

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

No.: MICT-13-38-Misc.2

Date: 15 April 2021

Original English

THE PRESIDENT

Before: Judge Carmel Agius

Registrar: Abubacarr Tambadou

THE PROSECUTOR

v.

FELICIEN KABUGA

Public with Confidential Annexes

MOTION FOR ORDER CONCERNING FROZEN ASSETS

The Office of the Prosecutor:
Serge Brammertz

Counsel for Felicien Kabuga:
Emmanuel Altit

Counsel for Donatien Nshimyumuremyi,
Innocent Twagirimukiza,
Alain Gilbert Habumukiza and
Estate of Josephine Mukazitoni
Peter Robinson

Introduction

1. Donatien Nshimyumuremyi, Innocent Twagirimukiza, Alain Gilbert Habumukiza, and the estate of Josephine Mukazitoni respectfully request that the President assign a Single Judge or Trial Chamber to issue an order declaring that the United Nations International Residual Mechanism for Criminal Tribunals (“Mechanism”) and its predecessor, the International Criminal Tribunal for Rwanda (“ICTR”), no longer maintain any interest in freezing the bank accounts and real property listed in Confidential Annex A. It is further requested that the Registrar be ordered to serve a copy of that order on the respective banks and the governments of Belgium, France, and Kenya.¹

Background

2. Felicien Kabuga was first indicted by the ICTR on 30 October 1997.² Subsequent indictments were filed against him on 29 August 1998,³ 12 October 2005,⁴ 14 April 2011,⁵ and 1 March 2021.⁶ He was arrested on 16 May 2020 in France.⁷ He is currently incarcerated at the United Nations Detention Unit in The Hague awaiting trial.

3. During the period when Mr. Kabuga was a fugitive, the Prosecution requested that various financial institutions and States freeze assets that it believed could be used to assist Kabuga in evading arrest. This included assets of Kabuga’s family members.

4. Donatien Nshimyumuremyi, Innocent Twagirimukiza, and Alain Gilbert Habumukiza are sons of Felicien Kabuga.

5. Josephine Mukazitoni was the wife of Felicien Kabuga. They were married in 1959. Ms. Mukazitoni died in 2017 in Belgium, where she was residing. Her eldest son, Donatien Nshimyumuremyi, is the executor of her estate. Her heirs include her husband, Felicien Kabuga, and their 13 children.

¹ It is requested that the petitioners also be authorised to disclose any resulting decision or order to the banks, government officials in Belgium, France, and Kenya and in connection with any court proceedings necessary to obtain return of the funds or to unencumber the property.

² *Prosecutor v Kabuga*, No. ICTR-97-22, *Indictment* (30 October 1997)

³ *Prosecutor v Bizimana, Karemera, Nzabonimana, Rwamakuba, Ngirumpatse, Nzirorera, Kabuga, and Kajelijeli*, No. ICTR-98-44-I, *Confirmation and Disclosure of the Indictment* (29 August 1998)

⁴ *Prosecutor v Kabuga*, No. ICTR-98-44B-I, *Decision on the Amended Indictment* (12 October 2005)

⁵ *Prosecutor v Kabuga*, No. ICTR-98-44B-PT, *Amended Indictment* (14 April 2011)

⁶ *Prosecutor v Kabuga*, No. MICT-13-38-PT, *Prosecution’s Second Amended Indictment* (1 March 2021)

⁷ *Urgent Motion for Amendment of Order for Transfer* (20 May 2020)

6. At the request of the ICTR prosecutor, their bank accounts in Belgium, France, and Kenya were frozen and their real property in Belgium and Kenya was blocked. Their efforts to obtain access to these funds and property through the courts in Belgium, France, and Kenya were unsuccessful because those courts ruled that those governments were obligated to cooperate with the ICTR and the ICTR Prosecutor maintained that the funds and property should remain frozen so long as Felicien Kabuga was a fugitive.⁸

5. The funds in frozen accounts and the real property belong to Messrs. Nshimyumuremyi, Twagirumukiza, Habumukiza, and the estate of Josephine Mukazitoni. Felicien Kabuga has no financial or ownership interest in any of them, save for his interest in property jointly owned with his late wife.⁹

Argument

6. Now that Felicien Kabuga has been arrested, there is no basis for the ICTR or the Mechanism to retain its freeze on the funds belonging to Messrs. Nshimyumuremyi, Twagirumukiza, and Habumukiza or the estate of Josephine Mukazitoni.

7. The funds were originally frozen upon request of the ICTR Prosecutor pursuant to ICTR Rule 40(A)(iii) of its Rules of Procedure and Evidence, which provided:

- (A) In case of urgency, the Prosecutor may request any State:
 - (i) To arrest a suspect and place him in custody;
 - (ii) To seize all physical evidence;
 - (iii) **To 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.
- The State concerned shall comply forthwith, in accordance with Article 28 of the Statute.¹⁰

8. The authority to continue to freeze the assets pursuant to Rule 40(A)(iii) no longer exists now that Felicien Kabuga has been arrested.¹¹

⁸ The most recent decisions of the courts in Belgium, France, and Kenya are attached as Confidential Annexes C, D, and E.

⁹ See declaration of Donatien Nshimyumuremyi attached as Confidential Annex B.

¹⁰ (emphasis added). This is currently Rule 37 of the Mechanism’s Rules of Procedure and Evidence.

¹¹ *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) (ordering release of frozen assets after arrest of accused person)

9. On 29 April 2013, Mechanism Single Judge Vagn Joensen issued a warrant of arrest for Felicien Kabuga that included a request to all Member States of the United Nations to:

MAKE INQUIRIES to discover whether the Accused has assets located within the territory of the Member State and if so, to adopt provisional measures to freeze such assets, without prejudice to the rights of third parties;¹²

10. This order was issued pursuant to Mechanism Rule 63(D), which provides:

The Single Judge shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or proprio motu, after having heard the Prosecutor, the Single Judge may order a State or States to adopt provisional measures to freeze the assets of the accused, considering the gravity of the crimes charged and the level of responsibility of the accused, without prejudice to the rights of third parties.

11. The Appeals Chamber of the ICTR has held that a third party whose assets are frozen by the Prosecutor has a right to request a judicial review by a Trial Chamber of that decision.¹³ Likewise, to the extent that the assets are claimed to now be frozen pursuant to the Single Judge's order, Messrs. Nshimyumuremyi, Twagirumukiza, Habumukiza and the estate of Josephine Mukazitoni are third parties prejudiced by that order and have the right to be heard.¹⁴

12. There is no basis for the Mechanism or ICTR to continue to block Messrs. Nshimyumuremyi, Twagirumukiza, and Habumukiza, or the estate of Josephine Mukazitoni's access to their funds and property pursuant to Mechanism Rule 63(D) because they are not assets of Felicien Kabuga and he has no interest in them whatsoever, apart from his interest in jointly owned property with his late wife, Josephine Mukazitoni.

13. To the extent that any of the accounts and property are considered assets of Felicien Kabuga, they cannot continue to be frozen or encumbered since the Mechanism has no valid claim to his assets. The Mechanism statute contains no provision for a monetary fine, if he is convicted, or for reparations.

14. The Mechanism provision allowing for restitution, Rule 122(B), provides as

¹² *Warrant of Arrest and Order for Transfer Addressed to All States* (29 April 2013), p. 2)

¹³ *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

¹⁴ *Prosecutor v Turinabo et al*, No. MICT-18-116-AR80.1, *Decision on Appeals of the Decision related to Materials Seized from Dick Prudence Munyeshuli* (19 August 2019), para. 35

follows:

If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement that shall be prepared in a reasonable time. The Trial Chamber may order restitution as provided in Rule 129.

15. Since the indictment against Felicien Kabuga does not allege the unlawful taking of property, the Mechanism is without power to order restitution in his case. Trial Chambers of the ICTR have held that restitution is not possible in cases where the unlawful taking of property is not alleged.¹⁵ The Mechanism is bound to interpret its statute and rules in the same manner that they were interpreted at the ICTR, particularly since Mechanism Rule 122(B) is taken verbatim ICTR Rule 88(B).¹⁶ Therefore, there is no authority to continue to freeze assets owned by Felicien Kabuga..

Conclusion

16. The Single Judge or Trial Chamber is respectfully requested to issue an order indicating that the Mechanism and ICTR no longer maintain any interest in freezing the bank accounts or encumbering the real property listed in Confidential Annex A. The order should further direct the Registrar to serve a copy of that order on the respective banks and the governments of Belgium, France, and Kenya.

17. Such an order is needed for the third parties, Messrs. Nshimyumuremyi, Twagirumukiza, Habumukiza and the estate of Josephine Mukazitoni, to once again obtain access to their funds and property.

¹⁵ *Prosecutor v Musema*, No. ICTR-96-13-T, *Decision on an Application by African Concern for Leave to Appear as Amicus Curiae* (17 March 1999) at para. 11; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Amicus Curiae Request by African Concern* (23 March 2004); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Amicus Curiae Request by Rwandan Government* (13 October 2004) at para. 6

¹⁶ *Prosecutor v Nzuwonemeye*, No. MICT-13-43, *Decision on the Appeal of the Single Judge's Decision of 22 October 2018* (17 April 2019) at para. 15

18. Should the Single Judge or Trial Chamber find that Felicien Kabuga's interest in jointly held property with Josephine Mukazitoni is nevertheless subject to continue to be frozen by the Mechanism, it is respectfully requested that the Judge or Chamber order the unfreezing of the estate of Josephine Mukazitoni's portion of those assets.

Word count: 1663

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter Robinson". The signature is written in a cursive, flowing style with large, connected loops.

PETER ROBINSON

Counsel for Donatien Nshimyumuremyi, Innocent Twagirumukiza, Alain Gilbert Habumukiza, and the estate of Josephine Mukazitoni



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