

**UNITED  
NATIONS**



International Residual Mechanism  
for Criminal Tribunals

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No.: MICT-13-38-Misc.1

Date: 3 May 2021

Original English

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**BEFORE THE SINGLE JUDGE**

**Before: Judge Mahandrisoa Edmond Randrianirina**

**Registrar: Abubacarr Tambadou**

**THE PROSECUTOR**

**v.**

**FELICIEN KABUGA**

*Public w/Confidential Annexes*

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**REQUEST FOR LEAVE TO REPLY AND REPLY:  
MOTION FOR ORDER CONCERNING FROZEN BANK ACCOUNTS**

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**The Office of the Prosecutor:**  
**Serge Brammertz**

**Counsel for Felicien Kabuga:**  
**Emmanuel Altit**

**Counsel for Francois Ngirabatware**  
**and Catherine Mukakayange**  
**Peter Robinson**

1. Francois Ngirabatware and Catherine Mukakayange respectfully request, pursuant to Rule 153(A) of the Mechanism’s Rules of Procedure and Evidence, leave to reply to the *Prosecution Response to Motion for Order Concerning Frozen Bank Accounts* (28 April 2021)(“*Response*”).

2. The Applicants believe that the Single Judge will be assisted if they provide further information about their ownership of their bank accounts, as suggested by the Prosecution, and if they address the new arguments put forth by the Prosecution to justify continuing the freeze on their accounts. Since the Prosecution had never provided a justification for freezing the accounts, apart from the fugitive status of Felicien Kabuga, it was impossible to anticipate all of its arguments.

3. The reply is limited to the matters raised by the Prosecution in the *Response*.<sup>1</sup> To avoid further delay, the substance of the reply is provided below, in the event that the Single Judge were to grant leave.

#### **I. The Burden of Proof**

4. The *Response* raises many questions, but provides no answers, or evidence. It ignores the fact that when seeking to justify the freezing of bank accounts, or the deprivation of a person’s property, it is the Prosecution that has the burden of proof to establish that grounds to freeze those accounts exist.

5. The right to enjoyment of one’s property is a fundamental international human right. The First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms provides in Article 1 that “every natural and legal person is entitled to the personal enjoyment of his possessions.”<sup>2</sup>

6. The Special Court of Sierra Leone has held that the burden is on the Prosecution to prove by “clear and convincing evidence” that the accounts are properly frozen.<sup>3</sup> Courts in the United States require the Prosecution to establish its proof by “a

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<sup>1</sup> *Prosecutor v Turinabo et al*, No. MICT-18-116-PT, *Decision on Motion for Access to Prosecution Requests for Assistance and Responses Thereto* (18 April 2019) at fn. 22

<sup>2</sup> See also American Convention on Human Rights, Article 21.

<sup>3</sup> *Prosecutor v Norman et al*, No. SCSL-04-14-PT, *Decision on Inter Partes Motion by Prosecution to Freeze the Account of the Accused Sam Hinga Norman at Union Trust Bank (SL) Limited or at any Other Bank in Sierra Leone* (19 April 2004), para. 13

preponderance of the evidence”.<sup>4</sup>

7. In a recent case at the Mechanism, the Single Judge ordered unfreezing of the account of an accused person. It found that “nothing suggests that unfreezing the assets contained in Munyeshuli's bank accounts...would prejudice ongoing investigations or the prosecution of the charge in the Indictment against him.”<sup>5</sup> This implies that it was for the Prosecution to adduce such evidence in order for the accounts to remain frozen.

8. Therefore, the Single Judge should hold that the burden of proof rests with the Prosecution to justify the continued freezing of Applicant’s bank accounts.

## II. The Merits

### (A) Ownership of the Accounts

9. The *Response* claims that there is no evidence demonstrating the existence of these two accounts or the Applicants’ interest in them,<sup>6</sup> and speculates that Mr. Ngirabatware’s ex-wife may be a joint owner on the accounts.<sup>7</sup> In fact, the declaration of Francois Ngirabatware, made under penalty of perjury and submitted with the *Motion*, unequivocally states that Ngirabatware is the owner of the specified account and that his sister, Catherine Mukakayange, is the owner of the other specified account.<sup>8</sup>

10. Applicants have attached to this reply as Confidential Annex A, a decision of the Court of Appeal in Brussels in which the Court specifies, on page 7, that the Applicants are the owners of those accounts. They have also attached declarations from Francois Ngirabatware (Confidential Annex B) and Catherine Mukakayange (Confidential Annex C) that once again confirm that they are the sole owners of the respective accounts and that Ngirabatware’s ex-wife is not, and has never been, a co-owner of either of the accounts. Therefore, there can be no doubt of the existence of these two accounts and the sole interest of the claimants in them.<sup>9</sup>

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<sup>4</sup> Title 18, United States Code, section 983(c)(1): “The burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture.”

<sup>5</sup> *Prosecutor v Turinabo et al*, No. MICT-18-116-PT, *Decision on Dick Prudence Munyeshuli’s Renewed Request to Release Frozen Assets* (7 May 2019), p. 2

<sup>6</sup> *Response*, para. 4

<sup>7</sup> *Id.*, para. 5

<sup>8</sup> *Motion Concerning Frozen Bank Accounts*, Annex B, para. 1

<sup>9</sup> Applicants have not been afforded access to the documents referred to in the *Response* at para. 5 (Ex Parte Annexes B and C). Should the Single Judge intend to place any reliance on them, Applicants request that the Prosecution be ordered to disclose them, redacting the names of other persons if necessary.

(B) Need for a decision by the Mechanism

11. The *Response* claims that no evidence has been offered in support of the allegation that a Mechanism decision is needed or that the accounts are presently blocked on the basis of the ICTR Prosecutor's request or the Mechanism's arrest warrant.<sup>10</sup> This too was included in Mr. Ngirabatware's declaration filed with the *Motion*.<sup>11</sup>

12. However, the Court decision attached as Confidential Annex A makes abundantly clear that the government of Belgium will not allow the claimants to access their accounts because of the request of the ICTR Prosecutor with whom they are bound to cooperate.

13. In the *Bemba* case, at the International Criminal Court, the Trial Chamber held that following the accused's acquittal, States that cooperated in the freezing or seizure of assets needed to be notified as soon as practicable that they are no longer under any obligation to comply with any of the requests for freezing of assets.<sup>12</sup> Likewise, if the Single Judge finds that the freezing of assets are no longer justified following the arrest of Felicien Kabuga, the Mechanism must inform the States that have been requested to cooperate in freezing those assets.

14. Therefore, the Prosecution's claim that an order from the Mechanism has not been shown to be necessary is without merit.

(C) Interest of Felicien Kabuga in the accounts

15. The *Response* claims that Felicien Kabuga may have an interest in those accounts.<sup>13</sup> This is entirely unfounded. It is based on the false premise that Mr. Ngirabatware's ex-wife, who is one of 13 children of Felicien Kabuga, is an account holder, and the speculation that somehow this fact might mean that Felicien Kabuga owns the accounts.

16. The declaration of Francois Ngirabatware filed in support the *Motion* clearly stated, under penalty of perjury, that Felicien Kabuga was not the source of the funds in

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<sup>10</sup> *Response*, para. 4

<sup>11</sup> *Motion Concerning Frozen Bank Accounts*, Annex B, paras. 5-7

<sup>12</sup> *Prosecutor v Bemba*, No. ICC-01/05-01/08-3660, *Decision on Mr. Bemba's Preliminary Application for Reclassification of Filings, Disclosure, Accounts, and Partial Unfreezing of Mr. Bemba's Assets and the Registry's Request for Guidance* (20 November 2018), paras. 14-15

<sup>13</sup> *Response*, para. 6

the bank accounts and has no interest in those accounts.<sup>14</sup> He has repeated that assertion in a declaration attached to this reply (Confidential Annex B). His sister, Catherine Mukakayange, has also submitted a declaration indicating unequivocally that Felicien Kabuga was neither the source of the funds nor has any ownership interest in them. (Confidential Annex C).

17. In addition, although having no burden to do so, Applicants have specifically refuted the Prosecution's claim<sup>15</sup> that they have failed to explain the provenance of the funds in the accounts by stating under penalty of perjury that the funds came from the operation of their own businesses. (Confidential Annexes B and C)

18. Therefore, there is not a scintilla of evidence to support the Prosecution's claim that the funds in the accounts are owned by Felicien Kabuga.

19. For all of these reasons, the Prosecution's contention that the accounts somehow are the property of Felicien Kabuga misapplies the burden of proof and is without any factual or evidential support.

(D) Prosecution's Refusal to Unfreeze the Accounts

20. The *Response* erroneously assumes that Applicants have not previously requested that the Prosecution lift the freeze on their accounts. As reflected in Annex A to the *Motion*, and in the Declaration of Francois Ngirabatware (Confidential Annex B), the Prosecution has been asked repeatedly by the Applicant's lawyers, the Government of Belgium, and Mr. Ngirabatware himself whether it was willing to unfreeze the accounts. These requests have been uniformly rejected.

21. The *Kabuga Family* decision, cited in the *Response*,<sup>16</sup> supports the Applicants position. In that case, the Appeals Chamber did not require the applicants to renew their two-year old request to the Prosecution, but instead decided on 22 November 2002 that "the Appellant has a right to request a judicial review by a Trial Chamber of the Decision of 12 September 2000."<sup>17</sup>

22. In any event, seeking yet another reconsideration of the Applicants' requests would not have resolved the issue, as the Prosecution relies on the Single Judge's order

<sup>14</sup> *Motion Concerning Frozen Bank Accounts*, Annex B, paras. 3-4

<sup>15</sup> *Response*, at para. 6

<sup>16</sup> *Response*, para. 9

<sup>17</sup> *Miscellaneous, Kabuga Family*, No 01-A, *Appeal of the Family of Felicien Kabuga against Decisions of the Prosecutor and President of the Tribunal* (22 November 2002), p. 4

pursuant to Mechanism Rule 63(D) for continuing to freeze the accounts. That section requires that orders be “without prejudice to the rights of third parties”. It is undisputed that Applicants, as third parties, have a right to directly petition the Mechanism when their rights have been prejudiced by such an order.

23. Finally, the *Response* makes it clear that the Prosecution remains opposed to unfreezing the accounts, evidencing that any further requests for reconsideration would have been futile. The Prosecution’s claim that it could retain the freeze of the funds on the grounds that the funds would be used to injure or intimidate witnesses or destroy evidence in the case of Felicien Kabuga<sup>18</sup> is not supported by citation to any facts or jurisprudence. Appellants know of no case in international criminal law where assets have been frozen because they might be used to injure or intimidate victims or destroy evidence.

24. For all of these reasons, the Prosecution’s claim that the motion should be dismissed for failure to obtain yet another rejection from the Prosecution should itself be rejected.

(E) Recourse to the Funds by the Registry or Victims

25. The *Response* contends that the funds can continue to be frozen to pay the legal fees and restitution obligations of Felicien Kabuga.<sup>19</sup> This presupposes that there is evidence that the funds belong to Mr. Kabuga. The Prosecution has pointed to no such evidence. The Applicants are under no obligation to use their own funds to pay Mr. Kabuga’s legal fees or make restitution to his alleged victims and emphatically decline to do so.

26. Therefore, the Prosecution’s claims for delaying a decision on unfreezing the funds, or making them available to victims, are based on a premise which is untrue and unproven.

### III. Conclusion

27. The Prosecution has deprived the Applicants of their hard-earned funds for years simply by stating that the funds might be used to assist Felicien Kabuga evade

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<sup>18</sup> *Response*, para. 10

<sup>19</sup> *Response*, paras. 11-16

arrest. Now that Felicien Kabuga has been arrested, and the Prosecution has been called upon to substantiate its freeze of the accounts, it turns out that its file is empty.

27. The Prosecution has failed to meet its burden of establishing that the funds in the Applicants' accounts are subject to being frozen. They cannot be used to help Kabuga evade justice because he is now arrested. There is not a scrap of evidence that the Applicants would use the funds to injure or intimidate witnesses or destroy evidence, or that any of the funds belong to Felicien Kabuga.

28. Instead, the declarations and related documents submitted by Applicants show that they are the owners of the accounts and that Felicien Kabuga has no interest in them. The Applicants have indicated that they would not use the funds to injure or intimidate witnesses or destroy evidence in the case of Felicien Kabuga, in which they are not concerned, and there is no evidence to the contrary.

29. The overwhelming weight of the evidence before the Single Judge demonstrates that the continued freezing of Applicants' accounts is unfounded. The Single Judge should issue a decision indicating that the Mechanism and ICTR no longer maintain any interest in freezing the accounts of Francois Ngirabatware and Catherine Mukakayange, and direct the Registrar to serve a copy of that decision on the bank and the government of Belgium.

Word count: 2173

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Peter Robinson', written in a cursive style.

PETER ROBINSON

Counsel for Francois Ngirabatware  
and Catherine Mukakayange



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