

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-PT
Date: 30 November 2020
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Pre-Trial Judge
Registrar: Mr. Abubacarr Tambadou
Decision of: 30 November 2020

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON PROSECUTION MOTION FOR
CONFIDENTIALITY OF DISCLOSED INFORMATION
AND MATERIALS**

Office of the Prosecutor:

Mr. Serge Brammertz

Duty Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

I, IAIN BONOMOY, Presiding Judge of the Trial Chamber of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and the Pre-Trial Judge in this case;¹

NOTING that the initial appearance of Mr. Félicien Kabuga took place on 11 November 2020 and that the Prosecution was reminded of its disclosure obligations under Rule 71(A)(i) of the Rules;²

BEING SEISED OF the “Prosecution Motion for Confidentiality of Disclosed Information and Materials” filed on 17 November 2020 requesting orders:³ (i) requiring all information and materials disclosed to the Defence be kept confidential unless when disclosure to a member of the public is directly and specifically necessary for the preparation and presentation of the Defence case;⁴ (ii) allowing redactions to information revealing the whereabouts of victims and witnesses from within the disclosed materials;⁵ and (iii) directing the Registry to maintain a list of all members of the Defence and instructing the Defence to take measures to destroy confidential material or return it to Registry at the conclusion of a Defence member’s participation in the case and at the conclusion of the five-year retention period required under the Directive on the Assignment of Defence Counsel;⁶

NOTING the informal communication from the Defence received on 18 November 2020 that it will not file a response to the Motion;

RECALLING that prior orders instructed that the supporting materials related to the indictments in this case shall remain under seal until otherwise ordered;⁷

NOTING that the Prosecution has made no reference to these orders in its Motion;

¹ See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Order Assigning a Trial Chamber, 1 October 2020, p. 1; *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Order Designating a Pre-Trial Judge, 29 October 2020, p. 1. In accordance with Rule 86(K) of the Rules of Procedure and Evidence (“Rules”), an application to rescind, vary, or augment protective measures may be dealt with either by the Chamber or by a Judge of that Chamber.

² See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Order Scheduling an Initial Appearance, 8 November 2020, p. 3; Transcript 11 November 2020 p. 40.

³ Prosecution Motion for Confidentiality of Disclosed Information and Materials, 17 November 2020 (“Motion”), paras. 1, 12.

⁴ Motion, paras. 2-5, 12. The Prosecution stresses that public disclosure “may compromise the safety and security of victims and witnesses, violate conditions set by the providers of the materials (for example, Rule 76 restrictions), and/or otherwise impair Mechanism investigations and proceedings” and that it is in the interests of justice to restrict such public disclosure to allow for “effective protective measures to be applied to specific witnesses and documents during the trial”. See Motion, paras. 3, 4.

⁵ Motion, paras. 6-8, 12.

⁶ Motion, paras. 9-12.

⁷ See *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-PT, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, 13 April 2011 (confidential) (“Decision of 13 April 2011”), p. 5; *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-PT, Decision on the Amended Indictment, 12 October 2005 (“Decision of 12 October 2005”), p. 3. These orders as well as the extant protective measures applicable to this case have the effect of superseding the prior order that lifts non-disclosure to the public of the, *inter alia*, supporting material upon the service

CONSIDERING that the disclosure obligation imposed under Rule 71(A)(i) of the Rules does not otherwise lift confidentiality measures ordered in relation to the supporting material;

CONSIDERING that, subject to restrictions imposed by applicable protective measures, the Defence may disclose information or material received pursuant to Rule 71(A)(i) the Rules where it is directly and specifically necessary for the preparation and presentation of its case and must take necessary precautions to otherwise limit further disclosure of the information or material;

CONSIDERING that, in relation to other prospective disclosures, the Prosecution relies on Rule 53 of the Rules to suggest that confidentiality limitations should be placed on its disclosures but provides no concrete showing of exceptional circumstances warranting restrictions beyond those that have already been ordered;⁸

CONSIDERING FURTHER that the Motion also ignores extant protective measures applicable to this case⁹ and provides no specific information warranting further restrictions that should be ordered under, *inter alia*, Rules 76 or 86 of the Rules;

FINDING that the Motion does not show that additional confidentiality orders are necessary;

CONSIDERING that Prosecution witnesses and potential Prosecution witnesses have been granted protective measures¹⁰ and that such measures continue to apply;¹¹

FINDING that the Motion does not demonstrate the existence of exceptional circumstances warranting the redaction of information identifying the whereabouts of witnesses and victims in its disclosures under Rule 71(A)(i) of the Rules or any prospective disclosures, to the extent such measures have not already been ordered;

CONSIDERING the obligations of Defence counsel to supervise subordinate counsel and other team members to ensure that their conduct is compatible with the professional obligations of

of the warrant of arrest upon the Accused. *See The Prosecutor v. Félicien Kabuga*, Case No. ICTR-97-22-I, Decision Confirming the Indictment, 26 November 1997, p. 3.

⁸ *See* Motion, paras. 2-4.

⁹ *See infra* n. 10.

¹⁰ *See, e.g., The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-R71bis, Order for Disclosure and Protective Measures, 17 March 2011 (“Decision of 17 March 2011”), pp. 3-5.

¹¹ *Prosecutor v. Jean de Dieu Kamuhanda*, Case No. MICT-13-33, Decision on Appeal of Decision Declining to Rescind Protective Measures for a Deceased Witness, 14 November 2016, paras. 9-11. Furthermore, to the extent Prosecution witnesses are subject to protective measures issued in other cases before the International Criminal Tribunal for Rwanda, these measures would apply *mutatis mutandis* to this proceeding in view of Rule 86(F)(i) of the Rules.

counsel,¹² and that lead counsel shall retain the case file for five years after the completion of the proceedings related to an accused before the Mechanism;¹³

CONSIDERING that the Decision of 17 March 2011 already contains requirements for the Duty Counsel representing Kabuga's interests to provide a list of persons on his team having access to identifying information and notify of any changes in its composition;¹⁴

FINDING it appropriate to confirm that this order applies with equal force to the current Defence team and to provide additional clarifications as to the current office responsible for the tracking of Defence team members with access to confidential material and the disposition of confidential materials as set forth in the Code of Conduct for Defence Counsel;

FINDING it necessary to reiterate the applicability of the extant non-disclosure and witness protection orders in force in this case and to provide additional clarifications on its applicability to the Defence in this case and on the manner of its use in connection in investigations following from the jurisprudence as set forth below;

FOR THE FOREGOING REASONS,

HEREBY CONFIRM the orders of confidentiality and the non-disclosure to the public of the supporting material applicable to the indictments in this case as reflected in the Decision of 12 October 2005 and the Decision of 13 April 2011;

HEREBY CONFIRM the applicability of the protective measures set forth in the Decision of 17 March 2011 and that references to Duty Counsel in that decision should be understood as referring to the Defence in this case;

ORDER that for the purposes of this Decision:

“the Defence” means the Accused, his defence counsel, immediate legal assistants and staff, and such other specific person assigned by or listed with the Registry as part of the Accused's defence team; and

¹² See Code of Professional Conduct for Defence Counsel Appearing Before the Mechanism, MICT/6, 14 November 2012 (“Code of Conduct for Defence Counsel”), Articles 32-34.

¹³ See Rule 42(C) of the Rules; Directive of the Assignment of Defence Counsel, MICT/5, 14 November 2012, Article 16(I).

¹⁴ Decision of 17 March 2011, p. 4 (para. viii).

“the public” means all persons, governments, organisations, entities, clients, associations, groups and media, other than the judges and staff of the Mechanism Chambers and Registry, the Prosecution, and the Defence;

ORDER that the Defence shall not in any way, either directly or indirectly, disclose to the public any of the confidential information and materials provided to it by the Prosecution pursuant to Rule 71(A)(i) of the Rules, except as directly and specifically necessary to allow it to prepare for and participate in these proceedings and present a defence, or where such material has become public in the course of public and open session proceedings;

ORDER that the Defence, when it is directly and specifically necessary to make disclosures of confidential material or information shared under Rule 71(A)(i) of the Rules to allow it to prepare for and participate in these proceedings and present a defence, shall:

- (i) not disclose information in contravention of applicable protective measures and take precautions to avoid identifying individuals as Prosecution witnesses;
- (ii) inform each person among the public to whom such material is shown or disclosed that the information and materials are confidential pursuant to judicial order and that breach of the confidentiality provisions may entail legal consequences;
- (iii) inform each person among the public to whom such material is shown or disclosed that such person is not to copy, reproduce, or publish such material or information, in whole or in part, and is not to show or disclose it to any other person;
- (iv) ensure that, if provided with the original or any copy of such material, the person shall return it to the Defence when the material is no longer specifically necessary to allow it to prepare for and participate in these proceedings; and
- (v) maintain a list of persons to whom the material or information is disclosed, recording the name of the persons, a description of the material disclosed, and the dates of both disclosure and return of the material or confirmation of its deletion or destruction;

ORDER the Registry to maintain a list identifying each person who is part of or who represents the Defence and that the Defence shall file an initial listing of its members within ten days of the issuance of the present Decision, and the Registry shall be notified in writing of all changes to the list within ten days of any such change;

ORDER any individual who leaves the Defence to return the materials disclosed pursuant to Rule 71(A)(i) of the Rules and any other material or information emanating from the Prosecution that is confidential under the Rules or subject to confidentiality or protective measures orders together with copies thereof to the lead counsel;

ORDER lead counsel to delete, securely destroy or return to the Registry all materials disclosed pursuant to Rule 71(A)(i) of the Rules, which have not become part of the public record, as well as any other material or information emanating from the Prosecution that is confidential under the Rules or subject to confidentiality or protective measures orders at the expiry of a period of five years after the completion of all proceedings in this case; and

DENY the request for further restrictions on the disclosure of confidential material to the Defence.

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

Done this 30th day of November 2020,
At Arusha,
Tanzania

Judge Iain Bony
Pre-Trial Judge

[Seal of the Mechanism]



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