

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

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

Date: 4 May 2021

Original English

BEFORE THE SINGLE JUDGE

Before: Judge Mahandrisoa Edmond Randrianirina

Registrar: Abubacarr Tambadou

THE PROSECUTOR

v.

FELICIEN KABUGA

Public with Confidential Annexes

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

The Office of the Prosecutor:
Serge Brammertz

Counsel for Felicien Kabuga:
Emmanuel Altit

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

1. Applicants 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 Assets* (29 April 2021) ("Response").

2. Applicants believe that the Single Judge will be assisted if they provide further information about their ownership of their bank accounts and property, as suggested by the Prosecution, and if they address the new arguments put forth by the Prosecution to justify continuing to freeze their assets. Since the Prosecution 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 its response.¹ To avoid further delay, the reply is provided below, in the event that the Single Judge were to grant leave.

I. The Burden of Proof

4. 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."²

5. 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.³ Courts in the United States require the Prosecution to establish its proof by "a preponderance of the evidence".⁴

6. In a recent case at the Mechanism, the Single Judge ordered unfreezing of an accused's bank accounts, finding that "nothing suggests that unfreezing the assets contained in Munyeshuli's bank accounts...would prejudice ongoing investigations or the

¹ *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

² *See also* American Convention on Human Rights, Article 21.

³ *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

⁴ 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."

prosecution of the charge in the Indictment against him.”⁵ This implies that it was for the Prosecution to adduce such evidence in order for the accounts to remain frozen.

7. Therefore, the Single Judge should find that the burden of proof rests with the Prosecution to justify the continued freezing of Applicants’ assets.

II. The Merits

(A) Ownership of the Accounts

8. The *Response* claims that Applicants have failed to provide sufficient documentation to assess their ownership of the assets.⁶ In fact, the declaration of Donatien Nshimyumuremyi, submitted with the *Motion* under penalty of perjury, specifically states that he is the owner of bank account number 1, his brother, Alain Gilbert Habumukiza, is the owner of bank account number 2, his other brother, Innocent Twagirumukiza is the owner of real property number 3, his mother was the owner of bank account number 4 until her death, and that his mother and father were the owners of joint bank accounts numbers 5 and 6 and jointly owned real property number 7.⁷

9. Applicants also attached to their *Motion* three court decisions that confirm that they are the owners of the accounts and property and that the accounts and property have been frozen at the request of the ICTR.⁸

10. To avoid any doubt, Applicants have now provided, with this reply, a supplemental declaration of Donatien Nshimyumuremyi (Confidential Annex A) and declarations of Alain Gilbert Habumukiza (Confidential Annex B) and Innocent Twagirumukiza (Confidential Annex C) in which they unequivocally state that they are the owners of the accounts and property and provide further documentation.

11. The Prosecution’s questions about the ownership of the assets have therefore been answered.

(B) Need for a decision by the Mechanism

12. The *Response* claims that no evidence has been offered that a Mechanism decision is needed or that the accounts are presently blocked on the basis of the ICTR

⁵ *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) at p. 2

⁶ *Response*, para. 4

⁷ *Motion for Order Concerning Frozen Assets* (15 April 2021)(“*Motion*”), Confidential Annex B, paras. 1,7,8

⁸ *Id*, Confidential Annex C (individuals number 2 (Twagirumukiza) and 4 (Habumukiza); Confidential Annex D (Nshimyumuremyi); Confidential Annex E, paras 2, 7(c) (Mukazitoni and Kabuga)

Prosecutor’s request or the Mechanism’s arrest warrant.⁹ This too was addressed in Mr. Nshimyumuremyi’s declaration, and in the Court decisions attached to the *Motion*. The declaration and decisions establish that the governments of Belgium, France, and Kenya will not allow Applicants to access their accounts because of the request of the ICTR Prosecutor with whom they are obligated to cooperate.¹⁰

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.¹¹ 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 questions about the necessity of an order from the Mechanism have been answered.

(C) Interest of Felicien Kabuga in jointly owned accounts and property

15. The *Response* claims that the *Motion* and Declaration of Donatien Nshimyumuremyi contradict each other as to whether the funds in the bank accounts of Mr. Nshimyumuremyi and Habumukiza are owned by Felicien Kabuga.¹² There is no contradiction. Felicien Kabuga was the source of the funds, but has not been the owner of those funds since 1994. The Prosecution fails to appreciate the difference between the source of funds and their owner.

16. The Prosecution also claims that by operation of the laws of the States involved, the joint bank accounts and jointly-held real property of Josephine Mukazitoni and Felicien Kabuga may have become the sole property of Felicien Kabuga upon the death of Ms. Mukazitoni.¹³ This is an issue best left to the States to interpret their own laws concerning joint ownership of property and rights of survivorship.

⁹ *Response*, para. 4

¹⁰ *Motion*, Confidential Annex B, paras. 6,9-10; Confidential Annexes C, D, and E

¹¹ *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

¹² *Response*, para. 5

¹³ *Response*, para. 6

17. With respect to the jointly owned accounts and property, the Single Judge is requested to issue and 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 of the estate of Josephine Mukazitoni. This will allow the banks and States to apply the applicable laws related to joint ownership.

(D) Prosecution’s Refusal to Unfreeze the Accounts

18. The *Response* cites the *Kabuga Family* decision¹⁴ for the proposition that the applicants must renew their request to unfreeze their assets. That decision did not require that the Applicants renew their two-year old request to the Prosecution, but instead held that “the Appellant has a right to request a judicial review by a Trial Chamber of the Decision.”¹⁵ This is that request for judicial review.

19. In any event, seeking reconsideration of the Applicants’ request would not have resolved the issue, as the Prosecution relies on the Single Judge’s order pursuant to Mechanism Rule 63(D) for continuing to freeze the assets. 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 petition the Mechanism when their rights have been prejudiced by such an order.

20. Finally, the *Response* makes it clear that the Prosecution remains opposed to unfreezing the assets, evidencing that any further requests for reconsideration would have been futile. Its claim that it could retain the freeze of the assets on the grounds that they would be used to injure or intimidate witnesses or destroy evidence in the case of Felicien Kabuga¹⁶ 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.

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

¹⁴ *Response*, para. 8

¹⁵ *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

¹⁶ *Response*, para. 19

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

22. The *Response* contends that the assets can continue to be frozen to pay the legal fees and restitution obligations of Felicien Kabuga.¹⁷ 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 to make restitution to his alleged victims.

23. The Prosecution claims that the Registrar is able to include assets transferred from the accused when requiring the accused to pay for his legal aid.¹⁸ However, Section 5(f) on the applicable Registrar's policy provides that in determining a legal aid applicant's disposable means, the Registrar may include any assets previously owned by the accused that were transferred to another person **for the purpose of concealing them**.¹⁹

24. The decisions cited in the *Response* are therefore distinguishable. In *Kvocka*, family members served as nominees for the accused's purchase of property derived from fee splitting.²⁰ In *Krajisnik*, the Trial Chamber required evidence of an intent to conceal the assets, when observing that:

In the instant case, it is not reasonable to interpret the Directive as having the effect that the elderly mother of the Complainant must contribute to the defence of her middle-aged son out of her own assets, unless of course those assets have been assigned to her by the Complainant...If, hypothetically speaking, the Complainant had enlarged his mother's (or anyone else's) assets to avoid his obligations under the Directive, or in general to conceal or obfuscate the extent of his own assets, the Registrar would again have been entitled to take those assets into account.²¹

25. Likewise, in the *Praljak* case, the President found that the property in question had been transferred to third parties for the purpose of concealment.²²

¹⁷ *Response*, paras. 10-16

¹⁸ *Response*, para. 11

¹⁹ *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013), para. 45 (emphasis added)

²⁰ *Prosecutor v Kvocka et al*, No. IT-98-30-I/A, *Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic* (7 February 2003), paras. 19,22,28,47

²¹ *Prosecutor c Krajisnik*, No. IT-00-39-PT, *Decision on the Defence's Motion for an Order Setting Aside the Registrar's Decision Declaring Momcilo Krajisnik Partially Indigent for Legal Aid Purposes* (20 January 2004), para. 22

²² *Prosecutor v Prlic et al*, No. IT-04-74-A, *Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means* (28 August 2013), para. 68

26. In the instant case, the Declaration of Donatien Nshimyumuremyi, filed with the *Motion*, indicates that the funds were given to him by his father around August 1994 when his father was leaving Europe to return to Africa.²³ The ICTR was not even established until November 1994,²⁴ and the first indictment was not returned against Felicien Kabuga until 30 October 1997.²⁵

27. Appellants have submitted with this reply a supplemental declaration of Donatien Nshimyumuremyi (Confidential Annex A) and a declaration of his sister, Bernadette Uwamariya (Confidential Annex D), that directly addresses this issue and establishes that the purpose of transferring the assets from Felicien Kabuga to Donatien Nshimyumuremyi had nothing to do with concealing assets from the ICTR.

28. Although this motion seeks the unfreezing of assets held by innocent third parties, the family of Felicien Kabuga cannot help but point out that if Mr. Kabuga's own funds were unfrozen, he could use those funds to retain a counsel of his choice. By freezing his assets, and insisting that he be represented by a lawyer who he does not want to represent him, the Mechanism is depriving him of that right.²⁶

29. Furthermore, the decisions of three ICTR Trial Chambers have specifically held that in order for restitution to be ordered in a case before the ICTR, the unlawful taking of property must be charged in the indictment.²⁷ The fact that these decisions were made in the context of applications for leave to appear as *amicus curiae*, as pointed out in the *Response*,²⁸ does not alter the holdings in those cases. Even the generous reparation provisions of the International Criminal Court require that reparations can only be ordered for conduct charged in the indictment and subject to a conviction.²⁹

²³ *Motion*, Confidential Annex B, para. 3

²⁴ United Nations Security Council Resolution 955 (8 November 1994)

²⁵ *Prosecutor v Kabuga*, No. ICTR-97-22, *Indictment* (30 October 1997)

²⁶ *Prosecutor v Kabuga*, No. MICT-13-38-PT, *Decision on Matters Related to Felicien Kabuga's Representation* (1 April 2021)

²⁷ *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

²⁸ *Response*, para. 14

²⁹ *Prosecutor v Katanga*, No. ICC-01/04-01/07-3728 *Order for Reparations pursuant to Article 75 of the Statute* (24 March 2017), para. 37

30. In any event, the Prosecution's claims for delaying a decision on unfreezing the assets, or making them available to victims, are unavailing, since the assets are not owned by Felicien Kabuga nor were they transferred for the purpose of concealing them from the then non-existent ICTR.

III. Conclusion

31. The Prosecution has failed to meet its burden of establishing that the assets of Felicien Kabuga's wife and children are subject to being frozen. The assets cannot be used to help Kabuga evade justice because he is now arrested. The Prosecution has presented no 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.

32. 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. They have indicated that they would not use the funds to injure or intimidate witnesses or destroy evidence in the case of Felicien Kabuga, and there is no evidence to the contrary.

33. The overwhelming weight of the evidence before the Single Judge demonstrates that the continued freezing of Applicants' assets is unfounded. The Single Judge should issue a decision declaring that the Mechanism and ICTR no longer maintain any interest in freezing the assets listed in Confidential Annex A to the *Motion*, and direct the Registrar to serve a copy of that decision on the banks and the governments of Belgium, France, and Kenya.

Word count: 2722

Respectfully submitted,

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

PETER ROBINSON

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



I - FILING INFORMATION / INFORMATIONS GÉNÉRALES

To/ À :	IRMCT Registry/ <i>Greffe du MIFRTP</i>	<input checked="" type="checkbox"/> Arusha/ <i>Arusha</i>	<input type="checkbox"/> The Hague/ <i>La Haye</i>
From/ De :	<input type="checkbox"/> Chambers/ <i>Chambre</i>	<input type="checkbox"/> Defence/ <i>Défense</i>	<input type="checkbox"/> Prosecution/ <i>Bureau du Procureur</i>
		<input checked="" type="checkbox"/> Other/ <i>Autre</i> :	Petitioners
Case Name/ Affaire :	Prosecutor v Kabuga	Case Number/ Affaire n° :	MICT-13-38-Misc.2
Date Created/ Daté du :	4 May 2021	Date transmitted/ Transmis le :	4 May 2021
		No. of Pages/ Nombre de pages :	8
Original Language / Langue de l'original :	<input checked="" type="checkbox"/> English/ <i>Anglais</i>	<input type="checkbox"/> French/ <i>Français</i>	<input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
		<input type="checkbox"/> Kinyarwanda / <i>B/C/S</i>	
Title of Document/ Titre du document :	REQUEST FOR LEAVE TO REPLY AND REPLY: MOTION FOR ORDER CONCERNING FROZEN ASSETS		
Classification Level/ Catégories de classification :	<input checked="" type="checkbox"/> Unclassified/ <i>Non classifié</i>	<input type="checkbox"/> Ex Parte Defence excluded/ <i>Défense exclue</i>	<input type="checkbox"/> Ex Parte Prosecution excluded/ <i>Bureau du Procureur exclu</i>
	<input type="checkbox"/> Confidential/ <i>Confidentiel</i>	<input type="checkbox"/> Ex Parte R86(H) applicant excluded/ <i>Art. 86 H) requérant exclu</i>	<input type="checkbox"/> Ex Parte Amicus Curiae excluded/ <i>Amicus curiae exclu</i>
	<input type="checkbox"/> Strictly Confidential/ <i>Strictement confidentiel</i>	<input type="checkbox"/> Ex Parte other exclusion/ <i>autre(s) partie(s) exclue(s)</i> (specify/préciser) :	
Document type/ Type de document :			
<input checked="" type="checkbox"/> Motion/ <i>Requête</i>	<input type="checkbox"/> Judgement/ <i>Jugement/Arrêt</i>	<input type="checkbox"/> Book of Authorities/ <i>Recueil de sources</i>	<input type="checkbox"/> Warrant/ <i>Mandat</i>
<input type="checkbox"/> Decision/ <i>Décision</i>	<input type="checkbox"/> Submission from parties/ <i>Écritures déposées par des parties</i>	<input type="checkbox"/> Affidavit/ <i>Déclaration sous serment</i>	<input type="checkbox"/> Notice of Appeal/ <i>Acte d'appel</i>
<input type="checkbox"/> Order/ <i>Ordonnance</i>	<input type="checkbox"/> Submission from non-parties/ <i>Écritures déposées par des tiers</i>	<input type="checkbox"/> Indictment/ <i>Acte d'accusation</i>	

II - TRANSLATION STATUS ON THE FILING DATE/ ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT

<input type="checkbox"/> Translation not required/ <i>La traduction n'est pas requise</i>
<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and requests the Registry to translate/ <i>La partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction :</i> (Word version of the document is attached/ <i>La version Word est jointe</i>)
<input type="checkbox"/> English/ <i>Anglais</i> <input checked="" type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
<input type="checkbox"/> Filing Party hereby submits both the original and the translated version for filing, as follows/ <i>La partie déposante soumet l'original et la version traduite aux fins de dépôt, comme suit :</i>
Original/ Original en <input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda / <i>B/C/S</i> <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
Translation/ Traduction en <input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda / <i>B/C/S</i> <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s)/ <i>La partie déposante soumettra la (les) version(s) traduite(s) sous peu, dans la (les) langue(s) suivante(s) :</i>
<input type="checkbox"/> English/ <i>Anglais</i> <input type="checkbox"/> French/ <i>Français</i> <input type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :

Send completed transmission sheet to/ *Veuillez soumettre cette fiche dûment remplie à :*

JudicialFilingsArusha@un.org OR/ *OU* JudicialFilingsHague@un.org

Rev. July 2018/ Rév. : juillet 2018