UNITED NATIONS

International Residual Mechanism for Criminal Tribunals

Case No.: MICT-13-38-R90.1

Date: 29 April 2024

Original: English

BEFORE A SINGLE JUDGE

Before: **Judge Mustapha El Baaj**

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

Decision of: **29 April 2024**

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC REDACTED

DECISION ON ALLEGATIONS OF CONTEMPT

Amicus Curiae
Mr. Robert L. Herbst

Counsel for Mr. François Ngirabatware
Mr. Jean Gakwaya

Counsel for Ms. Catherine Mukakayange
Mr. Robert Bokoro N'Saku

Mr. Peter Robinson

1. **I, MUSTAPHA EL BAAJ**, Judge of the International Residual Mechanism for Criminal Tribunals ("Mechanism") and Single Judge in this case,[1] am seised of the confidential and *ex parte* report filed on 6 April 2023 by the *amicus curiae* in this case concerning allegations of contempt in connection with the case of *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1 ("MICT-13-38-Misc.1 Proceedings").[2]

I. BACKGROUND

2. Mr. Félicien Kabuga was indicted before the International Criminal Tribunal for Rwanda ("ICTR") in November 1997.[3] While Kabuga was a fugitive, the Prosecutor of the ICTR made efforts to request national authorities to freeze certain assets belonging to Kabuga and his family.[4] On 29 April 2013, a Single Judge of the Mechanism issued a new warrant of arrest and order for Kabuga's transfer, which included a request to States to adopt provisional measures to freeze any assets that Kabuga had on their territory, without prejudice to the rights of third parties.[5] Kabuga was arrested in France on 16 May 2020 and transferred to the Hague branch of the Mechanism on 26 October 2020.[6]

3. On 12 November 2020, Kabuga applied for the Mechanism's legal aid on the basis that he did not have the means to remunerate counsel, after which the Registrar of the Mechanism ("Registrar") conducted an investigation into Kabuga's means and ability to pay for his defence.[7]

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[1] Order Assigning a Single Judge to Consider a Matter Pursuant to Rule 90(C), 9 March 2022 ("Order of 9 March 2022"), p. 1.

[2] Report of the *Amicus Curiae* Robert L. Herbst Appointed Pursuant to the Order of 19 April 2022, 6 April 2023 (confidential and *ex parte*) ("Report").

[3] *See The Prosecutor v. Félicien Kabuga*, Case No. ICTR-97-22-I, Decision Confirming the Indictment, 26 November 1997 (confidential). *See also Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Prosecution's Second Amended Indictment, 1 March 2021 (public with public and confidential annexes); *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision on Prosecution Motion to Amend the Indictment, 24 February 2021, para. 22.

[4] For example, on 30 September 1999, the Prosecutor of the ICTR requested the cooperation of the authorities of France pursuant to Article 28 of the Statute of the ICTR (concerning cooperation of states and judicial assistance) and Rule 40 of the Rules of Procedure and Evidence of the ICTR ("ICTR Rules") (concerning provisional measures) to seal certain bank accounts belonging to Kabuga's family members and to seize a number of related documents. *See Case Miscellaneous-Kabuga Family-01-A*, Decision (Appeal of the Family of Félicien Kabuga Against Decisions of the Prosecutor and President of the Tribunal), 22 November 2002, p. 2. Rule 40(A)(i) of the ICTR Rules states: "in case of urgency, the Prosecutor may request any State [...] [t]o take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence").

[5] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38, Warrant of Arrest and Order for Transfer Addressed to All States, 29 April 2013, pp. 1, 2.

[6] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Decision on Félicien Kabuga's Motion to Amend the Arrest Warrant and Order for Transfer, 21 October 2020 ("Decision of 21 October 2020"), para. 2. *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Order Scheduling an Initial Appearance, 8 November 2020, pp. 1, 2, *referring, inter alia, to* Decision of 21 October 2020, paras. 11-18.

[7] *See Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Decision on Indigency of the Accused, 6 October 2023 (public with confidential and *ex parte* annexes) ("Registrar Decision of 6 October 2023"), paras. 3, 4; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision, 6 January 2021 ("Registrar Decision of 6 January 2021"), p. 2.

4. The trial in the case of *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38 ("*Kabuga* case") commenced on 29 September 2022.[8] Following extensive litigation on Kabuga's health, Kabuga was found unfit to stand trial, and as instructed by the Appeals Chamber of the Mechanism, the Trial Chamber in the *Kabuga* case indefinitely stayed the proceedings against him on 8 September 2023.[9]

5. On 14 April 2021, while the proceedings against Kabuga were still at the pre-trial phase, Mr. François Ngirabatware, Kabuga's former son-in-law, and Ms. Catherine Mukakayange, Ngirabatware's sister, filed a motion in the MICT-13-38-Misc.1 Proceedings requesting an order declaring that the ICTR and the Mechanism no longer maintained an interest in freezing bank accounts [REDACTED] and [REDACTED] at the [REDACTED] Bank in Belgium, supposedly belonging to Ngirabatware and Mukakayange, respectively ("Bank Accounts").[10] They claimed that, at the request of the Prosecutor of the ICTR, the Bank Accounts were frozen on 11 March 2003 while Kabuga was a fugitive, and their efforts to obtain access to these funds through the courts in Belgium were unsuccessful due to Belgium's obligation to cooperate with the ICTR.[11] Annexed to their reply to the Office of the Prosecutor of the Mechanism ("Prosecution")'s response to the First Motion was a declaration "signed" by Mukakayange dated 2 May 2021, declaring "under penalty of perjury" that she was the sole owner of bank account [REDACTED], which contains her own funds ("Mukakayange Declaration").[12] On 11 May 2021, in its sur-reply to the Reply on First Motion, the Prosecution noted that the signature on the Mukakayange Declaration is markedly different from her signature on other evidence in its possession.[13] On 14 October 2021,

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On 6 October 2023, the Registrar issued a decision concluding that Kabuga is not indigent and capable of fully funding his defence before the Mechanism. The Registrar noted that this conclusion is conditioned upon anticipated access to some of the frozen assets in the future. *See* Registrar Decision of 6 October 2023, paras. 34, 39.

[8] *See Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, T. 29 September 2022 p. 1.

[9] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Further Decision on Félicien Kabuga's Fitness to Stand Trial, 6 June 2023, paras. 39, 59; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-AR80.3, Decision on Appeals of Further Decision on Félicien Kabuga's Fitness to Stand Trial, 7 August 2023, paras. 48, 79; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-T, Decision Imposing an Indefinite Stay of Proceedings, 8 September 2023, pp. 2, 5.

[10] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Motion for Order Concerning Frozen Bank Accounts, 14 April 2021 (confidential; public redacted version filed on the same day) ("First Motion"), paras. 1, 3-6, 11-13, Annex B (a declaration signed "under penalty of perjury" by Ngirabatware on 2 April 2021 that the two Bank Accounts are owned by Ngirabatware and Mukakayange). *See also Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Request for Leave to Reply and Reply: Motion for Order Concerning Frozen Bank Accounts, 3 May 2021 (public with confidential annexes) ("Reply on First Motion"), paras. 9, 10, 15, 16, 28, 29, Annex B, Annex C.

[11] First Motion, paras. 3, 4.

[12] Reply on First Motion, Annex C.

[13] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Prosecution Opposition to Request for Leave to Reply: Frozen Bank Accounts Motion, 11 May 2021 (confidential with confidential and *ex parte* annexes) ("Sur-Reply on First Motion"), para. 16, Annex 1.

the Single Judge in that case, *inter alia*, denied without prejudice the First Motion as premature pending the completion of the Registrar's inquiry in respect of the legal aid granted to Kabuga.[14]

6. On 18 October 2021, Mr. Peter Robinson, counsel for Ngirabatware and Mukakayange at the time, wrote to the Registrar and the Prosecution to support the contention that the funds in the Bank Accounts did not come from Kabuga.[15] On 16 November 2021, Robinson wrote another letter to the Registrar, a copy of which was sent to the Prosecution,[16] enclosing two documents: (i) a purported agreement dated 3 July 2000 concerning the sale of ten trucks and trailers between Ngirabatware and a buyer in Nairobi, Kenya, providing for payment to be made to "Ngirabatware's bank account in Kenya or into account [REDACTED] at the [REDACTED] Bank in Belgium" ("Purported Sale Agreement of 3 July 2000");[17] and (ii) a purported standing order form dated 3 July 2000 for transmission of the first payment of the sale to the same account ("Purported Standing Order of 3 July 2000").[18] On 18 November 2021, Robinson again wrote to the Registrar, copying the Prosecution, stating:

> After providing you with the documents pertaining to the sale of Fran[ç]ois Ngirabatware's trucks on Tuesday, I noticed an error in the account numbers that I have previously provided for my clients Fran[ç]ois Ngirabatware and Catherine Muka[k]ayange. The account numbers at [REDACTED] Bank for Fran[ç]ois Ngirabatware are #[REDACTED] and [REDACTED]. The account number for Catherine Mukakayange is [REDACTED]. I apologize for any inconvenience that this error may have caused you or the Office of the Prosecutor. I will correct the error with the Single Judge when making my next filing.[19]

7. On 3 January 2022, Ngirabatware and Mukakayange filed a second motion requesting an order declaring that the ICTR and Mechanism no longer maintained an interest in freezing their bank accounts in the absence of evidence that the funds therein belonged to or were derived from Kabuga or would be used to injure or intimidate a victim or witness or to destroy evidence in the *Kabuga* case.[20] The Second Motion attached redacted versions of the Letters of 16 November 2021 and 18 November 2021 without any enclosures[21] and stated that unredacted versions of the two

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[14] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Decision on Motions Filed by Félicien Kabuga's Family for Return of Frozen Assets and Seized Property, 14 October 2021 (English translation of French original filed on 21 October 2021), pp. 1, 4-7.
[15] Report, paras. 26, 27, Annex 1 (Letter sent by Robinson to the Registrar dated 18 October 2021), Annex 2 (Letter sent by Robinson to the Prosecution dated 18 October 2021).
[16] Report, paras. 28, 29, Annex 3 (Letter sent by Robinson to the Registrar dated 16 November 2021 ("Letter of 16 November 2021")).
[17] Report, para. 28, Annex 6.
[18] Report, para. 28, Annex 5.
[19] Report, para. 30, Annex 4 (Letter sent by Robinson to the Registrar dated 18 November 2021 ("Letter of 18 November 2021")).
[20] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Second Motion for Order Concerning Frozen Bank Accounts, 3 January 2022 ("Second Motion"), paras. 1, 2, 27.
[21] Second Motion, Annex C, Annex D.

letters would be provided to the Single Judge "if needed".[22] Annex E of the Second Motion is a letter dated 22 December 2021 allegedly from the branch manager of [REDACTED] Bank in Belgium addressed to Ngirabatware ("Purported Bank Statement of 22 December 2021"), stating in relevant parts: "[f]urther to our meeting of 22 December 2022, we would like to inform you that your accounts and those of Catherine Mukakayange remain frozen and that the assets in question have been transferred outside our branch to the Service Recovery [...]").[23]

8. On 18 January 2022, in its response to the Second Motion, the Prosecution provided the Purported Standing Order of 3 July 2000,[24] the Purported Sale Agreement of 3 July 2000,[25] and the unredacted Letters of 16 November 2021[26] and 18 November 2021.[27] The Prosecution submitted, *inter alia*, that the documentation provided in support of the Second Motion, referring specifically to the Purported Standing Order of 3 July 2000, "includes at least one apparent recent forgery, indicating [Ngirabatware and Mukakayange]'s willingness to interfere with judicial proceedings".[28] The Prosecution also doubted the authenticity of the Purported Sale Agreement of 3 July 2000.[29]

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[22] Second Motion, nn. 17, 18.

[23] Second Motion, n. 29; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Confidential Annex E to Second Motion for Order Concerning Frozen Bank Accounts, signed on 3 January 2022, filed on 28 June 2022 (confidential).

[24] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Prosecution Response to Second Motion for Order Concerning Frozen Bank Accounts, 18 January 2022 (confidential with confidential and *ex parte* annexes) ("Prosecution Response to Second Motion"), Annex C.

[25] Prosecution Response to Second Motion, Annex E.

[26] Prosecution Response to Second Motion, Annex B.

[27] Prosecution Response to Second Motion, Annex A.

[28] Prosecution Response to Second Motion, paras. 1, 4 ("One of the documents, a standing order form from [REDACTED] Bank purportedly dated 3 July 2000, is an apparent recent forgery. The handwritten information appears to have been filled in on a copy of [REDACTED] Bank's standard standing order form that was revised in February 2017. Logos of Facebook, LinkedIn and Twitter, which respectively were founded in 2004, 2002 and 2006, also appear at the bottom of the form, while two internet domain names appearing on the form were only registered in 2003 and 2004. Finally, the account number listed on the form does not match account numbers at [REDACTED] Bank claimed by Ngirabatware"), Annex C, Annex D.

[29] Prosecution Response to Second Motion, para. 5 ("The account numbers listed on the form for payment instalments—for a company called [REDACTED] and Ngirabatware at [REDACTED] Bank [REDACTED], and another account for Ngirabatware at [REDACTED] Bank in Belgium— do not match account numbers claimed by Ngirabatware. Prosecution records have also revealed another sale agreement for what appears to be the same ten trucks and trailers dated 1 July 2000 for a vastly lesser amount. The 1 July 2000 sale agreement references a company called [REDACTED] and only lists account numbers for the company and Ngirabatware at [REDACTED] Bank [REDACTED], without listing Ngirabatware's claimed account number at [REDACTED] Bank in Belgium. When the signature blocks of the two versions of the July 2000 sale agreement are overlaid, the typewritten text, handwritten signatures and lawyer's stamp are perfectly aligned, a strong indicator that one of the two versions is a partial copy of the other. Moreover, in civil litigation in Kenya concerning what appear to be the same trucks and trailers, Ngirabatware relied not on the purported sale agreement dated 3 July 2000, but on the agreement dated 1 July 2000."), Annexes E-L.

9. On 21 January 2022, Robinson withdrew the Second Motion and notified the Single Judge that he was terminating his representation of his clients.[30]

10. On 21 February 2022, the Single Judge in the MICT-13-38-Misc.1 Proceedings summarily dismissed the Second Motion.[31] In the Decision, the Single Judge considered that the case-file reveals that the Purported Bank Statement of 22 December 2021, as well as the documents transmitted to the Prosecution and Registrar to demonstrate the origin of the assets that were frozen while Kabuga was a fugitive, contain obvious and flagrant signs of forgery and that the presentation by Ngirabatware and Mukakayange of such manifestly incorrect evidence is prejudicial to the proper administration of justice.[32] The Single Judge also considered there are grounds to believe that the presentation of manifestly fraudulent and incorrect evidence before the Mechanism by Robinson reveals, at the very least, a lack of due diligence, professionalism, and ethics in the performance of his duties.[33] The Single Judge referred the matter pursuant to Rule 90(C) of the Rules of Procedure and Evidence of the Mechanism ("Rules") to the President of the Mechanism ("President") for the designation of another Judge to determine whether Ngirabatware, Mukakayange, and Robinson interfered with the administration of justice or should otherwise be subjected to disciplinary action, by presenting evidence that is incorrect and manifestly fraudulent, "including potentially notifying the relevant national courts in matters of bank fraud or reporting to the professional body to which [Robinson] belongs".[34]

11. On 19 April 2022, as Single Judge assigned to the matter, I ordered the Registrar to appoint an *amicus curiae* to investigate the matter.[35] The Registrar appointed Mr. Robert Herbst as the *amicus curiae* in this case ("*Amicus Curiae*") on 23 May 2022.[36]

12. On 6 December 2022, I granted the *Amicus Curiae*'s request for an order compelling Robinson to release certain communications and documents withheld on grounds that they are

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[30] *Prosecutor v. Felicien Kabuga*, Case No. MICT-13-38-Misc.1, Withdrawal of Second Motion for Order Concerning Frozen Bank Accounts, 21 January 2022 ("Motion of 21 January 2022"), paras. 1, 2, *referring to* Article 5 of the Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism and Other Defence Team Members (MICT/6/Rev.1), 14 May 2021 ("Mechanism's Code of Conduct").
[31] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Decision on Second Motion Filed by Félicien Kabuga's Family for Return of Frozen Assets and Seized Property, 21 February 2022 (English translation of French original filed on 25 February 2022) ("Decision of 21 February 2022"), pp. 2, 4.
[32] Decision of 21 February 2022, p. 2.
[33] Decision of 21 February 2022, p. 3.
[34] Decision of 21 February 2022, p. 4.
[35] *See* Order Directing the Registrar to Appoint an *Amicus Curiae* to Investigate Pursuant to Rule 90(C)(ii), 19 April 2022 ("Order of 19 April 2022"), pp. 2, 3; Order of 9 March 2022, p. 1.
[36] Decision, 23 May 2022, p. 2.

covered by attorney-client privilege.[37] On 3 March 2023, I denied as premature the *Amicus Curiae*'s request to terminate the dual representation by Mr. Jean Gakwaya of Ngirabatware and Mukakayange and to disqualify Gakwaya from representing Mukakayange on the basis of the existence of a conflict of interest.[38]

13. On 6 April 2023, following subsequent extensions and suspension of deadlines, the *Amicus Curiae* submitted his Report.[39]

14. On 8 June 2023, I denied a request from Ngirabatware and Mukakayange to order the *Amicus Curiae* to investigate certain matters in order to provide information on the provenance and holders of the bank accounts that have been frozen in relation to the proceedings before the Mechanism against Kabuga.[40] On 5 February 2024, the Registrar recognised Mr. Bokoro N'Saku as sole *pro bono* counsel to Mukakayange, replacing Gakwaya.[41]

II. DISCUSSION

15. Pursuant to Article 1(4)(a) of the Statute of the Mechanism ("Statute") and Rule 90(A) of the Rules, the Mechanism may hold in contempt any persons who knowingly and wilfully interfere with the administration of justice with respect to proceedings before the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), the ICTR, or the Mechanism. Pursuant to Rule 90(D)(ii) of the Rules, if the Single Judge assigned to the matter considers that there are sufficient grounds to proceed against a person for contempt, the Single Judge may issue an order in lieu of an

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[37] *See* Decision on Motion to Compel Production of Communications and Documents Withheld as Potentially Privileged, 6 December 2022 (confidential) ("Decision of 6 December 2022"), pp. 1, 3; Motion to Compel Production of Communications and Documents Withheld as Potentially Privileged, 25 August 2022 (confidential) ("Motion of 25 August 2022").

[38] *See* Decision on Motion for Terminating Dual Representation, 3 March 2023 (confidential), pp. 1- 4. *See also* Motion for Order Terminating Dual Representation, 17 January 2023 (confidential) ("Motion of 17 January 2023"); Registrar's Notice of Recognition of *Pro Bono* Counsel, 1 September 2022 (wherein the Registrar notified the President that he had recognised Gakwaya to act as *pro bono* counsel to Ngirabatware and Mukakayange in this case).

[39] I initially ordered the *Amicus Curiae* to submit the Report within 120 days from the date of his appointment. *See* Order of 19 April 2022, p. 3. On 19 September 2022, I suspended the deadline of 20 September 2022 for the filing of the Report until further order, pending the decision disposing of the Motion of 25 August 2022. *See* Order for Submissions, 19 September 2022 (confidential), pp. 2, 3. In the Decision of 6 December 2022, I ordered the *Amicus Curiae* to file the Report within 40 days of the receipt of materials withheld by Robinson, the last portion of which was reportedly received by the *Amicus Curiae* on 14 December 2022. *See* Decision of 6 December 2022, p. 3; Motion of 17 January 2023, para. 3, n. 1. I further suspended the deadline of 23 January 2023 for the filing of the Report until further order, pending the decision disposing of the Motion of 17 January 2023. *See* Order Concerning Extension of Time, 23 January 2023, pp. 1, 2. On 22 March 2023, I granted the *Amicus Curiae*'s request for extension and ordered him to file the Report by 6 April 2023. *See* Decision on Motion for Extension of Time to Submit Report, 22 March 2023, p. 2.

[40] Decision on Motion Filed by François Ngirabatware and Catherine Mukakayange, 8 June 2023 (confidential), pp. 1, 2 (finding that Ngirabatware and Mukakayange failed to demonstrate that the investigations are pertinent, particularly considering that such information is a collateral issue in ascertaining whether or not there was interference with the administration of justice by presenting evidence that is incorrect and manifestly fraudulent).

[41] *See* Registrar's Notice of Recognition of *Pro Bono* Counsel, 5 February 2024, paras. 1-3.

indictment and either prosecute the matter or direct an *amicus curiae* to prosecute the matter. The "sufficient grounds" standard requires the Single Judge to determine whether the evidence before him gives rise to a *prima facie* case of contempt.[42] The determination on whether or not to initiate contempt proceedings is a discretionary decision and a Judge may, acting within the bounds of his discretion, choose whether or not to initiate proceedings even if a *prima facie* case of contempt exists.[43]

16. In the Report, the *Amicus Curiae* suggests that there is sufficient evidence to initiate contempt proceedings against Ngirabatware,[44] but not, at this juncture, against Mukakayange or Robinson.[45] The *Amicus Curiae* does not recommend disciplinary action against Robinson in connection with the submission of the three fraudulent documents identified in the Order of 19 April 2022, namely, the Purported: Sale Agreement of 3 July 2000, Standing Order of 3 July 2000, and Bank Statement of 22 December 2021 ("Three Fraudulent Documents").[46] The *Amicus Curiae* submits, however, that there is evidence of professional lapses which violate the Mechanism's Code of Conduct in connection with Robinson's representation of Mukakayange in the context of the submission of the Mukakayange Declaration without having any direct contact with her during the entirety of his representation.[47] The *Amicus Curiae* submits that a determination may be taken on whether further proceedings are warranted to recognise or sanction those violations.[48]

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[42] *See In Re. Deogratias Sebureze and Maximilien Turinabo*, Case Nos. MICT-13-40-R90 & MICT-13-41-R90, Public Redacted Version of Decision on Allegations of Contempt of the ICTR, 18 July 2013 ("*Sebureze and Turinabo* Decision of 18 July 2013"), para. 14. *See also Prosecutor v. Edouard Karemera et al.*, ICTR-98-44-AR.91, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony" and on Motion for Oral Arguments, 22 January 2009 ("*Karemera et al.* Decision of 22 January 2009"), para. 19; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008, 25 July 2008 (confidential; public redacted version filed on 2 September 2008) ("*Šešelj* Decision of 25 July 2008"), para. 16.

[43] *Prosecutor v. Jean-Paul Akayesu*, Case No. MICT-13-30-R90.1, Order Terminating Proceedings and Vacating an Order, 17 October 2016, para. 13; *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-07-91-AR77, Decision on Nshogoza's Appeal of Decision on Allegations of Contempt by Members of the Prosecution, 7 July 2011 ("*Nshogoza* Decision of 7 July 2011"), para. 12; *The Prosecutor v. Hormisdas Nsengimana*, Case Nos. ICTR-01-69-A & ICTR-2010-92, Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses, l6 December 2010 ("*Nsengimana* Decision of 16 December 2010"), para. 17. *See also Prosecutor v. Gérard Ntakirutimana*, Case No. MICT-12-17-R108.1, Decision on Allegations of False Testimony, 20 November 2017 ("*Ntakirutimana* Decision of 20 November 2017"), para. 14; *Sebureze and Turinabo* Decision of 18 July 2013, para. 14.

[44] Report, paras. 5, 197-202, 267.

[45] Report, paras. 6, 7, 217, 267.

[46] Report, paras. 7, 244, 267. *See also* Report, paras. 28, 34, Annexes 5-7.

[47] *See* Report, paras. 8, 245-267.

[48] Report, para. 265.

A. François Ngirabatware

17. With respect to the allegations against Ngirabatware, the *Amicus Curiae* reports that the evidence "overwhelmingly demonstrates" that Ngirabatware provided to Robinson the Three Fraudulent Documents for use in proceedings before the Mechanism.[49] The *Amicus Curiae* contends that Ngirabatware knew and intended that the Three Fraudulent Documents would be used to deceive the Mechanism in his litigation to obtain release of the frozen funds.[50] The *Amicus Curiae* submits that there is sufficient evidence to conclude that Ngirabatware knowingly and wilfully interfered with the administration of justice and to initiate contempt proceedings against him.[51] The *Amicus Curiae* recommends that an order in lieu of indictment be issued for contempt against Ngirabatware.[52]

18. As recalled above, the "sufficient grounds" standard under Rule 90(D) of the Rules requires a Single Judge only to establish whether the evidence before him gives rise to a *prima facie* case of contempt of the Mechanism.[53] This is the same standard employed in confirming an indictment or in issuing charges in an order in lieu of an indictment, namely a "credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict the accused".[54] Under Rule 90(A) of the Rules, the *actus reus* of contempt is the act of interfering with the administration of justice.[55] Interference may be by way of conduct which obstructs, prejudices, or abuses the administration of justice.[56] While Rule 90(A) of the Rules includes a list of conduct which could be

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[49] Report, para. 202.
[50] Report, para. 202.
[51] Report, paras. 5, 202, 267.
[52] Report, para. 207.
[53] *See supra* para. 15.
[54] *See, e.g., Ntakirutimana* Decision of 20 November 2017, para. 11; *Sebureze and Turinabo* Decision of 18 July 2013, para. 14; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision Following *Amicus Curiae* Report Pertaining to Allegations Made by Prosecution Witnesses CNAL and CNAE, 21 February 2013 ("*Nzabonimana* Decision of 21 February 2013"), para. 18.
[55] *See, e.g., Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement, 15 March 2010 ("*Nshogoza* Appeal Judgement"), paras. 51, 55; *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-T, Judgement, 7 July 2009, para. 155; *Prosecutor v. Domagoj Margetić*, Case No. IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007 ("*Margetić* Contempt Judgement"), paras. 77, 79.
[56] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001 ("*Nobilo* Contempt Appeal Judgement"), para. 30 ("[…] [I]interference may be by way of conduct which obstructs, prejudices or abuses the Tribunal's administration of justice. Those who knowingly and wilfully interfere with the Tribunal's administration of justice in such a way may therefore be held in contempt of the Tribunal."); *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Vujin* Contempt Judgement"), para. 26 ("In the opinion of the Appeals Chamber [of the ICTY]: (a) the inherent power of the Tribunal as an international criminal court to deal with contempt is for present purposes adequately encompassed by the wording of the reservation inserted in Rule 77 [of the ICTY Rules of Procedure and Evidence ("ICTY Rules")] in November 1997 – that the Tribunal has the power 'to hold in contempt those who knowingly and wilfully interfere with its administration of justice' – as such conduct would necessarily fall within the general concept of contempt, being 'conduct which tends to obstruct, prejudice or abuse the administration of justice'".).

considered as constituting contempt,[57] such list is not exhaustive.[58] The Appeals Chamber of the ICTY, for example, entered a contempt conviction against a former counsel on the basis of the submission of witness statements which he knew to be false,[59] an act not specifically enumerated under the similar Rule 77 of the ICTY Rules at the time.[60]

19. I note that the Report provides that Ngirabatware admitted, in a taped conversation with Robinson and further in the conversation with the *Amicus Curiae*, to preparing the Three Fraudulent Documents, altering material terms therein, and sending them to Robinson for submission to the Mechanism.[61] Specifically, with respect to the Purported Standing Order of 3 July 2000, the Report indicated that Ngirabatware admitted to the *Amicus Curiae* to obtaining a standing order form from the bank in Kenya and getting it stamped, writing the handwritten information portions at the top part of this document, instructing someone to complete the writing on the lower part of the document, and having the form signed under the name of a person who does not exist.[62] Ngirabatware also admitted to writing the handwritten portions of the Purported Sale Agreement of 3 July 2000, typing the rest, and having the original buyer and six witnesses re-sign the document.[63] The *Amicus Curiae* contends that Ngirabatware doubled the purchase price to make it appear more likely that the proceeds of the truck sale constituted a sizeable portion of the money in his frozen

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[57] Rule 90(A) of the Rules states:

> The Mechanism in the exercise of its inherent power may, with respect to proceedings before the ICTY, the ICTR, or the Mechanism, hold in contempt those who knowingly and wilfully interfere with the administration of justice, including any person who:
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> (i) being a witness before a Chamber or a Single Judge, contumaciously refuses or fails to answer a question;
> (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber or a Single Judge;
> (iii) without just excuse fails to comply with an order by a Chamber or Single Judge, including an order to attend before or produce documents before a Chamber or a Single Judge;
> (iv) threatens, intimidates, causes any injury, or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber or a Single Judge, or a potential witness; or
> (v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Chamber or a Single Judge.

[58] *See Prosecutor v. Marie Rose Fatuma et al.*, Case No. MICT-18-116-A, Judgement, 29 June 2022 ("*Fatuma et al.* Appeal Judgement"), n. 276; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4, Decision on Failure to Remove Confidential Information from Public Website and Order in Lieu of Indictment, 9 May 2011, para. 26; *Margetić* Contempt Judgement, para. 13; *Vujin* Contempt Judgement, para. 26.
[59] *Vujin* Contempt Judgement, paras. 41-45, 132-138, 160.
[60] *Vujin* Contempt Judgement, paras. 23, 26.
[61] Report, paras. 60-63, 110-117, 119, 197-200, 202, Annex 8, *referring to*: (i) a transcript made by Robinson of a telephone conversation between Robinson and Ngirabatware on 20 January 2022 ("Robinson and Ngirabatware Call Transcript of 20 January 2022"); and (ii) the *Amicus Curiae*'s interview with Ngirabatware on 10 January 2023.
[62] Report, paras. 111-115, 198.
[63] Report, paras. 116, 199.

account.[64] The Report also indicated that Ngirabatware admitted to writing the Purported Bank Statement of 22 December 2021 and falsely presenting it as coming from the bank's representative, whose signature he forged.[65]

20. Having considered the Report, and the evidence referred therein, I find that the evidence in relation to the submission of the Three Fraudulent Documents is capable of demonstrating that Ngirabatware engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation and, if accepted and uncontradicted, would be sufficient to amount to the act of interfering with the administration of justice and, therefore, to satisfy the *actus reus* of contempt.

21. The *mens rea* "that attaches to contempt [...] requires the knowledge of the facts that make the conduct of the accused illegal [...]".[66] It is sufficient to establish that the act, which constitutes contempt, is deliberate and not accidental.[67] In the present case, I note the *Amicus Curiae*'s submission that the evidence indicated that Ngirabatware submitted the fraudulent documents with the intention to deceive the Mechanism in his litigation to obtain release of the frozen funds.[68] I consider that this evidence, if accepted and uncontradicted, would be sufficient to demonstrate that Ngirabatware "knowingly and wilfully" interfered with the administration of justice.

22. In light of the foregoing, having considered the Report and the evidence referred therein, I consider that the evidence before me with respect to Ngirabatware's alteration and submission of the Three Fraudulent Documents gives rise to a *prima facie* case of contempt.

23. With respect to the submission of the Mukakayange Declaration, the Report indicated that Ngirabatware acknowledged that he had signed the Mukakayange Declaration – seemingly stating that Mukakayange has no knowledge of it.[69] However, the *Amicus Curiae* asserts that he was unable to confirm whether Mukakayange authorised Ngirabatware's signature on her behalf as the *Amicus Curiae* had not managed to speak with Mukakayange at the time of the submission of the Report.[70] Unlike with respect to the Three Fraudulent Documents, I consider that at this juncture, there is not sufficient evidence to conclude that there is a *prima facie* case of contempt in relation to the Ngirabatware's submission of the Mukakayange Declaration.

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[64] Report, para. 199.
[65] Report, paras. 100, 101, 119, 200.
[66] *See Prosecutor v. Josip Jović*, Case No. IT-95-14&14/2-R77-A, Judgement, 15 March 2007, para. 27. *See also Fatuma et al.* Appeal Judgement, n. 243.
[67] *Fatuma et al.* Appeal Judgement, para. 84; *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 128; *Nobilo* Contempt Appeal Judgement, para. 54.
[68] *See* Report, paras. 61-63, 133, 119, 197, 202.
[69] *See* Report, paras. 118, 121, 201.
[70] Report, paras. 8, 214, 215. *See also* Report, paras. 46, 55, 118, 121, 132-135, 138, 201.

24. I recall that a decision determining whether to initiate contempt proceedings is a discretionary one and a Judge may, acting within the bounds of his discretion, choose whether or not to initiate proceedings even if a *prima facie* case of contempt exists.[71] In making such determination, consideration may be given to, *inter alia*, the gravity of the conduct and the personal motives of the alleged perpetrator.[72] I note the conclusions of the *Amicus Curiae* that Ngirabatware acknowledged that he falsified the submitted documents before the Mechanism "to help himself"[73] and that he falsified documents multiple times,[74] over a course of a period of time,[75] including forging a signature of a bank official.[76] Ngirabatware's alleged "frustration" for being denied access to the frozen Bank Accounts[77] cannot justify the unlawful practice of submitting fraudulent documents before the Mechanism. I am also cognizant of the fact that at the relevant time, the funds in Ngirabatware's account [REDACTED] were considered to belong to or originate, at least in part, from Kabuga and *prima facie* relevant in the Registrar's assessment of the indigency status of Kabuga, who benefited from the assigned counsel in the *Kabuga* case.[78] Ngirabatware's act of interference could therefore have negative implications on the Mechanism's ability to recover frozen assets for legal aid reimbursement. I therefore consider Ngirabatware's submission of fraudulent documents before the Mechanism to be a grave offence as it constitutes a direct challenge to the integrity and the conduct of the proceedings and to the administration of justice. Considering the seriousness of the offence, and in order to prevent repetition of similar conduct before the Mechanism, I find that contempt proceedings are the most effective and efficient way to ensure compliance with the obligations flowing from the Statute or the Rules in the specific circumstances of the case.[79] I therefore exercise my discretion to initiate contempt proceedings against Ngirabatware in relation to the submission of the Three Fraudulent Documents before the Mechanism.

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[71] *See supra* para. 15.
[72] *See, e.g.*, *Ntakirutimana* Decision of 20 November 2017, paras. 15, 18; *Sebureze and Turinabo* Decision of 18 July 2013, para. 15; *Nshogoza* Decision of 7 July 2011, para. 20; *The Prosecutor v. Léonidas Nshogoza*, Case No. ICTR-07-91-A, Decision on Defence Allegations of Contempt by Members of the Prosecution, 25 November 2010, paras. 20, 21; *Nshogoza* Appeal Judgement, para. 57.
[73] Report, para. 197.
[74] Report, paras. 198-202.
[75] *See* Report, paras. 28-32.
[76] Report, para. 200. *See also* Report, paras. 100, 101, 119, 120.
[77] *See* Report, paras. 113, 118, 119.
[78] *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1, Decision on Motions Filed by Félicien Kabuga's Family for Return of Frozen Assets and Seized Property, 14 October 2021 (English translation of French original filed on 21 October 2021), p. 5, n. 25, *referring to* Sur-Reply on First Motion, Annex 2, Registry Pagination ("RP.") 78, Annex 3, RP. 76.
[79] *See, e.g.*, *Sebureze and Turinabo* Decision of 18 July 2013, para. 15; *Nzabonimana* Decision of 21 February 2013, para. 20; *The Prosecutor v. Callixte Nzabonimana*, Case No. ICTR-98-44D-T, Decision on Motion for Contempt Proceedings Against an OTP Investigator Djibo Moumouni, 18 November 2011, para. 12; *Nsengimana* Decision of 16 December 2010, para. 22; *Karemera et al.* Decision of 22 January 2009, para. 21.

25. In light of the foregoing, I find it appropriate to issue an order in lieu of an indictment and to initiate proceedings against Ngirabatware and, subject to Article 6 of the Statute, direct the *Amicus Curiae* to prosecute the matter in accordance with Rule 90(D)(ii) of the Rules.

B. Catherine Mukakayange

26. With respect to the allegations against Mukakayange, the *Amicus Curiae* submits that he is not yet prepared to draw any firm conclusions about Mukakayange's culpability in connection with the filing of false documentation before the Mechanism, however, at this juncture, there is not sufficient evidence upon which to initiate contempt proceedings against Mukakayange.[80]

27. I note, in particular, that the Report records evidence suggesting that: (i) Ngirabatware was handling all the business concerning the Bank Accounts;[81] (ii) it remains unclear, and Robinson stated that he had no reason to believe, that Mukakayange knew about or was involved in Ngirabatware's submission of the Three Fraudulent Documents;[82] (iii) Ngirabatware acknowledged that he had signed the Mukakayange Declaration – stating that Mukakayange had no knowledge of it – and that it remains to be determined whether Mukakayange knew or read the declaration and whether she agreed to have Ngirabatware sign it on her behalf;[83] and (iv) Robinson filed the Mukakayange Declaration without directly communicating its substance with Mukakayange.[84]

28. Having considered the Report, and the evidence referred therein, I consider that, at this stage, there is no "credible case which, if accepted and uncontradicted, would be a sufficient basis on which to convict" Mukakayange.[85] The evidence before me does not give rise to a *prima facie* case of contempt of the Mechanism in this respect and, therefore, there are no sufficient grounds to initiate proceedings against Mukakayange for contempt pursuant to Rule 90(D) of the Rules.

C. Peter Robinson

1. Submission of the Three Fraudulent Documents

29. With respect to the allegations against Robinson in connection with the submission of the Three Fraudulent Documents before the Mechanism, the *Amicus Curiae* is not convinced that

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[80] Report, paras. 6, 212-217, 267.
[81] *See* Report, para. 55 (wherein Robinson told the *Amicus Curiae* that he had had no contact with Mukakayange because Ngirabatware was handling all the business for both of the frozen accounts up to the time they were frozen).
[82] *See, e.g.*, Report, paras. 55, 212, 213, 215, 217.
[83] Report, paras. 214, 215. *See also* Report, paras. 8, 46, 55, 118, 121, 132-135, 138, 201.
[84] *See* Report, paras. 58, 78. *See also* Report, paras. 8, 215, 245.

Robinson knew that these documents were fraudulent when he submitted them to the Mechanism.[86] The *Amicus Curiae* considers that there are insufficient grounds to believe that Robinson committed contempt[87] or "Professional Misconduct" under the Mechanism's Code of Conduct or the "Rules of Professional Conduct" of the United States North Carolina Bar, where Robinson is admitted.[88] The *Amicus Curiae* concludes that the evidentiary record does not support the initiation of contempt proceedings or disciplinary action against him.[89]

30. I note the *Amicus Curiae*'s observation that the evidentiary record suggests that Robinson only became aware that the three documents submitted to the Mechanism were fraudulent when signs of forgery were pointed out in the Prosecution Response to Second Motion.[90] In particular, the *Amicus Curiae* contends that Robinson's reaction when confronted with the Prosecution's evidence that the documents were fraudulent – namely: "being genuinely upset at having been duped by his client and made an instrument of his fraud", tape recording the conversation with his client, confronting Ngirabatware, and accusing him of lying and defrauding the Mechanism – "is consistent with a lawyer who just discovered that his client has lied to him".[91]

31. The *Amicus Curiae* further contends that, when viewed in hindsight, the documents contained signs of forgery, however, he does not find it obvious that Robinson, or even the *Amicus Curiae* himself, would have noticed these signs before they were pointed out to him.[92] For example, the *Amicus Curiae* considers that the Purported Standing Order of 3 July 2000 and the Purported Sale Agreement of 3 July 2000 seem to "fit together" and contain "the same important details [...] thereby according both a measure of legitimacy",[93] and that the spelling and formatting errors in the Purported Bank Statement of 22 December 2021 which was written in French – a language that Robinson does not speak – "may well have escaped his notice".[94] In the *Amicus Curiae*'s view, Robinson honestly believed that the continued freezing of his clients' funds by the Mechanism was unjust and due to his loyalty and devotion to his clients, Robinson might not have noticed the signs of fraud.[95]

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[85] *See supra* para. 18.
[86] Report, paras. 218-234.
[87] Report, paras. 7, 218, 234.
[88] Report, paras. 7, 243, 244. *See also* Report, paras. 235-242.
[89] Report, paras. 7, 218, 244, 267.
[90] Report, paras. 125-131, 218-234, 243.
[91] Report, paras. 219, 222.
[92] Report, paras. 225, 227-233.
[93] Report, para. 231.
[94] Report, para. 232.
[95] Report, paras. 226, 227. Additionally, the *Amicus Curiae* notes that: (i) the documents were of limited relevance and persuasive power within the context of the litigation on the issue of whether Ngirabatware's frozen accounts contained

32. Having considered the Report, and the evidence referred therein, I find that the evidentiary record, if accepted and uncontradicted, would not sufficiently support the inference that Robinson knew that the three documents were fraudulent at the time he submitted them to the Mechanism.[96] The evidence before me therefore does not give rise to a *prima facie* case of a knowing and wilful interference with the administration of justice within the meaning of Rule 90(A) of the Rules and there are no sufficient grounds to initiate proceedings against Robinson for contempt pursuant to Rule 90(D) of the Rules.

33. With respect to whether or not Robinson should be subjected to disciplinary action, pursuant to Article 4(B)(iii) of the Mechanism's Code of Conduct, counsel shall not assist a client[97] to engage in conduct which counsel knows is criminal or fraudulent. Under Article 18(B)(i) and (ii) of the Mechanism's Code of Conduct, counsel shall not knowingly make an incorrect statement of material fact or law to the Mechanism or offer evidence which counsel knows to be incorrect. In light of the above conclusion that the evidentiary record does not sufficiently support the inference that Robinson knew that the three documents were fraudulent at the time he submitted them to the Mechanism, I do not consider that Robinson's submission of the Three Fraudulent Documents amounts to a violation of these provisions or to "Professional Misconduct" as defined in the Mechanism's Code of Conduct.[98] I further note that upon discovering that the documents were fraudulent, Robinson subsequently took steps to rectify the conduct whereby he sought detailed clarification from Ngirabatware immediately after learning about the fraudulent nature of the documents,[99] withdrew the Motion of 3 January 2022 and the Three Fraudulent Documents, and terminated his representation of Ngirabatware and Mukakayange in accordance with Article 5 of the Mechanism's Code of Conduct.[100] In light of these considerations, I do not consider that

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Kabuga's money (*see* Report para. 224); and (ii) Robinson was fully cooperative and credible throughout the investigation (*see* Report, paras. 43, 221).

[96] *See supra* para. 18.

[97] The term "client" as defined in the Mechanism's Code of Conduct includes any person, including a suspect, who has engaged counsel or has been assigned counsel by the Registry for the purposes of legal representation before the Mechanism. *See* Mechanism's Code of Conduct, p. 3.

[98] Article 29 of the Mechanism's Code of Conduct defines "Professional Misconduct" as, *inter alia*, a counsel's violation or attempt to violate the Mechanism's Statute, Rules, Code of Conduct or any other applicable law; conduct involving dishonesty, fraud, deceit or misrepresentation related to the proceedings before the Mechanism; or conduct which is prejudicial to the proper administration of justice before the Mechanism.

[99] *See, e.g.*, Report, para. 219, Annex 8 (Robinson and Ngirabatware Call Transcript of 20 January 2022), pp. 2, 3 ("[Robinson]: But when you sent me that document, did you change the document so that it reflected a higher amount and also added [...] the account for Belgium? [...] The other document that you sent me, the one from the bank, the Kenyan bank, did you create that last year or is that something that was in existence from 2000? [...] If you were honest with me, I would have told you not to submit any false documents. We could have been successful in your case without that. [...]").

[100] Report, paras. 46, 47, 61, 62, 243, Annex 8 (Robinson and Ngirabatware Call Transcript of 20 January 2022), pp. 3, 6, 7, 9; Motion of 21 January 2022, paras. 1, 2. *See* Article 5(B)(i) of the Mechanism's Code of Conduct ("Counsel may terminate or [...] request withdrawal of their representation of a Client if [...] the Client has used Counsel's services to

disciplinary action is warranted against Robinson in connection with the submission of the Three Fraudulent Documents. Nevertheless, I recall the fundamental principles enshrined in Articles 3(i) and 6(i) of the Mechanism's Code of Conduct[101] and find it appropriate to remind Robinson to act with greater diligence and care when submitting documents before the Mechanism.

2. Representation of Mukakayange

34. In relation to Robinson's representation of Mukakayange, the *Amicus Curiae* submits that there is evidence of professional lapses in connection with the submission of the Mukakayange Declaration which he drafted on her behalf without directly consulting her.[102] According to the *Amicus Curiae*, Robinson's professional and ethical obligations under the Mechanism's Code of Conduct required Robinson: to ensure that he could have direct communication with his client, to consult with Mukakayange directly about the means by which her objectives and the litigation were to be pursued, to seek and accept only her instructions – rather than from Ngirabatware or his daughter – and to confirm that the declaration was factually accurate and that Mukakayange made an independent and informed decision before signing it.[103]

35. In this regard, the *Amicus Curiae* posits that Robinson knew that it was important to communicate with Mukakayange and obtain confirmation of the factual assertions contained in the Mukakayange Declaration, which turned out to be inaccurate in claiming that account [REDACTED] belonged to her rather than Ngirabatware.[104] Instead, Robinson sent the draft declaration to Ngirabatware's daughter, who first informed Robinson that she had not heard back from Mukakayange, and later stated that Mukakayange did not want to communicate with Robinson.[105] The *Amicus Curiae* submits that Robinson could have then demanded Mukakayange's contact or considered terminating his representation.[106] Rather, having had no contact details or prior contact with Mukakayange, Robinson submitted the Mukakayange Declaration –which states that Mukakayange made factual statements under the penalty of perjury – without: her input, swearing to the truth of those statements before a notary, confirming that Mukakayange acted independently and understood the meaning and implications of signing a declaration under the

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perpetrate a crime or fraud, or persists in a course of action involving Counsel's services that Counsel reasonably believes is criminal or fraudulent").

[101] Article 3(i) of the Mechanism's Code of Conduct provides that the role of counsel as advocates in the administration of justice requires them to act honestly, independently, fairly, skilfully, diligently, efficiently, and courageously. Article 6(i) of the of the Mechanism's Code of Conduct provides that that in the course of providing representation to a client, counsel shall act with competence, skill, care, honesty, and loyalty.

[102] Report, paras. 8, 265, 267. *See also* Report, paras. 245-254.

[103] Report, paras. 245, 246, 248, 250.

[104] Report, paras. 8, 249, 251.

[105] Report, paras. 252, 253.

[106] Report, para. 253.

penalty of perjury, or knowing that she believed in the truth and accuracy of the statements.[107] The *Amicus Curiae* adds that these negative implications of Robinson's lapses became more pronounced when the evidence surfaced in the Prosecution's sur-reply in support of the First Motion that Mukakayange's signature on her declaration was markedly different from her signatures from two decades ago.[108]

36. The *Amicus Curiae* submits that the differences between the signature in the Mukakayange Declaration and the documents on which Mukakayange signed 20 years ago were "stark" and "obvious" that a reasonable lawyer in Robinson's position would clearly have formed at least a reasonable belief that the signature on the Mukakayange Declaration was not hers.[109] The *Amicus Curiae* asserts that after evidence emerged that Mukakayange's signature on the Declaration was signed by Ngirabatware,[110] Robinson's inquiry was inadequate,[111] and that a case can be made that Robinson ignored an obvious falsehood, amounting to "wilful blindness" and "from which actual knowledge may be inferred".[112]

37. The *Amicus Curiae* concludes that by submitting the Mukakayange Declaration without communicating with Mukakayange directly and independently at any time during the representation, Robinson violated the Mechanism's Code of Conduct.[113] The *Amicus Curiae* submits that a determination may be taken on whether further proceedings are warranted to recognise or sanction this violation.[114]

38. At the outset, I consider that by submitting a document on behalf of a client which contains statements under the penalty of perjury without having had contacted her or confirming the truthfulness of the content of the document signify a professional lapse on the part of Robinson. However, based on the evidence presented in the Report, I do not find that Robinson's lack of contact with Mukakayange throughout his representation gives rise to a *prima facie* case of knowing and wilful interference with the administration of justice within the meaning of Rule

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[107] Report, paras. 246-249, 252.
[108] Report, para. 254.
[109] Report, paras. 254, 262.
[110] Report, paras. 254, 255.
[111] Report, para. 258. The *Amicus Curiae* reports that when Ngirabatware's response to Robinson's question on the differences in signature was that "people's signatures can change over time", Robinson inferred that Ngirabatware was asserting that Mukakayange had signed her Declaration, without making further inquiries. *See* Report, paras. 133, 135, 256, 262, n. 66.
[112] Report, paras. 256-259. The *Amicus Curiae* contends that the Mechanism's Code of Conduct would have required Robinson to take appropriate remedial measures, such as directly communicating with Mukakayange to seek her confirmation or having a more direct conversation with Ngirabatware, which may have revealed that he signed Mukakayange's name to the Declaration. *See* Report, paras. 259, 260.
[113] Report, paras. 8, 245, 246, 248, 265, 267.
[114] Report, para. 265.

90(A) of the Rules. Nor do I consider that there are sufficient grounds to conclude that this lapse amounts to conduct which is "offensive, abusive, or otherwise obstructs the proper conduct of the proceedings" within the meaning of Rule 47(A) of the Rules[115] or "Professional Misconduct" within the meaning of Article 29 of the Mechanism's Code of Conduct.[116]

39. Nevertheless, pursuant to Article 6(i) of the Mechanism's Code of Conduct, in the course of providing representation to a client, counsel shall act with competence, skill, care, honesty, and loyalty. Article 7 of the Mechanism's Code of Conduct provides that counsel shall represent the client diligently in order to protect the client's best interests. Article 8 of the Mechanism's Code of Conduct requires that counsel keep the client informed about the status of a matter before the Mechanism in which the client is an interested party. Furthermore, while a client before the Mechanism does not necessarily need to be consulted on each and every action taken by counsel in defence of the client's case,[117] Article 4(B)(ii) of Mechanism's Code of Conduct obliges counsel to "consult with the [c]lient about the means by which [the] objectives [of representation] are to be pursued". A lack of a meaningful communication and good working relationship between the client and his or her counsel could indeed compromise the preparation of the defence and the fairness of the trial.[118]

40. In this case, Robinson's lack of communication with Mukakayange with regard to ascertaining the authenticity of her signature on a declaration resulted into the submission of a potentially forged document before the Mechanism. I find that Robinson's failure to directly communicate with Mukakayange before submitting the Mukakayange Declaration is inconsistent with the standard of professional competence and ethics expected of a defence counsel as set out in the Mechanism's Code of Conduct. On this basis, I consider it prudent to warn Robinson and to remind him to strictly adhere to the standards required from counsel practicing before the

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[115] Rule 47(A) of the Rules concerning "Misconduct of Counsel" essentially provides that if a Single Judge finds that the conduct of a counsel is offensive, abusive, or otherwise obstructs the proper conduct of the proceedings, or that a counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Single Judge may, after giving counsel due warning and an opportunity to be heard, impose certain sanctions. The Single Judge may also, with the approval of the President, communicate misconduct to the professional body regulating the conduct of counsel in the counsel's state of admission. *See* Rule 47(B) of the Rules.

[116] *See supra* n. 98.

[117] *See Prosecutor v. Vidoje Blagojević*, Case No. IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, 7 November 2003, para. 26. *See also The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Withdrawal of Counsel, 22 June 2001 ("*Nyiramasuhuko et al.* Decision of 22 June 2001"), paras. 22, 23.

[118] *See, e.g., Joseph Nzirorera v. Le Procureur*, Case No. ICTR-98-44-A, Decision (Interlocutory Appeal Against the 3 October 2001 Trial Chamber II Decision on the Motion for Withdrawal of Assignment of Counsel), 1 February 2002, p. 4; *Nyiramasuhuko et al.* Decision of 22 June 2001, para. 13; *The Prosecutor v. Théoneste Bagosora*, Case No. ICTR-96-7-T, Decision on the Request by The Accused for Change of Assigned Counsel, 26 June 1997, p. 3; *Prosecutor v. Zejnil Delalić, et al.*, Case No. IT-96-21-T, Decision on Request by Accused Mucić for Assignment of New Counsel, signed on 24 June 1996, filed on 27 June 1996, para. 4.

Mechanism and desist from behaviour which ultimately compromises preparation of the defence and the best interests of his clients.

D. Next Stages

41. Recalling that my assignment was to assess whether contempt proceedings or any other disciplinary action are warranted against Ngirabatware, Mukakayange, or Robinson,[119] the present Decision – specifically, my determination that there is sufficient evidence to initiate contempt proceedings against Ngirabatware and not against Mukakayange or Robinson – brings this stage of the contempt process to a close. With the issuance of the order in lieu of indictment against Ngirabatware, it is appropriate in this regard that, going forward, the contempt case against Ngirabatware be named *In the Matter of François Ngirabatware*.

42. I further recall that Article 1(4) of the Statute provides, in relevant parts, that before proceeding to try persons for contempt, the Mechanism shall consider referring the case to the authorities of a State in accordance with Article 6 of the Statute, taking into account the interests of justice and expediency. Pursuant to Articles 6(2) and 12(1) of the Statute, after an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Mechanism,[120] the President may designate a Single Judge to determine whether the case should be referred to the authorities of a State.

43. In light of my decision to issue an order in lieu of indictment against Ngirabatware, I consider it appropriate at this stage to refer the matter to the President to consider the designation of a Single Judge to determine whether the case against Ngirabatware should be referred to the authorities of a State as well as to commence and conduct the proceedings *In the Matter of François Ngirabatware*, including setting a date for an initial appearance and issuing a summons,[121] where appropriate and applicable.

III. DISPOSITION

44. For the foregoing reasons, pursuant to Article 1(4) of the Statute and Rule 90(D)(ii) of the Rules, I hereby:

TERMINATE the proceedings in this case with respect to Mukakayange and Robinson;

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[119] Order of 9 March 2022, p. 1; Decision of 21 February 2022, p. 4.
[120] In view of the nature of the offence and general cooperation of Ngirabatware to date (*see, e.g.*, Report paras. 109-121), I do not consider it necessary at this stage of the proceedings to issue an arrest warrant against him.
[121] *See* Article 18 of the Statute; Rules 55 and 64 of the Rules.

REMIND Robinson to act with diligence and care when submitting documents before the Mechanism;

WARN and **REMIND** Robinson to strictly adhere to the standards of professional competence and ethics expected of a defence counsel in representing clients before the Mechanism as set out in the Mechanism's Code of Conduct;

INITIATE contempt proceedings against Ngirabatware and, subject to Article 6 of the Statute, **DIRECT** the *Amicus Curiae* to prosecute the matter;

ISSUE an Order in Lieu of Indictment against Ngirabatware for knowingly and wilfully interfering with the administration of justice with respect to proceedings before the Mechanism in relation to the submission of the Three Fraudulent Documents;

DIRECT the Registrar that all future filings in the contempt proceedings against Ngirabatware be filed under the case name *In the Matter of François Ngirabatware*; and

REFER the matter to the President to consider the designation of a Single Judge to conduct the proceedings *In the Matter of François Ngirabatware* and to determine whether the case should be referred to the authorities of a State.

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

Done this 29th day of April 2024,
At Arusha,
Tanzania

Judge Mustapha El Baaj
Single Judge

[Seal of the Mechanism]

UNITED NATIONS
International Residual Mechanism
for Criminal Tribunals

NATIONS UNIES
Mécanisme international appelé à exercer
les fonctions résiduelles des Tribunaux pénaux

IRMCT · MIFRTP

TRANSMISSION SHEET FOR FILING OF DOCUMENTS / *FICHE DE TRANSMISSION POUR LE DEPOT DE DOCUMENTS*

I - FILING INFORMATION / *INFORMATIONS GÉNÉRALES*

To/ *À* :	IRMCT Registry/ *Greffe du MIFRTP*	☒ Arusha/ *Arusha*	☐ The Hague/ *La Haye*	
From/ *De* :	☐ President / *Président*	☒ Chambers / *Chambre*	☐ Prosecution/ *Bureau du Procureur*	☐ Defence / *Défense*
	☐ Registrar / *Greffier*	☐ Other/ *Autre*		
Case Name/ *Affaire* :	**Prosecutor v. Félicien Kabuga**	**Case Number/ *Affaire n°:***	**MICT-13-38-R90.1**	
Date Created/ *Daté du* :	**29 April 2024**	**Date transmitted/ *Transmis le* :**	**29 April 2024**	**No. of Pages/ *Nombre de pages* :** **20**
Original Language / *Langue de l'original :*	☒ English/ *Anglais*	☐ French/ *Français*	☐ Kinyarwanda ☐ B/C/S	☐ Other/*Autre* (specify/*préciser*):
Title of Document/ *Titre du document* :	**Decision on Allegations of Contempt**			
Classification Level/ *Catégories de classification :*	☒ Unclassified/ *Non classifié*	☐ Ex Parte Defence excluded/ *Défense exclue*		
	☐ Confidential/ *Confidentiel*	☐ Ex Parte Prosecution excluded/ *Bureau du Procureur exclu*		
	☐ Strictly Confidential/ *Strictement confidentiel*	☐ Ex Parte R86(H) applicant excluded/ *Art. 86 H) requérant exclu*		
		☐ Ex Parte Amicus Curiae excluded/ *Amicus curiae exclu*		
		☐ Ex Parte other exclusion/ *autre(s) partie(s) exclue(s)* (specify/*préciser*) :		

Document type/ *Type de document* :

☐ Motion/ *Requête*	☐ Judgement/ *Jugement/Arrêt*	☐ Book of Authorities/ *Recueil de sources*	☐ Warrant/ *Mandat*
☒ Decision/ *Décision*	☐ Submission from parties/ *Écritures déposées par des parties*	☐ Affidavit/ *Déclaration sous serment*	☐ Notice of Appeal/ *Acte d'appel*
☐ Order/ *Ordonnance*	☐ Submission from non-parties/ *Écritures déposées par des tiers*	☐ Indictment/ *Acte d'accusation*	

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