

**UNITED  
NATIONS**



International Residual Mechanism for  
Criminal Tribunals

Case No. MICT-13-38-PT

Date: 29 March 2021

Original: English

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**BEFORE THE TRIAL CHAMBER**

**Before:** Judge Iain Bonomy, Presiding  
Judge Graciela Susana Gatti Santana  
Judge Elizabeth Ibanda-Nahamya

**Registrar:** Abubacarr Tambadou

**PROSECUTOR**

**v.**

**FÉLICIEN KABUGA**

***PUBLIC***

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**PROSECUTION RESPONSE TO KABUGA'S REQUEST FOR  
ACCESS TO CONFIDENTIAL MATERIALS**

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**The Office of the Prosecutor**

Rashid Rashid  
Rupert Elderkin

**Counsel for Félicien Kabuga**

Emmanuel Altit

1. Félicien Kabuga's request for access to all confidential materials in the *Nahimana et al.*, *Karemera et al.*, *Bagosora et al.*, *Ndindiliyimana et al.*, and *Ngirabatware* cases<sup>1</sup> should be granted in part. Kabuga should have access to all relevant evidence in order to facilitate the preparation of his defence. He should therefore be given access to all *inter partes*<sup>2</sup> confidential evidentiary materials consisting of exhibits and transcripts on the basis of the nexus between aspects of the case against Kabuga and aspects of these named cases.<sup>3</sup> In contrast, Kabuga has not shown any forensic purpose for access to procedural filings in these cases. Should access to filings be granted, it should be limited to filings that directly and specifically concern the substance of the relevant evidence. Kabuga's other requests should be denied.

#### **A. Access procedure**

2. If access is granted, the Prosecution requests that the Registry take the lead in applying the decision to the case records. This is necessary and appropriate in this case because the Registry, as the custodian of the judicial records, has exclusive access to the original documents, confidentiality information and other data essential to processing ICTR-related access requests. Once the Registry has created the list of confidential materials falling within the scope of the access decision, the Prosecution can confirm whether there are any Rule 76 or other sensitive documents within the Registry's list.

#### **B. Access to confidential evidentiary materials**

3. The Prosecution agrees that Kabuga should be granted access to evidentiary materials (exhibits and transcripts) from prior cases based on a showing of a legitimate forensic purpose. However, the fact that his name was mentioned in a prior indictment or judgement does not, in itself, transform the prior case into a "related case" for which full access should be granted.<sup>4</sup>

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<sup>1</sup> Defence Motion Seeking Access to Confidential Records from Various ICTR/MICT Cases Relevant to the Present Case, 24 March 2021, originally filed in French on 15 March 2021 ("Access Request"), paras.7-13.

<sup>2</sup> Kabuga does not specify whether he also seeks access to *ex parte* confidential material from the named cases. In any event, he has not made a heightened showing of a legitimate forensic purpose to justify such access. *See Prosecutor v. Karadžić*, Case No.MICT-13-55-A, Decision on a Motion for Redacted Versions of Rule 86(F) Filings, 24 January 2017, pp.3-4; *Prosecutor v. Karadžić*, Case No.MICT-13-55-A, Decision on a Motion for Redacted Versions of Decisions Issued Under Rule 75(H) of the ICTY Rules, 18 July 2016, p.4.

<sup>3</sup> Prosecution's Second Amended Indictment, 1 March 2021 (public with public and confidential annexes) ("Second Amended Indictment"). *See also* Decision on Prosecution Motion to Amend the Indictment, 24 February 2021.

<sup>4</sup> *Contra* Access Request, para.6.

4. Kabuga should be granted access to all confidential evidentiary materials in the *Prosecutor v. Nahimana et al.*, Case No.ICTR-99-52, trial and appeal record.<sup>5</sup> There is a substantial overlap between the *Nahimana et al.* and the *Kabuga* cases in relation to the establishment of *Radio Télévision Libre des Mille Collines* (“RTLM”) by, *inter alios*, Kabuga, Ferdinand Nahimana, and Jean-Bosco Barayagwiza, and its use in furthering hatred and violence against Tutsi and others perceived as accomplices or allies of the Rwandan Patriotic Front.<sup>6</sup>

5. Kabuga should also be granted access to those confidential evidentiary materials in the *Prosecutor v. Karemera et al.*, Case No.ICTR-98-44, in which the *Fonds de Défense Nationale* (“FDN”) is mentioned, given the overlap in the two cases in the allegations related to the FDN.<sup>7</sup> However, Kabuga is not charged with participation in a joint criminal enterprise with Karemera, Ngirumpatse and others.<sup>8</sup> He therefore has not demonstrated a legitimate forensic purpose for access to the *Karemera et al.* case file on that basis. To ensure that Kabuga has access to all relevant materials beyond those concerning the FDN, the Prosecution proposes that Kabuga also be granted access to confidential evidentiary materials in the *Karemera et al.* trial and appeal record containing the name “Kabuga”.

6. In light of the overlap between the *Prosecutor v. Bagosora et al.*, Case No.ICTR-98-41, and the *Kabuga* case with respect to RTLM,<sup>9</sup> Kabuga should be granted access to all confidential evidentiary materials in the *Bagosora et al.* case that mention RTLM. In addition, the Prosecution proposes that Kabuga be granted access to confidential evidentiary materials in the *Bagosora et al.* trial and appeal record containing the name “Kabuga”. The Second Amended Indictment does not, however, contain any allegations in relation to meetings of the *Mouvement Républicain National pour la Démocratie et le Développement* (“MRND”) prior to 6 April 1994, including to establish a list of people to be killed at a meeting in Butare

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<sup>5</sup> Access Request, para.9.

<sup>6</sup> See Second Amended Indictment, paras.8-36; *Prosecutor v. Nahimana et al.*, Case No.ICTR-99-52, Judgement and Sentence, 3 December 2003, paras.342-619.

<sup>7</sup> Access Request, para.10.

<sup>8</sup> See Access Request, para.10. Compare Second Amended Indictment with *Prosecutor v. Karemera et al.*, Case No.ICTR-98-44, Judgement and Sentence, 2 February 2012, paras.1441-1456.

<sup>9</sup> Access Request, para.11. See Second Amended Indictment, paras.8-36; *Prosecutor v. Bagosora et al.*, Case No.ICTR-98-41, Judgement and Sentence, 18 December 2008 (“*Bagosora et al.* Trial Judgement”), paras.621-649.

prefecture in February 1994.<sup>10</sup> Therefore, Kabuga has not made a showing that he should be granted access to the entire case file in the *Bagosora et al.* case based on these meetings.<sup>11</sup>

7. With respect to *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56,<sup>12</sup> Kabuga has not demonstrated a legitimate forensic purpose to access the entire case file. The supposed nexus is due to his presence at a meeting in the Nkuli commune office in August 1993, as discussed in three paragraphs of the *Ndindiliyimana et al.* Trial Judgement.<sup>13</sup> The Second Amended Indictment does not contain any allegations in relation to this meeting.<sup>14</sup> However, the Prosecution does not object to Kabuga having access to confidential materials referred to in the footnotes to those three paragraphs of the *Ndindiliyimana et al.* Trial Judgement. In addition, to ensure that Kabuga has access to all relevant materials, the Prosecution proposes that Kabuga be granted access to confidential evidentiary materials in the *Ndindiliyimana et al.* trial and appeal record containing the name “Kabuga”.

8. Finally, Kabuga has not demonstrated that he has a legitimate forensic purpose to access the entire case file of the *Ngirabatware* proceedings.<sup>15</sup> The Second Amended Indictment does not charge Kabuga with conspiracy to commit genocide as alleged in the *Ngirabatware* case.<sup>16</sup> However, in light of the allegations relating to Kabuga’s support to *interahamwe* in Gisenyi prefecture contained in the Second Amended Indictment, there is a limited overlap between the two cases.<sup>17</sup> On this basis, to ensure that Kabuga has access to all relevant materials, the Prosecution proposes that Kabuga be granted access to confidential evidentiary materials in the *Ngirabatware* trial and appeal record containing the name “Kabuga”.

### C. Access to non-evidentiary confidential materials

9. Kabuga’s request for “full access” to the confidential files in other cases should be denied.<sup>18</sup> All of his arguments concerning forensic purpose focus on evidentiary materials. He

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<sup>10</sup> Access Request, para.11. See Second Amended Indictment; *Bagosora et al.* Trial Judgement, paras.312-339.

<sup>11</sup> Should access be granted to this part of the case, the Prosecution proposes that it be done in relation to specific topics that can be located in the Unified Judicial Database (“UJDB”) using search terms.

<sup>12</sup> Access Request, para.12.

<sup>13</sup> See Access Request, fn.16 citing *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56, Judgement and Sentence, 17 May 2011 (“*Ndindiliyimana et al.* Trial Judgement”), paras.331, 376, 384.

<sup>14</sup> See Second Amended Indictment.

<sup>15</sup> Access Request, para.13.

<sup>16</sup> Compare Second Amended Indictment with *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Amended Indictment, 13 April 2009 (“*Ngirabatware* Indictment”), pp.3-4.

<sup>17</sup> See Second Amended Indictment, paras.48-61; *Ngirabatware* Indictment, paras.12, 14, 34, 36, 59.

<sup>18</sup> Access Request, p.4.

fails to explain how any other confidential filings or submissions are relevant to his purpose and does not show that such non-evidentiary materials are “likely to assist [his] case materially, or that there is at least a good chance that [they] would.”<sup>19</sup>

10. If access is nevertheless granted to non-evidentiary filings, the Prosecution proposes that access be expressly limited to materials directly related to the substance of the relevant confidential evidence to which access has been granted. In particular, the Prosecution proposes that the Trial Chamber avoid defining the filings with “no forensic purpose” solely by reference to a closed list of document types.<sup>20</sup> The “closed list” approach has created unnecessary delays in processing access requests in other cases. Problems arise, for example, when reviewers have to process long documents such as exhibit or witness lists which offer no forensic purpose but must be reviewed line-by-line for redactions. This can be particularly onerous where, as here, the Access Request concerns a number of closed cases that no longer have active defence teams which could review the defence-related items.

#### **D. Access to other materials**

11. Kabuga’s request for access to material related to the Prosecution’s anticipated witnesses<sup>21</sup> is premature. The Prosecution will disclose such material to Kabuga at the appropriate time pursuant to Rule 71(A)(ii).

12. Regarding the request for access to “the discussions” of the Prosecution’s expected exhibits in previous cases,<sup>22</sup> there is no practical way to fulfil this request. Internal Prosecution records concerning specific documents are generally kept by reference to their eight-digit Evidence Reference Number (“ERN”), while judicial records (accessible through the UJDB) are recorded by exhibit numbers or other descriptions. There is no reliable way to

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<sup>19</sup> See e.g. *Prosecutor v. Karadžić*, Case No.MICT-13-55-A, Decision on Stanislav Galić’s Further Motion for Access to Confidential Materials in the Karadžić Case, 4 August 2016, para.11.

<sup>20</sup> These are materials, for example, related to: remuneration, provisional release, fitness to stand trial, reports of the reporting medical officer, expert reports on health issues submitted by the Registry, notices of non-attendance in court, modalities of proceedings, protective measures, subpoenas, video-conference links, orders to redact transcripts and broadcasts of a hearing, witness scheduling, appearance and attendance, execution of arrest warrants, enforcement of sentences, the health of other accused, and notices of compliance filed in respect of other access decisions. See *Prosecutor v. Mladić*, Case Nos.MICT-13-56-A & MICT-15-96-T, Decision on Franko Simatović’s Request for Access to Confidential Material in the *Mladić* Case, 27 July 2018 (“*Mladić* Access Decision”), p.4; *Prosecutor v. Karadžić*, Case Nos.MICT-13-55-A & MICT-15-96-T, Decision on Simatović’s Request for Access to Confidential Material in the *Karadžić* Case, 4 July 2018 (“*Karadžić* Access Decision”), p.3; *Prosecutor v. Mladić*, Case No.IT-09-92-T, Decision on Motion by Stanislav Galić for Access to Confidential Materials in the *Mladić* Case, 20 July 2016, para.9.

<sup>21</sup> Access Request, para.17.

<sup>22</sup> Access Request, para.16.

cross-reference or connect this information.<sup>23</sup> It is, however, to be expected that there will be considerable overlap between the documents that will be made accessible as discussed above and this additional request. Moreover, the Prosecution’s proposal to give access to additional confidential evidentiary material that mentions the name “Kabuga” should also serve to address the Defence’s underlying concern. If the Defence determines from a judicial record that a particular document was tendered in a prior case and they cannot directly access confidential information about this document on the UJDB, then a new access request for this specific information would be appropriate.


**E. Confidentiality of accessed materials**

13. The Prosecution further requests that the Trial Chamber include a confidentiality order, similar to other Mechanism access decisions.<sup>24</sup>

**F. Conclusion**

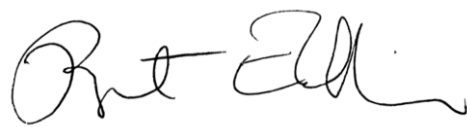
14. For the foregoing reasons, the Prosecution requests that the Trial Chamber grant Kabuga access to the *inter partes* confidential materials in the named cases subject to the limitations described above.

Word Count: 2051




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Rashid/Rashid  
Senior Trial Attorney




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Rupert Elderkin  
Senior Trial Attorney

Dated this 29<sup>th</sup> day of March 2021  
Arusha, Tanzania

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<sup>23</sup> *E.g.* even on the ICTR Prosecution exhibit lists—which do not necessarily identify all exhibits admitted or discussed in a particular case—ERNs have not been systematically used. Defence exhibit lists contain even fewer references to ERNs. If they contain references to ERNs at all, this could only relate to documents which the Defence obtained from the Prosecution.

<sup>24</sup> *See e.g. Prosecutor v. Turinabo et al.*, Case Nos.MICT-18-116-PT & MICT-12-29-R, Decision on Request for Access, 26 February 2019, pp.3-4 (confidential, declassified by *Prosecutor v. Turinabo et al.*, Case Nos.MICT-18-116-PT & MICT-19-121-PT, Decision on Prosecution Motion for Reclassification of Filings Relating to Search and Seizure Operations at the United Nations Detention Facility, 27 November 2019); *Karadžić* Access Decision, pp.5-6; *Mladić* Access Decision, p.6; *Prosecutor v. Stanišić and Simatović*, Case No.MICT-15-96-T, Decision on Simatović’s Request for Access to Confidential Material in the *Hadžić* Case, *Krajišnik* Case, *Brdanin* Case, *Orić* Case, *Jelišić* Case, *Simić et al.* Case, 18 July 2018, pp.5-6.



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