UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

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

Date: 16 March 2025

Original: English

BEFORE THE APPEALS CHAMBER

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

Registrar: **Mr Abubacarr M. Tambadou**

PROSECUTOR

v.

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

Public

REPLY BRIEF: APPEAL OF DECISION ON ALLEGATIONS OF CONTEMPT

Amicus Curiae:
Mr. Kenneth Scott

Mr. Peter Robinson

1. The *amicus curiae's* response[1] challenges the Appeals Chamber's jurisdiction to hear my appeal. He also challenges the notion that the Single 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.[2] These challenges are addressed in turn below.

JURISDICTION

2. Rule 90(J) of the Rules provides in pertinent part 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." As the *amicus curiae* recognises,[3] I do not rely on this Rule as the jurisdictional basis of my appeal.[4] 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.[5]

3. In practice, Rule 90(J) limits appeals of decisions to initiate contempt proceedings to the prosecution, since only a decision declining to initiate proceedings disposes of a contempt case at that stage. The *amicus curiae* nevertheless contends that because Rule 90(J) limits appeals of contempt decisions to one party, the Appeals Chamber ought not to entertain an appeal on the same subject from the other party, regardless of the issue's relationship to the proper functioning of the Mechanism.[6]

4. There is no authority for this interpretation of the Appeals Chamber's jurisdiction. In fact, the Appeals Chamber's practice is to the contrary.

5. Two of the cases where the Appeals Chamber exercised its jurisdiction as relating to the proper functioning of the Mechanism involved a Rule that limited an appeal to one party. In the *Nzuwonemeye* cases, the appellant sought an order to the States of France and Niger. The Single Judge declined to issue an order and Major Nzuwonemeye appealed.

6. Rule 134(A) of the Rules provides that "A State directly affected by an interlocutory decision of a Trial Chamber may, within fifteen days from the date of the decision, file a request for review of the decision by the Appeals Chamber." The Rule does not provide for an appeal from such an interlocutory decision by a defendant. The existence of Rule 134(A) did not prevent the Appeals Chamber from exercising jurisdiction over the appeals on the grounds that they involved issues related to the proper functioning of the Mechanism, even though Rule 134(A), like Rule

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[1] *Response to the "Appeal of Decision on Allegations of Contempt" dated 3-March-2025* (11 March 2025) ("*Response*").
[2] *Decision on Allegations of Contempt* (25 February 2025)(the "*Impugned Decision*").
[3] *Response*, para. 7.
[4] *Appeal from Decision on Allegations of Contempt* (3 March 2025) ("*Appeal brief*"), para. 73, citing *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), para. 13.
[5] *Appeal brief*, para. 74.
[6] *Response*, para. 7.

90(J), only expressly authorized one party to appeal.[7]

7. Therefore, the *amicus curiae*'s argument that this Chamber should decline to hear the appeal because of Rule 90(J) is without merit. The existence of a Rule that expressly allows for one party to appeal does not preclude the exercise of jurisdiction over another party's appeal if the issue involves the proper functioning of the Mechanism.

8. The *amicus curiae* also disputes that the issue in this case relates to the proper functioning of the Mechanism. He contends that the issue is not the role of defence counsel but the initiation of contempt proceedings.[8] This, too, is a distinction without a difference. In *Kamuhanda*, where an appeal was authorized on the grounds that the issue involved the proper functioning of the Mechanism, it could be said that the issue was about who could consent to variation of protection measures for a deceased person, not the role of victims and witnesses.[9] The *amicus curiae*'s efforts to reframe the issue cannot avoid the fact that subjecting a defence counsel to criminal prosecution for interpreting court orders is an issue related to the proper functioning of the Mechanism.

9. The *amicus curiae* has not identified any prejudice to his case from appellate review of the Impugned Decision. It has already been almost decade since the conduct that is the subject of the contempt proceedings occurred. The *amicus curiae*'s own investigation took three years. The appeal engages directly with the important role that the defence plays at the Mechanism and in the international justice system, and should be decided on the merits.

FAILURE TO CONSIDER RELEVANT MATERIAL

10. The *amicus curiae* and I agree that the Single Judge had before him a vast amount of information that I was contending that I should not be prosecuted because my actions as Ngirabatware's defence counsel were pursuant to a good faith interpretation of the protective measures orders.

11. As pointed out by the *amicus curiae*, after he submitted his report without giving me the opportunity to be heard, I filed a request with the Single Judge to make submissions relevant to the exercise of his discretion to initiate contempt proceedings. In that submission, I claimed that I acted pursuant to a good faith interpretation of the protective measures.[10]

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[7] *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; *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.
[8] *Response*, paras. 8-10.
[9] *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.
[10] *Response,* para. 36 and fn. 49. A request to reclassify the underlying document is pending before the Appeals Chamber.

12. When the Single Judge ordered the *amicus curiae* to interview me, I provided a 37-page single-spaced statement with 38 annexes. This statement was attached to the *amicus curiae*'s supplemental report to the Single Judge. It is replete with evidence that I acted pursuant to my good faith interpretation of the protective measures orders.

13. In the introduction to that statement, I contended that counsel in a criminal case were frequently called upon to interpret judicial orders, such as protective measures, and should not have to interpret such orders at the peril of criminal prosecution.[11] In the body of the statement, I explained that I interpreted the protective measures to mean that we were not to ask or instruct anyone to contact a prosecution witness on our behalf.[12]

14. Throughout the statement, I emphasised that I believed that I was faithful to, and in compliance with, the protective measures orders for prosecution witnesses.[13] I repeatedly instructed my client,[14] investigators,[15] resource person,[16] and defence witnesses[17] that we were to obey the protective measures and not have any direct or indirect contact with prosecution witnesses. When I confirmed that my client was involved in disobeying these instructions, I resigned as his counsel.[18]

15. The Single Judge also had information that I was contending that I had interpreted the protective measures in good faith in my capacity as defence counsel from my two-day interview with the *amicus curiae*. The transcript of that interview, which the *amicus curiae* provided to the Single Judge,[19] is filled with my statements to that effect and details as to how I interpreted the protective measures decisions in the context of the individual actions that were the subject of the alleged contempt.[20]

16. The Single Judge also had information that my interpretation of the protective measures was not an after-the-fact justification, but one that I maintained from the outset. As described in the *amicus curiae* report, In February 2016, when the prosecution objected to my contacts with defence witnesses who were close to the protected prosecution witnesses, I explained to the Appeals Chamber that I "never **asked or instructed** anyone to solicit any person to contact prosecution witnesses". The Appeals Chamber found that the Prosecution failed to show that I violated the

[11] That statement is also attached as an annex to the *Respondent's Brief* (15 May 2024) in the Rule 76 litigation before the Appeals Chamber. See para. 3. A request to reclassify that document is pending before the Appeals Chamber.
[12] *Id*, para. 36.
[13] *Id*, paras. 54, 98, 104, 112, 135, 147, 162, 169.
[14] *Id*, para. 34.
[15] *Id*, paras. 49, 73. This was also before the Single Judge in the *Amicus Curiae* report, para. 437.
[16] *Id*, para. 111. This was also before the Single Judge in the *Amicus Curiae* report, para. 437.
[17] *Id*, para. 110.
[18] *Id*, para. 183.
[19] *Response*, para. 29.
[20] Transcript of interview, pps. 28, 49-50, 53, 70-71, 89-90, 102-03, 113-14, 119, 122, 124-26, 128-29, 137, 152-53, 192, 203-04.

protective measures in relation to those witnesses.[21] I made similar statements in June and September 2016 that were before the Single Judge.[22]

17. It is also undisputed by the *amicus curiae* that the Impugned Decision contains no discussion by the Single Judge of the issue of my role, or the role of defence counsel in general, when interpreting court orders. The *amicus curiae* resorts to double negatives when he contends that "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" and "there is no evidence that he did not do so".[23] He also resorts to unsupported adverbs when stating that the Single Judge "**plainly** considered this material."[24] The text of the decision speaks for itself: the Single Judge never addressed this fundamental issue.

18. The *amicus curiae* relies on jurisprudence from appeals of trial judgments to establish the standard of review of the failure to consider relevant information.[25] Understandably, in the context of a lengthy trial, a Trial Chamber or Single Judge's failure to explicitly refer to information before them is not determinative when reviewing a judgment. However, a review of relevant interlocutory decisions of the Appeals Chamber demonstrates that the standard is more exacting when there are limited issues before the Trial Chamber or Single Judge.

19. In the *Halilovic* case, the ICTY Appeals Chamber reviewed the decision of the Trial Chamber to admit evidence of the accused's pre-trial interview with the Prosecution. The Appeals Chamber found that the Trial Chamber erred in failing to take into account three relevant considerations—that the prosecution had made an inducement to the accused during the interview, that the prosecution led the accused to believe that the indictment may be withdrawn should he cooperate, and that the accused had inadequate representation at the time of the interview. The Appeals Chamber held that the failure to consider these relevant considerations, all of which were known to the Trial Chamber, constituted an abuse of discretion. It went on to substitute the exercise of its own discretion for that of the Trial Chamber and ordered the interview expunged from the trial record.[26]

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[21] *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), para. 25 quoted in *amicus curiae* report, para. 45 (emphasis added).
[22] See para. 147 (instructions re ANAL) and Annex 21 (instructions to DWAN-28) to my personal statement annexed to the *amicus curiae's* supplemental report.
[23] *Response*, paras. 29, 33 (emphasis added).
[24] *Id*, para. 39 (emphasis added).
[25] *Id,* paras. 30, 31.
[26] *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at paras. 63-65.

20. In the *Haradinaj* case, the ICTY Appeals Chamber reviewed on interlocutory appeal a decision denying provisional release. It recognized that Trial Chambers were not obliged to deal with all possible factors "but at a minimum, must provide reasoning to support its findings regarding the substantive considerations relevant to its decision." It found that the Trial Chamber failed to explain how the uncertainty of the Appellant's ability to earn a livelihood, and the vagueness of his plans would have an impact upon the likelihood that he would not appear for trial if provisionally released. It reversed the Trial Chamber's decision.[27]

21. Similarly, the Single Judge was obligated to discuss whether contempt proceedings should be initiated against me in light of my contention that counsel in a criminal case are frequently called upon to interpret judicial orders such as protective measures, and should not have to interpret such orders at their peril of prosecution for contempt and that the alleged conduct was undertaken based on my good faith interpretation of the protective measures orders.

22. The fact that the Single Judge had all of that material before him, just as the Trial Chambers in *Halilovic* and *Haradinaj* had all of the information before them, did not excuse the failure to deal with those issues in the decision. When exercising his discretion on those violations for which he found a *prima facie* case had been established, the Single Judge considered issues related to 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.[28] But he ignored the main contention of my request to make submissions, my written statement, and my interview with the *amicus curiae*—that my actions were taken while interpreting protective measures orders to the best of my ability and in the best interest of my client while acting as his defence counsel.

23. The *amicus curiae* also seeks to avoid the double standard between the Impugned Decision and the many decisions cited in my appeal where contempt proceedings were not initiated against members of the prosecution by citing jurisprudence that each case is different.[29] However, at least in the early release context, the President has emphasized that a proper exercise of discretion requires consistency with past practice.[30]

24. The *amicus curiae* cites to the multiple alleged violations as a reason to distinguish my

[27] *Prosecutor v Haradinaj et al,* No. IT-04-84-AR65.2, *Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release* (9 March 2006) at para. 10.
[28] Impugned Decision, paras. 24, 26, 32.
[29] *Response*, paras, 30-31.
[30] *Prosecutor v Simba*, No. MICT-14-62-ES.1, *Public Redacted Version of the President's 7 January 2019 Decision on the Early Release of Aloys Simba* (7 January 2019) at para. 33; *Prosecutor v Coric*, No. MICT-17-112-ES.4, *Decision of the President on the Early Release of Valentin Coric and Related Motions* (16 January 2019) at para. 41.

case.[31] However, interpreting the protective measures meant that I acted consistently throughout my two-year representation of Ngirabatware. While this multiplied the number of alleged violations, it is evidence of my good faith. Had I been inconsistent, it would call into question whether my acts were pursuant to a good faith interpretation of the orders or whether I was trying to get away with something. The fact that I repeated my interpretation of the protective measures to the Appeals Chamber[32] and Registry[33] along the way supports my position that the alleged violations were in fact pursuant to a good faith interpretation of the protective measures.

25. The *amicus curiae*'s defence of the Impugned Decision fares no better on the other issues raised in my appeal. Concerning my contention that the Single Judge failed to consider the well-established disciplinary issues as an alternative to initiating contempt proceedings,[34] the *amicus curiae* states that "the Judge considered whether certain acts and conduct should be subject to disciplinary proceedings because of Robinson's status as Defence counsel."[35] However, the Single Judge only considered disciplinary procedures as a **supplement** to initiating criminal proceedings. A proper exercise of his discretion should have considered them as an **alternative** to criminal proceedings.

26. In a footnote, the *amicus curiae* dismissed my contention that the Single Judge erred in failing to consider the long passage of time (8-10 years) since the conduct in question.[36] He speculates, again relying on unsupported adverbs, that "[t]he Single Judge was **obviously** well aware of the overall chronology."[37] Even if true, this does not justify the failure to discuss this relevant factor in the decision whether to initiate contempt proceedings.

27. The *amicus curiae* responds to my contention that the Impugned Decision's failed to consider my cooperation as a factor as to whether to initiate contempt proceedings,[38] by claiming that the Single Judge took my cooperation into account.[39] However, the Impugned Decision only mentioned my cooperation in a footnote when deciding that a summons should be issued.[40] The Single Judge gave no consideration of my cooperation when deciding whether to initiate contempt proceedings.

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[31] *Response*, para. 32.
[32] Annex A, para. 97.
[33] *Id*, para. 105.
[34] *Appeal brief*, paras. 105-06.
[35] *Response,* para. 44.
[36] *Appeal brief*, para. 111.
[37] *Response*, fn. 59.
[38] *Appeal brief*, para. 112.
[39] *Response*, para. 34.
[40] Impugned Decision, fn. 132.

28. The Single Judge's failure to give sufficient weight or any weight at all to these relevant considerations in reaching the decision constitutes an abuse of discretion that rendered the Impugned Decision unfair and unreasonable.

CONCLUSION

29. The Appeals Chamber has jurisdiction to consider my appeal because the issues relate to the role of defence counsel in interpreting court orders and hence the proper functioning of the Mechanism. The decision unjustly punishes me for my interpretation of the protective measures orders in this case and unfairly jeopardises the important role of defence counsel to achieve fair trials for those accused in international criminal courts and tribunals. The Appeals Chamber is respectfully requested to reverse the Impugned Decision and take whatever steps it believes are appropriate to do justice.

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Respectfully submitted,

PETER ROBINSON

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