

MICT-12-17-R
12-06-2018
(7 - 1/1190bis)

7/1190bis
ZS

Mechanism for International Criminal Tribunals

BEFORE THE PRESIDENT

Before: Judge Theodor Meron, President
Registrar: Mr Olufemi Elias
Date: 16 April 2018
Case no. : MICT-12-17-R
Original language: French
Category: Public

THE PROSECUTOR

v.

GERARD NTAKIRUTIMANA

**Motion for Order to Assign Counsel to Represent Mr Gérard Ntakirutimana in
His Request for Review**

Defence Counsel:

Mr Vincent Courcelle-Labrousse

Office of the Prosecutor:

Mr Serge Brammertz

**Received by the Registry
International Residual Mechanism for Criminal Tribunals
12/06/2018 17:23**

Thwaipopo

I. PROCEDURAL BACKGROUND

1. On 2 March 2016, a Single Judge of the Mechanism for International Criminal Tribunals (“Mechanism” or “MICT”) ruled that there were reasons to believe that Witness HH knowingly and wilfully gave false testimony in the case of *The Prosecutor v. Elizaphan and Gérard Ntakirutimana* (“*Ntakirutimana*”).¹

2. Pursuant to Rule 108 (B) of the Rules of Procedure and Evidence (“Rules”) of the Mechanism, the matter was referred to the President. On 11 March 2016, the President assigned Judge Graciela Susana Gatti as Single Judge (“Single Judge”) to decide whether there was a need to investigate the allegations.²

3. On 13 June 2016, the Single Judge issued an order appointing an *Amicus Curiae* to investigate the testimony of Witness HH and to inform her whether sufficient grounds existed to initiate proceedings for false testimony.³ On 10 October 2016, pursuant to this order, the Registry appointed Martin Petrov as *Amicus Curiae* in this investigation.

4. On 28 August 2017, the *Amicus Curiae* submitted a confidential and *ex parte* final report (“Final Report”).⁴ This Final Report confirmed that the Witness knowingly and wilfully gave false testimony before the International Criminal Tribunal for Rwanda (“ICTR”) in the *Ntakirutimana* Case and that sufficient grounds existed to initiate proceedings against the Witness for giving false testimony.

5. On 20 November 2017, on the basis of the Final Report, the Single Judge took note that Witness HH had given false testimony in the *Ntakirutimana* Case.⁵ The Single Judge decided not to initiate proceedings against him for false testimony pursuant to Rule 108 (C) of the Rules. Indeed, in view of the circumstances and the willing cooperation of Witness HH, she deemed that such proceedings would not achieve the important goals, namely “deterrence and denunciation”.⁶

¹ Case no. MICT-12-17, “Decision on Motion to Appoint an *Amicus Curiae* to Investigate False Testimony”, 2 March 2016, paras 18-19.

² Case no. MICT-12-17, “Order Assigning a Single Judge”, 11 March 2016.

³ Case no. MICT-12-17, “Order Appointing an *Amicus Curiae* to Investigate False Testimony”, 13 June 2016.

⁴ Case no. MICT-12-17-R108.1, *The Prosecutor v. Ntakirutimana*, “*Amicus Curiae*’s Final Report and Conclusions of the Investigation”, confidential, dated 14 December 2017.

⁵ Case no. MICT-12-17-R108.1, *The Prosecutor v. Ntakirutimana*, “Decision on Allegations of False Testimony”, 20 November 2017 (“Decision of 20 November 2017”), para. 19.

⁶ Decision of 20 November 2017, para. 19.

6. On 31 October 2017, prior to this decision and considering the progress in the case-file described above, the Registry informed the President that it recognised Vincent Courcelle-Labrousse as *pro bono* Counsel for Gérard Ntakirutimana, pursuant to Rule 31 (B) of the Rules, in relation to review proceedings and recantation of a witness, as of 11 September 2015.⁷

II. SUBMISSION

7. Relating to the request for review, pursuant to Rule 146 of the Rules,⁸ it is appropriate to seise the President of the Mechanism to assign a Bench to decide on the request.

8. In respect of requests for assistance presented to this end, the Appeals Chamber has already recalled that “[i]t is only in exceptional circumstances that a convicted person will be granted legal assistance by the [Mechanism] after a final judgement has been rendered against him. At the preliminary examination stage of a request for review, such assistance will be granted only if the Appeals Chamber deems it ‘necessary to ensure fairness of the proceedings’. This necessity is, to a great extent, assessed in light of the grounds for review put forward by the applicant.”⁹

A. Grounds in support of the request to initiate review proceedings

9. Mr Ntakirutimana was convicted at trial on 21 February 2003.¹⁰ This Judgement was for the most part upheld by the Judgement of the Appeals Chamber of 13 December 2004.¹¹

10. Since then, an *Amicus Curiae* was appointed by the Single Judge to conduct an in-depth investigation into the allegations of false testimony given by Witness HH.

11. In his Final Report, the *Amicus Curiae* found that Witness HH had specifically recanted his testimony before the ICTR against Mr Ntakirutimana on several occasions in a number of proceedings before different domestic courts.¹² It has therefore been

⁷ Case no. MICT-12-17, *The Prosecutor v. Ntakirutimana*, “Registrar’s Notice of Recognition of *pro bono* Counsel”, 31 October 2017.

⁸ See also Case no. MICT-13-52-R.1, *The Prosecutor v. Lukić*, “Order Assigning Judges to a Case before the Appeals Chamber”, 24 February 2014.

⁹ Case no. MICT-12-24-R, *The Prosecutor v. François Karera*, 4 December 2012, para. 10 and references cited therein.

¹⁰ Case nos ICTR-96-10-T and ICTR-96-17-T, *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Judgement and Sentence, 21 February 2003 (“Judgement”). The specific charges can be found in Indictments no. ICTR-96-10-1, *The Prosecutor v. Elizaphan Ntakirutimana, Gérard Ntakirutimana, and Charles Sikubwabo (Mugonero)* and no. ICTR-96-17-1, *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana* (Bisesero).

¹¹ Case nos ICTR-96-10-A and ICTR-96-17-A, *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Judgement on Appeal, 13 December 2004 (“Appeals Judgement”).

¹² Final Report, paras 57 to 92.

confirmed that the statements of Witness HH, cited in support of the Prosecution in this case, were lies and that sufficient grounds existed to initiate proceedings against this witness for false testimony.¹³

12. In the decision on the allegations of false testimony, the Single Judge wanted to place this new fact in context recalling that, “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”.¹⁴ The Single Judge revisited in detail the findings of the Trial Chamber and then of the Appeals Chamber in this respect, precisely identifying the paragraphs in the Judgement and the Appeals Judgement where the findings relied on the testimony of Witness HH, in the following terms:

“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.¹⁵ 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 in the attack on Gitwe Hill near Gitwe Primary School when entering a conviction on appeal for extermination as a crime against humanity.¹⁶ 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 Bisesero in assessing his intent with respect to genocide.¹⁷ 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.¹⁸ Witness HH’s testimony of seeing Ntakirutimana with Mathias Ngirinshuti or seeing his participation in an attack at Mubuga Primary School was not relied upon by the Trial Chamber.”¹⁹

13. Acknowledging the conclusions of the Final Report, and in light of it, the Single Judge of the Mechanism nevertheless considered that proceedings for false testimony pursuant to Rule 108 (C) would not be the most effective and efficient way

¹³ Final report, paras 140 to 143.

¹⁴ Decision of 20 November 2017, para. 15.

¹⁵ See Trial Judgement, paras 199, 364, 366, 368, 370 to 373, 384, 552 to 559, 791 to 794, 795, 806, 810, 832 (iii), 878 (i) and (iv).

¹⁶ See Appeal Judgement, paras 222, 223, 227 to 232, 235, 257 to 262, 286, 292, 505 to 507, 535 to 537, 556 (i), 557 (i), 558 to 560 and p. 195.

¹⁷ See Trial Judgement, paras 554, 555, 557 to 559, 664 to 668, 702 to 704, 793, 832 (iii), 832 (viii), 832 (x), 834 to 836, 845 to 849, 878 (i) and 878 (iv).

¹⁸ See Appeals Judgement, paras 82 to 85, 92 to 99, 292, 504, 555 (iv) and 555 (vii).

¹⁹ See Trial Judgement, paras 114, 117, 437, 438, 618 to 620 and 819 to 822.

to ensure compliance with obligations flowing from the Statute or the Rules in the specific circumstances of this case.²⁰ The same Single Judge also emphasised that this 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 already in his possession”.²¹ Finally, the Single Judge ordered that a confidential version of the Final Report and its annexes be transmitted to Gérard Ntakirutimana and the Prosecution,²² thus taking the necessary measures to allow Mr Ntakirutimana access to all useful information in order to seek a review of his convictions in light of this witness’s retraction.

14. In view of the above, there is no doubt that, since the Judgement on Appeal convicting *in fine* Mr Ntakirutimana, new facts have been discovered of which Mr Ntakirutimana was not aware in the course of the proceedings before the ICTR Trial Chamber and Appeals Chamber. This discovery could not have been made despite all due diligence. Mr Ntakirutimana could not have been aware, in the course of the initial proceedings, of HH’s admission to having testified falsely against Mr Ntakirutimana. Furthermore, the fact that Mr Ntakirutimana had not discovered it cannot be ascribed to a lack of diligence on his part. Therefore, it seems that the requirements under Article 24 of the Statute and Rule 146 of the Rules of the Mechanism for filing a request for review have been met in this case.

15. As emphasised by the Single Judge, the testimony of HH was a determining factor in the findings reached by the judges in the first instance and on appeal, and he specifically mentioned that “[w]hile Ntakirutimana’s convictions are also supported by evidence other than that of Witness HH, his false testimony is of significant gravity and interfered with the administration of justice.”²³ The Single Judge also emphasised that “[t]his is particularly true in the Ntakirutimana case, and the prejudicial impact of Witness HH’s false testimony is demonstrated by the aspects of the evidence he has recanted were relied upon by either the Trial Chamber and/or the Appeals Chamber of the ICTR in convicting Ntakirutimana.”²⁴

16. Nonetheless, it is up to the Appeals Chamber to rule on this, relying on the arguments that were presented to it as part of the request for review proceedings, but not at this stage of the process.

²⁰ Decision of 20 November 2017, para. 23.

²¹ Decision of 20 November 2017, para. 2/21/.

²² *Ibid.*

²³ Decision of 20 November 2017, para. 15.

²⁴ *Ibid.*

17. Nevertheless, in a decision issued on 13 July 2015, wherein an applicant maintained that new information involving the credibility of a Prosecution witness had been discovered, some of which followed the testimony of this witness in another case in domestic proceedings, the Appeals Chamber of the Mechanism deemed that the request for review may have a chance of success and consequently agreed to assign counsel to the applicant.²⁵

18. In any event, it would be in the interest of justice if Mr Ntakirutimana was able to submit a request for review of his conviction.

B. Assignment of Counsel is needed to guarantee fair proceedings

19. In the proceedings relating to the *Amicus Curiae*, the defence of Mr Ntakirutimana's interests could have been guaranteed *pro bono* by his Counsel, in addition to the main activities of his office, through the assistance he could have obtained.

20. The preparation and potential start of review proceedings cannot, however, follow the same system.

21. First, Counsel must be able to meet in person with Mr Ntakirutimana about his case-file, which in this case is not physically possible as the former is in France and the latter is in Africa. Consequently, Mr Ntakirutimana's Counsel and, if necessary, any assisting staff, must travel to the place where he is currently located; these costs should not be borne by him.

22. Second, Counsel did not assist Mr Ntakirutimana during the trial, did not attend hearings and, in these circumstances, must review the case-file in order to familiarise himself fully and be able to discharge meaningfully his duty as Counsel and to file a request for review that would be properly argued and could assist the Chamber.

23. Third, as Counsel for Mr Ntakirutimana did not assist him at trial, he is not familiar with the locations where the crimes with which the defendant has been charged were committed. He, and any staff assisting him, may need to visit these locations if he finds that this may be of interest at this stage.

24. Four, depending on what may be needed, and the protective measures regime for Prosecution Witness HH, Counsel for Mr Ntakirutimana may need to interview him or have him interviewed, as part of the preparation of the request for review. He would then need to travel to wherever the witness is located, together with one or more

²⁵ *The Prosecutor v. Eliézer Niyitegeka*, "Decision on Niyitegeka's Request for Review and Assignment of Counsel", MICT, Appeals Chamber, 13 July 2015, paras 12-13.

assisting staff, should he deem this necessary.

25. Finally, Counsel must be assisted in his activities and legal research as well as in any investigations that will need to be undertaken in order to be able to prepare the request for review. This will involve, in particular, addressing any objections by the Prosecutor to his request, in strict compliance with the principle of equality of arms.

26. All of the aforementioned activities cannot be executed through *pro bono* assistance. Considering that Mr Ntakirutimana is indigent, he is not in a position to pay for these services.

27. Pursuant to Rule 43 (A) of the Rules of Procedure and Evidence, procedural fairness requires that counsel is assigned, under the auspices of the Mechanism's legal aid, to guarantee that the interests of Mr Ntakirutimana are effectively represented and defended during the review proceedings.

FOR THE FOREGOING REASONS, may it please the President to:

28. FIND the present motion admissible;

29. ORDER the Registrar, pursuant to Rule 43 (A) of the Rules of Procedure and Evidence, to assign Attorney Vincent Courcelle-Labrousse and provide him with the necessary means to represent the interests of Mr Gérard Ntakirutimana in the proceedings relating to his request for review.

Done this 16 April 2018

/signed/

Vincent COURCELLE-LABROUSSE

Number of words /in original/: 2,657



**TRANSMISSION SHEET FOR FILING OF TRANSLATIONS
WITH THE ARUSHA BRANCH OF
INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS**

To	MICT Registry		
From	<input checked="" type="checkbox"/> ICTY CLSS	<input type="checkbox"/> ICTR LSS	
Original Submitting Party	<input type="checkbox"/> Chambers	<input checked="" type="checkbox"/> Defence	<input type="checkbox"/> Prosecution <input type="checkbox"/> Other
Case Name	NTAKIRUTIMANA	Case Number	MICT-12-17-R No. of Pages 7
Original Document No.	MICT-12-17-0100	Translation Reference No.	REG53087
Date of Original	16/04/2018	Original Language	<input type="checkbox"/> English <input checked="" type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Date Transmitted	12/06/2018	Language of Translation	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of original document	Requête aux fins d'une ordonnance de commission d'office d'un Conseil pour représenter les intérêts de M. Gérard Ntakirutimana dans le cadre de sa demande de révision		
Title of translation	Motion for Order to Assign Counsel to Represent Mr. Gérard Ntakirutimana in his Request for Review		
Classification Level	<input checked="" type="checkbox"/> Unclassified <input type="checkbox"/> Confidential <input type="checkbox"/> Strictly Confidential	<input type="checkbox"/> Ex Parte Defence excluded <input type="checkbox"/> Ex Parte Prosecution excluded <input type="checkbox"/> Ex Parte R86(H) Applicant excluded <input type="checkbox"/> Ex Parte Amicus Curiae excluded <input type="checkbox"/> Ex Parte other exclusion (specify) :	
Document type/ Type de document:	<input type="checkbox"/> Indictment <input type="checkbox"/> Warrant <input type="checkbox"/> Motion <input type="checkbox"/> Decision	<input type="checkbox"/> Order <input type="checkbox"/> Affidavit <input type="checkbox"/> Correspondence <input type="checkbox"/> Judgement	<input type="checkbox"/> Appeal Book <input type="checkbox"/> Submission from non-parties <input checked="" type="checkbox"/> Submission from parties <input type="checkbox"/> Book of Authorities <input type="checkbox"/> Notice of Appeal

Send completed transmission sheet to: JudicialFilingsArusha@un.org