UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-18-116-AR90.1
Date: 15 May 2025
Original: English

IN THE APPEALS CHAMBER

Before: **Judge Graciela Gatti Santana, Presiding**
Judge Prisca Matimba Nyambe
Judge Claudia Hoefer

Registrar: **Mr. Abubacarr M. Tambadou**

Decision of: **15 May 2025**

PROSECUTOR

v.

ANSELME NZABONIMPA
JEAN DE DIEU NDAGIJIMANA
MARIE ROSE FATUMA
DICK PRUDENCE MUNYESHULI
AUGUSTIN NGIRABATWARE

PUBLIC

DECISION ON APPEAL OF DECISION ON ALLEGATIONS OF CONTEMPT AND ON REQUESTS TO APPEAR AS *AMICI CURIAE*

***Amicus Curiae*:**
Mr. Kenneth Scott

Mr. Peter Robinson

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

NOTING that, on 25 February 2025, the Single Judge seised of the case of *Prosecutor v. Anselme Nzabonimpa et al.*, Case No. MICT-18-116-R90.1, issued a decision initiating contempt proceedings against Mr. Peter Robinson ("Robinson"), pursuant to Article 1(4) of the Statute of the Mechanism ("Statute") and Rule 90(D)(ii) of the Rules of Procedure and Evidence of the Mechanism ("Rules"),[2] and further issued an order in lieu of indictment against Robinson;[3]

BEING SEISED OF a motion, filed by Robinson on 3 March 2025, seeking to appeal the Impugned Decision on the basis that the Single Judge abused his discretion in initiating contempt proceedings "by failing to consider the role and obligations of defence counsel to interpret court orders and to act in the best interest of their clients and other mitigating factors";[4]

NOTING Robinson's submissions that the Appeals Chamber should exercise jurisdiction over the Appeal because of its importance to the proper functioning of the Mechanism as it: (i) concerns victims, witnesses, and the role of defence counsel; (ii) impacts on Robinson's right to liberty and on his professional reputation; and (iii) if left unaddressed, the issue of the proper exercise of the Single Judge's discretion will be "irreparably unreviewable";[5]

NOTING that, on 11 March 2025, the *amicus curiae*, directed to prosecute the matter ("*Amicus Curiae*"),[6] filed a response opposing the Appeal;[7]

NOTING the *Amicus Curiae*'s submissions, *inter alia*, that: (i) Rule 90(J) of the Rules provides for a right to appeal from decisions disposing of a contempt case only, thus excluding a right to appeal against decisions initiating contempt proceedings;[8] and (ii) the Impugned Decision is not one which concerns the proper functioning of the Mechanism, rather the initiation of contempt proceedings, which is expressly governed by the Rules as not appealable;[9]

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[1] Order Assigning a Bench of the Appeals Chamber to Consider an Appeal, 10 March 2025, p. 1.
[2] *Prosecutor v. Anselme Nzabonimpa et al.*, Case No. MICT-18-116-R90.1, Decision on Allegations of Contempt, 25 February 2025 ("Impugned Decision"), para. 41.
[3] *In the Matter of Peter Robinson*, Case No. MICT-25-135-I, Decision Issuing Order in Lieu of Indictment, 25 February 2025 ("Decision Issuing Order in Lieu of Indictment").
[4] Appeal of Decision on Allegations of Contempt, 3 March 2025 ("Appeal"), paras. 1-3, 83, 84.
[5] *See* Appeal, paras. 74-81, 115.
[6] Impugned Decision, para. 41. *See also Prosecutor v. Anselme Nzabonimpa et al.*, Case No. MICT-18-116-R90.1, Order Directing the Registrar to Appoint an *Amicus Curiae* to Investigate Pursuant to Rule 90(C)(ii), 25 October 2021, p. 3; *Prosecutor v. Anselme Nzabonimpa et al.*, Case No. MICT-18-116-R90.1, Decision, 30 November 2021, p. 2.
[7] *See* Response to the "Appeal of Decision on Allegations of Contempt" Dated 3-March-2025, 11 March 2025 ("*Amicus Curiae* Response"), paras. 4, 12-56.
[8] *Amicus Curiae* Response, para. 5.
[9] *See Amicus Curiae* Response, paras. 8-10.

NOTING that, on 16 March 2025, Robinson filed a reply,[10] arguing, *inter alia*, that: (i) while Rule 90(J) provides for a right to appeal against decisions disposing of a contempt case, it does not preclude the Appeals Chamber from exercising jurisdiction over the Appeal on the basis that it concerns issues related to the proper functioning of the Mechanism;[11] and (ii) "subjecting a defence counsel to criminal prosecution for interpreting court orders is an issue related to the proper functioning of the Mechanism";[12]

BEING FURTHER SEISED OF three requests filed by the Association of Defence Counsel practising before the International Courts and Tribunals ("ADC-ICT"), the International Criminal Court Bar Association ("ICCBA"), and the European Criminal Bar Association ("ECBA") on 17 March 2025, 20 March 2025, and 22 April 2025, respectively, seeking leave to file submissions as *amici curiae* in support of Robinson's submissions that the Single Judge abused his discretion in the Impugned Decision and/or on the matters raised in the Appeal relating to the role and obligations of defence counsel ("Requests to Appear as *Amici Curiae*");[13]

NOTING the submissions, filed by the *Amicus Curiae* on 24 March 2025 and 28 April 2025 opposing the Requests to Appear as *Amici Curiae*;[14]

NOTING that Robinson did not file submissions in response to the Requests to Appear as *Amici Curiae*;

CONSIDERING that, pursuant to Rule 90(J) of the Rules, a decision disposing of a contempt case rendered by a Single Judge is subject to appeal as of right;[15]

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[10] Reply Brief: Appeal of Decision on Allegations of Contempt, 16 March 2025 ("Reply").
[11] Reply, paras. 2-7, *referring to In the Matter of François-Xavier Nzuwonemeye et al*., Case No. MICT-22-124, Decision on Motions to Appeal Decision of 8 March 2022, for Reconsideration of Decision of 15 March 2022, and to Appear as *Amicus Curiae*, 27 May 2022 ("*Nzuwonemeye et al*. Decision of 27 May 2022"), para. 14, *Prosecutor v. François-Xavier Nzuwonemeye*, Case No. MICT-13-43, Decision on the Appeal of the Single Judge's Decision of 22 October 2018, 17 April 2019 ("*Nzuwonemeye* Decision of 17 April 2019"), para. 7.
[12] Reply, paras. 8, 9. Robinson adds that the *Amicus Curiae* has not identified any prejudice to his case from the appellate review of the Impugned Decision. Reply, para. 9.
[13] ADC-ICT Request for Leave to Appear as *Amicus Curiae*, 17 March 2025 ("ADC-ICT Request"), paras. 1-3, 18; ICCBA Request for Leave to Appear as *Amicus Curiae*, 20 March 2025, paras. 1, 8, 9, 15; Request for Leave to Appear as *Amicus Curiae* on Behalf of the European Criminal Bar Association (ECBA), 22 April 2025, paras. 1, 2, 19.
[14] Response to the "ADC-ICT Request for Leave to Appear as *Amicus Curiae*" Dated 17-March-2025, 24 March 2025, paras. 5, 16, p. 6; Response to the "ICCBA Request for Leave to Appear as *Amicus Curiae*" Dated 20-March-2025, 24 March 2025, paras. 7, 15, p. 6; *Amicus Curiae*'s Response to "Request to Appear as *Amicus Curiae* on Behalf of the European Criminal Bar Association (ECBA)" Dated 17-April-2025, 28 April 2025, paras. 3, 7.
[15] *See also* Rule 77(J) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") ("[a]ny decision rendered by a Trial Chamber under this Rule shall be subject to appeal"); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008, 25 July 2008 (confidential; public redacted version filed on 2 September 2008) ("*Šešelj* Decision of 25 July 2008"), paras. 8, 12; *Prosecutor v. Vojislav Šešelj*, IT-03-67-AR77.1, Decision on Vojislav Šešelj's Appeal Against the Trial Chamber's Decision of 19 July 2007,

CONSIDERING that a decision initiating contempt proceedings does not dispose of a contempt case;[16]

CONSIDERING, therefore, that the Impugned Decision, which initiates proceedings against Robinson for contempt, is not subject to appeal as of right pursuant to Rule 90(J) of the Rules;[17]

CONSIDERING that in circumstances where the Statute or the Rules do not expressly provide for – and/or in the absence of any provision limiting[18] – the right of appeal, the Appeals Chamber has found that it may exceptionally assert jurisdiction over, *inter alia*, matters related to the proper functioning of the Mechanism;[19]

CONSIDERING that, in contrast, in relation to the present case, Rule 90(J) of the Rules and established jurisprudence expressly regulate that there is no appeal as of right against a decision initiating contempt proceedings;[20]

CONSIDERING that, in any event, Robinson has failed to demonstrate that the subject matter of the appeal – namely whether the Single Judge correctly exercised his discretion in initiating proceedings against Robinson for contempt, given Robinson's official position as defence counsel – raises issues related to the proper functioning of the Mechanism that warrant appellate review as of right;

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14 December 2007, p. 2 ("CONSIDERING […] that Rule 77(J) of the [ICTY] Rules shall be interpreted as allowing for appeals against decisions disposing of the contempt case only").

[16] The ICTR Appeals Chamber has held that the equivalent Rule 77(J) of the ICTR Rules of Procedure and Evidence does not apply to decisions allowing for the investigation of allegations of contempt or initiating contempt proceedings. *See Callixte Nzabonimana v. The Prosecutor*, Case No. ICTR-98-44D-AR77, Decision on Callixte Nzabonimana's Interlocutory Appeal of the Trial Chamber's Decision Dated 10 February 2011, 11 May 2011, para. 13 (wherein the ICTR Appeals Chamber held that the relevant rule provides for an appeal as of right against decisions disposing of a contempt case only, namely appeals against judgements on contempt, decisions denying requests for investigation into allegations of contempt, and decisions dismissing requests to initiate contempt proceedings, and that it does not provide for an appeal as of right against decisions allowing for the investigation of allegations of contempt). *See also Šešelj* Decision of 25 July 2008, paras. 8 ("Rule 77(J) of the [ICTY] Rules provides that "[a]ny decision rendered by a Trial Chamber" under Rule 77 is subject to appeal. The Appeals Chamber has interpreted this provision as allowing for appeals against decisions disposing of the contempt case only"), 12.

[17] *See also* Appeal, para. 73; Response, para. 5; Reply, para. 2.

[18] *Prosecutor v. Radovan Stanković*, Case No. MICT-13-51, Decision on Stanković's Appeal Against Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond, 21 May 2014, para. 9. *See also Prosecutor v. Ratko Mladić*, Case No. MICT-13-56-A, Decision on Prosecution Appeal of the Acting President's Decision of 13 September 2018, 4 December 2018, para. 12, n. 30.

[19] *See*, *e.g.*, *Nzuwonemeye et al.* Decision of 27 May 2022, para. 14; *Nzuwonemeye* Decision of 17 April 2019, para. 7; *Prosecutor v. Zdravko Tolimir*, Case Nos. MICT-15-95 & MICT-15-85, Decision on Request for Access to Confidential Material in *The Prosecutor v. Zdravko Tolimir* Case Presented by Vujadin Popović, 17 May 2017 (original in French, English translation filed on 4 July 2017) ("*Tolimir* Decision of 17 May 2017"), para. 12; *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Decision on Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness, 14 November 2016 ("*Kamuhanda* Decision of 14 November 2016"), para. 6. *See also Prosecutor* v. *Naser Orić,* Case No. MICT-14-79, Decision on an Application for Leave to Appeal the Single Judge's Decision of 10 December 2015, 17 February 2016, para. 6; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-R75, Decision on Motion for Clarification, 20 June 2008, para. 14.

[20] *See supra*. p. 3, n. 16.

CONSIDERING in this regard that, as reflected by Rule 90(I) of the Rules and respective jurisprudence, Rule 90 of the Rules also provides for contempt proceedings to be initiated against defence counsel and other members of the defence team;[21]

CONSIDERING FURTHER that, at trial, Robinson will have an opportunity to present arguments on the role and obligations of defence counsel to interpret court orders and on his own interpretation of such orders, and will have an opportunity to appeal in accordance with Rule 90(J) of the Rules;

FINDING, therefore, Judge Nyambe dissenting, that Robinson has failed to demonstrate a legal basis for the Appeals Chamber's exercise of jurisdiction over the Appeal, and that, consequently, the Appeals Chamber will not address the Appeal on the merits;

RECALLING that, pursuant to Rule 83 of the Rules, the Appeals Chamber has the discretion to grant leave to an organisation to appear before it and make submissions on specific issues, if it considers it desirable for the proper determination of the case;[22]

CONSIDERING the foregoing finding that the Appeals Chamber will not address the Appeal on the merits;

FINDING, therefore, Judge Nyambe dissenting, that granting leave to the ADC-ICT, the ICCBA, and the ECBA to appear as *Amici Curiae* would not assist the Appeals Chamber in adjudicating the Appeal;

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[21] Rule 90 (I) of the Rules (stating, in relevant parts: "If a Counsel is found guilty of contempt of the ICTY, the ICTR, or the Mechanism pursuant to this Rule, […]"). *See*, *e.g.*, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001, paras. 1, 2, 57 (wherein contempt proceedings were initiated against counsel for accused Tihomir Blaškić and the ICTY Appeals Chamber reversed his conviction); *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 27 February 2001 (original filed in French, English translation filed on 10 April 2001), pp. 2, 7 (wherein contempt proceedings were initiated against former counsel for accused Duško Tadić and the ICTY Appeals Chamber upheld his conviction); *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-R77, Judgement in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000, paras. 1-3, 6, 8, 101 (wherein the ICTY Trial Chamber acquitted Branislav Avramović, former defence counsel for accused Milan Simić, in contempt proceedings initiated against him). *See also Prosecutor v. Marie Rose Fatuma et al.*, Case No. MICT-18-116-A, Judgement, 29 June 2022, p. 46 (wherein contempt proceedings were initiated against Dick Prudence Munyeshuli, investigator on the defence team of Augustin Ngirabatware, and the Appeals Chamber of the Mechanism reversed his acquittal); *In the case Against Petar Jojić and Vjerica Radeta*, Case No. MICT-17-111-R90, Decision on Failure of the Republic of Serbia to Execute Arrest Warrants, 16 April 2021, pp. 1, 5, *referring*, *inter alia*, *to In the Case Against Petar Jojić, Jovo Ostojić, and Vjerica Radeta*, Case No. IT-03-67-R77.5, Revised Order in Lieu of Indictment, 17 August 2017, Annex C (wherein lawyers serving on the defence team of accused Vojislav Šešelj were charged with contempt of the ICTY); *Prosecutor v. Jelena Rašić*, Case No. IT-98-32/1-R77.2-A, Judgement, 16 November 2012, p. 26 (wherein contempt proceedings were initiated against a member of the defence team of accused Milan Lukić, and the Appeals Chamber of the ICTY affirmed her conviction and sentence); *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-A, Judgement, 15 March 2010, paras. 2, 3, 112 (wherein contempt proceedings were initiated against former defence investigator of accused Jean de Dieu Kamuhanda and the ICTR Appeals Chamber affirmed his conviction).

[22] *See Nzuwonemeye et al*. Decision of 27 May 2022, para. 43.

FOR THE FOREGOING REASONS,

HEREBY DISMISSES, Judge Nyambe dissenting, the Appeal; and

DISMISSES, Judge Nyambe dissenting, the Requests to Appear as *Amici Curiae*.

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

Judge Prisca Matimba Nyambe appends a dissenting opinion.

Done this 15th day of May 2025
At Arusha,
Tanzania

Judge Graciela Gatti Santana
Presiding Judge

[Seal of the Mechanism]

DISSENTING OPINION OF JUDGE PRISCA MATIMBA NYAMBE

1. Having considered the relevant submissions from the parties, the Rules, and the jurisprudence, I respectfully disagree with the Majority position ("Majority Decision"), which dismisses the Appeal of Mr. Robinson for lack of jurisdiction.[1]

2. I do not agree with the Majority that Rule 90(J) of the Rules provides only for a right to appeal decisions disposing of a contempt case and excluding a right to appeal against decisions initiating contempt proceedings.[2] The wording of Rule 90(J) of the Rules explicitly provides the Appeals Chamber with such authority as it stipulates that "[a]ny decision disposing of a contempt case rendered by a Single Judge under this Rule shall be subject to appeal as of right".

3. I concur with the Majority that the Appeals Chamber may exceptionally assert jurisdiction over, *inter alia*, matters related to the proper functioning of the Mechanism.[3] However, I respectfully disagree with the finding that Mr. Robinson has failed to demonstrate that the subject matter of the Appeal pertains to issues warranting appellate review as of right.[4] I am of the view that the Impugned Decision and the Appeal engage directly with matters related to the proper functioning of the Mechanism as they: (i) concern victims, witnesses, and the vital role that defence plays at the Mechanism and in the international justice system; and (ii) impact Mr. Robinson's right to liberty and his professional reputation.[5]

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[1] *See* Majority Decision, pp. 3-5.
[2] *See* Majority Decision, pp. 2, 3.
[3] *See* Majority Decision, p. 3, n. 19.
[4] *See* Majority Decision, p. 3.
[5] *See* Appeal, paras. 74-81. *See also Nzuwonemeye et al*. Decision of 27 May 2022, para. 14 ("The Appeals Chamber observes that neither the Statute nor the Rules provide for an appeal as of right against a decision of a single judge related to the proper interpretation of Article 28 of the Statute and Rule 8(A) of the Rules. Notwithstanding, the Appeals Chamber has previously found that these are issues that concern the proper functioning of the Mechanism and the Mechanism's duty to ensure the welfare of acquitted or released persons pending their relocation. The Appeals Chamber, therefore, may exercise jurisdiction over such issues and will consider the appeals of the Impugned Decision."); *Nzuwonemeye et al*. Decision of 17 April 2019, para. 7 ("The Appeals Chamber notes that Nzuwonemeye correctly observes that neither the Statute nor the Rules provide an appeal as of right from a decision related to the proper interpretation of Article 28 of the Statute. However, the Appeals Chamber observes that Nzuwonemeye argues that the Single Judge erred in his interpretation of Article 28 of the Statute, which as a consequence, has interfered in the Mechanism's ability to give full effect to his acquittal, and by consequence, his 'human right to family life'. Accordingly, the Appeals Chamber finds that the Appeal raises questions as to the scope of the Mechanism's power to order cooperation of States pursuant to Article 28 of the Statute and implicates a clearly defined right of Nzuwonemeye. These issues concern the proper functioning of the Mechanism, and as the Appeals Chamber may exercise jurisdiction over such issues, it will consider the Appeal."); *Kamuhanda* Decision of 14 November 2016, para. 6 ("The Appeals Chamber […] observes that Rule 86 of the Rules, which regulates measures for the protection of victims and witnesses, does not expressly provide for an appeal as of right or address the issue of whether a decision rendered by a Single Judge after the close of trial and appeal proceedings is subject to appeal. In interpreting an equivalent provision in the ICTR Rules, the ICTR Appeals Chamber has held that an applicant is entitled to appeal a decision on witness protective measures which was rendered after the close of the trial and appeal proceedings. Bearing this practice in mind and in light of the importance of the protection of victims and witnesses to the proper functioning of the Mechanism, the Appeals Chamber considers that it has jurisdiction over this appeal."); *Tolimir* Decision of 17 May 2017, para. 12 ("The Appeals Chamber notes that Rule 86 [of the Rules], which

4. In my view, based on existing jurisprudence, the Appeals Chamber may and should assert jurisdiction to adjudicate the merits of the Appeal. For example, in the *Nzuwonemeye et al*. case, the existence of Rule 134(A) of the Rules – which did not provide for an appeal – did not prevent the Appeals Chamber from exercising jurisdiction over the appeals in question on the grounds that they involved issues related to the proper functioning of the Mechanism, even though this rule, like Rule 90(J) of the Rules, only expressly authorized one party to appeal.[6] I agree with Mr. Robinson's position that the *Amicus Curiae*'s submission – that the Appeals Chamber should decline to hear the appeal – is without merit or legal basis.[7] Indeed, the existence of a rule that expressly allows for one party to appeal does not preclude the exercise of jurisdiction over another party's appeal if the issue involves the proper functioning of the Mechanism.[8]

5. In the *Kamuhanda* case, an appeal was authorized on the ground that the issue involved the proper functioning of the Mechanism even if the issue related to who could consent to variation of protective measures for a deceased witness, not the role of the victims and witnesses.[9] Accordingly, I agree with Mr. Robinson's position that the *Amicus Curiae*'s efforts to reframe the issues raised in the Appeal cannot avoid the fact that subjecting a defence counsel to criminal prosecution for interpreting court orders is squarely a matter related to the proper functioning of the Mechanism.[10] The *Amicus Curiae*'s submissions in response have also not identified any prejudice to his case if the Impugned Decision were subjected to appellate review.[11]

6. In view of the above, the Appeal should therefore be adjudicated on its merits and not dismissed for lack of jurisdiction. I share Mr. Robinson's concern that, if left unaddressed, the issue of the proper exercise of the Single Judge's discretion will be "irreparably unreviewable".[12] Given the importance and the far-reaching consequences of issues under consideration, I would be inclined to grant, pursuant to Rule 83 of the Rules, the Requests to Appear as *Amici Curiae*. Notably, I observe Mr. Robinson's submissions that the Impugned Decision "unfairly punishes [him] for [his] interpretation of the protective measures orders in this case and unfairly jeopardises the important role of defence counsel to achieve fair trials for those accused in international criminal courts and

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regulates measures for the protection of victims and witnesses, does not expressly provide for an appeal. In interpreting this provision in the Rules, the Appeals Chamber of the Mechanism held that an applicant is entitled to appeal a decision on witness protective measures which was rendered after the close of the trial and appeal proceedings, in light of the importance of the issue of the protection of witnesses and victims to the proper functioning of the Mechanism. The Appeals Chamber considers, consequently, that it has jurisdiction over this Appeal.").

[6] *See Nzuwonemeye et al*. Decision of 27 May 2022, para. 14; *Nzuwonemeye et al*. Decision of 17 April 2019, para. 7. *See also* Reply, para. 6.

[7] *See* Response, paras. 5-11; Reply, para. 7.

[8] *See* Reply, para. 7.

[9] *Kamuhanda* Decision of 14 November 2016, para. 6. *See also* Reply, para. 8.

[10] *See* Reply, para. 8.

[11] *See* Reply, para. 9.

[12] *See* Appeal, para. 8.

tribunals".[13] In my view, the submissions of the ADC-ICT, ICCBA, and the ECBA would have assisted the Appeals Chamber in adjudicating the merits of the Appeal.

7. Based on the foregoing, I would have addressed the merits of whether the Single Judge abused his discretion by failing to consider relevant material, and specifically the role and obligations of defence counsel to interpret court orders and to act in the best interests of their clients. I note Mr. Robinson's submissions that counsel in criminal cases are frequently called upon to interpret judicial orders, such as protective measures. Defence counsel should not have to interpret such orders at the risk of prosecution for contempt, especially when the alleged conduct may have been undertaken based on a good faith interpretation of relevant protective measures orders and in the best interests of clients.[14]

8. I find Mr. Robinson's submissions to be particularly persuasive on the fact that the Single Judge had before him a vast amount of information that Mr. Robinson should not be prosecuted given that his actions, as defence counsel for Mr. Augustin Ngirabatware, were pursuant to a good faith interpretation of the relevant protective measures orders and in the best interests of his client.[15] According to Mr. Robinson, after the *Amicus Curiae* submitted his report without giving Mr. Robinson the opportunity to be heard, Mr. Robinson filed a request with the Single Judge to make submissions relevant to the Judge's exercise of his discretion to initiate contempt proceedings. In that submission, Mr. Robinson claimed that he acted pursuant to a good faith interpretation of the protective measures.[16] Thereafter, when the Single Judge ordered the *Amicus Curiae* to interview Mr. Robinson, Mr. Robinson provided a 37-page single-spaced statement with 38 annexes ("Statement"), all of which were attached to the *Amicus Curiae*'s supplemental report to the Single Judge and are replete with evidence that Mr. Robinson acted in good faith.[17]

9. In this Statement, Mr. Robinson: (i) provided that counsel in criminal cases are frequently called upon to interpret judicial orders, such as protective measures, and should not have to interpret such orders at the peril of criminal prosecution; (ii) explained that he interpreted the relevant protective measures orders to mean that the defence was not to ask or instruct anyone to contact a Prosecution witness on their behalf; (iii) emphasized that he believed he had been faithful to, and in compliance with, the relevant protective measures orders for Prosecution witnesses, and had repeatedly instructed his client, investigators, resource person, and defence witnesses to obey the

[13] *See* Reply, para. 29.
[14] *See* Appeal, paras. 2, 60, 85-104; Reply, paras. 10-24.
[15] *See* Reply, paras. 10, 22.
[16] *See* Reply, para. 11 and references cited therein.
[17] *See* Reply, para. 12. *See also* Public Redacted Version of "Respondent's Brief" Dated 15 May 2024, 5 May 2025, Annex.

protective measures and not have direct or indirect contact with Prosecution witnesses; and (iv) noted that when he had confirmed that his client was involved in disobeying Mr. Robinson's instructions, Mr. Robinson resigned as counsel.[18]

10. The Single Judge equally had information that, during Mr. Robinson's two-day interview with the *Amicus Curiae*, he had interpreted the protective measures in good faith in his capacity as defence counsel. The transcript of this interview – filled with statements from Mr. Robinson to this effect including how he interpreted the protective measures orders in the context of individual actions subject to the alleged contempt – were provided to the Single Judge.[19] Mr. Robinson also contends that the Single Judge had information that Mr. Robinson's interpretation of the protective measures orders was not an "after-the-fact justification" but one that was maintained from the outset.[20] Specifically, in February 2016, when the Prosecution had objected to Mr. Robinson's contacts with Defence witnesses who were close to protected Prosecution witnesses, Mr. Robinson had explained to the Appeals Chamber that he "never asked or instructed anyone to solicit any person to contact prosecution witnesses".[21] The Appeals Chamber at the time found that the Prosecution had failed to demonstrate that Mr. Robinson violated the protective measures in relation to those witnesses.[22] I note Mr. Robinson's submissions that he made similar statements in June and September 2016, that were also before the Single Judge.[23]

11. Indeed, the Impugned Decision contains no discussion by the Single Judge of the issue of Mr. Robinson's role, or the role of defence counsel in general, when interpreting court orders. The text of the decision speaks for itself – the Single Judge never addressed this fundamental matter. In the case of *Halilović* case, the ICTY Appeals Chamber held that the failure to address relevant considerations, all of which were known to the ICTY Trial Chamber, constituted an abuse of discretion, and accordingly went on to substitute the exercise of its own discretion in that case.[24] Additionally, in the *Haradinaj et al*. case, the ICTY Appeals Chamber recognized that trial chambers are "not obliged to

[18] *See* Reply, para. 13, 14.
[19] *See* Reply, para. 15 and references cited therein.
[20] *See* Reply, para. 16.
[21] *See* Reply, para. 16.
[22] *See* Reply, para. 16, *referring to*, *inter alia*, *Prosecutor v. Augustin Ngirabatware*, Case No. MICT-12-29, Decision on Prosecution's Motion Regarding Protected Witnesses and Ngirabatware's Motion for Assignment of Counsel, 5 May 2016, para. 25.
[23] *See* Reply, para. 16 and references cited therein.
[24] *See Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, paras. 63-65. *See also* Reply, para. 19.

deal with all possible factors […] but at a minimum, must provide reasoning to support its findings regarding the substantive considerations relevant to its decision".[25]

12. I am of the opinion that the Single Judge was obligated to discuss whether Mr. Robinson's alleged conduct was undertaken based on a good faith interpretation of the protective measures orders. Notably, the Single Judge should have considered whether contempt proceedings should have been initiated against Mr. Robinson, in light of his contention that counsel in criminal cases are frequently called upon to interpret judicial orders, such as protective measures, and counsel should not have to interpret such orders at their own peril. The Single Judge's failure to give weight to all these considerations in reaching its determination may well constitute an abuse of discretion, potentially rendering the Impugned Decision unfair and unreasonable.

13. I am further of the view that the Single Judge erred by failing to consider the well-established alternative of referring Mr. Robinson's conduct to the Mechanism's own disciplinary regime as a more efficient way to ensure compliance with obligations flowing from the Statute and the Rules.[26] In this regard, I consider the submissions presented by the ADC-ICT to be persuasive. I first note that, pursuant to Rule 42(A)(iii) of the Rules, the ADC-ICT is a body officially recognized by the Registrar of the Mechanism as representing all defence counsel practicing before the Mechanism, and its predecessor (ADC-ICTY) was officially recognized by the Registrar of the ICTY since 2002.[27] A key objective of the ADC-ICT is to:

> offer advice to the President, the Chambers and the Registrar of International Courts and Tribunals in relation to the rights of the accused to a fair trial and the Rules of Procedure and Evidence as well as Regulations, Practice Directives and Policies related to the work of Defence Counsel, such as inter alia, the Directive on the Assignment of Counsel, the Code of Professional Conduct for Conduct Appearing Before the International Courts and Tribunals and the applicable Legal Aid Policies.[28]

I further note that, according to the ADC-ICT, it is tasked with:

> overseeing 'the performance and professional conduct of Defence Counsel, in so far as it is relevant to their duties, responsibilities, and obligations pursuant to the Statute, the Rules of Procedure and

[25] *See Prosecutor v. Ramush Haradinaj et al*., Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006, para. 10 (where the ICTY Appeals Chamber found that the ICTY Trial Chamber's decision provided no reasons explaining how the uncertainty of the appellant's ability to earn a livelihood, and the vagueness of his plans would have an impact upon the likelihood that he would not appear for trial if provisionally released, and consequently, quashed the underlying decision). *See also* Reply, para. 20.

[26] *See* Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism, MICT/6, 14 November 2012 ("Code of Conduct"), Articles 37-51. I note that the latest version of the Code of Conduct, issued on 14 May 2021, is not applicable as Mr. Robinson's alleged conduct occurred prior to this. *See also* ADC-ICT Request, para. 3; Appeal, paras. 105-107.

[27] *See* ADC-ICT Request, para. 5. *See also* ADC-ICT Request, n. 5 (indicating that the ADC-ICT was founded in September 2002 and recognized by the ICTY Registry the following month pursuant to Rule 44(A)(iii) of the ICTY Rules).

[28] *See* ADC-ICT Request, para. 6 and references cited therein.

> Evidence, the Code of Professional Conduct for Counsel Appearing Before the International Courts and Tribunals, the Directive on the Assignment of Defence Counsel, and the Detention Rules and Regulations of the International Courts and Tribunals'.[29]

Moreover, in the context of whether conduct of counsel constituted contempt of court, the ICTY Trial Chamber had requested the ADC-ICT to provide an advisory opinion on the characterization of conduct undertaken by defence counsel, which now arise in Mr. Robinson's appeal.[30] According to the ICTY Trial Chamber, it was necessary to have the opinion of the ADC-ICT regarding the implications of the conduct in question and specifically sought its expertise by posing questions on whether counsel's conduct was compatible with the ICTY Rules and the relevant code of conduct.[31]

14. I note that Articles 37 to 51 of the Code of Conduct set out a "Disciplinary Regime" – which includes procedures for investigations and determinations by a Disciplinary Panel and a Disciplinary Board (both of which are to include members of the association of counsel) – to address misconduct on the part of defence counsel. Pursuant to Article 37 of the Code of Conduct, the purpose of the Mechanism's disciplinary regime is, *inter alia*, to: (i) protect individuals, particularly witnesses, from counsel; (ii) ensure counsel's compliance with the necessary standards of professionalism and uphold the ethics and practice of the Mechanism's legal system at the highest level; and (iii) guarantee that any disciplinary proceedings against counsel are procedurally fair. Article 48 of the Code of Conduct outlines a range of sanctions, which must be proportionate to the alleged misconduct and may include official reprimands, financial penalties, suspensions, or disbarment.

15. I agree with the ADC-ICT's submission that the Code of Conduct effectively establishes a "robust mechanism" to regulate a wide range of conduct in a fair and appropriate manner, and that these objectives can only be fully achieved through the involvement of the ADC-ICT, as provided for within the disciplinary framework.[32] I further observe that, according to the ADC-ICT: (i) over the past 23 years, the association has cultivated a membership of experienced defence counsel who practice across international courts and tribunals; and (ii) its members understand the unique challenges of defence work and have first-hand experience, thus allowing them to assess whether the alleged misconduct was a result of systemic challenges or indeed an intentional violation of the Code of Conduct and corresponding statutory obligations.[33]

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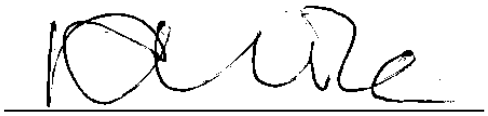
[29] *See* ADC-ICT Request, para. 7. *See also* ADC-ICT Request, n. 11 (wherein the ADC-ICT website indicates that judges felt a need to have an association to ensure a higher quality for defence counsel and to make collective representations to the organs of tribunals on behalf of all defence counsel involved in cases; and further that it was necessary an association was necessary "in the context of the Code of Professional Conduct for Counsel Appearing Before the International Tribunal the Judges adopted and its associated Disciplinary mechanism".)
[30] *See* ADC-ICT Request, para. 9 and references cited therein.
[31] *See* ADC-ICT Request, para. 9 and references cited therein.
[32] *See* ADC-ICT Request, para. 11.
[33] *See* ADC-ICT Request, para. 12.

16. According to the ADC-ICT, while decisions issued by the Disciplinary Panels and the Disciplinary Boards are predominantly confidential, the association's advisory opinion to an ICTY Trial Chamber reflects the expertise offered by the association in its role in disciplinary proceedings.[34] This includes in relation to, *inter alia*, factors to be considered when determining whether conduct is serious enough to constitute misconduct, noting that not all violations of the Code of Conduct amount to misconduct, and the broad discretion to be afforded to counsel within the bounds of their professional obligations to decide how best to effectively represent their client.[35]

17. I note that, in the Impugned Decision, while the Single Judge considered the application of the Code of Conduct for certain alleged violations, there was no systematic assessment of whether alleged violations that were eventually identified for the initiation of contempt proceedings could have been better addressed through the disciplinary framework under the Code of Conduct. I note that Article 35 of the Code of Conduct explicitly provides for the violation or attempted violation of the Statute and the Rules or any other applicable law. I am of the view that the Single Judge's failure to consider whether contempt proceedings were the most effective and efficient way to ensure compliance of the Statute and the Rules may well constitute an abuse of discretion.

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

Done this 15th day of May 2025
At Arusha,
Tanzania



Judge Prisca Matimba Nyambe

[Seal of the Mechanism]

[34] *See* ADC-ICT Request, n. 16.
[35] *See* ADC-ICT Request, n. 16.

UNITED NATIONS
International Residual Mechanism
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Mécanisme international appelé à exercer
les fonctions résiduelles des Tribunaux pénaux

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