

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case Nos.: MICT-13-38-Misc.1
MICT-13-38-Misc.2

Date: 9 June 2021

Original: English

BEFORE A SINGLE JUDGE

Before: Judge Mahandrisoa Edmond Randrianirina
Registrar: Mr. Abubacarr Tambadou
Date: 9 June 2021

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**REGISTRAR'S SUBMISSION IN RELATION TO THE
MOTIONS FOR ORDERS CONCERNING FROZEN ASSETS**

Office of the Prosecutor:

Mr. Serge Brammertz

Counsel for Mr. Félicien Kabuga:

Me Emmanuel Altit

**Counsel for Mr. Donatien Nshimyumuremyi,
Mr. Innocent Twagirimukiza, Mr. Alain Gilbert
Habumukiza, and the Estate of Josephine
Mukazitoni:**

Mr. Peter Robinson

**Counsel for Mr. Francois Ngirabatware and
Ms. Catherine Mukakayange:**

Mr. Peter Robinson

I. INTRODUCTION

1. Pursuant to Rule 31(B) of the Rules of Procedure and Evidence of the International Residual Mechanism for Criminal Tribunals (“Rules” and “Mechanism”, respectively), I respectfully file this submission in relation to the “Motion for Order Concerning Frozen Bank Accounts”, dated 14 April 2021 (“First Motion”),¹ filed on behalf of Mr. Francois Ngirabatware and Ms. Catherine Mukakayange (“First Motion Applicants”), and the “Motion for Order Concerning Frozen Assets”, dated 15 April 2021 (“Second Motion”),² filed on behalf of Mr. Donatien Nshimyumuremyi, Mr. Innocent Twagirimukiza, Mr. Alain Gilbert Habumukiza, and the estate of Ms. Josephine Mukazitoni (“Second Motion Applicants”).
2. The Motions request orders declaring that the Mechanism no longer maintains any interest in freezing the bank accounts and/or real property of the Applicants.³ Noting the Applicants relation to, or former association with Mr. Félicien Kabuga (“Accused”), the Motions submit that the original basis for freezing the Applicants’ assets is no longer valid because the Accused is no longer a fugitive.⁴ The Motions request that a Judge direct the Registrar to serve the orders sought on the respective bank(s) and government(s) holding frozen assets.⁵
3. On 26 April 2021, the President assigned the Motions to a Single Judge.⁶

II. APPLICABLE LAW

4. Articles 7 through 10 of the Directive on the Assignment of Defence Counsel (“Directive”) are relevant with respect to determining the extent to which an applicant for legal aid is able to remunerate counsel in proceedings before the Mechanism.⁷ In particular, and when a request for the assignment of Mechanism-funded counsel has been made by a suspect or accused, a declaration of means must be submitted to the Registry while the burden of proof lies on the applicant to prove that he is unable to remunerate

¹ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.1 (“*Kabuga Misc.1*”), Motion for Order Concerning Frozen Bank Accounts, public redacted version, 14 April 2021.

² *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-Misc.2 (“*Kabuga Misc.2*”), Motion for Order Concerning Frozen Assets, public with confidential annexes, 15 April 2021. See also, *Kabuga Misc.2*, Public Redacted Versions of Confidential Annexes A and B: Motion for Order Concerning Frozen Assets, public redacted version, 4 May 2021 (“Second Motion Public Redacted Annexes”).

³ First Motion, paras 1, 12; Second Motion, paras 1, 16.

⁴ First Motion, paras 4-6, 11-12; Second Motion, paras 2-8.

⁵ First Motion, paras 1, 12; Second Motion, paras 1, 16.

⁶ *Kabuga Misc.1*, Order Assigning a Single Judge, public, 26 April 2021; *Kabuga Misc.2*, Order Assigning a Single Judge, public, 26 April 2021.

⁷ Directive on the Assignment of Defence Counsel, 14 November 2012, MICT/5.

counsel.⁸ In determining whether and to what extent an applicant is able to remunerate counsel, the Registrar shall take into account means of all kinds of which the suspect or accused has direct or indirect enjoyment or freely disposes.⁹

5. To facilitate consistent and transparent determinations as to the indigency of suspects and accused persons, the Registry adopted the Guidelines for Determining the Extent to Which an Applicant for Legal Aid is Able to Remunerate Counsel (“Guidelines”).¹⁰ The Guidelines supplement Articles 7 through 10 of the Directive, specifically outlining the process required for the Registry to undertake an indigency determination. The Guidelines set out that the Registry shall assess the income and assets of the applicant for legal aid and calculate the applicant’s “disposable means”.¹¹ Disposable means are defined as the income and assets of the applicant and his household that reasonably exceed their needs, while any assets previously owned by the applicant which were assigned or transferred to another person, for the purpose of sheltering or concealing those assets, are included in this calculation.¹² The Registry then deducts the “estimated living expenses” of the applicant’s family and dependents during the estimated period in which the applicant will require representation before the Mechanism from the disposable means.¹³ The amount remaining, if any, is the “contribution” the applicant must make to his defence.¹⁴
6. In applying the Directive and the Guidelines the Registrar may take into account the value of assets in the hands of other persons where those assets have been purchased with means of which the accused has freely disposed.¹⁵ Similarly, the Registrar may include any assets previously owned by an applicant that were transferred to another person for the purpose of concealing them, particularly where “valuable assets were transferred for no consideration.”¹⁶

⁸ See, Directive, Articles 7(A) – (E), 8(A).

⁹ See, Directive, Article 10(A). Such means include, but are not limited to, direct income, bank accounts, real or personal property, pensions, and stocks, bonds, or other assets held by the applicant, but excluding any family or social benefits to which he may be entitled.

¹⁰ Guidelines for Determining the Extent to Which an Applicant for Legal Aid is Able to Remunerate Counsel, 13 November 2017.

¹¹ See, Guidelines, paras 1, 3, 8-12.

¹² See, Guidelines, paras 1, 8.

¹³ See, Guidelines, paras 1, 3, 14.

¹⁴ See, Guidelines, paras 1, 3, 15-16. The Guidelines define contribution as the extent to which an applicant is able to remunerate counsel; that is, the amount the applicant must contribute to his defence.

¹⁵ *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, public, 7 February 2003, para. 47.

¹⁶ *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Decision on Slobodan Praljak’s Motion for Review of the Registrar’s Decision on Means 25 July 2013, public redacted version, 28 August 2013, para. 45.

III. SUBMISSION

7. In the present case, the Motions reveal the existence of assets which are attributable to the Accused, and therefore may be appropriately considered in determining his means to contribute to his defence.
8. The First Motion Applicants and Second Motion Applicants assert that the Accused has no interest in the assets identified in the Motions, save for his interest in jointly owned property in the estate of his late wife, and that in any event the Mechanism has no valid claim to the referenced assets.¹⁷ However, the Second Motion acknowledges that the Accused is the source of all the assets referred to therein, which were given to the Second Motion Applicants as a gift.¹⁸ Such assets would constitute disposable means of the Accused,¹⁹ and would be considered in a determination as to his ability to remunerate counsel. The assets identified in the First Motion may also be relevant to a determination of the Accused's disposable means, however the source of the funds remains unclear at this time. Consequently, further investigation would be required by the Registry under the Directive and Guidelines, as to the provenance of these assets.
9. Based on the foregoing, I consider that the requests contained in the Motions to unfreeze the assets and unconditionally release them to the Applicants²⁰ would frustrate the process of determining the disposable means of the Accused and any related contribution to his defence. Consequently, any adjudication of the Motions is premature, and should be deferred until the Registry has meaningfully assessed the Accused's indigency status. This process remains ongoing, but has been frustrated to date due to lack of cooperation from the Accused.²¹

¹⁷ First Motion, paras 5, 11; Second Motion, paras 5, 12-13. The citation to paragraph 5 of the Second Motion is to the 2nd paragraph 5 therein.

¹⁸ See, Second Motion Public Redacted Annexes, Annex B, para. 3, which states: "The source of the funds was a gift from my father, Felicien Kabuga, who had accumulated the funds through his years as a businessman."

¹⁹ Applying the relevant framework, transfers made to family members (or anyone else) as gifts, and even before the issuance of an indictment, have previously been included in indigency determinations conducted by the Registry (See e.g., *Prosecutor v. Praljak*, Case. No.IT-04-74-T, Decision, public, 22 August 2012, Appendix I, para. 65).

²⁰ First Motion, paras 12-13; Second Motion, paras 16-17.

²¹ To the extent that the assets identified in the Motions are attributable to him, these assets were not disclosed by the Accused in his request for Mechanism-funded legal aid ("Request"). The Request was accompanied by a declaration of means form ("Declaration") which has not enabled the Registry to properly assess the Accused's ability to remunerate counsel, and therefore represents a failure to comply with the burden of proof imposed upon him, pursuant to Article 8(A) of the Directive. The Accused has not supplemented the Declaration to date (See, *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-PT, Decision, public, 6 January 2021, pp. 2-3.). An accused is considered to have made a significant contribution to the delay of the issuance of an indigency decision if he refuses to provide information when offered the opportunity to do so. See, *Prosecutor v. Prlić et*

IV. CONCLUSION

10. I remain available should the Single Judge required further information.

Respectfully submitted,



Abubacarr Tambadou
Registrar

Done this 9th day of June 2021,
At Arusha,
Tanzania.

al., Case No. IT-04-74-A, Decision on Slobodan Praljak's Motion for Review of the Registrar's Decision on Means 25 July 2013, public redacted version, 28 August 2013, para. 36.



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