

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-18-116-R90.1

Date: 2 April 2024

Original: English

BEFORE A SINGLE JUDGE

Before: Judge José Ricardo de Prada Solaesa

Registrar: Mr. Abubacarr M. Tambadou

Decision of: 2 April 2024

PROSECUTOR

v.

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

PUBLIC

**DECISION ON APPLICATION OF LAWYER-CLIENT PRIVILEGE
AND USE OF MATERIAL SUBJECT TO RULE 76 IN FURTHER
PROCEEDINGS**

Amicus Curiae:
Mr. Kenneth Scott

Mr. Peter Robinson

1. I, José Ricardo de Prada Solaesa, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Single Judge in this case,¹ following submissions from Mr. Kenneth Scott (“*Amicus Curiae*”) and Mr. Peter Robinson,² hereby render this decision regarding the application of the lawyer-client privilege and the use of material subject to the provisions of Rule 76 of the Rules of Procedure and Evidence (“Rules”), in contempt proceedings pursuant to Article 1(4) of the Statute and Rule 90 of the Rules or other appropriate disciplinary action against Robinson.

I. BACKGROUND

2. On 25 June 2021, a Single Judge of the Mechanism pronounced the judgement in the case of *Prosecutor v. Anselme Nzabonimpa et al.*, Case No. MICT-18-116-T (“*Nzabonimpa et al. Contempt Case*”), on charges against Mr. Augustin Ngirabatware and four other accused concerning the interference with protected witnesses, who had testified for the Office of the Prosecutor of the International Criminal Tribunal for Rwanda (“ICTR”) during Ngirabatware’s trial before the ICTR and then subsequently testified during Ngirabatware’s review proceedings before the Mechanism.³ In the course of his final deliberations and the preparation of the written judgement in the *Nzabonimpa et al. Contempt Case*, the Single Judge considered, *inter alia*, that the record before him raised 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 Robinson may be in contempt of the Mechanism.⁴ Consequently, on 20 September 2021, the Single Judge referred the matter to the President of the Mechanism (“President”), in accordance with Rule 90(C) of the Rules, so that another Single Judge of the Mechanism could independently assess whether or not

¹ Order Assigning a Single Judge to Consider a Matter Pursuant to Rule 90(C), 8 October 2021, p. 1.

² Submissions on Rule 76 and Privileged Materials, 22 November 2023 (confidential) (“Robinson Submission”); Submissions on the Use of Rule 76 Material and the Crime-Fraud Exception to Lawyer-Client Privilege, 4 December 2023 (confidential) (“*Amicus Curiae* Response”); Reply Re: Rule 76 and Privileged Materials, 11 December 2023 (confidential) (“Robinson Reply”); *Amicus Curiae* Sur-Reply to “Reply Re: Rule 76 and Privileged Materials”, 28 December 2023 (confidential) (“*Amicus Curiae* Sur-Reply”); Response to Sur-Reply Re: Rule 76 and Privileged Materials, 4 January 2024 (confidential) (“Robinson Response to Sur-Reply”). *See also* Order for Submissions, 27 October 2023 (confidential) (“Order of 27 October 2023”), pp. 2, 3; Decision on Request for Leave to Sur-Reply to “Reply Re: Rule 76 and Privileged Materials”, 22 December 2023 (confidential) (“Decision of 22 December 2023”), p. 2. Although the Order of 27 October 2023 and submissions were filed confidentially, nothing in the present decision requires that it be filed confidentially. Accordingly, I render this decision publicly. *See* Rules 92 and 131 of the Rules.

³ *See Prosecutor v. Anselme Nzabonimpa et al.*, Case No. MICT-18-116-T, Judgement, pronounced on 25 June 2021 and filed in writing on 20 September 2021, paras. 1, 2, 7, 9-11, 409.

⁴ *Prosecutor v. Anselme Nzabonimpa et al.*, Case No. MICT-18-116-T, Order Referring a Matter to the President, 20 September 2021 (“*Nzabonimpa et al. Contempt Case* Order of 20 September 2021”), p. 3.

further proceedings under Rule 90 of the Rules or other appropriate disciplinary action against Robinson, including denial of audience before the Mechanism, are warranted.⁵

3. On 25 October 2021, having been assigned by the President as the Single Judge in this case, I directed the Registrar of the Mechanism (“Registrar”), pursuant to Rule 90(C)(ii) of the Rules, to appoint an *amicus curiae* to investigate whether Robinson interfered with the administration of justice – or should otherwise be professionally sanctioned or denied audience – by: (i) violating order(s) of a Chamber or Single Judge; (ii) having unauthorised communication with Ngirabatware; and (iii) engaging in a pattern of repeated professional and ethical lapses while acting as Ngirabatware’s counsel, with a view to reporting back as to whether there are sufficient grounds for instituting contempt proceedings or other appropriate disciplinary action (“Investigation”).⁶

4. On 30 November 2021, the *Amicus Curiae*, who had been directed to submit a report containing the conclusions of the Investigation within 120 days from the date of his appointment,⁷ was appointed by the Registrar to conduct the Investigation.⁸ However, in view of, *inter alia*, the volume and nature of material for review that continued to come into the *Amicus Curiae*’s possession during the Investigation,⁹ I granted a number of requests for extension of time to file the report.¹⁰ Thereafter, on 13 March 2023, the *Amicus Curiae* filed the confidential and *ex parte* “*Amicus Curiae* Report to the Single Judge” (“Report”).¹¹

5. On 20 April 2023, I denied Robinson’s request for leave to make written submissions on whether I should initiate contempt or disciplinary proceedings against him because I deemed that it would not be helpful or in the interests of justice, and, at that stage, premature.¹² However, I considered, *inter alia*, that it may be beneficial for the *Amicus Curiae* to interview Robinson, if he maintained his willingness, as previously expressed, to be interviewed by the *Amicus Curiae*, and

⁵ *Nzabonimpa et al.* Contempt Case Order of 20 September 2021, p. 3.

⁶ Order Directing the Registrar to Appoint an *Amicus Curiae* to Investigate Pursuant to Rule 90(C)(ii), 25 October 2021 (“Order of 25 October 2021”), p. 3.

⁷ See Order of 25 October 2021, p. 4.

⁸ Decision, 30 November 2021, p. 2.

⁹ See *Prosecutor v. Marie Rose Fatuma et al.*, Case No. MICT-18-116-A, Decision on *Amicus Curiae*’s Motion for Access and Requests for Clarification and Variation of Protective Measures, 21 January 2022 (“*Fatuma et al.* Decision of 21 January 2022”); Decision on *Amicus Curiae*’s Motions for Access to Non-Public Material in the *Ngirabatware* Proceedings and Requests for Variation of Protective Measures, 23 March 2022 (confidential and *ex parte*); Decision on Request for Order to Registrar, 22 September 2022 (confidential and *ex parte*); Decision on *Amicus Curiae*’s Request Concerning Decision of 21 January 2022, 22 September 2022 (confidential).

¹⁰ See Decision on Request for Extension of Time, 1 April 2022, pp. 1, 2; Decision on Request for Extension of Time, 28 July 2022, pp. 1, 2; Decision on Request for Extension of Time, 28 September 2022, pp. 1, 2; Decision on Request for Extension of Time, 29 November 2022, pp. 1, 2; Decision on Further Request for Extension of Time, 26 January 2023, pp. 2, 3; Decision on Further Request for Extension of Time, 13 February 2023, pp. 1, 2.

¹¹ The Report was initially due on 30 March 2022. See Order of 25 October 2021, p. 4.

¹² Decision on Request for Leave to Make Submissions, 20 April 2023 (confidential) (“Decision of 20 April 2023”), pp. 2, 3. See also Request for Leave to Make Submissions, 20 March 2023, paras. 1, 12.

for the *Amicus Curiae* to supplement the Report on that basis.¹³ Following his interview of Robinson on 23 and 24 May 2023 (“Suspect Interview”), the *Amicus Curiae* filed the confidential and *ex parte* “*Amicus Curiae*’s Supplemental Report to the Single Judge” on 13 June 2023 (“Supplemental Report”).¹⁴

6. During the Suspect Interview, the *Amicus Curiae* informed Robinson of his right to remain silent and that any statement he makes, including in relation to his written statement dated 28 April 2023 (“Robinson April 2023 Statement”) and 38 annexes attached thereto that he provided to the *Amicus Curiae* prior to the Interview,¹⁵ could be used as evidence against him.¹⁶ Robinson waived his right to remain silent and responded in the affirmative when the *Amicus Curiae* inquired whether Robinson understood that any statement during the Suspect Interview and in the Robinson April 2023 Statement, including the annexes attached thereto, may be used as evidence against him in the *Amicus Curiae*’s investigation and in “any related or resulting proceedings related to these matters”.¹⁷ Robinson also waived his right to counsel and the *Amicus Curiae* reminded him of his right to stop the interview and nonetheless seek counsel at any point.¹⁸ Throughout the Suspect Interview, Robinson did not exercise this right.¹⁹

7. On 27 October 2023, having considered, *inter alia*, that the Report and the Supplemental Report referred to materials that may be subject to the provisions of Rule 76 of the Rules and/or lawyer-client privilege, I ordered submissions on: (i) the use of materials that may be subject to the provisions of Rule 76 of the Rules, including those that have been disclosed by Mr. Dick Prudence Munyeshuli to the Office of the Prosecutor of the Mechanism (“Prosecution”) in the *Nzabonimpa et al.* Contempt Case, admitted as exhibits in the same case, and/or disclosed by Robinson to the

¹³ Decision of 20 April 2023, pp. 2, 3.

¹⁴ Supplemental Report, para. 4. *See* Decision of 20 April 2023, p. 3 (wherein I instructed the *Amicus Curiae* to schedule an interview with Robinson and to file a supplement to the Report no later than 5 June 2023). *See also* Decision on Joint Motion Concerning Rule 41 and Related Waiver, 16 May 2023 (confidential), pp. 1-3; Decision on Motion for Extension of Time, 18 May 2023 (confidential and *ex parte*), pp. 1, 2.

¹⁵ *See* Supplemental Report, para. 6. I note that the Robinson April 2023 Statement was attached as Annex A to Supplemental Report.

¹⁶ Supplemental Report, para. 4; Submission to the Single Judge of Material Related to the Interview of Mr. Peter Robinson, 12 July 2023 (strictly confidential and *ex parte*) (“*Amicus Curiae* Submission of 12 July 2023”), Annex 1 (“Interview Transcript of 23 May 2023”), Registry Pagination (“RP.”) 1033-1030.

¹⁷ Interview Transcript of 23 May 2023, RP. 1032-1030; Supplement Report, para. 7. With respect to the Robinson April 2023 Statement, I specifically note that Robinson responded in the affirmative when asked by the *Amicus Curiae* “[...] if I took you through your statement, as part of the interview, line by line, [...] that the statements and information provided in your statement would be your testimony in the same way and to the same extent as if I asked you questions and you gave these answers or made these statements as part of this interview?”. *See* Interview Transcript of 23 May 2023, RP. 1031.

¹⁸ Interview Transcript of 23 May 2023, RP. 1030-1028.

¹⁹ *See generally* Interview Transcript of 23 May 2023; *Amicus Curiae* Submission of 12 July 2023, Annex 2.

Amicus Curiae in the present case, in any possible trial or disciplinary actions; and (ii) the applicability of the crime-fraud exception to lawyer-client privilege with respect to such material.²⁰

8. By way of background to the Order of 27 October 2023, I note that the Single Judge in the *Nzabonimpa et al.* Contempt Case had initially dismissed, on 20 February 2019, Munyeshuli's request for an order applying Rule 76(B) and (F) of the Rules to information to be provided to him by Robinson, who had previously represented Ngirabatware.²¹ In dismissing Munyeshuli's initial request, the Single Judge had considered, *inter alia*, that: (i) Munyeshuli had not shown that Rule 76 of the Rules can be applied for the purposes of allowing a lawyer to unilaterally disclose to a third party information that is subject to the lawyer-client privilege as provided for in the Rules; and (ii) in the absence of additional submissions or evidence demonstrating that Ngirabatware had been fully consulted and had knowingly consented to his former counsel disclosing certain information that may be subject to lawyer-client privilege, the requested order raised the question of whether Robinson would be providing information in violation of his obligation to maintain lawyer-client privilege.²²

9. Thereafter, following a renewed request from Munyeshuli, the Single Judge ordered, on 29 March 2019, that the provisions of Rule 76 of the Rules shall apply to information provided by Robinson to Munyeshuli and that any information provided shall not be further disclosed without prior written approval by Robinson ("*Nzabonimpa et al.* Rule 76 Order").²³ In reaching this decision, the Single Judge noted, *inter alia*, that Robinson had indicated that he had "absolutely no intention of disclosing any information protected by the [lawyer]-client privilege or of violating that privilege in any way".²⁴ On the basis of this information, *inter alia*, the Single Judge ultimately found that Munyeshuli had demonstrated that appropriate circumstances existed to issue such an order in relation to the information that he sought to obtain from Robinson.²⁵

10. On 5 February 2021, the Munyeshuli Defence filed its exhibit list in the *Nzabonimpa et al.* Contempt Case, pursuant to Rule 70 of the Rules, containing 108 items described as "subject to

²⁰ Order of 27 October 2023, pp. 2, 3.

²¹ *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-PT, Decision on Dick Prudence Munyeshuli's Request for a Rule 76 Order, 20 February 2019 (confidential and *ex parte*; *ex parte* status lifted on 1 April 2021) ("*Turinabo et al.* Decision of 20 February 2019"), pp. 1, 2.

²² *Turinabo et al.* Decision of 20 February 2019, p. 2.

²³ *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-PT, Decision on Dick Prudence Munyeshuli's Request for a Rule 76 Order, 29 March 2019 (confidential and *ex parte*; *ex parte* status lifted on 1 April 2021) ("*Turinabo et al.* Decision of 29 March 2019"), p. 2. *See also* *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-PT, Renewed Request of the Defence of Dick Prudence Munyeshuli for a Rule 76 Order, 13 March 2019 (strictly confidential and *ex parte*).

²⁴ *Turinabo et al.* Decision of 29 March 2019, p. 1.

²⁵ *Turinabo et al.* Decision of 29 March 2019, p. 2.

Rule 76 restricted use/no further dis[s]emination”²⁶ and, on 22 March 2021, it indicated that Robinson had given consent to the disclosure of these materials to the Prosecution.²⁷ Subsequently, the Ngirabatware Defence (then represented by Mr. David Hooper and no longer Robinson) requested to review, *inter alia*, the 108 items subject to Rule 76 of the Rules.²⁸ In addition, during Munyeshuli’s testimony, the Ngirabatware Defence asserted lawyer-client privilege and objected on this basis to a specific item, included among the 108 items, which, consequently, was withdrawn by the Munyeshuli Defence.²⁹ According to the *Amicus Curiae*, “Munyeshuli testified in [the] *Nzabonimpa* [*et al.* Contempt Case] concerning a significant number of [Rule 76] items shown and described in open session.”³⁰

11. On 21 January 2022, the Appeals Chamber of the Mechanism (“Appeals Chamber”) granted the *Amicus Curiae* access to the entire case file of the *Nzabonimpa et al.* Contempt Case with the exception of, *inter alia*, material provided pursuant to Rule 76 of the Rules, unless and until the provider consents.³¹ According to the *Amicus Curiae*, he received access to all admitted exhibits including a number of items listed in Munyeshuli’s exhibit list as protected under Rule 76 of the Rules.³² In addition, the *Amicus Curiae* received 74 items “purportedly subject to the Rule 76 Order” from the Prosecution.³³ According to the *Amicus Curiae*, the Prosecution had asked the Munyeshuli Defence to verify that Robinson consented to the disclosure and expressly obtained Robinson’s consent, and the Prosecution had provided to the *Amicus Curiae* an email indicating that the Munyeshuli Defence did not state any limitation or condition regarding these materials or their use.³⁴

12. On 10 August 2022, Robinson indicated to the *Amicus Curiae* that, while he consents to the use of the ‘Rule 76 material’ in the *Amicus Curiae*’s report to the Single Judge, he presently does

²⁶ *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-T, Munyeshuli’s Defence Submissions Pursuant to Rule 70(M) RPE, 5 February 2021 (confidential), Annex B, RP. 19146-19137.

²⁷ See *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-PT, Reply to Ngirabatware Response to Prosecution Urgent Motion for Public Redacted or Confidential *Inter Partes* Version of 29 March 2019 Decision and Related Decision(s), 30 March 2021 (confidential).

²⁸ See *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-T, Ngirabatware’s Response to Prosecution Urgent Motion for Public Redacted or Confidential and *Inter Partes* Version of 29 March 2019 Decision and Related Decision(s), 19 March 2021 (confidential), paras. 3, 4. See also *Amicus Curiae*’s Motion for Authorisation to Use Material Provided Pursuant to Rule 76 in Potential Proceedings, 14 October 2022 (confidential and *ex parte*) (“*Amicus Curiae* Motion of 14 October 2022”), para. 14.

²⁹ *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-T, Munyeshuli, T. 8 April 2021 pp. 52, 53. See also *Amicus Curiae* Motion of 14 October 2022, paras. 16, 21.

³⁰ *Amicus Curiae* Response, para. 4.

³¹ *Fatuma et al.* Decision of 21 January 2022, pp. 2, 4, 5.

³² Report, para. 163; *Amicus Curiae* Motion of 14 October 2022, para. 7.

³³ Report, para. 163; *Amicus Curiae* Motion of 14 October 2022, para. 8.

³⁴ Report, para. 163; *Amicus Curiae* Motion of 14 October 2022, para. 8.

not consent to the use of the material as admissible evidence in any further proceedings.³⁵ According to the *Amicus Curiae*, none of the ‘Rule 76 material’ currently in his possession has been claimed by Ngirabatware to be subject to lawyer-client privilege.³⁶ Further, the *Amicus Curiae* indicated that, among the 38 documents annexed to the Robinson April 2023 Statement, 27 documents are “so-called Rule 76 documents – the same type and category of documents as those connected to Robinson’s previous and renewed refusal”.³⁷

13. With the foregoing background, and as noted above, I issued the Order of 27 October 2023, having found that it would be beneficial to receive submissions from Robinson and the *Amicus Curiae* on the application of the lawyer-client privilege and use of materials that may be subject to the provisions of Rule 76 of the Rules.³⁸ Specifically, as the issue of Robinson’s consent to the use of ‘Rule 76 material’ or of other material that may be subject to lawyer-client privilege, along with the possibility of a crime-fraud exception arose, a threshold determination, and possibly the appeal of such determination, has become necessary in assessing the viability of prosecuting, if appropriate, certain violations identified by the *Amicus Curiae* in his Report and Supplemental Report. This may be a relevant factor in assessing whether or not to authorize criminal proceedings under Article 1(4) of the Statute and Rule 90 of the Rules or other appropriate disciplinary action against Robinson.

14. Pursuant to my Order of 27 October 2023, the Robinson Submission, *Amicus Curiae* Response, and Robinson Reply were filed on 22 November 2023, 4 December 2023, and 11 December 2023, respectively. Following my grant of the *Amicus Curiae*’s request to file a sur-reply,³⁹ the *Amicus Curiae* Sur-Reply and Robinson Response to Sur-Reply were filed on 28 December 2023 and 4 January 2024, respectively.

II. DISCUSSION

15. 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

³⁵ Decision on *Amicus Curiae*’s Motion for Authorisation to Use Material Provided Pursuant to Rule 76 in Potential Proceedings, 7 November 2022 (confidential and *ex parte*), p. 2.

³⁶ See *Amicus Curiae* Motion of 14 October 2022, paras. 16, 17, 19, 20.

³⁷ Supplemental Report, para. 157.

³⁸ See *supra* para. 7.

³⁹ Decision of 22 December 2023, p. 2. See also Request for Leave to Sur-Reply to “Reply Re: Rule 76 and Privileged Materials”, 13 December 2023 (confidential).

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.⁴⁰ I will address the *Amicus Curiae* and Robinson’s arguments related to the application of the lawyer-client privilege and the limitations on the use of material, which is subject to Rule 76 of the Rules, in any possible criminal proceedings against Robinson in turn.

A. Application of Lawyer-Client Privilege

16. While Robinson concedes that some communications between him and Ngirabatware “appear to have been made in furtherance of the crime of interfering with the administration of justice”, others do not, and submits that the crime-fraud exception to the lawyer-client privilege should be evaluated on an item-by-item basis.⁴¹ With respect to ‘Rule 76 material’, the *Amicus Curiae* submits that lawyer-client privilege is inapplicable as it does not include communications between Robinson and Ngirabatware and neither of them can claim privilege on various ‘Rule 76 material’ that the *Amicus Curiae* obtained following the material’s disclosure and use in the *Nzabonimpa et al.* Contempt Case.⁴² Moreover, as a general matter on all relevant communications in this case, the *Amicus Curiae* submits that the lawyer-client privilege is not absolute and cannot be relied upon to conceal communications, including those exchanged through prohibited means, that are in furtherance of criminal activities.⁴³ In the present case, the *Amicus Curiae* contends that the crime-fraud exception applies to Robinson’s entire representation, and that an item-by-item assessment of whether the privilege applies is neither required nor appropriate.⁴⁴

17. Rule 119 of the Rules governing lawyer-client privilege provides:

(A) All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

- (i) the client consents to such disclosure; or
- (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

(B) Nothing in this Rule shall be interpreted as permitting the use of confidentiality between Counsel and client to conceal the participation of Counsel in illegal practices such as fee-splitting with the client.

⁴⁰ See Robinson Reply, para. 24; Robinson Reply to Sur-Reply, para. 10. See also Robinson Submission, para. 3; Robinson Reply, paras. 1-23; Robinson Reply to Sur-Reply, paras. 1-9.

⁴¹ Robinson Submission, para. 3; Robinson Reply, paras. 1, 12-23; Robinson Reply to Sur-Reply, paras. 1, 7-9.

⁴² *Amicus Curiae* Response, para. 13.

⁴³ *Amicus Curiae* Response, paras. 14, 17-36; *Amicus Curiae* Sur-Reply, paras. 10-13.

⁴⁴ *Amicus Curiae* Response, paras. 18-22; *Amicus Curiae* Sur-Reply, paras. 11, 12. See also *Amicus Curiae* Response, para. 27 (wherein the *Amicus Curiae* notes that during the Suspect Interview, Robinson stated “all the work I was putting in for Ngirabatware was being abused by these people” and “all of my efforts, you know, basically, to legitimately overturn his conviction were being used”).

18. The lawyer-client privilege, which protects the confidentiality of communications between lawyers and their clients, is to encourage clients to openly share information with their lawyers so that the lawyers can effectively represent their client’s interests.⁴⁵ The privilege is that of the client and not the legal adviser and will be lost where a client consents to the disclosure, or voluntarily discloses the content of the communication to a third party.⁴⁶ A client’s consent to the disclosure of otherwise privileged material can be express or implied.⁴⁷ Moreover, the lawyer-client privilege cannot be relied upon to conceal communications that are in furtherance of criminal activities.⁴⁸ In addition, the code of conduct for defence counsel provides that counsel may reveal confidential information that has been entrusted to them in confidence in certain circumstances, including:

[...]

(iii) when essential to establish [...] a defence to a criminal or disciplinary charge [...] instituted against Counsel based upon conduct in which the Client was involved, or to respond to allegations in any proceeding concerning Counsel’s representation of the Client; [...]⁴⁹

With the jurisprudence in mind, the following is my determination on the application of the lawyer-client privilege in the matter before me.

19. At the outset, I note that only documents that were provided to Munyeshuli by Robinson during the *Nzabonimpa et al. Contempt Case* (“*Nzabonimpa et al. Rule 76 Documents*”) are subject to the *Nzabonimpa et al. Rule 76 Order*. No demonstration has been made that material other than the *Nzabonimpa et al. Rule 76 Documents* is subject to Rule 76 of the Rules pursuant to a judicial order.

20. As detailed above, the Single Judge in the *Nzabonimpa et al. Contempt Case* was explicit in stating that materials protected under the lawyer-client privilege cannot be unilaterally disclosed by

⁴⁵ See also European Court of Human Rights, *Michaud v. France*, Application no. 12323/11, Judgement, 6 December 2012, para. 115; United States, Supreme Court, *Upjohn Co. v. United States*, 449 U.S. 383, 13 January 1981, p. 449.

⁴⁶ *Prosecutor v. Maximilien Turinabo et al., Prosecutor v. Augustin Ngirabatware, Prosecution v. Jean de Dieu Kamuhanda*, Case Nos. MICT-18-116-AR80.1, MICT-12-29-R, MICT-13-33, Decision on Appeals of the Decision in Relation to Material Seized from Dick Prudence Munyeshuli, 19 August 2019 (“*Turinabo et al. Decision of 19 August 2019*”), para. 52.

⁴⁷ *Turinabo et al. Decision of 19 August 2019*, para. 52.

⁴⁸ See *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-PT, Order for Further Submissions, 25 March 2020 (public with confidential and *ex parte* Annexes A and B) (“*Turinabo et al. Order of 25 March 2020*”), p. 2, n. 10 (indicating that this exception or limitation to the privilege, with certain nuances, is generally recognized in both common and civil law jurisdictions, as well as in the law and jurisprudence of other international tribunals).

⁴⁹ See Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism and Other Defence Team Members (MICT/6/Rev.1), 14 May 2021 (“Code of Conduct”), Article 9(C)(iii). I note that the applicable code of conduct in the present case is the previous version (see Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism (MICT/6), 14 November 2012) and that the identical wording can be found in the previous version in Article 13(B)(iii).

Robinson pursuant to Rule 76 of the Rules.⁵⁰ Following this determination, Ngirabatware had the opportunity to assert the lawyer-client privilege over the *Nzabonimpa et al.* Rule 76 Documents that Munyeshuli placed on his exhibit list and claimed this privilege with respect to at least one document, which was subsequently withdrawn.⁵¹ As far as the record indicates, material subject to lawyer-client privilege is not part of the documents subject to Rule 76 of the Rules that were reviewed by the *Amicus Curiae*.⁵² Consequently, the lawyer-client privilege does not prevent any of the documents subject to Rule 76 of the Rules that the *Amicus Curiae* has relied upon from being used in further proceedings, including criminal proceedings.

21. With respect to the documents other than those subject to Rule 76 of the Rules that have been used for the Investigation, Report, and Supplemental Report, I am also not persuaded that the lawyer-client privilege is applicable. To the extent communications between Ngirabatware and his Defence team and/or among the Ngirabatware Defence were admitted as evidence in the *Nzabonimpa et al.* Contempt Case, the lawyer-client privilege, which was Ngirabatware's to assert in that proceeding, has been waived. Thus, the privilege does not apply to any evidence provided to the *Amicus Curiae* from that case. Additionally, I am not aware of any material provided to the *Amicus Curiae* that pertains to Robinson as a client who can claim this privilege. Indeed, Robinson acknowledges that the privilege is not his but Ngirabatware's:

I am constrained by the [lawyer]-client privilege from unilaterally revealing the content of my communications with Ngirabatware. I will do my best in this statement to describe the events as they occurred while fully respecting Ngirabatware's [lawyer]-client privilege. If Ngirabatware waives the privilege, or the Court finds that the privilege has been waived or does not apply, I can supplement this statement with further detail.⁵³

If the issue of lawyer-client privilege is raised for a specific document in any further proceedings, it can be considered then on a case-by-case basis, bearing in mind, *inter alia*, the possibility of the crime-fraud exception⁵⁴ as well as Robinson's ability to use privileged yet exculpatory material in his defence as provided for in the Mechanism's Code of Conduct.⁵⁵

22. In view of the foregoing, I find that the lawyer-client privilege does not prevent the use of any materials relied upon for the Investigation, Report, and Supplemental Report, including documents subject to Rule 76 of the Rules, in further proceedings, including in criminal

⁵⁰ See *supra* para. 8.

⁵¹ See *supra* para. 10.

⁵² See *Amicus Curiae* Motion of 14 October 2022, paras. 16, 21.

⁵³ Robinson April 2023 Statement, para. 30.

⁵⁴ See *Turinabo et al.* Order of 25 March 2020, p. 2.

⁵⁵ See *supra* para. 18, n. 49.

proceedings or other proceedings. However, if the privilege is raised for a specific document in any further proceedings, it can be considered then on a case-by-case basis.⁵⁶

B. Limitations on the Use of Material Subject to Rule 76 of Rules

23. Robinson consents to the use of ‘Rule 76 material’ in any disciplinary proceeding.⁵⁷ However, he does not consent to their use in any possible criminal proceedings, contending that the material cannot be admitted over his objection and that the only remedy is to exclude the evidence if fair trial rights are infringed.⁵⁸ The *Amicus Curiae* submits that Robinson, as the information provider, has not shown any continuing legitimate or genuine interest for invoking Rule 76 of the Rules to protect information in this case.⁵⁹ The *Amicus Curiae* supports this position by highlighting: (i) the extensive use of the ‘Rule 76 material’ in the *Nzabonimpa et al.* Contempt Case, including in open session; (ii) Robinson’s disclosure of certain ‘Rule 76 material’, as part of the Suspect Interview, and consent to their use in future proceedings; and (iii) his consent to the use of ‘Rule 76 material’ for investigation and disciplinary proceedings.⁶⁰ The *Amicus Curiae* further submits that the interests of justice supports the use of the ‘Rule 76 material’ in this case and that the exclusion of the material is not the only remedy, particularly as there has been no showing of unfairness, that the material was improperly obtained, or that it is wholly unreliable.⁶¹

24. Robinson responds that there is no burden on the Rule 76 information provider to show a genuine interest in protecting the information and that, in any event, he has shown such interest as: (i) he is concerned that it not be disseminated to the certain authorities and that its dissemination be controlled if he were to inadvertently disclose privileged communications; and (ii) if there were to be criminal proceedings against him, his counsel who may represent him should be allowed to make their own decision on the admissibility of evidence rather than Robinson consenting to their use in a vacuum.⁶²

25. Rule 76 of the Rules governs “matters not subject to disclosure” and, in particular, provides guarantees to those who provide information on a confidential basis that they may limit its disclosure to opposing parties in proceeding and/or use in trial proceedings before the Mechanism. Specifically, relevant aspects of the rule provide that:

⁵⁶ See *supra* para. 21.

⁵⁷ Robinson Submission, para. 1.

⁵⁸ Robinson Submission, para. 2; Robinson Reply, paras. 1, 3-11; Robinson Response to Sur-Reply, para. 1.

⁵⁹ *Amicus Curiae* Response, para. 10; *Amicus Curiae* Sur-Reply, paras. 2-4. See also *Amicus Curiae* Response, para. 15.

⁶⁰ *Amicus Curiae* Response, paras. 7, 11; *Amicus Curiae* Sur-Reply, paras. 5, 6, 8.

⁶¹ *Amicus Curiae* Response, para. 16; *Amicus Curiae* Sur-Reply, paras. 7-9.

⁶² Robinson Reply to Sur-Reply, paras. 3-6. See Robinson Submission, para. 2. See also *Amicus Curiae* Response, paras. 1, 2, 15.

[...]

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information [...].

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document, or other material so provided, the Trial Chamber [...] may not order either Party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.

[...]

(F) The Trial Chamber may order, upon an application by the accused, that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused.

26. The purpose of Rule 76 of the Rules, as the Appeals Chamber stated in reference to its identical antecedent – Rule 70 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY Rules” and “ICTY”, respectively) – is to encourage States and other entities and persons to share sensitive information “by providing certain guarantees of confidentiality with respect to the information they offer” and by allowing the provider to, *inter alia*, place “limitations on the scope of a witness’s testimony or on the dissemination of that witness’s testimony”.⁶³ The Appeals Chamber has further stated this rule “does not place a burden on those providing information under this rule to substantiate their concerns”.⁶⁴ Moreover, the ICTY Appeals Chamber has interpreted Rule 70(F) of the ICTY Rules as “enabling the [d]efence to request a Trial Chamber that it be permitted to give the same undertaking as the Prosecution to a prospective provider of confidential material that that material will be protected if disclosed to the [d]efence”.⁶⁵

⁶³ *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Judgement, 20 March 2019 (public redacted) (“*Karadžić* Appeal Judgement”), para. 262 (references omitted), *referring, inter alia, to The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.6, Decision on Interlocutory Appeal Relating to the Testimony of Former United States Ambassador Robert Flaten, 17 July 2007, para. 17; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 29 October 2002, para. 19.

⁶⁴ *Karadžić* Appeal Judgement, para. 263.

⁶⁵ *Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73, Public Redacted Version of “Decision on Interlocutory Appeal Concerning Rule 70” Issued on 24 March 2004, 26 March 2004, para. 6.

27. In this context, Rule 76 of the Rules gives providers of sensitive information considerable control over the use of information in trials before the Mechanism.⁶⁶ Once judicially-ordered protection is provided under this rule, it continues until consent from the information provider has been obtained. It is clear that Robinson has given consent for Munyeshuli to use the documents subject to Rule 76 of the Rules in Munyeshuli's defence in the *Nzabonimpa et al.* Contempt Case and for the *Amicus Curiae* to have access to these documents for the present case.⁶⁷ However, those circumstances do not equate to Robinson consenting to their use as evidence in a subsequent criminal trial, including where Robinson may be a defendant.⁶⁸ Moreover, Robinson bears no burden in justifying why he does not consent in using such material in possible criminal proceedings against him. Additionally, the fact that information contained in these documents is in the public domain does not unequivocally undermine the necessity of his consent to use them in a possible criminal prosecution against him.⁶⁹ Accordingly, I find that the documents subject to Rule 76 of the Rules that have been used for the Investigation, Report, and Supplemental Report continue to be subject to protection under Rule 76 of the Rules, including the need for Robinson's consent for their use in further criminal proceedings, subject to the limitations identified below.

28. With respect to the issue of Robinson's consent, he waived his right to remain silent during the Suspect Interview, and confirmed that he understood that any statement he made during the Suspect Interview and in the Robinson April 2023 Statement, as well as the 38 documents attached as annexes thereto, may be used against him in "any proceedings related to or resulting from [the *Amicus Curiae*'s] investigation".⁷⁰ Robinson discussed a number of the documents subject to Rule 76 of the Rules during the Suspect Interview and as part of the Robinson April 2023 Statement. I find that such statements or explanations from Robinson or the specific document itself, if explicitly provided by Robinson in those contexts, may be used in any further proceedings, including criminal proceedings, given Robinson's consent during the Suspect Interview. In my view, the fact that Robinson may have indicated in subsequent submissions that he does not consent, at

⁶⁶ See *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR-108bis.2, Decision on Request of the United States of America for Review, 12 May 2006, para. 35 (wherein the ICTY Appeals Chamber stated that "the State has control over how it may be used, whether for evidence generation purposes only or also as evidence at trial").

⁶⁷ See *Fatuma et al.* Decision of 21 January 2022, p. 5 (requesting the Registry of the Mechanism to withhold from the *Amicus Curiae* access to any material provided pursuant to Rule 76 of the Rules, unless and until the relevant information providers have consented to disclosure of such material).

⁶⁸ See *Fatuma et al.* Decision of 21 January 2022, pp. 4, 5 (reflecting that consent for use of material provided under Rule 76 of the Rules in the *Nzabonimpa et al.* Contempt Case does not equate to consent for access to that same material in a subsequent criminal investigation). See also Rule 76(C) of the Rules (reflecting that the source of sensitive material must provide consent for the use of material provided under Rule 76(B) of the Rules to be used at trial).

⁶⁹ See *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution's Motion to Change the Status of ECMM Documents Pursuant to Rule 70, 14 April 2011, pp. 2, 3 (wherein the ICTY Trial Chamber ordered that the public status of documents be changed to confidential, considering that the information provider controls its confidentiality and makes its own determination that the material should be subject to protection).

⁷⁰ Interview Transcript of 23 May 2023, RP. 1033-1030.

this stage to the use of these documents in criminal proceedings, does not negate the explicit and unlimited consent he gave during the Suspect Interview to the use of his statements to the *Amicus Curiae* during the Suspect Interview, as well as the Robinson April 2023 Statement and the documents attached thereto.

29. In view of the foregoing, I find that the documents subject to Rule 76 of the Rules that were used for the Investigation, Report, and Supplemental Report can only be used in further proceedings, including criminal proceedings, with Robinson’s consent. He has unequivocally consented to their use in disciplinary proceedings. Moreover, in view of Robinson’s consent during the Suspect Interview, I find his statements to the *Amicus Curiae* during the Suspect Interview, as well as the Robinson April 2023 Statement and the documents attached thereto, which may encompass materials subject to Rule 76 of the Rules, may be used in any further proceedings, including criminal proceedings.

III. DISPOSITION

30. For the foregoing reasons, I **FIND** that:

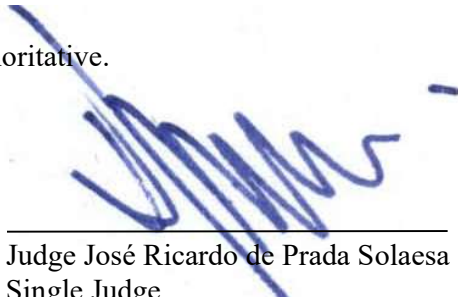
(i) the lawyer-client privilege does not prevent the use of any materials used for the Investigation, Report, and Supplemental Report, including the documents subject to Rule 76 of the Rules, in further proceedings, including in criminal proceedings or other proceedings, unless otherwise ordered;

(ii) in view of Robinson’s consent during the Suspect Interview, documents subject to Rule 76 of the Rules may be used in further proceedings to the extent provided for in this Decision; and

REMAIN SEISED of the matter of whether proceedings under Article 1(4) of the Statute and Rule 90 of the Rules or other appropriate disciplinary action against Robinson are warranted.

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

Done this 2nd day of April 2024,
At Arusha,
Tanzania



Judge José Ricardo de Prada Solaesa
Single Judge

[Seal of the Mechanism]



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