

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-12-17-R

Date: 18 September 2024

Original: English

THE PRESIDENT OF THE MECHANISM

Before: Judge Graciela Gatti Santana, President

Registrar: Mr. Abubacarr M. Tambaou

Decision of: 18 September 2024

PROSECUTOR

v.

GÉRARD NTAKIRUTIMANA

PUBLIC

**DECISION ON PROSECUTION MOTION FOR REVIEW OF
REGISTRAR'S DECISION CONCERNING ASSIGNMENT OF A
LEGAL CONSULTANT**

Office of the Prosecutor:

Mr. Serge Brammertz
Ms. Laurel Baig

Counsel for Mr. Gérard Ntakirutimana:

Mr. Vincent Courcelle-Labrousse

I, **GRACIELA GATTI SANTANA**, President of the International Residual Mechanism for Criminal Tribunals (“President” and “Mechanism”, respectively);

RECALLING that, on 21 May 2024, the Appeals Chamber of the Mechanism granted in part Mr. Gérard Ntakirutimana’s request for review of his final judgment issued by the International Criminal Tribunal for Rwanda in relation to Witness HH’s purported recantation of his testimony concerning the events at Gitwe Hill, near Gitwe Primary School;¹

OBSERVING that certain information submitted in connection with Mr. Ntakirutimana’s request for review – and specifically in relation to Witness HH’s purported recantation – derives from a statement provided by Mr. Philippe Larochelle, a former Counsel for Mr. Ntakirutimana who is currently assigned as a legal consultant on Mr. Ntakirutimana’s Defence team (“the Defence”) in connection with the review proceedings;²

NOTING that, on 24 July 2024, the Officer-in-Charge of the Registry at the Arusha branch, on behalf of the Registrar of the Mechanism (“Registrar”), denied the request of the Office of the Prosecutor of the Mechanism (“Prosecution”) to revoke the assignment of Mr. Larochelle as a legal consultant (“Impugned Decision”), stating that Mr. Vincent Courcelle-Labrousse is the only assigned Counsel in this matter and that, based on a *prima facie* assessment that relies *inter alia* on assurances provided by Messrs. Courcelle-Labrousse and Larochelle, no conflict of interest exists;³

BEING SEISED of the Motion, filed by the Prosecution on 8 August 2024, requesting that I quash the Impugned Decision and find that Mr. Larochelle is precluded from representing Mr. Ntakirutimana in any capacity in connection with his ongoing review proceedings;⁴

NOTING that the Prosecution argues that the Registrar: (i) erred in his application of the *prima facie* assessment of the conflict of interest matter;⁵ (ii) applied the wrong legal standard, contending that Article 21 of the “Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism and Other Defence Team Members”⁶ (“Code of Conduct”) prohibits representation in a matter in which Counsel is likely to be a necessary witness;⁷ (iii) failed to consider information that Mr. Larochelle’s evidence already forms part of the record in the review proceedings, which increases

¹ Decision on Request for Review, 21 May 2024, pp. 6-7. See *Prosecutor v. Elizaphan Ntakirutimana & Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004.

² See Prosecution Motion for Review of Registrar’s Decision, 8 August 2024 (confidential) (“Motion”), paras. 10-11, Annex 1, para. 1, Annex 2, paras. 2, 4.

³ Motion, Annex 1.

⁴ Motion, paras. 1, 3-4, 16.

⁵ Motion, paras. 3, 14.

⁶ MICT/6/Rev.1, 14 May 2021.

⁷ Motion, paras. 5-9.

the likelihood of him becoming a witness;⁸ and (iv) by refusing to revoke the assignment of “a lawyer who has already given factual evidence in relation to the issues in this case”, “who is likely to be called to testify”, and “who previously resigned from the case in the face of similar conflict allegations”, reached an unreasonable conclusion that jeopardises the integrity and efficiency of the review proceedings and could prejudice the administration of justice;⁹

NOTING the Registrar’s submission, filed on 22 August 2024, arguing that: (i) a matter which potentially affects the integrity of the review proceedings should be decided by the adjudicating body seised of the matter, which, in this case, is the Appeals Chamber; and (ii) alternatively, the Impugned Decision complied with legal requirements, was procedurally fair, considered only relevant material, and was reasonable, highlighting that Mr. Larochelle is not to be regarded as “Counsel” under the Code of Conduct if assigned as a legal consultant;¹⁰

NOTING the request of the Defence for leave to respond and consolidated response to the Motion and the Registrar’s Submission, filed on 26 August 2024, arguing that: (i) the Prosecution fails to meet its burden of proof for judicial review of an administrative decision; and (ii) Mr. Larochelle is not a Counsel and does not represent Mr. Ntakirutimana before the Mechanism, thus removing the basis of the Motion;¹¹

NOTING the Prosecution’s reply to the Registrar’s Submission, filed on 26 August 2024, submitting that the Registrar’s interpretation of the Code of Conduct is untenable as the Code of Conduct provides a functional definition of “Counsel” that applies to all Counsel and other Defence team members representing a client before the Mechanism, and that it only specifies responsibilities for “Lead Counsel” and “Co-Counsel”;¹²

CONSIDERING that, in the absence of any objection from the Prosecution and the fact that the Motion seeks to challenge the composition of the Defence, it is in the interests of justice to consider the Defence Response and to recognise it as validly filed;

⁸ Motion, paras. 10-12.

⁹ Motion, paras. 13-15.

¹⁰ Registrar’s Submission on the “Prosecution Motion for Review of Registrar’s Decision”, 22 August 2024 (confidential) (“Registrar’s Submission”), paras. 32-50.

¹¹ Defence Request for Leave to Respond and Consolidated Response to the Prosecution Motion for Review and the Registrar’s Submission, 26 August 2024 (confidential) (“Defence Response”), paras. 3-25.

¹² Prosecution Reply to Registrar’s Submission on the “Prosecution Motion for Review of Registrar’s Decision”, 26 August 2024 (confidential), paras. 1-5.

RECALLING that it is well-established that an administrative decision of the Registrar is subject to review by the President for procedural or substantive unfairness;¹³

RECALLING that the President may quash an administrative decision if the Registrar: (i) failed to comply with legal requirements; (ii) failed to observe any basic rules of natural justice or to act with procedural fairness towards the person affected by the decision; (iii) took into account irrelevant material or failed to take into account relevant material; or (iv) reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached (the unreasonableness test);¹⁴

RECALLING that unless unreasonableness has been established, there can be no interference with the margin of appreciation of the facts or merits of that case to which the maker of such an administrative decision is entitled, and that the party challenging the administrative decision bears the burden of demonstrating that an error of the nature enumerated above has occurred and that this error significantly affected the administrative decision to his or her detriment;¹⁵

OBSERVING, at the outset, that a motion for review of an administrative decision of the Registrar, as opposed to one challenging the fairness of proceedings, is properly filed before the President;¹⁶

CONSIDERING that the term “Counsel”, as defined in the Code of Conduct¹⁷ and when interpreted in accordance with its ordinary meaning and in light of the object and purpose of the Code of Conduct, is intended as a general reference encompassing “Lead Counsel”¹⁸ and “Co-Counsel”,¹⁹ but not other members of the “Defence Team”;²⁰

¹³ *In the Matter of François-Xavier Nzuwonemeye et al.*, Case No. MICT-22-124, Decision on Requests for Review of an Administrative Decision, 30 August 2024 (public redacted) (“*Nzuwonemeye et al.* Decision”), p. 5; *In the Matter of Rasmus Soelberg*, Case No. MICT-24-132-Misc.1, Decision on Motion for Review of an Administrative Decision Concerning Admission to the List of Defence Counsel, 12 July 2024 (public redacted) (“*Soelberg* Decision”), p. 2; *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29-A, Decision on Motion to Quash Decision of Suspension and to Re-Instate Defence Team Legal Assistant, 19 March 2013 (“*Ngirabatware* Decision”), paras. 6-7.

¹⁴ *Nzuwonemeye et al.* Decision, p. 5; *Soelberg* Decision, p. 2; *Ngirabatware* Decision, para. 8.

¹⁵ *Nzuwonemeye et al.* Decision, p. 5; *Soelberg* Decision, p. 2; *Ngirabatware* Decision, para. 8.

¹⁶ *See generally* Practice Direction on Formal Requirements for Requests for Review of Administrative Decisions (MICT/9/Rev.1), 20 February 2019.

¹⁷ Code of Conduct, Part I (p. 3) (“A legal professional in communication with a prospective Client or engaged to represent a Client and who is or was assigned, appointed or recognised by the Registrar”).

¹⁸ Code of Conduct, Part I (p. 4) (“A Counsel engaged by a Client and assigned by the Registrar pursuant to Article 16(B) of the Directive, or, in case of appointment or recognition by the Registrar, a person so designated by the Registrar following instruction from the Client”).

¹⁹ Code of Conduct, Part I (p. 3) (“A second counsel, engaged by Lead Counsel, and assigned by the Registrar pursuant to Article 16(C) of the Directive, or otherwise appointed or recognised by the Registrar to assist in the defence of a Client”).

²⁰ Code of Conduct, Part I (p. 3) (“Lead Counsel, Co-Counsel and other persons who perform services for Counsel for the purpose of representing a Client before the Mechanism, or in the case of a self-represented accused, their recognised legal associates and other persons who assist a self-represented accused in their defence”). The distinction between

CONSIDERING that Mr. Courcelle-Labrousse is the only “Counsel” assigned to represent Mr. Ntakirutimana in connection with the review proceedings and that Mr. Larochelle, who has been assigned as a legal consultant, is more appropriately considered a non-Counsel member of the “Defence Team” as defined in the Code of Conduct;

RECALLING that Article 10(B) of the Code of Conduct provides that “Counsel shall exercise all care to ensure that no conflict of interest arises”;

NOTING that the Registrar explained that the assignment of Defence support staff members, such as legal consultants, is customarily preceded by a *prima facie* assessment of the Registrar with regard to any conflict of interest and that a relevant consideration in this analysis is Counsel’s position thereon;²¹

CONSIDERING that, while the Code of Conduct is applicable to all Defence team members, those assisting Counsel (as is the case with Mr. Larochelle) are not representing a client as such;

CONSIDERING that, in this context, the Prosecution has failed to demonstrate that the Registrar applied the incorrect legal standard by not revoking the assignment of Mr. Larochelle as a legal consultant to assist Mr. Courcelle-Labrousse following a *prima facie* assessment with regard to any conflict of interest;

CONSIDERING that the Prosecution has also failed to demonstrate: (i) that the relevant prohibitions under Article 21 of the Code of Conduct would apply to Mr. Larochelle, as a legal consultant; and, therefore, (ii) that the Registrar committed any legal error in his consideration as to whether Mr. Larochelle may be a necessary witness in the anticipated review hearing;²²

CONSIDERING that, in view of the above, it is unnecessary to consider the Prosecution’s contentions that the Registrar failed to consider relevant information or that his decision was unreasonable as these arguments are predicated on the submission that he applied the incorrect legal standard;

“Counsel” and “Legal Consultants” has further been considered in various cases, where Chambers have exceptionally granted legal consultants representational functions, usually under the supervision of Counsel. *See Prosecutor v. Jovica Stanišić & Franko Simatović*, Case No. MICT-15-96-A, Transcript of 31 May 2023, p. 2; *Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Decision on a Defence Request for an Extension of Right of Audience to a Legal Consultant, 3 June 2021, p. 4; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Judgment, 22 November 2017, para. 5228 and references cited therein; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-A, Transcript of 20 March 2017, p. 116; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Transcript of 13 May 2013, pp. 53-54.

²¹ Registrar’s Submission, paras. 40-41.

²² The Prosecution cites no cases that establish the existence of a conflict when there is a likelihood that a legal consultant on a Defence team – who is not a Counsel – would be called to testify as a witness. *See* Motion, paras. 1, 7, 15 and references cited therein.

FINDING that the Motion fails to demonstrate that the Impugned Decision should be quashed;

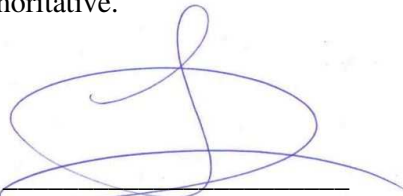
FOR THE FOREGOING REASONS,

GRANT the Defence leave to file the Defence Response and **FIND** it validly filed; and

DENY the Motion.

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

Done this 18th day of September 2024,
At Arusha,
Tanzania.



Judge Graciela Gatti Santana
President

[Seal of the Mechanism]



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Case Name/ Affaire :	Prosecutor v. Gérard Ntakirutimana		Case Number/ Affaire n° : MICT-12-17-R			
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