

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-12-17-R

Date: 18 September 2024

Original: English

IN THE APPEALS CHAMBER

Before: Judge Graciela Gatti Santana, Presiding
Judge Jean-Claude Antonetti
Judge Burton Hall
Judge Aminatta Lois Runeni N’gum
Judge Seon Ki Park

Registrar: Mr. Abubacarr M. Tambadou

Order of: 18 September 2024

PROSECUTOR

v.

GÉRARD NTAKIRUTIMANA

PUBLIC

**ORDER ON SCHEDULING AND SCOPE OF
THE REVIEW HEARING**

The Office of the Prosecutor

Mr. Serge Brammertz
Ms. Thembile Segoete
Ms. Laurel Baig

Counsel for Mr. Gérard Ntakirutimana

Mr. Vincent Courcelle-Labrousse

THE APPEALS CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively);¹

RECALLING the judgement rendered by Trial Chamber I of the International Criminal Tribunal for Rwanda (“ICTR”) in *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10 and ICTR-96-17 (“*Ntakirutimana* case”) on 21 February 2003,² and the judgement rendered by the Appeals Chamber of the ICTR in the same case on 13 December 2004;³

NOTING that, on 13 June 2016, Judge Graciela Gatti Santana, acting as a Single Judge, ordered an investigation by an *amicus curiae* (“*Amicus Curiae*”) concerning allegations of false testimony against Witness HH in the *Ntakirutimana* case,⁴ and that, on 28 August 2017, the *Amicus Curiae* issued a report at the conclusion of his investigation;⁵

RECALLING that, on 21 May 2024, the Appeals Chamber, *inter alia*: (i) found that Witness HH’s purported recantations of his testimony in the *Ntakirutimana* case, following the rendering of the Appeal Judgement, constitute a new fact and granted, in part, Mr. Gérard Ntakirutimana (“*Ntakirutimana*”)’s the request for review⁶ with respect to Witness HH’s evidence as it pertained to the events at Gitwe Hill, near Gitwe Primary School; (ii) dismissed as a new fact Witness GG’s purported materially inconsistent evidence provided in domestic proceedings; (iii) dismissed as a new fact the purported collusion between Prosecution witnesses to falsely incriminate Ntakirutimana; and (iv) considered, Judge Burton Hall dissenting, that a review hearing (“*Review Hearing*”) will be held pursuant to Rule 147 of the Rules of Procedure and Evidence of the Mechanism (“*Rules*”);⁷

RECALLING that the Appeals Chamber ordered Ntakirutimana and the Office of the Prosecutor of the Mechanism (“*Prosecution*”) to each submit a list of evidence and witnesses – with brief descriptions of anticipated relevance and estimated time allocations – that the parties propose to

¹ Order Replacing a Judge, 5 April 2024, p. 2. *See also* Order Assigning a Request for Review to a Bench of the Appeals Chamber, 29 December 2023, p. 1.

² *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Judgement and Sentence, 21 February 2003 (filed on 24 February 2003) (“*Trial Judgement*”).

³ *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 (“*Appeal Judgement*”).

⁴ *Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-R108.1, Order Appointing an *Amicus Curiae* to Investigate False Testimony, 13 June 2016, p. 3.

⁵ *Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-R108.1, *Amicus Curiae*’s Final Report and Conclusions of the Investigation, 28 August 2017 (confidential and *ex parte*); *Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-R108.1, *Amicus Curiae*’s Corrigendum to Final Report and Conclusions of the Investigation, 23 October 2017 (confidential and *ex parte*) (collectively, “*Amicus Curiae* Report”). A confidential version of the *Amicus Curiae* Report was transmitted to parties on 14 December 2017 in accordance with a decision issued on 20 November 2017. *See Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-R108.1, Decision on Allegations of False Testimony, 20 November 2017 (“*Decision of 20 November 2017*”), para. 24.

⁶ *See* Application for Review, 14 December 2023 (originally filed in French, English translation filed on 5 September 2024) (confidential).

⁷ Decision on Request for Review, 21 May 2024 (“*Review Decision*”), pp. 5-8.

introduce at the Review Hearing, and further informed the parties that an order scheduling the Review Hearing and setting out its evidentiary scope would be issued in due course;⁸

NOTING that, on 10 June 2024, Ntakirutimana filed his list of evidence and witnesses, proposing to: (i) call Witness HH and three other witnesses (“Three Witnesses”), with an estimated length of two days for Witness HH and one day each for the Three Witnesses for their respective examinations-in-chief; and (ii) tender into evidence 47 documents related to Witness HH’s purported recantations, including Witness HH’s prior statements, decisions by domestic courts, as well as the *Amicus Curiae* Report and various statements annexed therein;⁹

NOTING that, on 18 June 2024, the Prosecution filed its list of evidence and witnesses, proposing to: (i) call a Prosecution investigator and the *Amicus Curiae* (“Prosecution Witnesses”), with an estimated length of five and three hours for their respective examinations-in-chief; and (ii) tender into evidence a declaration from the Prosecution investigator, as well as the *Amicus Curiae* Report;¹⁰

NOTING that, on 20 June 2024, Ntakirutimana filed supplementary information regarding the anticipated testimony of the Three Witnesses,¹¹ and on 1 July 2024, the Prosecution filed supplementary submissions with respect to the Prosecution Witnesses;¹²

NOTING that, on 5 July 2024, Ntakirutimana filed a motion requesting, *inter alia*, the Appeals Chamber to reconsider the Review Decision as it relates to the killing of Charles Ukobizaba, and to stay review proceedings until this motion had been adjudicated;¹³

RECALLING that, on 18 September 2024, the Appeals Chamber, by majority, *inter alia*, dismissed Ntakirutimana’s Motion for Reconsideration in its entirety;¹⁴

⁸ Review Decision, pp. 7, 8.

⁹ Mr Ntakirutimana’s Witness and Exhibit Lists for the Review, 10 June 2024 (originally filed in French; English translation filed on 24 June 2024) (public with confidential annexes) (“Ntakirutimana Submission”), para. 1, Annexes A and B. *See also* Decision on Gérard Ntakirutimana’s Urgent Request for Extension of Time to File List of Evidence and Witnesses, 3 June 2024, p. 2.

¹⁰ Prosecution Preliminary Exhibit and Witness Lists, 18 June 2024 (public with confidential annex) (“Prosecution Submission”), paras. 1, 2, Annex.

¹¹ Additional Information on Mr Ntakirutimana’s Witness and Exhibit List for the Review, 20 June 2024 (originally filed in French; English translation filed on 9 July 2024) (confidential) (“Ntakirutimana Supplementary Submission”), paras. 7-9. *See also* Decision on Prosecution Motion for Disclosure and Suspension of Deadline, 14 June 2024 (“Decision of 14 June 2024”), pp. 2, 3; Prosecution Urgent Motion for Disclosure and Suspension of Deadline, 13 June 2024 (confidential).

¹² Supplementary Submission on Preliminary Witness List, 1 July 2024 (confidential) (“Prosecution Supplementary Submission”), paras. 1, 3-9. *See also* Order for Supplementary Submission, 26 June 2024 (“Order of 26 June 2024”), p. 2.

¹³ *Requête en reconsidération de la “Decision on Request for Review” du 21 mai 2024*, 5 July 2024 (confidential) (“Motion for Reconsideration”), paras. 1, 7, 18, 58.

¹⁴ Decision on Gérard Ntakirutimana’s Motion for Reconsideration of “Decision on Request for Review”, 18 September 2024 (“Reconsideration Decision”), pp. 5-8.

NOTING that, in view of their partial dissents to the Reconsideration Decision, Judge Antonetti and Judge Park would have, *inter alia*, called Witness GG to the Review Hearing in relation to the killing of Charles Ukobizaba;¹⁵

CONSIDERING that Ntakirutimana bears the burden of proving the new fact;¹⁶

CONSIDERING that, given the majority position in the Reconsideration Decision,¹⁷ the main focus of the Review Hearing is to test the veracity of the new fact, namely, the credibility and reliability of Witness HH's purported recantations of his testimony in the *Ntakirutimana* case,¹⁸ which for the purposes of the present review proceedings underpin Ntakirutimana's convictions related to the events at Gitwe Hill, near Gitwe Primary School;¹⁹

FINDING that it is therefore appropriate to hear Witness HH at the Review Hearing;

CONSIDERING, however, that the examination-in-chief of Witness HH should focus on clarifying or highlighting particular aspects of the witness's evidence relating to the scope of the granted review,²⁰ avoiding unnecessary duplications of the evidentiary record, and that therefore Ntakirutimana's estimation of two days for the examination-in-chief appears excessive;²¹

NOTING Ntakirutimana's submission that the Three Witnesses' anticipated testimony relates to events at Gitwe Hill as well as allegations of collusion to provide false testimony against Ntakirutimana, thereby corroborating Witness HH's purported recantations;²²

CONSIDERING that the Review Hearing is limited in scope and not intended to be a trial *de novo* regarding events at Gitwe Hill with additional evidence;²³

¹⁵ See Reconsideration Decision, *Opinion partiellement dissidente du Juge Jean-Claude Antonetti* ("Judge Antonetti Dissent"), Partially Dissenting Opinion of Judge Seon Ki Park.

¹⁶ See *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Order Regarding the Scope of the Review Hearing, 30 July 2019 (confidential) ("*Ngirabatware* Order of 30 July 2019"), p. 3, n. 14; *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Further Order Scheduling Review Hearing, 22 July 2019, p. 1, n. 7.

¹⁷ See Reconsideration Decision, pp. 6-8.

¹⁸ See Order of 26 June 2024, p. 2, n. 12 and reference cited therein. See also *Ngirabatware* Order of 30 July 2019, p. 2.

¹⁹ See Review Decision, pp. 6, 7.

²⁰ See Review Decision, pp. 6, 7.

²¹ See *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-R, Order Regarding Lists of Witnesses, 13 August 2018 (confidential) ("*Ngirabatware* Order of 13 August 2018"), p. 1. See also *Ngirabatware* Order of 13 August 2018, pp. 2, 3 (wherein the Appeals Chamber granted Mr. Augustin Ngirabatware ("*Ngirabatware*") a total of four hours for examination-in-chief and any re-examination of four witnesses); *Ngirabatware* Order of 30 July 2019, pp. 2, 3 (wherein the Appeals Chamber granted *Ngirabatware* five hours to present its case in chief in relation to five or six witnesses).

²² See Ntakirutimana Supplementary Submission, paras. 7-9. See also Ntakirutimana Submission, Annex A.

²³ See Decision of 14 June 2024, p. 2.

CONSIDERING FURTHER that review proceedings are not an opportunity to re-litigate unsuccessful arguments on appeal,²⁴ and that the Appeals Chamber has explicitly denied review of the Appeal Judgement on the basis of new information alleging a campaign of collusion as the matter was extensively litigated at trial and on appeal and ultimately dismissed in the Trial and Appeal Judgements;²⁵

FINDING, therefore, that the proposed evidence of the Three Witnesses will not assist the Appeals Chamber, and that it is consequently not necessary to hear their testimony at the Review Hearing, which, in light of the majority position in the Reconsideration Decision,²⁶ is fundamentally focused on assessing the credibility of Witness HH's testimony concerning his purported recantations;

NOTING the Prosecution's submission, *inter alia*, that the purpose of calling: (i) the Prosecution investigator is to describe steps taken to refute and corroborate the alleged new fact, but without access to all of Witness HH's prior statements or further information on the Three Witnesses, it cannot provide more details on this witness's expected testimony;²⁷ and (ii) the *Amicus Curiae* is to present information concerning the nature, methodology, and investigative steps taken by the *Amicus Curiae*, as well as to show the limitations of the *Amicus Curiae* Report, which was the basis of decisions issued by the Single Judge and the Appeals Chamber;²⁸

CONSIDERING the Appeals Chamber's foregoing determination that, save for Witness HH, it will not hear the testimony of the Three Witnesses proposed by Ntakirutimana at the Review Hearing;

CONSIDERING FURTHER that the alleged limitations of the *Amicus Curiae* Report, as well as details of the Prosecution's investigations into Witness HH's prior statements or the evidence of the Three Witnesses, are collateral to the central issue before the Appeals Chamber – the reliability and credibility of Witness HH's testimony concerning his purported recantations, which will be directly tested through examination-in-chief and cross-examination at the Review Hearing;

²⁴ See, e.g., Order of 26 June 2024, p. 2, n. 11 and reference cited therein; Review Decision, p. 7, n. 41 and reference cited therein.

²⁵ Review Decision, pp. 6, 7. While supporting the position to reject review on the basis of collusion in the Review Decision, Judge Antonetti, in his partially dissenting opinion to the Reconsideration Decision, has indicated that Witness HH's recantation merits examination of the alleged collusion of Prosecution witnesses in the *Ntakirutimana* case. See Judge Antonetti Partial Dissent, para. 6.

²⁶ See Reconsideration Decision, pp. 6-8.

²⁷ Prosecution Supplementary Submission, paras. 3-8. See also Prosecution Supplementary Submission, para. 2; Prosecution Submission, Annex.

²⁸ Prosecution Supplementary Submission, para. 9, n. 13, referring to Decision on a Request for Assignment of Counsel, 4 July 2018, Decision of 20 November 2017. See also Prosecution Submission, Annex.

FINDING, therefore, that, in view of the scope of the present review proceedings, the proposed evidence of the Prosecution Witnesses will not assist the Appeals Chamber, and that it is consequently not necessary to hear their testimony at the Review Hearing;

FOR THE FOREGOING REASONS,

PURSUANT TO Article 24 of the Statute of the Mechanism, Rules 55, 131, 147 of the Rules, and the majority position in the Reconsideration Decision;

HEREBY ORDERS that the Review Hearing shall be held from Monday, 18 November 2024, until Friday, 22 November 2024, at the Mechanism’s branch in Arusha, Tanzania;

ALLOWS Ntakirutimana to call Witness HH to testify at the Review Hearing;

ALLOWS Ntakirutimana two hours for the examination-in-chief, the Prosecution the equivalent amount of time for its cross-examination, and Ntakirutimana an appropriate amount of time to conduct re-examination;

DECIDES that a party may be allotted more time for examination-in-chief, cross-examination, or re-examination upon the showing of good cause at the Review Hearing;

ORDERS each party to upload in e-court all documents that it intends to tender at the Review Hearing by Wednesday, 2 October 2024;

ORDERS each party to provide to the Appeals Chamber, the Registry of the Mechanism (“Registrar”), and the opposing party by Monday, 11 November 2024, a list of documents or materials that it intends to use during the examination-in-chief or cross-examination of Witness HH;

INFORMS the parties that the timetable for the Appeals Chamber to sit on a given day during the Review Hearing shall be as follows, subject to adjustments as appropriate:

9:30 – 11:00 hearing (90 minutes)

11:00 – 11:30 break (30 minutes)

11:30 – 13:00 hearing (90 minutes)

13:00 – 14:30 break (90 minutes)

14:30 – 16:00 hearing (90 minutes)

INFORMS the parties that, at the conclusion of the presentation of evidence, each party shall have 45 minutes to present final submissions with Ntakirutimana having a 15-minute reply; and

REQUESTS the Registrar to make the necessary arrangements for the Review Hearing as scheduled.

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

Done this 18th day of September 2024,
At The Hague,
The Netherlands



Judge Graciela Gatti Santana
Presiding Judge

[Seal of the Mechanism]



I - FILING INFORMATION / INFORMATIONS GÉNÉRALES

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Case Name/ Affaire :	Prosecutor v. Gérard Ntakirutimana		Case Number/ Affaire n° :	MICT-12-17-R		
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Classification Level/ Catégories de classification :	<input checked="" type="checkbox"/> Public/ Document public	<input type="checkbox"/> Confidential/ Confidentiel	<input type="checkbox"/> Ex Parte Defence excluded/ Défense exclue	<input type="checkbox"/> Ex Parte Prosecution excluded/ Bureau du Procureur exclu	<input type="checkbox"/> Ex Parte Rule 86 applicant excluded/ Article 86 requérant exclu	<input type="checkbox"/> Ex Parte Amicus Curiae excluded/ Amicus curiae exclu
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