UNITED NATIONS

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

International Residual Mechanism for Criminal Tribunals

Date: 11 March 2025

Original: English

BEFORE THE APPEALS CHAMBER

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

Registrar: **Mr. Abubacarr Tambadou**

PROSECUTOR

v.

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

PUBLIC

RESPONSE TO THE "APPEAL OF DECISION ON ALLEGATIONS OF CONTEMPT" DATED 3-MARCH-2025

Amicus Curiae

Mr. Kenneth Scott

Mr. Peter Robinson

The *Amicus Curiae* ("*Amicus*") respectfully files this response to Peter Robinson's ("Robinson") "Appeal of Decision on Allegations of Contempt" dated 3-March-2025.[1]

1. On 20-September-2021, Judge Vagn Joensen issued an Order referring a Matter to the President asking that another Single Judge be assigned to determine whether or not to initiate contempt proceedings or other disciplinary action against Robinson. Judge Vagn Joensen explained that in the course of his final deliberations and preparation of the trial judgement in the *Nzabonimpa et al. contempt* case, he found that: "the record before me raises grave concerns of repeated professional and ethical lapses on the part of Robinson while acting as Ngirabatware's counsel as well as reason to believe that he may be in contempt of the Mechanism."[2] Judge Vagn Joensen also recalled that he had concluded that Dick Prudence Munyeshuli, Robinson's investigator, had to "adhere to his independent duty to uphold such [protective] measures even if his lead counsel, as Robinson appears to have done in this instance, instructs him to violate them".[3] The *Nzabonimpa et al.* contempt case concerned "witness interference and the violation of court orders that occurred in connection with the *Ngirabatware* Review Case, [concerning] Ngirabatware's efforts to have his convictions reviewed before the Mechanism." Robinson acted as counsel for Augustin Ngirabatware in or regarding the *Ngirabatware* Review Case from at least 15-August-2015 until 19-December-2017.[4]

2. On 25-February-2025, Judge de Prada Solaesa, in his capacity as Single Judge in the investigation into allegations of contempt against Robinson ("Single Judge"), issued his

[1] As explained in this Response, there is no basis for considering Robinson's "appeal" as either an appeal as of right or an interlocutory appeal. *Amicus* notes nonetheless that Rule 132(B) gives ten days for the filing of a response to an interlocutory appeal, and that paragraph 19 of the Practice Direction on Requirements and Procedures for Appeals provides that a response shall also be filed within ten days of the appeal, when it is an appeal as of right. *Amicus* files his Response within seven days following the actual circulation of the Appeal, on 4-March-2025.

[2] *Prosecutor v. Nzabonimpa et al.,* MICT-18-116-T, Order Referring a Matter to the President, 20-September-2021, p.3 (emphasis added).

[3] Order Referring a Matter to the President, p.1 (emphasis added)

[4] Decision, para.2.

Decision on Allegations of Contempt ("Decision") and the *Decision issuing Order in Lieu of Indictment* ("Order in Lieu of Indictment"), initiating contempt proceedings against Robinson.[5]

3. On 3-March-2025, Robinson filed his "Appeal of Decision on Allegations of Contempt" ("Appeal"), asking that the Appeals Chamber vacate the Decision and "exercise its discretion [-- as if in a first instance proceeding --] 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."[6]

4. *Amicus'* first position is that there is no appellate jurisdiction in the circumstances here allowing or supporting Robinson's appeal. Second, and only if the Court finds jurisdiction, *Amicus* submits that that there was no abuse of discretion. *Amicus* asks the Appeals Chamber to reject the Appeal as without jurisdiction, completely unfounded and failing to demonstrate any reversible error by the Single Judge.

I. THERE IS NO JURISDICTION FOR ROBINSON'S APPEAL.

5. There is no Rule 90(J) jurisdiction for Robinson's Appeal. At the ICTY and ICTR, Rule 77(J), which provided that "[a]ny decision rendered by a Trial Chamber under [Rule 77] shall be subject to appeal", was interpreted as only allowing for decisions disposing of contempt cases to be appealed.[7] This jurisprudence was codified in the Mechanism's Rules, where Rule 90(J) states "Any decision disposing of a contempt case rendered by a Single Judge under this Rule shall be subject to appeal as of right." (Emphasis added.) Rule 90(J) clearly excludes a right to appeal decisions which do not "dispos[e] of a contempt case", such as decisions that initiate contempt proceedings, as here.

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5 *Prosecutor v. Nzabonimpa et al.*, MICT-18-116-R90.1, Decision on Allegations of Contempt, 25-February-2025; *In the Matter of Peter Robinson*, MICT-25-135-I, Decision Issuing Order in Lieu of Indictment, 25-February-2025.

6 *Prosecutor v. Nzabonimpa et al.*, MICT-18-116-AR90.1, Appeal of Decision on Allegations of Contempt, 3-March-2025, para.3.

7 *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, 14-December-2007, p.2: "Rule 77(J) of the Rules shall be interpreted as allowing for appeals against decisions disposing of the contempt case only". *See* also *Prosecutor* v. *Nzabonimana,* 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 and the jurisprudence referred to therein.

6. Similarly, the Mechanism Rules do not allow for an interlocutory appeal of decisions issuing an Order in Lieu of an Indictment for contempt. Rule 79(B) allows interlocutory appeals of decisions on preliminary motions, and Rule 80(B) provides for a right to file an interlocutory appeal of decisions on motions.[8] The Decision is not a decision on preliminary or other motions.

7. Given Rule 90(J) cited above, Robinson argues that there is appellate jurisdiction based on "the jurisprudence of the Mechanism that the Appeals Chamber may assert jurisdiction over matters raising issues related to the proper functioning of the Mechanism."[9] The cases cited by Robinson, however, do not concern matters for which a right to appeal was excluded by the Rules, but rather when a right to appeal was not provided in the Rules.[10] In other words, appeals on matters that concern the proper functioning of the Mechanism were heard in cases where the Rules were silent, in other words to "fill a hole" in the Rules. Here, the Rules are not silent, but only provide appeals on the specific bases cited, which do not apply here.

8. In any case, a decision to initiate contempt proceedings is not a case, at least here, which concerns "the proper functioning of the Mechanism," where the rules on initiating contempt cases are clear. Robinson's assertion that the Decision is one that concerns the proper functioning of the Mechanism because it "involves the subject of the victims and witnesses before the Mechanism" and "the role of defence counsel"[11] is wrong.

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8 *See* also Rule 132.

9 Appeal, para.74.

10 *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 (emphasis added) ("*Nzuwonemeye* Decision of 17-April-2019"): "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". *In the matter of Nzuwonemeye et al*, 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 (emphasis added) ("*Nzuwonemeye* Decision of 17-April-2019"): "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." *Prosecutor* v. *Kamuhanda,* MICT-13-33, *Decision on Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness*, 14-November-2016, para.6 (emphasis added) ("*Kamuhanda*") : "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." *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 Popović*, 17-May-2017 ("*Tolimir*"), para.12 (emphasis added): "The Appeals Chamber notes that Rule 86, which regulates measures for the protection of victims and witnesses, does not expressly provide for an appeal."

11 Appeal, para.79.

9. The cases cited by Robinson in which the appeals were taken based on the importance of the matter to the proper functioning of the Mechanism concerned matters which were the main subject of the impugned decisions. Indeed, in the *Nzuwonemeye* Decisions of 2-April-2019 and of 17-April-2019, the matter in play was the Mechanism's fundamental power to order State cooperation and the impugned Decisions concerned a request for such an order.[12] In *Kamuhanda* and in *Tolimir*, the issue relevant to the proper functioning of the Mechanism was the protection of victims and witnesses and the decision appealed was a decision on witness protective measures (or the modification thereof).[13]

10. In contrast, Robinson is challenging the exercise of the Single Judge's discretion in initiating contempt proceedings against him, where the rules are clear. The fact that Robinson was defence counsel at the time when he is accused of violating protective measures does not change the nature and subject of the Decision, which is the initiation of contempt proceedings. Robinson is asking the Appeals Chamber -- without any trial or other proceedings before the newly-assigned Single Judge, Judge Chiondo Masanche -- to substitute its discretion for that of the Single Judge (de Prada Solaesa), in vacating the Decision to indict him or ordering the Single Judge (de Prada Solaesa) to reassess his Decision. Here, the subject of the Decision is not the role of Defence counsel or the protection of victims and witnesses, but the initiation of contempt proceedings, which is plainly governed by the Rules, which are not silent.[14] Robinson cites no decision before the ICTY, ICTR or Mechanism where an accused was allowed to appeal a decision issuing an Order in Lieu of Indictment against him.

11. There is no appellate jurisdiction and the Appeal should be dismissed.

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[12] *Nzuwonemeye* Decision of 2-April-2019, para.7; *Nzuwonemeye* Decision of 17-April-2019, paras.3, 7.

[13] *Kamuhanda*, para.6; *Tolimir,* para.12.

[14] The decision in the *Kamuhanda* case, which Robinson cites to argue that the subject of victims and witnesses is one that concerns the proper functioning of the Mechanism, concerns an appeal of a decision on the recission of protective measures for a witness, not the initiation of contempt proceedings. See Appeal, para.77.

II. ROBINSON'S FACTUAL NARRATIVE DOES NOT CREATE JURISDICTION OR SHOW AN ABUSE OF DISCRETION.

12. The substantial majority of the Appeal Brief is devoted to factual matters (or allegations) concerning which there have not been any trial proceedings. Robinson, in essence, is inviting the Appeals Chamber to act as a first instance court and make factual determinations, skipping a trial and going directly to the appellate court on a vastly incomplete record. While *Amicus*, with respect, does not intend to try his case here, suffice it to say, in response:

13. The applicable protective measures were clear on their face, did not require any special "interpretation," and provided Robinson a specific, explicit avenue for contacting protected witnesses if he, allegedly, had some basis to believe that they might change their prior testimony in a way favorable to his client: to proceed through the prosecution office and the Witness Support and Protection Unit ("WISP").[15]

14. Robinson plainly admits that one cannot do indirectly what one cannot do directly,[16] but had many indirect contacts with various protected witnesses without taking the course clearly provided in the protective measures -- exactly what the Single Judge found, based on the *prima facie* evidence.[17]

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[15] *See The Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Prosecution's Motion for Special Protective Measures for Prosecution Witnesses and Others, 7-May-2009, p.7: "(v) 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 [ICTR Prosecution] witness and/or his or her family. If the person concerned consents, the Prosecution shall facilitate such contact together with the [Witness Support and Protection Unit ("WISP")]". *Prosecutor v. Ngirabatware,* MICT-12-29-R, Decision on a Motion for Modification of Protective Measures, 5-August-2016: "(v) [a] party who wishes to contact Witnesses [...] shall notify the WISP and the other party. The WISP shall contact the witness to determine if he or she consents to the meeting. The WISP shall thereafter facilitate the meeting if the witness consents and shall be present during the meeting. The other party may be present during the meeting if it so wishes". These quotations appear at footnotes 47 and 48 of the Decision.

[16] Referring to the 7-May-2009 protective measures cited above, Robinson explained: "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." Appeal, para.29.

[17] *See*, e.g., Decision, para.20, in relation to two violations: "This finding is in view of the Protective Measures Decision of 5 August 2016, which was the result of Robinson 's motion for the variation of protective measures, that required him to notify the WISP and the Prosecution if he wished to contact these protected witnesses. The evidence, if proven, appears to show that Robinson circumvented this judicial order by communicating with individuals, whom Robinson was well aware were in communication with the protected witnesses, to contact the witnesses on his behalf in order to relay certain information that may otherwise not reach the witnesses." *See* also, in relation to some of the other violations, Decision, paras.17-19.

15. The Appeals Chamber specifically warned Robinson about his conduct concerning contact with protected witnesses, where the Appeals Chamber indicated no need for any special or esoteric interpretation of the applicable measures.[18]

16. Similarly, in his Order referring a Matter to the President of 20-September-2021, Judge Vang Joensen noted that the Appeals Chamber, on 5-August-2016, modified the protective measures applicable to, among others, Witnesses ANAE, ANAM, ANAN and ANAT, and that the 5-August-2016 measures were "exceptional and additional measures [...] instituted given the specific circumstances of Ngirabatware's case". The Appeals Chamber modified the measures at Robinson's request.[19] The Appeals Chamber found that it was "appropriate that the Defence and the Prosecution be aware of the other party's contact with the Protected Witnesses and for the WISP to seek consent of the witnesses prior to any such contact..." in order "to safeguard the integrity of any such statements by the Protected Witnesses and to ensure that there is no interference with the course of justice".[20] Judge Vang Joensen noted that "Robinson nonetheless instructed Munyeshuli on 14 July 2017 to contact Maximilian Turinabo and have prohibited indirect contact with protected prosecution witnesses in violation of the Protective Measures Decision of 5 August 2016 notwithstanding the exceptional measures put in place to prohibit such conduct."[21] A similar instruction by Robinson to Munyeshuli, in addition to the 14-July-2017 instruction, was also included in the Order in Lieu

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[18] On 5-May-2016, after finding that Robinson had a prohibited contact with a protected Prosecution Witness, the Appeals Chamber cautioned Robinson "to exercise greater care when seeking to contact witnesses and to check the trial record accordingly." The Appeals Chamber decided that it was sufficient to caution Robinson, rather than to sanction him, "in light of the explanation provided" that Robinson had met the protected witness without the knowledge that he was the subject of protective measures – it was not because Robinson had made a "good faith interpretation" duties towards his client Ngirabatware. The Appeals Chamber also stated: "The Appeals Chamber recalls that Mr. Robinson has access to the record of the proceedings and that knowledge of the witness protection measures in place is of central importance to the conduct of any defence investigation, including into possible witness recantation for the purposes of a review application." The Decision refers to the above at para.21, fn.80. *See Prosecutor v. Ngirabatware,* MICT-12-29, Decision on Prosecution's Motion Regarding Protected Witnesses and Ngirabatware's Motion for Assignment of Counsel, 5-May-2016, paras.24-27.

[19] Decision, para.20: "This finding is in view of the Protective Measures Decision of 5 August 2016, which was the result of Robinson 's motion for the variation of protective measures ..."

[20] Order Referring a Matter to the President, p.2, citing the Decision on a Motion for Modification of Protective Measures, p.3 (emphasis added).

[21] Order Referring a Matter to the President, p.2.

of Indictment.[22] The 5-August-2016 measures, ordered at the request of Ngirabatware's Defence and instituted given the specific circumstances of Ngirabatware's review case, did not require some special interpretation so as to permit Robinson to respect his duties towards his client as part of that case.

17. The Single Judge found that Robinson made multiple statements to the Appeals Chamber, including that he "never asked or encouraged any person to contact protected witnesses", which, "[i]n view of the evidence underpinning the violations discussed above" "appear to be false." [23]

18. Robinson's investigator (Dick Prudence Munyeshuli) was convicted in the contempt case and sentenced to five months' imprisonment for having improper contact with protected witnesses and disclosing protected witness identities, while acting under Robinson's instruction.[24] Robinson's instruction to Munyeshuli, which led to the events for which Munyeshuli was convicted, is the basis for only one of the eight violations for which Robinson is now charged.[25]

19. In short, Robison's long narrative provides no basis for the relief requested here.

III. THE APPEAL FAILS TO DEMONSTRATE ANY ERROR IN THE SINGLE JUDGE'S EXERCISE OF HIS DISCRETION

20. If and only if the Appeals Chamber finds jurisdiction to support the Appeal, *Amicus* submits that there was, plainly, no abuse of discretion.

21. It is abundantly clear from the Decision itself that the Single Judge exercised his discretion and recognized that he was doing so. In the absence of direct evidence to the contrary, it must be presumed that the Judge acted upon and considered all relevant factors and

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22 Decision, para.20.

23 Decision, paras.31-32.

24 Decision, paras. 87, 99, 115.

25 Order in Lieu of Indictment, para.13.

circumstances informing and underlying his discretion. There is no evidence or record of any error, let alone an error which made the Decision "so unfair and unreasonable" as to constitute an abuse of discretion.

A. The Single Judge did not have to explicitly address every potential factor that the accused alleges to be relevant to the exercise of his discretion.

22. Robinson alleges that he made a "good faith interpretation" of the applicable protective measures and that the Judge "failed 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."[26]

23. Robinson does not refer to any jurisprudence requiring the Judge, in the exercise of his discretion to initiate contempt proceedings, to take into consideration the alleged factor of "the role and obligations of defence counsel to interpret court orders and to act in the best interest of their clients", nor any other factor which Robinson identifies in the Appeal.

24. The Appeals Chamber in the ICTR *Nshogoza* case and *Nsengimana* case made clear that a Judge or Chamber is not required to consider a particular factor raised by Robinson in the Appeal,[27] in the exercise of his or her discretion to initiate contempt proceedings, highlighting that the exercise of discretion to initiate contempt proceedings can include multiple factors that the Judge or Chamber may consider relevant. The *Nsengimana* Appeals Chamber stated that the Trial Chamber "was not required to determine whether the initiation of contempt proceedings against the investigators was 'the most effective and efficient way to ensure compliance with the witness protection measures'", but that considering such factor

[26] Appeal, paras.83, 85.

[27] Appeal, para.106.

"was within the scope of its discretion."[28] The *Nshogoza* Appeals Chamber concluded the same.[29]

25. Even in the case of trial judgements, where Rule 122(C) states that the Judges shall provide a reasoned opinion in writing, where the parties submit detailed final trial briefs and where an accused has an essential right to appeal which will be exercised based on the Judges reasoned opinion, Judges are not required to expressly address every potential matter that could be alleged to be relevant.

26. In *Prlić*, the Appeals Chamber stated that "the Trial Chamber was not under an obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls, rather, that the Trial Chamber maintained the discretion as to which legal arguments to address."[30] The Appeals Judgement in *Kvočka et al.* states: "[T]he Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial. The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address."[31]

27. In terms of factual findings, the *Kvočka* Appeals Chamber determined that:

> [T]he Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. (...) If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction

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[28] *The Prosecutor v. Hormisdas Nzengimana,* Case Nos. ICTR-01-69-A & ICTR-2010-92, Re: Léonard Safari and Rémi Mazas, Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses, 16-December-2010, paras.22-23 (emphasis added).

[29] *Prosecutor v. Nshogoza*, ICTR-07-91-AR77, Decision on Nshogoza's Appeal of Decision on Allegations of Contempt by Members of the Prosecution, 7-July-2011, para.20: "a Trial Chamber is not required to determine whether the initiation of contempt proceedings is the most effective and efficient way to ensure compliance with witness protection measures."

[30] *Prosecutor v. Prlić et al.,* IT-04-74-A, Judgement, 29-November-2017, para.989. *See* also *Prosecutor v. Ratko Mladić,* MICT-13-56-A, Judgement, 8-June-2021, para.200: "a trial chamber has the discretion to select which legal arguments to address."

[31] *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28-February-2005, para.23 ("Kvočka et al. Appeals Judgement*").*

> to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[32]

28. Robinson argues that the Single Judge's Decision is an "outlier" in failing to consider Robinson's "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."[33]

29. First, there is no evidence or other indication that the Single Judge failed to consider the factors or circumstances which Robinson claims he should have, but did not consider. There is no dispute that the Single Judge had before him the transcript of Robinson's suspect interview and a detailed 37-page single-spaced submission by Robinson, with 38 annexes, in which Robinson could plead his case.[34]

30. Second, it is well-established jurisprudence that a factor determined to be relevant in a certain case cannot be presumed to be relevant in another case. In the ICTR *Nyiramasuhuko et al.* case, the Appeals Chamber explained:

> The Appeals Chamber stresses that the manner in which the discretion to manage trials is exercised by a trial chamber should be determined in accordance with the case before it; what is reasonable in one trial is not automatically reasonable in another. The question of whether a trial chamber abused its discretion should not be considered in isolation, but rather by taking into account all relevant circumstances of the case at hand.[35]

31. Similarly, the *Hadžihasanović & Kubura* Appeals Chamber stated:

> The Appeals Chamber reiterates that whether certain factors going to a convicted person's character constitute mitigating or aggravating factors depends largely on the particular circumstances of each case. The Appeals Chamber previously underlined that "[c]aution is

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32 Kvočka et al. Appeals Judgement, para.23 (emphasis added).

33 Appeal, para.100.

34 *See* Appeal, paras.60-61; Decision, para.14.

35 *Prosecutor v. Nyiramasuhuko et al.,* ICTR-98-42-A, Judgement, 14-December-2015, para.179.

> needed when relying as a legal basis on statements made by Trial Chambers in the context of cases and circumstances that are wholly different"[36]

32. As to one of the circumstances which distinguishes the present case from others, the Single Judge found *prima facie* evidence that Robinson, in his role as defence counsel, violated protective measures and/or the Defence Code of Conduct on multiple occasions. Indeed, not only did the Single Judge charge Robinson with nine of the 34 violations identified by the investigation,[37] the Single Judge also found *prima facie* evidence of four violations involving disclosure of the content of confidential decisions,[38] eleven violations involving the disclosure of protected witness identities, status and other information,[39] three false statements to the Appeals Chamber,[40] and repeated communications through prohibited contraband means between Robinson and Ngirabatware, in violation of detention facility rules.[41]

33. In sum, no jurisprudence required the Single Judge, in the exercise of his discretion, to expressly consider the factors identified by Robinson (although there is no evidence that he did not do so), and the Single Judge did not have to explicitly address every potential factor that Robinson alleges to be relevant. At the very least, Robinson (a) must explain why an alleged factor was required to be taken into consideration; (b) must establish that the Judge failed to take that factor into consideration; and (c) must show that the Judge's Decision was so unfair and unreasonable as to constitute an abuse of discretion. As further outlined below, Robinson fails to do so.

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[36] *Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-A, Judgement, 22-April-2008, para.328. *See* also Prosecutor v. Milomir Stakic, IT-97-24-A, Judgement, 22-March-2006, para.416: "Thus, while in that context the conclusion of the Trial Chamber may well be persuasive, the same is not true when the same reasoning is transplanted in a completely different context such as the case of the Appellant. Caution is needed when relying as a legal basis on statements made by Trial Chambers in the context of cases and circumstances that are wholly different."

[37] Two of those violations were considered by the Single Judge to constitute the same violation. Decision, para.18.

[38] Decision, paras.23-24.

[39] Decision, paras.25-26.

[40] Decision, paras.32-33.

[41] Decision, para.33-37.

34. The Decision shows that the Single Judge considered numerous factors in the exercise of his discretion, including "the nature of Robinson's conduct"[42], "evidentiary issues that may pose difficulties" in proving violations at trial,[43] the "deliberate" nature of an instruction by Robinson to a protected witness,[44] what "triggered" Robinson's violations, the harm that befell the protected witnesses, the seriousness of the violations, the "expenditure of resources that would be required to prosecute" various violations,[45] the "standard of professionalism and ethics required of the important role Defence counsel play in the administration of justice",[46] and the "necessary and an efficient use of limited judicial resource to initiate contempt proceedings".[47] The Single Judge also considered other factors, such as the contents of the Code of Conduct for Defence Counsel and Robinson's cooperation with the investigation.[48] *Amicus* submits that when a factor is determined to be relevant to a certain violation or other matter addressed in the Decision, this shows that the Single Judge had such factor in mind in overall relation to his Decision. The absence of a specific mention or reference in a particular part of the Decision does not show that the Judge forgot about or failed to consider the various factors.

35. The factors and elements outlined in the Decision are clearly sufficient to support the exercise of the Judge's discretion to initiate contempt proceedings.

B. The Single Judge plainly took into consideration Robinson's status as Defence counsel and the availability of disciplinary proceedings.

36. *Amicus* always contemplated and planned to conduct a suspect interview of Robinson before completing his investigation, but had not done so as of the time when the Single Judge

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42 Decision, para.17.

43 Among others, *see* Decision, paras.17-18.

44 Decision, para.19.

45 Decision, parsa.24, 26.

46 Decision, para.26 (emphasis added).

47 Decision, para.32.

48 Decision, paras.35, 36 & fn.99, 119, 120. On cooperation, *see* fn.132.

ordered *Amicus* to submit his principal report, which was submitted on 13-March-2023. Robinson asked the Single Judge for leave to make submissions, including concerning his "good faith interpretation" argument.[49]

37. During the subsequent suspect interview and as part of his 37-page statement, Robinson was allowed to present whatever alleged factual matters, submissions or arguments that he wished to put forward. *Amicus* then filed his supplemental report on 13 June 2023, and provided to the Single Judge Robinson's full 37-page statement and 38 annexes, and, sometime later (once *Amicus* received it) the full transcript of Robinson's interview.[50]

38. In addition to alleging that he made a "good faith interpretation of protective measures", Robinson clearly stated in his Request for Leave to Make Submissions, which led to the Judge's instruction to *Amicus* to conduct Robinson's interview, that he sought an opportunity to be heard "on the issue of discretion" on whether to initiate contempt proceedings.[51]

39. The Single Judge refers to Robinson's suspect interview, his 37-page statement and the statement's numerous annexes provided to the Single Judge, as well as *Amicus*' Supplemental Report on the suspect interview and related material, at various places throughout his Decision.[52] He plainly considered this material.

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[49] Robinsons states in his appeal:

> 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." The Single Judge directed the *amicus curiae* to interview me.
>
> That interview took place on 23-24 May 2023. I provided the *amicus curiae* with a detailed 37-page, single-spaced statement with 38 annexes in advance of the interview. The *amicus curiae* filed a supplemental report on 13 June 2023.

Appeal, paras.60-61, citing *Prosecutor v. Nzabonimpa et al*., MICT-18-116-R90.1, Request for Leave to Make Submissions, 20-March-2023, para. 9 (emphasis added).

[50] See Decision, fn.14, and the numerous references to these documents in the Decision. *See* also *Prosecutor v. Nzabonimpa et al.*, MICT-18-116-R90.1, Decision on Application of Lawyer-Client Privilege and Use of Material Subject to Rule 76 in Further Proceedings, 2-April-2024, para.6 & fn.15, 16.

[51] Request for Leave to Make Submissions, para.11.

[52] *See* the numerous references in the Decision's footnotes.

40. In his Decision to initiate contempt proceedings, the Single Judge was not required to explicitly address, at each turn, from every angle, every factor that Robinson says he was required to address.

41. Indeed, in relation to the disclosures of protected witness identities, status and other protected witness information, the Judge declined to charge those disclosure despite the *prima facie* evidence of contempt, and rather decided instead to issue a warning to Robinson, citing the standards of professionalism and ethics for, and important role of Defence Counsel:

> Accordingly, in the exercise of my discretion, I decline to initiate contempt proceedings against Robinson for his conduct in relation to Violations 14-23 and 34 and, bearing in mind that Robinson's conduct under these violations falls well below the standard of professionalism and ethics required of the important role Defence counsel play in the administration of justice, I find that judicial warnings are instead warranted.[53]

42. The Single Judge was aware of the jurisprudence and took it into account. In relation to contacts with family members of protected witnesses, the Judge stated:

> In this context, where these family members were subject to potentially conflicting protective measures and considering the principle that protective measures should be interpreted and implemented in the least restrictive manner necessary to provide protection for victims and witnesses, questions arise as to whether Robinson' s contact with these individuals necessarily violates the Protective Measures Decision of 7 May 2009.[54]

43. The Single Judge took into consideration the practical realities of, and best practices for conducting an investigation. When it comes to potential violations of protective measures for having recorded witness interviews, the Judge interpreted the term “person” to whom such measures applied, as excluding the parties and applicable only to non-parties. He bore in mind "that the recording of interviews during an investigation can be considered best practices”.[55]

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53 Decision, para.26 (emphasis added).

54 Decision, para.28 (emphasis added).

55 Decision, para.30.

44. Similarly, contrary to Robinson's allegations,[56] the Judge considered whether certain acts and conduct should be subject to disciplinary proceedings because of Robinson's status as Defence counsel. In relation to Robinson's false statements to the Appeals Chamber, the Single Judge, citing article 41 of the Code of Conduct for Defence Counsel concerning disciplinary hearings, stated: "I consider that any determination as to whether these violations should be subject to disciplinary measures should be deferred until the conclusion of contempt proceedings against Robinson for the Single Judge assigned to the matter."[57]

45. The Single Judge referred at various places in the Decision to the *Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism*, when determining whether certain acts and conduct should be charged.[58] The Decision also makes it clear that Robinson's role as Defence counsel and the Code of Conduct for Defence Counsel was taken into consideration as part of the investigation: "Turning now to the allegations, the *Amicus Curiae* submits that Robinson committed 34 violations, constituting contempt or a violation of the Code of Conduct, during his representation of Ngirabatware in the Ngirabatware Review Case."[59]

46. In sum, Robinson was given the opportunity, during his suspect interview and as part of his related 37-page statement, to demonstrate that he allegedly acted pursuant to a good faith interpretation of protective measures, which is exactly what he stated to the Single Judge when he was asked by the Single Judge why he should be granted leave to make submissions. The

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[56] Appeal, para.105.

[57] Decision, para.32. *See* also para.37 and p.22, where the Judge defers the determination on whether to initiate disciplinary proceedings. *See* also *Prosecutor v. Nzabonimpa et al.*, MICT-18-116-R90.1, Decision on Application of Lawyer-Client Privilege and Use of Material Subject to Rule 76 in Further Proceedings, 2-April-2024, para.15 (emphasis added). The Single Judge noted: "Robinson argues that criminal proceedings are not the most effective and efficient way to ensure compliance with obligations flowing from the Statute or the Rules in view of (i) the item-by-item approach required for the application of lawyer-client privilege and, therefore, the same application required for the crime-fraud exception; (ii) the evidentiary limitations imposed by Rule 76 of the Rules; (iii) his statements provided in the Robinson April 2023 Statement and Suspect Interview; and (iv) the availability of a disciplinary system at the Mechanism."

[58] Decision, paras.35, 36 & fn.99, 119, 120.

[59] Decision, para.13. Robinson also argues that the Single Judge should have considered the passage of eight to ten years since the underlying conduct. The Single Judge was obviously well aware of the overall chronology. *Amicus* notes that he was appointed on 30-November-2021, received the first set of confidential materials from the Registry in January 2022, and filed his principal report on 13-March-2023.

Single Judge thoroughly considered Robinson's interview and statement, and made clear at various places that Robinson's status and role as Defence counsel was taken into consideration. Robinson simply disagrees with the Single Judge's conclusions.[60]

C. The case against Robinson is not one of different interpretation of protective measures, as Robinson plainly knew what the measures required.

47. Robinson's acts and conduct cannot be defended on the basis that they resulted from an alleged good faith interpretation of the various protective measures, as Robinson's Appeal demonstrates that he plainly violated protective measures based on his own understanding.

48. As an example, in relation to Violation No. 1 described in the Decision, Robinson explains:

> 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 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. (...) 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.[61]

49. The Order in Lieu of Indictment states that Robinson told DWAN-147 in response to the above that it would be "very helpful to know what [ANAE's] position is", and that Robinson followed through and obtained confirmation on two occasions that ANAE was willing to meet with Robinson.[62] That the protective measures prohibited Defence counsel and

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60 In relation to a Trial Chamber's assessment of evidence, the Appeals Chambers has stated: "The Appeals Chamber finds that Karadžić's reference to other evidence on the record, which, in his view, is inconsistent with the Trial Chamber's conclusion, reflects mere disagreement with the Trial Chamber's assessment of the evidence without demonstrating an error. In this regard, the Appeals Chamber recalls that the mere assertion that the Trial Chamber failed to give sufficient weight to evidence or that it should have interpreted evidence in a particular manner is liable to be summarily dismissed." *Prosecutor v. Radovan Karadžić,* MICT-13-55-A, Judgement, 20-March-2019, para.376 (emphasis added).

61 Appeal, paras.32, 34 (emphasis added).

62 Order in Lieu of Indictment, paras.5-6.

mandated the Prosecution to communicate with ANAE to "see whether she was willing to meet" with Defence counsel is exactly what the measures state, and the quotation in the paragraph above plainly shows that Robinson knew this. This was no "error of good faith interpretation."

50. In relation to Violation No. 32 in the Decision, Robinson states, in reference to his meetings on 24-November-2015, including one with DWAN-147:

> During these meetings [on 24-November-2015], 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.[63]

51. However, Violation No. 32 is all about Robinson's contact with ANAE through DWAN-147. The Order in Lieu of an Indictment states that during that 24-November-2015 meeting, Robinson used DWAN-147 as intermediary, and "intended for Witness DWAN-147 to communicate with Witness ANAE on his behalf, or was recklessly indifferent that prohibited contact with Witness ANAE would or may occur as a result of his acts and conduct."[64]

52. Regarding Violation No. 7, the Decision states:

> [T]he evidence indicates that Robinson gave his investigator's phone number to a protected ICTR Prosecution witness, instructed the witness to call the investigator if the witness had any problems, and that the witness did indeed contact the investigator. Recalling the jurisprudence that contact may still be in violation of protective measures even if the contact is initiated by a protected witness, I consider that the evidence gives rise to a *prima facie* case for contempt case...[65]

53. In the Appeal, Robinson states, in relation to a meeting with DWAN-78 concerning the same Witness to whom he gave his investigator's phone number: "I asked DWAN-78 not to talk to ANAN about Ngirabatware's case between now and then because 'it's not allowed for

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63 Appeal, para.42.

64 Order in Lieu of Indictment, para.6.

65 Decision, para.19.

anyone on Ngirabatware's team to either directly or indirectly have contact with a prosecution witness ...'"[66] The Appeal also states that in a prior meeting with DWAN-78, Robinson: "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."[67] There was no possible error of interpretation. Robinson knew that he and his investigator could not "have contact" or "talk" with the protected witness without going through the procedure set forth in the protective measures.

54. The Decision and related Order in Lieu of an Indictment describe incidents, in addition to those described above, in relation to which Robinson was found *prima facie* to have given instructions with the intention of having contacts with protected witnesses through others, or at least with reckless indifference to the occurrence of contacts with protected witnesses through others on his behalf.[68] For example, in relation to Violations No. 8 and No. 9 which originate from Robinson's instructions to his investigator, the Decision states that "[t]he evidence, if proven, appears to show that Robinson circumvented this judicial order by communicating with individuals, whom Robinson was well aware were in communication with the protected witnesses, to contact the witnesses on his behalf in order to relay certain information that may otherwise not reach the witnesses."[69]

55. In fact, the Single Judge concluded that two of Robinson's statements to the Appeals Chamber -- that Robinson "never asked or encouraged any person to contact protected witnesses" and that he "never asked or instructed anyone to solicit any person to contact the prosecution witnesses on our behalf" -- appear, "[i]n view of the evidence underpinning the violations discussed above," to be false.[70]

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66 Appeal, para.45. There appears to be a typographical error at this paragraph of the Appeal, where Robinson mentions to have met prosecution Witnesses in July-2015. These meetings took place in July-2016. *See* Appeal, para.47.

67 Appeal, para.40.

68 Decision, paras.17, 18, 20; Order in Lieu of Indictment, paras.7, 8, 10, 12, 13.

69 *See* Decision, para.20 (emphasis added) and Order in Lieu of Indictment, paras.12-13.

70 Decision, paras.31-32.

56. The case against Robinson is a case of repeated knowing and wilful violation of protective measures. The obligations that the protective measures entailed were clear, were plainly known by Robinson, and there was no alleged interpretation that can excuse Robinson's acts and conduct.

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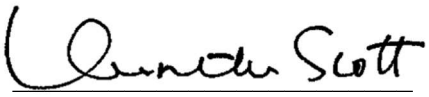
Respectfully submitted this 11-March-2025.



Kenneth Scott
Amicus Curiae

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