**UNITED
NATIONS**

International Residual Mechanism
for Criminal Tribunals

Case No: MICT-18-116-AR90.1

Date: 3 March 2025

Original: English

BEFORE THE APPEALS CHAMBER

Before: **A bench of the Appeals Chamber**

Registrar: **Mr Abubacarr M. Tambadou**

PROSECUTOR

v.

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

Public

APPEAL OF DECISION ON ALLEGATIONS OF CONTEMPT

Amicus Curiae:
Mr. Kenneth Scott

Mr. Peter Robinson

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I. INTRODUCTION

1. I hereby appeal from the *Decision on Allegations of Contempt* (25 February 2025)("the Impugned Decision"). In the Impugned Decision, the Single Judge exercised his discretion to initiate contempt proceedings against me for violating the protective measures orders in the *Ngirabatware* case by making indirect contact with protected prosecution witnesses. This is the first time that a defence counsel has been criminally prosecuted solely for violating protective measures orders in the 75+ years since lawyers began defending international criminal cases at Nuremburg.

2. I respectfully contend that the Single Judge abused his discretion when deciding to initiate contempt proceedings against me 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. Counsel in a criminal case are frequently called upon to interpret judicial orders, such as protective measures. They should not have to interpret such orders at their peril for prosecution for contempt

3. I request that the Appeals Chamber vacate the Impugned Decision and exercise its discretion not to initiate contempt proceedings, or remand the matter to the Single Judge for a proper consideration of the special role that defence counsel play at the Mechanism and in the international criminal justice system.

II. BACKGROUND

4. I was as a federal prosecutor for the United States Department of Justice for ten years. I spent another twelve years as a criminal defence lawyer in California. Near the end of that time, I played a small part in freeing a man who had been imprisoned for 25 years for a crime he did not commit. This was the most satisfying work of my legal career. Freeing an innocent man serving a long sentence for a crime he did not commit seemed to be the highest calling for a criminal defence lawyer. I decided that someday I would try to help another innocent person.

5. My career took an unexpected turn when I spent what I thought would be a one-year stint at the ICTY in The Hague in 2000. Although my family and I returned to California on schedule, I was hooked on international criminal law. In April 2002, Joseph Nzirorera, the former Secretary-General of the MRND ruling party in Rwanda, selected me, out of the blue, to be his Lead Counsel. My career as an international criminal defence lawyer began.

6. I represented Joseph Nzirorera at the ICTR from 2002 until his death in July 2010. I represented General Dragoljub Ojdanic at the ICTY as his co-counsel in the pretrial stage and on appeal. I was appointed Legal Advisor to former Bosnian Serb President Radovan Karadzic by the ICTY in 2008 and then his Lead Counsel by the Mechanism in 2016. At the ICC, I was appointed as Associate Counsel for Jean Jacques Mangenda in 2017 and Alfred Yekatom in 2019.

7. In the summer of 2014, when the trial phase of the Karadzic case was coming to a close, I decided to use my 13 years of experience in international criminal law and dedicate my time and resources to help someone who may have been wrongfully convicted at one of the Tribunals. My colleagues in the defence bar widely believed that Jean de Dieu Kamuhanda, the former Rwandan Minister of Higher Education, was innocent and wrongfully convicted.

8. After the *Karadzic* closing arguments in October 2014, I focused in on Kamuhanda's case. He was convicted of leading an attack at the Gikomero Parish on 12 April 1994. He maintained from the moment of his arrest throughout his proceedings, that he had not gone to Gikomero after the death of President Habyarimana on 6 April 1994. He said that he was in Kigali with his family and neighbors at the time of the attack. I contacted several persons, including Rwandans who were themselves convicted and acquitted at the ICTR, for advice. The opinion was unanimous that Kamuhanda was wrongfully convicted. I decided to help him.

9. Because the Mechanism did not provide legal aid for convicted persons to prepare a motion for review of their judgement, I knew that taking on Kamuhanda's case would require me to work *pro bono*. It would be a significant time and financial commitment on my part.

10.Although I was familiar with the ICTR jurisprudence on motions for review, I consulted it again before finally deciding to take on Kamuhanda's case. Every motion for review at the ICTR was denied. No one ever even got a review hearing at the ICTR. The ICTR judges required the convicted person to establish the existence of a "new fact" capable of overturning the judgement before granting review. Fair enough. But it defined a "new fact" as a "new issue". If a fact was in issue at the trial or on appeal, it would not be considered "new".[1]

11. I considered this a high barrier to obtaining review. If I found perpetrators of the Gikomero Parish attack, or other witnesses to the attack, who could attest that Kamuhanda was not present at the attack, this would not be a "new fact" under the Mechanism's jurisprudence, because the issue of whether Kamuhanda was present was in issue at the trial and on appeal. Indeed, this very type of evidence had already been rejected in Kamuhanda's earlier motion for review for that very reason.[2]

12. The ICTR's jurisprudence did leave open one avenue for review. New information as to the credibility of prosecution evidence was said to constitute a "new fact" that might warrant review. This led me to conclude that just about the only way to obtain review of Kamuhanda's

[1] See, for example, *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006), para. 6..
[2] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Decision on Request for Review* (25 August 2011), para. 43.

conviction was if prosecution witnesses who falsely claimed to have seen Kamuhanda at the Gikomero Parish now told the truth.

21. However, the ability to contact prosecution witnesses was constrained by the fact that every witness testified anonymously with protective measures. The order granting protective measures prohibited the defence from contacting a protected witness on its own. To contact a prosecution witness, the defence had to apply for permission from the Chamber. If authorised, it would be the Office of the Prosecutor that would contact the witness and arrange for the interview by the defence.

22. I settled upon a strategy that included employing an investigator to identify persons who were close friends of the prosecution witnesses. He would then interview those persons as to what, if anything, the prosecution witnesses ever said to them about what happened at the Gikomero Parish. I understood that this could not include family members, who were also covered by the protective measures. I also understood that we had to be careful not to disclose to the people we were interviewing that the person we were inquiring about was a witness against Kamuhanda. I also understood that we could not ask or instruct the people we were interviewing to contact the prosecution witness or family members, because that would be doing indirectly what we could not do directly. In my view, this would be in violation of the protective measures. We were limited, in this aspect of the investigation, to finding out what the prosecution witness said in the past to their close friends about the events at the Gikomero Parish.

23. I considered this strategy to be the best way to try to free Kamuhanda within the framework of the ICTR and Mechanism's jurisprudence. I believed this strategy to be in full compliance with the protective measures order.

24. Augustin Ngirabatware first contacted me in June 2015, just six months after I started working on Kamuhanda's case. He had heard that I was working *pro bono* for Kamuhanda and asked if I would consider also helping him to seek a review of his conviction. I did some of my own research to determine if it was likely that he was innocent of the crimes for which he was convicted. I read his judgements and spoke to various persons with knowledge of his case.

25. Ngirabatware was convicted of genocide by distributing weapons at a roadblock in Gisenyi on 7 April 1994. He was also convicted of incitement to genocide by making a speech at a roadblock in Gisenyi in February 1994. For each incident, his conviction was based on the testimony of two prosecution witnesses: ANAE and ANAM for the weapons distribution and ANAN and ANAT for the speech at the roadblock. The testimony of ANAE and ANAM was so irreconcilable that the judges concluded that they must have witnessed two separate incidents at the

same roadblock on the same day. ANAN and ANAT were inmates who were housed together at Gisenyi prison.

26. From my own experience in Nzirorera's case, where I spent eight years deeply immersed in the national events that took place in Rwanda from 1990-94, I believed that it was highly unlikely for Ngirabatware to have been able to travel from Kigali to Gisenyi on 7 April 1994. I was aware that most of the MRND Ministers, including Ngirabatware, were escorted to the Presidential Guard Camp in Kigali where they spent the day of 7 April 1994. In my experience, it was not unusual for Rwandan survivors and prisoners to falsely claim to have seen high-ranking national authorities in their native communes after the genocide broke out.

27. Following this research, I agreed to take on Ngirabatware as a *pro bono* client because I believed he was wrongfully convicted. I specified to Ngirabatware that the approach to the prosecution witnesses and/or those close to them had to be very carefully planned and executed and in full compliance with the ICTR's protective measures.

28. The protective measures order in Ngirabatware's case provided that:

> The Defence team in this case and any representative acting on its behalf shall notify the Prosecution in writing if it wishes to contact any protected witness and/or his or her family. If the person concerned consents, the Prosecution shall facilitate such contact together with the WVSS.[3]

29. This protective measure was similar to that in the *Kamuhanda* case, except that it did not require an order of a Chamber to meet the witness. I interpreted the provision to mean that if I wished to contact a prosecution witness, I needed to go through the Office of the Prosecutor. As in Kamuhanda's case, I believed that our defence team could not do indirectly what we could not do directly. Therefore, we were not to ask or instruct anyone to contact a prosecution witness on our behalf.

30. Ngirabatware's investigator from his trial had been contacted by Defence Witness DWAN-147. That witness was a close family member of ANAE.[4] Although contact with family members of prosecution witnesses was covered by the protective measures order, the Trial Chamber in Ngirabatware's case exempted DWAN-147 from that provision. It expressly allowed the defence team to contact DWAN-147 without going through the prosecution.[5]

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[3] *Prosecutor v Ngirabatware*, Mo. ICTR-99-54-I, *Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others* (6 May 2009). WVSS was the acronym for the ICTR's Witnesses and Victims Support Section. The acronym changed to WISP when the Mechanism took over those functions.
[4] In conformance with the Impugned Decision, I will not specify the exact relationship between the two.
[5] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Variation of Protective Measures for Prosecution Witnesses and Others* (14 December 2010).

31. DWAN-147 told the investigator that he had important information about a possible recantation by ANAE. He wanted to speak to Ngirabatware's lawyer about it. He wanted to ask the lawyer about the procedure for ANAE to finally tell the truth. I decided to meet with DWAN-147 to hear what he had to say. I believed that I was in full compliance with the protective measures in doing so. Defence team members were specifically authorised to meet with DWAN-147 even though he was a family member of a prosecution witness.

32. I did not consider that by speaking with DWAN-147, I was indirectly contacting ANAE. Surely given the close family relationship, when it made its order allowing the defence to have contact with DWAN-147, the Trial Chamber contemplated that he might share information with ANAE. I believed that as long as I did not ask or instruct DWAN-147 to communicate with ANAE on my behalf, I was in compliance with the protective measures. I didn't "wish to contact" ANAE at that time. Therefore, I did not need to request such contact through the prosecution.

33. I met with DWAN-147 in Kampala on 15 August 2015. I recorded our meeting with his consent. DWAN-147 asked me if it would have an impact on Ngirabatware's conviction if someone who testified against him changed their testimony. I answered in the affirmative. He said that ANAE would be ready to recant her testimony.

34. I told DWAN-147 that the rules did not allow us to meet with a prosecution witness directly. We had to notify the prosecutor, who would contact the witness to see whether she was willing to meet with the lawyer for Ngirabatware. If the witness agreed to such a meeting, then the meeting would take place with the lawyer for Ngirabatware, but also with a lawyer for the prosecution, being present. I asked him if he thought ANAE would be willing to agree to that. He replied that he thought it was possible and would speak to her and find out what her position was.

35. That was how the matter was left at the end of the meeting. If DWAN-147 said that ANAE was likely to consent to be interviewed by me, I would make a request to the prosecution to facilitate the meeting between me and ANAE. I believed that I had fully complied with the protective measures order by this approach.

36. I engaged my own investigator, Dick Prudence Munyeshuli, to work on the *Ngirabatware* case with me. At the outset, I specified that "we have to be strict in obeying the protective measures because our conduct will be scrutinized closely if we end up having a review hearing."[6]

37. In late 2015, I learned that there were other defence witnesses who were close friends to Prosecution Witnesses ANAM, ANAN, and ANAT to whom those witnesses admitted that they lied

[6] *Prosecutor v Nzabonimpa et al*, No. MICT-18-116-T, Exhibit P01708.

when testifying at Ngirabatware's trial. Specifically, ANAM had admitted this to DWAN-41, ANAN had admitted this to DWAN-78, and ANAT had admitted this to DWAN-28. I decided to go to Rwanda in November and meet with these three defence witnesses. I planned to record their statements as I did with DWAN-147 in Kampala. I asked Dick Prudence to organise the meetings with those defence witnesses.

38. I never requested Dick Prudence or anyone else to ask or instruct any of the defence witnesses I was to interview on 24 November to contact any prosecution witness. My intention was to interview those witnesses about what the prosecution witnesses said to them in the past, not to use the defence witnesses as intermediaries to contact the prosecution witnesses on my behalf. In that way, I believed that I was faithful to, and in compliance with, the protective measures order for prosecution witnesses.

39. On 24 November 2015, I met individually with the defence witnesses. I recorded the interviews with the witnesses' consent. I first interviewed DWAN-78, who was a close friend and neighbor of ANAN. He told me that ANAN told him he had testified falsely at Ngirabatware's trial, felt bad about it, and was now ready to tell the truth.

40. I then explained to DWAN-78 the procedure that the defence team had to use to talk to someone who has testified as a witness against Ngirabatware. I told him that we were not free to speak to a prosecution witness directly. We had to request permission through the prosecution before we could meet the witness. I explained that now that we received the information from him, we were going to ask to meet with ANAN. The Prosecution would then contact ANAN to see if he agreed. If he agreed to meet with the lawyer for Ngirabatware, I would have a meeting with ANAN. Then he could tell me directly what he told DWAN-78.

41. I had a similar conversation with DWAN-28, who was a close friend and neighbor of ANAT, and Jean de dieu Ndajigimana, who was an acquaintance of ANAM.[7] Both told me that the prosecution witnesses had admitted that they had lied at Ngirabatware's trial and now felt bad about it. They told me that the prosecution witnesses had in fact written letters to that effect. I told the defence witnesses that we were not free to speak to a prosecution witness directly. We had to request permission through the prosecution before we could meet the witness. I explained that now that we had received the information from them, we were going to ask to meet with the prosecution witnesses. The Prosecution would then contact the witnesses to see if they agreed. If they agreed to meet with the lawyer for Ngirabatware, I would have a meeting with them and they could tell me directly what they told them.

[7] DWAN-41, who I expected to meet concerning ANAM, had been unable to make our meeting and Ndajigimana came in her stead.

42. During these meetings, I believed that I was acting in conformance with the protective measures order. I did not "wish to contact" the prosecution witnesses through the defence witnesses. I never asked or instructed them to contact the prosecution witnesses on my behalf. While I expected that, as with DWAN-147, given the fact that they were close friends and neighbors with the prosecution witnesses, they might share stories about our meeting, I did not believe that I was violating the protective measures so long as I did not ask or instruct them to contact the prosecution witnesses on my behalf.

43. During the following two years that I represented Ngirabatware, I followed this interpretation of the protective measures. I expressed this principle to the Appeals Chamber when the prosecution raised questions about my contacts with the defence witnesses, telling the Chamber that I had specifically emphasized to our investigators that there was to be no contact, direct or indirect, with prosecution witnesses and that I never asked or instructed anyone to solicit any person to contact the prosecution witnesses on our behalf.[8]

44. I was also transparent about my intentions when requesting authorisation to travel from the Mechanism's Office of Legal Aid and Defence Matters ("OLAD"). I informed OLAD that I would be meeting with the four defence witnesses in order to obtain the latest information they may have concerning the attitudes or concerns of the prosecution witnesses. I explained that these defence witnesses were each either relatives or close friends of the prosecution witnesses and they provided me with the initial information that the witnesses now wanted to tell the truth.

45. When I travelled to Rwanda to meet the prosecution witnesses in July 2015 as arranged through the prosecution pursuant to the protective measures order, I first met with the defence witnesses. When I met DWAN-78, I told him we would be meeting ANAN the following week. I asked him whether ANAN was of the same mind as when he wrote the letter saying he was ready to tell the truth. DWAN-78 said he was. I asked DWAN-78 not to talk to ANAN about Ngirabatware's case between now and then because "it's not allowed for anyone on Ngirabatware's team to either directly or indirectly have contact with a prosecution witness…because we don't want anybody to think that we were trying to use you to contact him because that's not allowed. I wanted to meet with you to see what he was thinking, but I didn't want you to do anything in the future about that." DWAN-78 said he understood.

46. This reflected my interpretation of the protective measures. I knew that as close friends and neighbors (and in one case a close family member) that the defence witnesses were in regular contact with the prosecution witnesses in their daily lives. I believed that so long as we did not ask

[8] *Prosecutor v Ngirabatware,* No. MICT-12-29, *Reply Brief: Motion for Assignment of Counsel* (2 March 2016) Annex A, para. 6.

or instruct the defence witnesses to contact the prosecution witnesses on our behalf, we were not violating the protective measures.

47. On July 5, 2016, I interviewed the four prosecution witnesses in the Mechanism's Kigali office. Each witness admitted they had given false testimony against Ngirabatware and were now willing to tell the truth. I filed a motion for review of Ngirabatware's wrongful conviction three days later.[9]

48. Over the next year, my investigator, Dick Prudence Munyeshuli and I took statements from 14 witnesses who were with Ngirabatware on 7 April 1994 at the Presidential Guard Camp in Kigali and could testify that he could not possibly have gone to Gisenyi that day as ANAE and ANAM claimed. We also took statements from four former inmates at Gisenyi prison who corroborated ANAN and ANAT's scheme to falsely accuse Ngirabatware. We attached their statements to our witness and exhibit list for the review hearing.

49. This evidence confirmed my belief in Ngirabatware's innocence. Whatever the credibility of the prosecution witnesses' recantations, they were corroborated by a large body of evidence that Ngirabatware was not at the places those witnesses testified about at his trial and did not do the things that they claimed. Much to my great regret, on 10 October 2017, the Appeals Chamber granted the prosecution's motion to exclude all of that evidence from the review hearing.[10] To this day, I consider this to be a miscarriage of justice because it prevented them from relying on objective evidence when determining which version from the prosecution witnesses was the truth.

50. In late 2016, and again in late 2017, the prosecution sought to interview the prosecution and defence witnesses. The protective orders had been modified to require either party to go through the WISP if they wished to have contact with the former prosecution witnesses, who were now defence witnesses for the review proceedings. When the prosecution requested those interviews, I asked my investigator to inform the defence witnesses. Consistent with my interpretation of the protective measures order, I believed that there was nothing wrong with informing them that the prosecution wished to interview the witnesses, provided I did not ask or instruct them to contact the prosecution witnesses on my behalf.

51. On 22 November 2017, the Appeals Chamber issued an order scheduling the review hearing for 8 February 2018.[11] At the same time, the Pre-Review Judge issued an order in which he disclosed that ANAL, who had not been one of the prosecution witnesses whose testimony formed

[9] *Prosecutor v Ngirabatware*, No. MICT-12-29, *Motion for Review of Judgement* (8 July 2016).
[10] *Prosecutor v Ngirabatware,* No. MICT-12-29-R, *Decision on Prosecution's Motion to Exclude Evidence* (10 October 2017).
[11] *Prosecutor v Ngirabatware,* No. MICT-12-29-R, *Scheduling Order for Review Hearing* (22 November 2017).

the basis of Ngirabatware's conviction, but who had testified to events occurring on the same day as ANAE and ANAM, informed the WISP that certain individuals requested the witness to testify for Ngirabatware's defence in exchange for financial and material benefits. The Pre-Review Judge ordered the Registry to disclose the *ex parte* submissions it had made on the issue.

52. On 27 November 2017, I received the Registry's submissions. I was very surprised and disturbed by the information. After obtaining an explanation from Ngirabatware, I very sadly came to the conclusion that I had to resign as his counsel because prosecution witnesses were being contacted behind my back and despite my explicit instructions that this not be done.

53. I hated to abandon Ngirabatware. I strongly believed in his innocence. I believe in his innocence to this day. But after having been wrongly convicted at trial, and sitting through an appeal which ignored his pleas that the evidence against him was false, Ngirabatware apparently didn't trust the Mechanism to give him justice during the review process. I deeply regret that he did not have sufficient faith in me to play by the rules.

54. On 30 November 2017, I filed a motion to withdraw with the Appeals Chamber.[12] The Appeals Chamber granted the motion on 19 December 2017.[13] My quest to overturn Augustin Ngirabatware's wrongful conviction had itself gone horribly wrong.

III. PROCEDURAL HISTORY

55. Contempt proceedings were initiated in 2018 against Ngirabatware and a group of his supporters for paying the prosecution witnesses to recant. My investigator, Dick Prudence Munyeshuli, was also charged with having contact with the prosecution witnesses in violation of the protective measures orders.

56. I travelled to Arusha on 18 March 2021 to testify as a witness in Dick Prudence's defence. However, his counsel decided that Dick Prudence didn't need my testimony. Therefore, the Single Judge hearing Dick Prudence's case never heard my version of these events.

57. I was never charged in that case. In the Prosecution's final brief in Dick Prudence's case, the Prosecution pointed to many examples of how the other accused in that case, including Ngirabatware, worked to conceal from me that they were training and paying money to the prosecution witnesses.[14] The Single Judge, in his *Judgement*, also accepted the payments and training took place without my knowledge.[15]

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[12] *Prosecutor v Ngirabatware,* No. MICT-12-29-R, *Defence Counsel's Motion to Withdraw* (30 November 2017).
[13] *Prosecutor v Ngirabatware,* No. MICT-12-29-R, *Decision on Defence Counsel's Motion to Withdraw* (19 December 2017).
[14] *Prosecutor v Nzabonimpa et al*, No. MICT-18-116-T, *Prosecution Final Trial Brief* (31 May 2021), paras. 64-65, 78, 102, 143.
[15] *Prosecutor v Nzabonimpa et al*, No. MICT-18-116-T, *Judgement* (23 June 2021), paras. 112, 125, 131, 136, 206, 229, 296, 317.

58. Dick Prudence was acquitted on 25 June 2021.[16] On 20 September 2021, the same day as he issued his written judgement in that case, the Single Judge hearing the *Nzabonimpa et al* contempt case issued an order pursuant to Rule 90(C) of the IRMCT Rules of Procedure and Evidence ("Rules") so that another judge could independently assess whether or not to bring contempt or disciplinary proceedings against me for potential professional and ethical lapses that he had perceived while hearing evidence in the trial.[17]

59. On 25 October 2021, the Single Judge in this case directed the Registrar to appoint an *amicus curiae* to investigate. He also directed the *amicus curiae* to submit a report containing the conclusions of the investigation within 120 days of his appointment.[18] The Single Judge granted six further extensions of time to file the report.[19]

60. When the report was filed on 13 March 2023 without providing me an opportunity to tell my side of the story, I requested to be heard before the Single Judge before he rendered a decision. I stated, "[i]f allowed to make submissions, I believe that I can demonstrate that I acted pursuant to a good faith interpretation of the protective measures and the rules of detention."[20] The Single Judge directed the *amicus curiae* to interview me.[21]

61. That interview took place on 23-24 May 2023.[22] I provided the *amicus curiae* with a detailed 37-page, single-spaced statement with 38 annexes in advance of the interview.[23] The *amicus curiae* filed a supplemental report on 13 June 2023.[24] The Single Judge thereafter authorized the *amicus curiae* to take additional investigative steps in confidential, *ex parte* orders dated 27 October 2023 and 15 February 2024.[25]

62. On 27 October 2023, the Single Judge ordered submissions on the issue of the use of Rule 76 material.[26] On 2 April 2024, he held that such material could not be used in contempt proceedings except to the extent that I had disclosed it in connection with my statement or interview

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[16] On 29 June 2022, the Appeals Chamber reversed his acquittal and convicted him of disclosing the identity of prosecution witnesses and of indirectly contacting prosecution witnesses in violation of the protective measures orders. *Prosecutor v Fatuma et al,* No. MICT-18-116-A, *Judgement* (29 June 2022).
[17] *Prosecutor v. Nzabonimpa et at.,* No. MICT- 18-116-T, *Order Referring a Matter to the President* (20 September 2021).
[18] *Order Directing the Registrar to Appoint an Amicus Curiae to Investigate Pursuant to Rule 90(C)(ii)* (25 October 2021).
[19] *Decision on Request for Extension of Time,* (1 April 2022)*; Decision on Request for Extension of Time,* (28 July 2022)*; Decision on Request for Extension of Time,* (28 September 2022)*; Decision on Request for Extension of Time,* (29 November 2022)*; Decision on Further Request for Extension of Time,* (26 January 2023)*; Decision on Further Request for Extension of Time,* (13 February 2023).
[20] *Request for Leave to Make Submissions* (20 March 2023), para. 9.
[21] *Decision on Request for Leave to Make Submissions* (20 April 2023).
[22] Impugned Decision, para. 5.
[23] The information in the Background section, above, was all provided in that statement.
[24] Impugned Decision, para. 5.
[25] *Id*.
[26] *Order for Submissions* (27 October 2023).

with the *amicus curiae*.[27] The *amicus curiae* received leave to appeal this decision on 24 April 2024.[28] On 17 July 2024, the Appeals Chamber reversed that decision.[29] The *amicus curiae* filed further submissions updating his recommendations on 26 July 2024.[30]

63. The Single Judge issued the Impugned Decision on 25 February 2025.

IV. THE IMPUGNED DECISION

64. In the Impugned Decision, the Single Judge recognized that, even if a *prima facie* case of contempt were found to exist, the decision on whether or not to initiate a contempt proceeding is discretionary.[31]

65. The Single Judge explained that:

> I consider that such exercise of my discretion entails a careful and reasonable consideration of proportionality that takes into account and acknowledges the nature and seriousness of the alleged events, which are balanced against a variety of factors.[32]

66. The Single Judge did not further elaborate on the variety of factors he would consider, save for the United Nations Security Council's emphasis that the Mechanism be a "small, temporary and efficient structure, whose functions and size will diminish over time."[33]

67. The Impugned Decision then went on to elaborate on the elements of contempt under Rule 90. It referred to jurisprudence that "[a] finding of intent to violate a judicial order will almost necessarily follow where it is established that an accused had knowledge of the existence of that order."[34]

68. The Impugned Decision then analyzed the 34 potential violations of contempt identified by the *amicus curiae*, grouping them by the nature of the violation.

69. With respect to alleged violation of the protective measures decisions, after finding that a *prima facie* case had been established, the Single Judge concluded that "taking into consideration the nature of Robinson's conduct, I exercise my discretion to initiate contempt proceedings against Robinson for these violations."[35]

70. The Single Judge also declined to initiate contempt proceedings on a number of other potential violations. In doing so, when exercising his discretion despite the existence of a *prima*

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[27] *Decision on Application of Lawyer-Client Privilege and Use of Material Subject to Rule 76 in Further Proceedings*, (2 April 2024).
[28] *Decision on Amicus Curiae Request for Certification* (24 April 2024).
[29] *Decision on Appeal of Decision on the Use of Material Subject to Rule 76 in Further Proceedings,* (17 July 2024).
[30] Impugned Decision, fn. 46.
[31] *Impugned Decision*, para. 9.
[32] *Id.*
[33] *Id*.
[34] *Id*, paras. 10-11.
[35] *Id*, paras. 17-20.

facie case, he based his decision on the fact that the alleged violations were less serious than those for which he had authorized prosecution, that no harm befell the protected witnesses, and the resources required to prosecute those violations.[36]

71. In some instances, the Single Judge found that a *prima facie* case had not been established.[37] In two instances, he found that the allegations established a *prima facie* case of a violation of the *Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism* (14 November 2012)("*Code of Professional Conduct*"). He deferred a decision on whether to refer those matters for disciplinary proceedings to the judge presiding over the contempt proceedings.[38]

72. Nowhere in the Impugned Decision did the Single Judge take into consideration the effect of criminalizing a defence counsel's interpretation of court orders.

V. JURISDICTION

73. Rule 90(J) of the Rules provides 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." The ICTR Appeals Chamber has interpreted the ICTR's predecessor to Rule 90(J) to exclude decisions to initiate an investigation for contempt, reasoning that such decisions do not dispose of the contempt case.[39] Since the Mechanism considers itself bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the ICTR and ICTY, [40] I do not rely on this provision as the jurisdictional basis for this appeal.

74. Instead, I rely upon the jurisprudence of the Mechanism that the Appeals Chamber may assert jurisdiction over matters raising issues related to the proper functioning of the Mechanism.

75. Under this practice, the Appeals Chamber has exercised its jurisdiction in a number of cases.

76. In the *Nzuwonemeye* case, in which I was counsel, the Appeals Chamber held that an appeal raising issues relating to the Mechanism's power to order cooperation of States concerned the proper functioning of the Mechanism warranting the exercise of its jurisdiction.[41] In a different case involving Major Nzuwonemeye, in which I also was counsel, the Appeals Chamber exercised its jurisdiction over issues related to the detention of acquitted and released persons by the

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[36] *Id,* paras. 24, 26, 32.
[37] *Id,* paras. 28, 30, 34.
[38] *Id,* paras. 32, 37.
[39] *Nzabonimana v Prosecutor*, 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) at para. 13.
[40] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Decision on Radovan Karadzic's Notice of Sentencing Appeal and the Related Motion for Assignment of Counsel and Extension of Time* (2 April 2019) at p. 3.
[41] *Prosecutor v. Nzuwonemeye,* No. MICT-13-43, *Decision on the Appeal of the Single Judge's Decision of 22 October 2018,* (17 April 2019), para. 7.

Government of Niger, again finding that the issue of its power to order States concerned the proper functioning of the Mechanism.[42]

77. In the *Kamuhanda* case, in which I also was counsel, the Appeals Chamber held that in light of the importance of victims and witnesses to the proper functioning of the Mechanism, it would entertain jurisdiction over a convicted person's appeal of a decision relating to the recission of protective measures for a deceased witness.[43]

78. In the *Mladic* case, the Prosecution argued that the Appeals Chamber should exercise its jurisdiction on its appeal of a judicial disqualification issue because of the general importance to the functioning of the Mechanism. The Appeals Chamber was unpersuaded. It noted that:

> "Appellate jurisdiction has been exercised on this basis when the litigation has raised questions as to the Mechanism's jurisdiction and fairness of the proceedings or when it was apparent that the litigation impacts clearly defined rights of a party, victim and/or witness."

Finding no such issues in the Prosecution's appeal, it declined to exercise its jurisdiction on that basis.[44]

79. Applying these principles to the instant appeal, the entire context of the Impugned Decision involves the subject of victims and witnesses before the Mechanism. Moreover, the role of defence counsel, like those of victims and witnesses, is essential to the proper functioning of the Mechanism. And these issues impact my clearly defined rights to liberty, to say nothing of my professional reputation after 46 years as a lawyer.

80. Unlike the situation in the *Mladic* case, if left unresolved, the issue of the proper exercise of the Single Judge's discretion will be irreparably unreviewable. The Appeals Chamber has held that once a Single Judge decides to charge a person with contempt, the judge presiding over the trial no longer has the discretion whether to enter a conviction, if the elements of the offence have been proven.[45] Therefore, unless the Appeals Chamber exercises its jurisdiction, the proper exercise of discretion will be forever lost to me.

81. For all of these reasons, the Appeals Chamber is urged to entertain jurisdiction over this appeal because of its importance to the proper functioning of the Mechanism.[46]

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[42] *In the matter of Nzuwonemeye et al*, No. MICT-22-124, *Decision on Motions to Appeal Decision of 8 March 2022, for Reconsideration of the Decision of 15 March 2022, and to Appear as Amicus Curiae* (27 May 2022), para. 14.
[43] *Prosecutor* v. *Kamuhanda*, No. MICT-13-33, *Decision on Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness*, (14 November 2016), para. 6. See also *Prosecutor v Tolimir*, No. MICT-15-95, 15-85, *Decision on Request for Access to Confidential Material in The Prosecutor v. Zdravko Tolimir Case Presented by Vujadin Popovic* (17 May 2017), para. 12.
[44] *Prosecutor v Mladic*, No. MICT-13-56-A, *Decision on Prosecution's Appeal of the Acting President's Decision of 13 September 2018* (4 December 2018) at para. 14.
[45] *Prosecutor v Fatuma et al*, No. MICT-18-116-A, *Judgement* (29 June 2022), para. 94.
[46] In the event that the amicus curiae were to appeal any aspects of the Impugned Decision, I would request the Appeals Chamber to exercise jurisdiction over his appeal issues ancillary to that appeal in the interests of fairness.

VI. STANDARD OF REVIEW

82. In order to succeed on appeal, an appellant has to demonstrate that the Single Judge committed a discernible error in that the impugned decision was based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or that it was so unfair or unreasonable as to constitute an abuse of discretion. In this respect, the Appeals Chamber will consider whether the Single Judge has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching the decision.[47]

VII. GROUND OF APPEAL

83. I wish to advance the following ground of appeal:

> The Single Judge abused his discretion 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.

84. I contend that in failing to consider these relevant considerations, the Single Judge committed a discernible error in that the Impugned Decision was based on an incorrect interpretation of the governing law, resulting in a decision that was so unfair or unreasonable as to constitute an abuse of discretion.

VIII. ARGUMENT

> The Single Judge abused his discretion 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

85. The conduct alleged to constitute contempt arose entirely from my good faith interpretation of the protective orders in the *Ngirabatware* case. The Single Judge's decision to criminalise my interpretation of the protective measures orders failed to consider my actions in the context of the role and obligations of a counsel before the Mechanism.

86. The jurisprudence of the Mechanism and the *ad hoc* Tribunals is replete with instances in which courts declined to prosecute violations of a court order by prosecution counsel who interpreted the order differently than the court.

87. In this very case, the prosecution initially refused to facilitate the defence interviews of the prosecution witness, claiming that the provision in the protective measures order that required it to facilitate a meeting between protected prosecution witnesses and "the Defence team" did not apply because, since Ngirabatware's conviction was affirmed on appeal, those working for him on a potential motion for review did not constitute "the Defence team" within the meaning of that term. The Appeals Chamber soundly rejected this interpretation of the protective measures order. It held

[47] *Prosecutor* v. *Kamuhanda*, No. MICT-13-33, *Decision on Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness*, (14 November 2016), para. 7.

that the prosecution's interpretation of the protective measures was "unduly restrictive and formalistic".[48]

88. The prosecution therefore violated the protective measures order by refusing to facilitate the meeting with the witnesses. No one suggested that the prosecution's violation of the protective measures order through its "unduly restrictive and formalistic" interpretation should be prosecuted as contempt. Yet the Single Judge initiated contempt proceedings based on my interpretation of that same protective measures order.

89. This was not the only instance in which the prosecution violated the protective measures order in this case. Before the *Nzabonimpa et al* trial, the prosecution met with protected witnesses in violation of the protective measures decision.[49] It claimed to have interpreted that decision as not applying to proofing sessions.[50] The Single Judge ruled that proofing was included in the protective measures order.[51] No contempt proceedings were initiated for the prosecution's violation of the protective measures order based on its erroneous interpretation of that order.

90. In other cases, whenever the Prosecution has violated protective measures by contacting protected defence witnesses, the Trial Chamber has declined, in the interests of justice, to initiate contempt proceedings.

91. In *Prosecutor v Nshogoza*, where the prosecution contacted defence witnesses in violation of the protective measures order, the Trial Chamber considered that the prosecution may have misinterpreted the court's order.[52] Finding that pursuing contempt proceedings was not necessary to achieve the important goals of deterrence and denunciation, it exercised its discretion not to initiate contempt proceedings.[53] On appeal, the Appeals Chamber affirmed the decision as a proper exercise of the Trial Chamber's discretion.[54] The Appeals Chamber held that although not a defence, it was proper to consider the investigators' underlying motives in connection with the exercise of discretion to initiate contempt proceedings.[55]

92. In *Prosecutor v Nchamihigo*, the Trial Chamber exercised its discretion not to initiate contempt proceedings against prosecution counsel who disclosed the identity of all the defence witnesses to Rwandan authorities in violation of the protective measures order. The Chamber based

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[48] *Prosecutor v Ngirabatware*, No. MICT-12-29, *Decision on Prosecution's Motion Regarding Protected Witnesses and Ngirabatware's Motion for Assignment of Counsel* (5 May 2016) paras. 11-14.
[49] *Prosecution v Nzabonimpa et al*, No. MICT-18-116-T, *Oral Motion and Decision* (26 October 2020), p. 5-7
[50] *Id,* p. 9.
[51] *Id,* p. 10.
[52] *Prosecutor v Nshogoza*, No. ICTR-07-91-A, *Decision on Defence Allegations of Contempt by Members of the Prosecution* (25 November 2010), para. 23.
[53] *Id*, para. 24.
[54] *Nshogoza v Prosecutor*, No. ICTR-07-91-AR77, *Decision on Nshogoza's Appeal of Decision on Allegations of Contempt by Members of the Prosecution* (7 July 2011).
[55] *Id,* para. 19.

its decision on the fact that the prosecution counsel, while knowing of the protective measures order, did not believe it applied to his letter to the Rwandan authorities.[56]

93. In *Prosecutor v Karadzic*, an ICTY Trial Chamber was called upon to determine if contempt proceedings should be initiated against prosecution counsel for violating the court's disclosure orders. The Chamber held that although the Prosecution violated its disclosure obligations on numerous occasions, such violations were not indicative of a lack of good faith on the part of the Prosecution. It exercised its discretion not to initiate contempt proceedings.[57]

94. In *Prosecutor v. Nzabonimana*, the Trial Chamber exercised its discretion not to initiate contempt and false statement proceedings against a prosecution investigator and a prosecution witness. The Chamber based its decision in part of the lack of intent to mislead and cause harm .[58]

95 In *Prosecutor v Kajelijeli*, a prosecution investigator interviewed a defence witness in violation of provision of protective measures order that required it to notify the defence before contacting a defence witness. The Trial Chamber exercised its discretion not to initiate contempt proceedings because it was not convinced "that the individual acted in **knowing and wilful** violation of the witness protection order."[59] (emphasis added)

96. In the *Bagosora et al* case, the Trial Chamber exercised its discretion not to initiate contempt proceedings against prosecution counsel who filed a witness list of more than 100 witnesses, in direct contravention of the court's order. Although finding the counsel's violation of the court order to be knowing and wilful, the Chamber exercised its discretion not to hold the prosecution in contempt.[60]

97. In *Prosecutor v. Nyiramasuhuko et. al,* the Trial Chamber found that prosecution counsel had acted in contempt of the Tribunal by disclosing the identity of a defence investigator and had acted improperly and recklessly against the interests of justice. Nevertheless, taking into consideration the prosecution's good faith belief in the reason for disclosing the identity, the Trial

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[56] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses* (9 August 2007), para. 10.
[57] *Prosecutor v Karadzic*, No. IT-95-5/18-T, *Decision on Invitation from the Single Judge of the Mechanism for International Tribunals* (6 August 2014), p. 3.
[58] *Prosecutor v. Nzabonimana*, ICTR-98-44D-T, *Decision Following Amicus Curiae Report Pertaining to Allegations of Contempt of the Tribunal by Prosecution Witness CNAI and/or a Member of the Prosecution Office* (21 October 2011), para. 18.
[59] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C))*(15 November 2002), paras. 9,11.
[60] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order* (1 March 2004), para. 10.

Chamber exercised its discretion not to initiate contempt proceedings and instead issued a warning to prosecution counsel.[61]

98. There have been some cases where courts of the ICTR, ICTY, and Mechanism have also exercised their discretion not to initiate contempt proceedings against defence team members. In a decision arising from the trial of the *Ngirabatware* case, a Single Judge of the Mechanism exercised his discretion not to initiate contempt proceedings against defence investigators who were alleged to have violated the protective measures order. The Judge reasoned that the personal motives of the person alleged to be in contempt was a proper consideration when determining whether to initiate contempt proceedings.[62]

99. In the *Rukundo* case, the ICTR Trial Chamber exercised its discretion not to initiate contempt proceedings against a defence counsel whose investigator contacted a prosecution witness on her instructions, in violation of the protective measures. It did so because it found "no evidence that the conduct in question was done with specific intent." It used its power to issue a warning to counsel under the ICTR Rules instead.[63]

100. This extensive jurisprudence shows what an outlier the Impugned Decision is in its failure to consider my actions and intent in the context of my duties and responsibilities as defence counsel to interpret court orders in good faith and in the best interests of my client.

101. The *Code of Professional Conduct* provides that "[c]ounsel have a duty of loyalty to their Clients consistent with their duty to the Mechanism to act with independence in the administration of justice."[64] Article 4(C) of that Code provides that Counsel shall not advise nor assist a Client to engage in conduct which Counsel **knows is criminal or fraudulent,** in breach of the Statute, the Rules, this Code or any other applicable law. (emphasis added).

102. The American Bar Association's *Criminal Justice Standards for the Defense Function* (2017) recognizes that:

> Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients. The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counsel or and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.[65]

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[61] *Prosecutor v. Nyiramasuhuko et. al,* No. ICTR-97-2I-T, *Decision on the Prosecutor's Allegation of Contempt, the Harmonisation of Witness Protective Measures, and Warning to Prosecution Counsel* (10 July 2001), para. 33.
[62] *In the Matter of Deogratias Sebureze and Maximilian Turinabo*, No. MICT-13-40-R90, *Decisions on Allegations of Contempt of the ICTR* (17 July 2013), para. 15.
[63] *Prosecutor v Rukundo*, No. ICTR-01-70-T, *Decision on the Haguma Report* (14 December 2007), para. 16
[64] Article 3(ii).
[65] Section 4-1.2.

103. Criminalizing my interpretation of the witness protection measures orders in this case is particularly inappropriate given the extensive jurisprudence of the Mechanism and *ad hoc* Tribunals holding that the interpretation and implementation of protective measures orders should be the least restrictive necessary to provide for the protection of victims and witnesses.[66] My interpretation of the protective measures was consistent with this jurisprudence.

104. The Single Judge gave no consideration my role and responsibilities to my client as defence counsel when interpreting court orders. In light of this jurisprudence, the Single Judge committed a discernible error in failing to take into account this relevant consideration and abused his discretion when deciding to initiate contempt proceedings against me.

105. In addition, there were a number of other mitigating factors that the Single Judge ignored. These included the existence of the well-established alternative of referring my conduct to the Mechanism's own Disciplinary Panel under the extensive disciplinary regime put in place by the Mechanism's judges to police conduct of defence counsel.[67]

106. Judges of the Mechanism and ad hoc Tribunals have often considered whether proceedings for contempt are the most effective and efficient way to ensure compliance with the obligations flowing from the Statute and the Rules when exercising their discretion to initiate contempt proceedings.[68]

107. The Single Judge also failed to consider whether proceedings for contempt were the most effective and efficient way to ensure compliance with the obligations flowing from the Statute and the Rules in the specific circumstances of the case. This was particularly germane to my case given the availability of the disciplinary regime and the fact that there are no further judicial proceedings contemplated at the Tribunal and hence the deterrent value of contempt proceedings are significantly diminished.

111. The Single Judge also failed to consider the passage of 8-10 years between the conduct alleged to be in violation of the protective measures orders and the initiation of contempt proceedings. In an earlier decision on contempt in the *Ngirabatware* case, a different Single Judge

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[66] *Prosecutor v Karadzic*, No. MICT-13-55-A, *Decision on a Motion for an Order Referring a Matter to the President pursuant to Rule 90(C)* (23 November 2018), pp. 4, 7, 9, 12; *Prosecutor v. Bagosora et al.*, Nos. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* (6 October 2005), para. 19.

[67] Code of Professional Conduct, Articles 31 through 49.

[68] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Contempt Proceedings Against OTP Investigator Djibo Moumouni* (18 November 2011); *Prosecutor v Nshogoza*, No. ICTR-07-91-A, *Decision on Defence Allegations of Contempt by Members of the Prosecution* (25 November 2010), para. 21; *Prosecutor v Nsengimana*, No. ICTR-01-69-A, *Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses* (16 December 2010), paras 22-23.

considered the passage of three years to be a factor in favor of exercising his discretion not to initiate contempt proceedings.[69]

112. The Single Judge also failed to consider my extensive cooperation during the investigation. I provided consent for the *amicus curiae* and Single Judge to have access to extensive materials otherwise protected by Rule 76. I provided a 38-page detailed statement with 38 annexes. And I submitted to a two-day recorded interview by the *amicus curiae* in which I answered all of his questions. In the *Nsengimana* case, the Appeals Chamber found that the Trial Chamber properly considered the cooperation of the subjects of the investigation in exercising its discretion not to initiate contempt proceedings.[70]

113. I did all those things because that is the way I have conducted myself throughout my career as a lawyer. I have endeavored to be a courageous advocate for my clients and a trustworthy advocate before the Court.

VIII. CONCLUSION

114. I have a great deal of respect for the Single Judge, who has been a distinguished judge in his own country and internationally for some 40 years, and the *amicus curiae*, who has been a prosecutor about the same amount of time. But neither of them have ever served as defence counsel in any court. This lack of perspective has led to a process and a decision that fails to appreciate the role and duties of defence counsel, to his client as well as the court, and fails to appreciate the dangerous precedent of imprisoning a defence counsel for his interpretation of court orders.

115. The role of defence counsel is of vital importance to the proper functioning of the Mechanism. The Appeals Chamber is respectfully requested to exercise jurisdiction over this appeal, reverse the Impugned Decision, and rectify this injustice.

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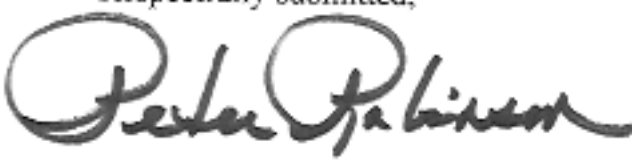
Respectfully submitted,



PETER ROBINSON

[69] *In the Matter of Deogratias Sebureze and Maximilian Turinabo*, No. MICT-13-40-R90, *Decisions on Allegations of Contempt of the ICTR* (17 July 2013), para. 47.

[70] *Prosecutor v Nsengimana*, No. ICTR-01-69-A, *Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses* (16 December 2010), para. 34.

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