judge of 13 October 2015, 17 November 2015 (confidential) (English translation of the French original filed on 17 December 2015) ("Response of 17 November 2015").

¹⁶ *The Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17, Prosecution Response to *Réponse de Gérard Ntakirutimana à l'ordonnance du juge unique en date du 13 octobre 2015*, 3 December 2015 (confidential).

Ntakirutimana case before the ICTR and referred the matter to the President.¹⁷ The President assigned me to the matter on 11 March 2016.¹⁸

7. On 4 April 2016, I instructed Ntakirutimana and the Prosecution to file submissions on whether I should exercise my discretion to: (i) order an investigation into whether Witness HH gave false testimony in the *Ntakirutimana* case; and, if so, (ii) instruct the Prosecutor to investigate the alleged false testimony, or, due to a conflict of interest, direct the Registrar to appoint an *amicus curiae* to investigate it.¹⁹ Ntakirutimana and the Prosecution filed their responses on 22 April 2016 and 6 May 2016, respectively.²⁰

8. On 13 June 2016, in view of the record and the further submissions from Ntakirutimana and the Prosecution, I found that an investigation into Witness HH's recantation of his evidence in the *Ntakirutimana* case is the most effective and efficient way of determining: (i) whether Witness HH lied when testifying before the ICTR or during the domestic proceedings when he recanted his testimony in the *Ntakirutimana* case; and (ii) accordingly, whether sufficient grounds exist to initiate proceedings against Witness HH for giving false testimony under Rule 108(C) of the Rules.²¹ In this respect, I considered that the circumstances surrounding Witness HH's recantation were also indicative of the possibility that the recantation of his testimony before the ICTR may have been fabricated,²² which, if so, would mean that the Mechanism did not have jurisdiction to address the matter. As a consequence, I ordered the Registrar to appoint an *amicus curiae* to investigate whether Witness HH gave false testimony before the ICTR in the *Ntakirutimana* case as well as the possibility that the witness's recantation in the domestic proceeding of his testimony in the *Ntakirutimana* case was fabricated.²³

9. On 10 October 2016, the Registrar appointed the *Amicus Curiae*.²⁴ On 14 November 2016, I granted the *Amicus Curiae* access to certain documents necessary for his investigation and further ordered that he provide regular progress reports on the status of the investigation until its

¹⁷ *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. MICT-12-17, Decision on Motion to Appoint an *Amicus Curiae* to Investigate False Testimony, 2 March 2016, paras. 18, 19.

¹⁸ *See supra* n. 1.

¹⁹ Order for Submissions, 4 April 2016, p. 1.

²⁰ Prosecutor's Response to the Order for Submissions of 4 April 2016, 6 May 2016; Mr. Gérard Ntakirutimana's Response to the Order of the Single Judge of 4 April 2016, 22 April 2016 (confidential) (English translation of the French original filed on 12 May 2016).

²¹ Order Appointing an *Amicus Curiae* to Investigate False Testimony, 13 June 2016 ("Order of 13 June 2016"), p. 2.

²² Order of 13 June 2016, p. 2. *See also* Decision of 2 March 2016, paras. 16-18.

²³ Order of 13 June 2016, p. 3.

²⁴ Registrar's Decision, 10 October 2016 (confidential), p. 2. *See also* Order for Submissions, 26 September 2016, p. 1 (requesting an update from the Registrar with respect to the appointment of the *Amicus Curiae*).

completion.²⁵ Between 10 January 2017 and 21 June 2017, the *Amicus Curiae* filed 5 progress reports and one addendum concerning the status of his investigation.²⁶ On 28 August 2017, the *Amicus Curiae* filed the Final Report concluding his investigation. Among other information, the Final Report reflects that the *Amicus Curiae* interviewed Witness HH on two separate occasions and that, during both interviews, Witness HH was assisted by counsel assigned by the Mechanism pursuant to Rule 40(A)(i) of the Rules.²⁷ The Final Report further indicates that Witness HH provided the *Amicus Curiae* with a supplementary statement following those interviews.²⁸ Based on the information gathered during the course of his investigation, the *Amicus Curiae* submits that the witness knowingly and wilfully provided false testimony before the ICTR in the *Ntakirutimana* case and that sufficient grounds exist for initiating false testimony proceedings against him.²⁹

II. DISCUSSION

10. False testimony is “a deliberate offence which requires wilful intent on the part of the perpetrator to mislead the Judge and thus to cause harm”.³⁰ The elements of false testimony are: (i) the witness must make a solemn declaration; (ii) a false statement must be contrary to the solemn declaration; (iii) the witness must believe at the time that it was false; and (iv) there must be a relationship between the statement and a material matter within the case.³¹

11. Rule 108(C)(ii) of the Rules provides that “if the Single Judge considers that there are sufficient grounds to proceed against a person for giving false testimony, the Single Judge may [...]

²⁵ Order on *Amicus Curiae*'s Request for Access to Documents, 14 November 2016, p. 2.

²⁶ See *Amicus Curiae*'s Confidential, *Ex Parte* Progress Report on the Status of the Investigation, 10 January 2017 (confidential and *ex parte*); *Amicus Curiae*'s Confidential, *Ex Parte* Second Progress Report on the Status of the Investigation, 10 February 2017 (confidential and *ex parte*); *Amicus Curiae*'s Confidential, *Ex Parte* Third Progress Report on the Status of the Investigation, 10 March 2017 (confidential and *ex parte*); *Amicus Curiae*'s Confidential, *Ex Parte* Fourth Progress Report on the Status of the Investigation, 10 April 2017 (confidential and *ex parte*); *Amicus Curiae*'s Confidential, *Ex Parte* Fifth Progress Report on the Status of the Investigation, 10 May 2017 (confidential and *ex parte*); *Amicus Curiae*'s Confidential, *Ex Parte* Addendum to Fifth Progress Report on the Status of the Investigation (confidential and *ex parte*), 21 June 2017 (“Addendum to Fifth Progress Report”). On 28 June 2017, I granted the *Amicus Curiae*'s request to file the Final Report after the translation of certain additional submissions from Witness HH in Kinyarwanda. See Decision on *Amicus Curiae*'s Addendum to Fifth Progress Report, 28 June 2017 (confidential and *ex parte*), p. 2; Addendum to Fifth Progress Report, p. 3.

²⁷ Final Report, para. 30. The *Amicus Curiae* interviewed Witness HH through video-conference link on 20 April 2017 and 9 May 2017. Witness HH also noted the assistance of Mechanism-assigned counsel in his supplementary statement of 14 May 2017. See Final Report, Annex 12, Registry pagination (“RP.”) 888.

²⁸ Final Report, paras. 31, 33; Final Report, Annex 12.

²⁹ Final Report, paras. 26-33, 93, 137, 142, 143. The *Amicus Curiae* concluded that Witness HH's recantation of his testimony in the *Ntakirutimana* case was not fabricated. See Final Report, paras. 94(a), 130, 134, 141.

³⁰ *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, n. 68.

³¹ See, e.g., *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonnyunkiza for False Testimony, 29 December 2006 (“*Karemera et al.* Decision of 29 December 2006”), para. 6; *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Reconsideration of the Decision on Protective Measures for Witness P024 and Initiation of the Proceedings pursuant to Rule 91, 13 July 2006 (confidential), para. 3.

issue an order in lieu of an indictment and direct an *amicus curiae* to prosecute the matter”. The “sufficient grounds” standard is satisfied where the evidence establishes a *prima facie* case of false testimony, which is the same standard employed in confirming an indictment, namely a “credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused”.³²

12. The *Amicus Curiae* has provided information to the effect that Witness HH expressly recanted his ICTR testimony against Ntakirutimana in evidence he gave during the domestic trial,³³ in an 18 November 2013 statement for proceedings in a separate domestic jurisdiction,³⁴ during his interviews with the *Amicus Curiae* when represented by Mechanism-assigned counsel,³⁵ and in a 14 May 2017 supplementary statement he provided to the *Amicus Curiae*.³⁶ I observe that, in his own words, Witness HH “plead[ed] guilty to giving false testimony” against Ntakirutimana.³⁷

13. The Final Report further identifies specific aspects of Witness HH’s testimony in the *Ntakirutimana* case that are false. In particular, there is information to the effect that Witness HH: (i) never witnessed Ntakirutimana shoot at Charles Ukobizaba during the Mugonero attacks and that he never witnessed Ukobizaba’s murder;³⁸ (ii) never witnessed Ntakirutimana kill a person by the name of Esdras during the attack on Gitwe Hill;³⁹ (iii) associated Ntakirutimana to acts committed by other “attackers”, including Mathias Ngrinshuti, to make his account appear more plausible;⁴⁰ and (iv) never saw Ntakirutimana “during any of the attacks about which he had testified”.⁴¹ In light of the above, and consistent with the recommendation of the *Amicus Curiae*, I find that sufficient grounds exist to support the elements of false testimony that would allow for the initiation of false testimony proceedings against Witness HH.

³² See *In Re, Deogratias Sebureze and Maximilien Turinabo*, Case Nos. MICT-13-40-R90 and MICT 13-41-R90, Public Redacted Version of Decision on Allegations of Contempt of the ICTR, 18 July 2013 (“*Sebureze and Turinabo* Decision of 18 July 2013”), para. 14. See also, *mutatis mutandis*, *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR.91, Decision on “Joseph Nzirorera’s Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony” and on Motion for Oral Arguments, 23 January 2009 (“*Karemera et al.* Decision of 23 January 2009”), para. 19; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR.91.2, Decision on Joseph Nzirorera’s and the Prosecutor’s Appeals of Decision Not to Prosecute Witness BTH for False Testimony, 16 February 2010 (“*Karemera et al.* Decision of 16 February 2010”), para. 19.

³³ Final Report, paras. 75, 76, 79, 132.

³⁴ Final Report, para. 81. See also Final Report, Annex 9, RP. 929.

³⁵ Final Report, paras. 85-87, 91, 133.

³⁶ Final Report, para. 33; Final Report, Annex 12, RP. 891-889.

³⁷ Final Report, Annex 12, RP. 890, 889.

³⁸ Final Report, paras. 67, 86, 131. See also Final Report, paras. 40, 41 (referring to Witness HH’s statements to the ICTR regarding Charles Ukobizaba).

³⁹ Final Report, para. 86. See also Final Report, paras. 44, 102 (referring to Witness HH’s testimony regarding the killing of a person named Esdras).

⁴⁰ Final Report, para. 79.

⁴¹ Final Report, para. 86.

14. Notwithstanding this conclusion, the plain language of the Rule 108(C)(ii) of the Rules reflects that determining whether or not to initiate false testimony proceedings is a discretionary decision.⁴² Notably, the language in Rule 108(C)(ii) of the Rules follows that used in Rules 91(C)(ii) of the Rules of Procedure of Evidence of the ICTR (“ICTR Rules”) and the International Criminal Tribunal for the former Yugoslavia (“ICTY Rules”).⁴³ Both rules have been interpreted as allowing a chamber, acting within the bounds of its discretion, to choose whether or not to initiate proceedings even if a *prima facie* case of false testimony exists.⁴⁴

15. At the outset, it must be emphasized that false testimony under solemn declaration is a very grave offence as it constitutes a direct challenge to the integrity of the trial process and to the administration of justice.⁴⁵ Indeed, the nature of the crimes under the jurisdiction of the ICTR and the context in which they were committed necessitated substantial reliance upon oral evidence and, as such, false testimony in such proceedings is extremely prejudicial.⁴⁶ This is particularly true in the *Ntakirutimana* case, and the prejudicial impact of Witness HH’s false testimony is demonstrated by the fact that aspects of the evidence he has recanted were relied upon either by the Trial Chamber and/or the Appeals Chamber of the ICTR in convicting *Ntakirutimana*.⁴⁷ While

⁴² See *supra* para. 11.

⁴³ See Rule 91(C)(ii) of the ICTR Rules and ICTY Rules (“If the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may [...] issue an order in lieu of an indictment and direct *amicus curiae* to prosecute the matter”). Initiating false testimony proceedings under Rule 108(C) of the Rules is also subject to Article 6 of the Statute of the Mechanism (“Statute”), which is a material distinction from the rule’s antecedents in the ICTR and ICTY Rules. This additional requirement, however, does not limit the discretion to decide whether or not to institute false testimony proceedings.

⁴⁴ See, e.g., *Karemera et al.* Decision of 16 February 2010, paras. 15, 17. See also *The Prosecutor v. Hormisdas Nsengimana*, Case Nos. ICTR-01-69A and ICTR-10-92, Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses (*Re: Léonard Safari and Rémi Mazas*), 16 December 2010 (“*Nsengimana* Decision of 16 December 2010”), para. 8. Cf. *Sebureze and Turinabo* Decision of 18 July 2013, para. 14; *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-AR77, Decision on Nshogoza’s Appeal of Decision on Allegations of Contempt by Members of the Prosecution, 7 July 2011 (“*Nshogoza* Decision of 7 July 2011”), paras. 11, 12; *Nsengimana* Decision of 16 December 2010, paras. 17, 22; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, Order Issuing a Public Redacted Version of “Decision on the Prosecution’s Appeal against the Trial Chamber’s Decision of 10 June 2008”, 2 September 2008, paras. 3, 13.

⁴⁵ See *The Prosecutor v. GAA*, Case No. ICTR-07-90-R77-I, Judgement and Sentence, 5 December 2007 (“*GAA* Trial Judgement”), para. 10. See also *Karemera et al.* Decision of 29 December 2006, para. 10, referring to *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54-A, T. 19 May 2005, p. 50 (“the Appeals Chamber has already made it very clear to potential witnesses that the Tribunal will not tolerate false testimony before the Court”).

⁴⁶ Cf. *Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgement on Contempt Allegations, 27 May 2005, para. 60.

⁴⁷ The Trial Chamber relied on Witness HH’s testimony in convicting *Ntakirutimana* with respect to the shooting of Charles Ukobizaba and the attack on Gitwe Hill near Gitwe Primary School. See Trial Judgement, paras. 199, 364, 366, 368, 370-373, 384, 552-559, 791-794, 795, 806, 810, 832(iii), 878 (i), (iv). The Appeals Chamber of the ICTR affirmed the Trial Chamber’s reliance on Witness HH’s testimony with respect to these two events and relied, in part, on *Ntakirutimana*’s participation on the attack on Gitwe Hill near Gitwe Primary School when entering a conviction on appeal for extermination as a crime against humanity. See Appeal Judgement, paras. 222, 223, 227-232, 235, 257-262, 286, 292, 505-507, 535-537, 556(i), 557(i), 558-560, p. 188. The Trial Chamber also relied on Witness HH’s testimony in convicting *Ntakirutimana* for the killing of Esdras and a June 1994 attack on Muyira Hill, and relied on his evidence in relation to various attacks at locations in Bissero in assessing his intent with respect to genocide. See Trial Judgement, paras. 554, 555, 557-559, 664-668, 702-704, 793, 832(iii), 832(viii), 832(x), 834-836, 845-849, 878(i),

Ntakirutimana's convictions are also supported by evidence other than that of Witness HH,⁴⁸ his false testimony is of significant gravity and interfered with the administration of justice.

16. Bearing the gravity of Witness HH's conduct in mind, I may nonetheless consider whether prosecuting him for false testimony is the most effective and efficient way to ensure compliance with the obligations flowing from the Statute or the Rules in the specific circumstances of this case.⁴⁹ It is noteworthy that Witness HH, even after being discouraged, subjected to threats and intimidation, and informed that he could be punished under the law for having lied, has "categorically and unequivocally" confessed to testifying falsely against Ntakirutimana.⁵⁰ Furthermore, Ntakirutimana previously submitted that he was "wary that the prosecution proceedings against [Witness HH] will have the effect of discouraging other witnesses in his case, or in others elsewhere, who are thinking of [admitting to having given false testimony]".⁵¹ I also harbour concerns that prosecuting a witness who has voluntarily and unequivocally admitted his wrong doing could have a discouraging effect on others in similar circumstances.

17. Furthermore, it must be observed that proceedings for false testimony are independent of the proceedings out of which they arise.⁵² While prosecuting Witness HH may reveal information relevant to review proceedings that may be sought by Ntakirutimana, prosecuting him for the principal purpose of eliciting evidence in support of review proceedings is inefficient.⁵³ In view of the above, I am not persuaded that prosecuting Witness HH is an effective and efficient way to ensure compliance with the obligations flowing from the Statute or the Rules in the specific circumstances of this case.

878(iv). However, the killing of Esdras and Ntakirutimana's participation in the Muyira Hill attack were overturned by the Appeals Chamber of the ICTR due to insufficient notice. *See* Appeals Judgement, paras. 82-85, 92-99, 292, 504, 555(iv), 555(vii). Witness HH's testimony of seeing Ntakirutimana with Mathias Ndirinshuti or seeing his participation in an attack at Mubuga Primary School was not relied upon by the Trial Chamber. *See* Trial Judgement, paras. 114, 117, 437, 438, 618-620, 819-822.

⁴⁸ In entering convictions for genocide and/or murder as a crime against humanity, the Trial Chamber relied, in part, on Witness OO's testimony to find that Ntakirutimana procured gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994, Witness SS's testimony to find that he participated in an attack at Mubuga Primary School, and Witness GG's testimony to find that he killed Charles Ukobizaba. *See* Trial Judgement, paras. 172-186, 364, 365, 368, 369, 371-373, 384, 623-628, 791-795, 806-810, 832, 836, 878. The Trial Chamber's findings and reliance on these witnesses was affirmed on appeal. *See* Appeal Judgement, paras. 179-211, 245-250, 257-262, 277, 278, 295, 505-509, 535-537, 556-560, p. 188.

⁴⁹ *See Karemera et al.* Decision of 23 January 2009, para. 21. *Cf. Sebureze and Turinabo* Decision of 18 July 2013, para. 15; *Nshogoza* Decision of 7 July 2011, para. 20; *Nsengimana* Decision of 16 December 2010, paras. 22, 23.

⁵⁰ Final Report, paras. 52, 56, 71, 85-87, 91, 120-123, 133; Final Report, Annex 12, RP. 889.

⁵¹ Response of 17 November 2015, para. 36.

⁵² *Karemera et al.* Decision of 16 February 2010, para. 25.

⁵³ To the extent that Ntakirutimana can satisfy the Appeals Chamber of the Mechanism that Witness HH's recantation constitutes a new fact that, if proved, could have been a decisive factor in reaching the decision, the rules provide for the presentation of submissions and evidence related to that new fact. *See Prosecutor v. Augustin Ndirabatware*, Case No. MICT-12-29-R, Decision on Ndirabatware's Motion for Review, 19 June 2017 (public redacted version), p. 3, referring, *inter alia*, to Rules 55, 131, and 147 of the Rules.

18. Witness HH's motives for providing false testimony may also be considered when deciding whether to initiate false testimony proceedings.⁵⁴ I note that Witness HH explained that, in certain instances, he was motivated to provide false testimony in order to travel abroad and "earn some money".⁵⁵ However, according to the witness, other principal motivations were that: (i) he was the only member of his family to survive the genocide; (ii) he "wanted to avenge himself to all those who were associated with the killers of his family", which motivated him to incriminate persons he had not seen committing crimes; and (iii) "all the anger and the grief" persuaded him to falsely implicate others, which he attributes to "post-traumatic stress".⁵⁶ When asked why he falsely accused Ntakirutimana, Witness HH stated that he was "angry" at Ntakirutimana and wanted "revenge" against him for having chased away displaced persons, including the witness, from Mugonero hospital, which led them towards the "attackers".⁵⁷ While Witness HH's motives are no defence against a charge of false testimony, they are relevant along with other factors in deciding whether to institute proceedings against him.⁵⁸ I find that, when considered as a whole, the rationale behind his decision to give false testimony tends to weigh against initiating false testimony proceedings.

19. Whether prosecuting Witness HH for false testimony will serve penal goals – such as deterrence and denunciation, rehabilitation, protection of society, and retribution – is also relevant to determining whether to initiate such proceedings.⁵⁹ As noted above, even under duress and the possibility of punishment under the law, Witness HH has categorically and unequivocally confessed to his false testimony.⁶⁰ Moreover, Ntakirutimana's trial and appeal proceedings are complete. In this context, Witness HH's prosecution does not necessarily "achieve the important goals of deterrence and denunciation" in the specific circumstances of this case.⁶¹

20. In addition, the Final Report indicates that Witness HH's own experience of being falsely accused of a crime in January 2011 and his incarceration until April 2011 represented "a turning point", during which he pledged to "correct" his false testimony and promised that he would "never

⁵⁴ *Sebureze and Turinabo* Decision of 18 July 2013, para. 15; *Nshogoza* Decision of 7 July 2011, para. 19; *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010 ("*Nshogoza* Appeal Judgement"), para. 57.

⁵⁵ Final Report, paras. 55, 73.

⁵⁶ Final Report, paras. 62, 73, 90; Final Report, Annex 12, RP. 891, 890.

⁵⁷ Final Report, paras. 76, 79, 88, 138.

⁵⁸ *Nshogoza* Decision of 7 July 2011, para. 19; *Nshogoza* Appeal Judgement, para. 57.

⁵⁹ See *Sebureze and Turinabo* Decision of 18 July 2013, para. 15; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-A, Decision on Defence Allegations of Contempt by Members of the Prosecution, 25 November 2010 ("*Nshogoza* Decision of 25 November 2010"), para. 24; *GAA* Trial Judgement, para. 8.

⁶⁰ See *supra* para. 16.

⁶¹ See *Nshogoza* Decision of 25 November 2010, para. 24.

again accuse anyone unfairly [...] whatever the circumstances”.⁶² Following his release, Witness HH voluntarily: (i) provided details of his wrongdoing against Ntakirutimana and others;⁶³ (ii) provided information which could assist in the prosecution of others;⁶⁴ (iii) admitted to Rwandan authorities that he had provided false testimony;⁶⁵ and (iv) expressed remorse and asked for forgiveness for testifying falsely.⁶⁶ Thus, Witness HH has already demonstrated a significant measure of rehabilitation. Nothing in the record suggests that he poses a risk to society. While the penal goal of retribution may be served by Witness HH’s prosecution, I also note that he requests that the Mechanism “pardon” him as he is a caregiver of several children.⁶⁷

21. Finally, a decision declining the prosecution of Witness HH for false testimony does not prejudice Ntakirutimana were he to seek review of his convictions in light of Witness HH’s recantation, particularly in view of the information that is contained in this decision and that is already in his possession.

22. I note that the *Amicus Curiae* requests that the Final Report and its annexes remain confidential and *ex parte* on the basis that they contain sensitive information, information received on a confidential basis, and that relevant jurisprudence and United Nations guidelines do not indicate that the report must be transmitted to the parties.⁶⁸ Neither the Statute nor the Rules requires the disclosure of reports generated or materials gathered by an *Amicus Curiae* in the course of an investigation ordered pursuant to Rule 108(B)(ii) of the Rules. Nonetheless, I retain the discretion, subject to Rule 76 of the Rules, to order that such material be communicated to the parties of the underlying proceeding in which the alleged false testimony occurred where it is in the interests of justice or when the material would otherwise be subject to disclosure under Rule 73 of the Rules.⁶⁹ I find that the interests of justice as well as Rule 73 of the Rules necessitate the confidential disclosure of the Final Report and accompanying annexes to Ntakirutimana as well as

⁶² Final Report, paras. 50, 51, 64, 82, 89, 91, 112, 113, 117; Final Report, Annex 10, RP. 909, Annex 11, RP. 902, 901, Annex 12, RP. 890, 889.

⁶³ Final Report, paras. 62, 66-70, 72, 74-76, 78, 79, 81, 85-87, 131, 132; Final Report, Annex 12, RP. 889.

⁶⁴ Final Report, paras. 62, 67, 69, 71, 75, 76, 78, 79; Final Report, Annex 12, RP. 889.

⁶⁵ Final Report, para. 84.

⁶⁶ Final Report, paras. 58, 62, 92; Final Report, Annex 12, RP. 889, 888.

⁶⁷ Final Report, Annex 12, RP. 888.

⁶⁸ Final Report, paras. 3, 4, 6, referring to *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision Regarding Ntahobali, Nyiramasuhuko, and Kanyabashi’s Motions to Transmit the *Amicus Curiae* Report, 5 March 2010, para. 18; *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-T, Decision on the Report of the Independent Counsel pursuant to Rules 77(C)iii and 77(D) of the Rules of Procedure and Evidence, 29 April 2005; Secretary-General’s bulletin on “International Criminal Tribunals: information sensitivity, classification, handling and access”, (ST/SGB/2012/3), 20 July 2012, sections 4.2(a), 5.2(a), 5.3; Secretary-General’s bulletin on “Information sensitivity, classification and handling”, (ST/SGB/2007/6), 12 February 2007, sections 1.1, 2.2.

⁶⁹ See, *mutatis mutandis*, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgement, 14 December 2015, paras. 295, 299, 300. See also *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Decision on Third Motion to Compel Disclosure of Witness GEK Material, 21 March 2017, pp. 3-5.

the Prosecution.⁷⁰ Such disclosure may include necessary redactions where information in the Final Report and/or accompanying annexes is subject to Rule 76 of the Rules.

III. CONCLUSION

23. The proceedings in this case have ascertained the truth as it concerns Witness HH's false testimony in the *Ntakirutimana* case. Having reviewed the information and recommendations in the Final Report, as well as the entire record related to this proceeding, I find that the totality of the circumstances weigh against initiating proceedings against Witness HH for false testimony under Rule 108(C)(ii) of the Rules.⁷¹ Notwithstanding the clear indication that Witness HH gave false testimony in the *Ntakirutimana* case, for the reasons explained above, I am not convinced that prosecuting the witness for this crime is the most effective and efficient way to ensure compliance with the obligations flowing from the Statute or the Rules in the specific circumstances of this case.

IV. DISPOSITION

24. In view of the foregoing, pursuant to Article 1(4)(b) of the Statute and Rules 55 and 108(C)(ii) of the Rules, I **HEREBY**:

ORDER the *Amicus Curiae* to file a confidential version of the Final Report and accompanying annexes, with any necessary redactions pursuant to Rule 76 of the Rules, for transmission to Ntakirutimana and the Prosecution as soon as practicable after the issuance of the present decision;

TERMINATE the proceedings in the case of *Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-R108.1; and

REQUEST the Registrar through the Witness Support and Protection Unit of the Mechanism to inform Witness HH of the contents of this decision.

⁷⁰ I note that information concerning Witness HH's recantation may have implications that extend beyond Ntakirutimana's case to other proceedings before the ICTR. Consequently, disclosure of the Final Report and accompanying annexes to the Prosecution is necessary for it to carry out its disclosure obligations under, *inter alia*, Rule 73 of the Rules.

⁷¹ Neither Ntakirutimana nor the Prosecution has had the opportunity to provide submissions in relation to the Final Report. However, this is not provided for in Rule 108(C)(ii) of the Rules nor has it been deemed necessary in similar circumstances. *See, e.g., Nsengimana* Decision of 16 December 2010 (affirming a trial chamber's refusal to initiate contempt proceedings even when the Prosecution was not given the opportunity to provide submissions on reports provided to and relied upon by the trial chamber in rendering its decision).

Done in English and French, the English version being authoritative.

Done this 20th day of November 2017,
At Arusha,
Tanzania



Judge Graciela Susana Gatti Santana
Single Judge

[Seal of the Mechanism]





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