

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-13-38-I

Date: 27 May 2020

Original: English

BEFORE A DUTY JUDGE

Before: Judge William H. Sekule
Registrar: Mr. Olufemi Elias
Decision of: 27 May 2020

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON PROSECUTOR'S REQUEST TO AMEND
THE ARREST WARRANT AND ORDER FOR TRANSFER**

The Office of the Prosecutor:

Mr. Serge Brammertz

Félicien Kabuga

1. I, William H. Sekule, Duty Judge for the Arusha Branch of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) for the month of May 2020¹ am seised of an urgent motion filed by the Prosecutor requesting a modification of the arrest warrant against Félicien Kabuga in order to allow for his temporary transfer to the Hague Branch of the Mechanism.² It is not necessary to await a response from Mr. Kabuga because arrest warrants and orders for transfer are typically issued *ex parte*. After receipt of this decision or once taken into the custody of the Mechanism, Mr. Kabuga may apply for appropriate relief or any additional modification concerning the conditions or location of his detention on remand into the custody of the Mechanism in accordance with the Statute and the Rules of Procedure and Evidence (“Rules”).

I. BACKGROUND

2. The United Nations has sought Félicien Kabuga’s arrest for over two decades. He was among the most high profile accused before the International Criminal Tribunal for Rwanda (“ICTR”) from the confirmation of his initial indictment by Judge Lennart Aspegren on 26 November 1997.³ As the Mechanism assumed the functions of the ICTR in 2012, Mr. Kabuga – one of the most senior leaders suspected of being the most responsible for the genocide in Rwanda – remained a key target for arrest and trial at the Arusha Branch of the Mechanism.⁴ The search for Mr. Kabuga ended the morning of 16 May 2020 when French authorities executing a Mechanism warrant of arrest brought him into custody. He is currently appearing before the French judiciary in line with France’s law on cooperation with the Mechanism.⁵

3. While a fugitive, Mr. Kabuga’s indictment was amended several times, and Judge Dennis C. M. Byron of the ICTR confirmed the operative indictment on 13 April 2011.⁶ He stands accused of

¹ See General, Case No. MICT-12-01, Order Assigning a Duty Judge for the Arusha Branch for March 2020 Through June 2020, 14 February 2020, pp. 1, 2.

² Urgent Motion for Amendment of Order for Transfer, 20 May 2020 (“Motion”), paras. 1-7. See also Order Assigning a Motion to the Duty Judge for the Arusha Branch, 22 May 2020, p. 1.

³ *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-97-22-I, Decision Confirming the Indictment, 26 November 1997.

⁴ See Article 1(2) of the Statute.

⁵ See *Loi n° 95-1 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l’ex-Yougoslavie depuis 1991*, 2 January 1995; *Loi n° 96-432 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables d’actes de génocide ou d’autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s’agissant des citoyens rwandais, sur le territoire d’États voisins*, 22 May 1996; *Loi n° 2013-711 portant diverses dispositions d’adaptation dans le domaine de la justice en application du droit de l’Union européenne et des engagements internationaux de la France*, 5 August 2013, Chapter IX.

⁶ *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); *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-I, Amended Indictment, 14 April 2011 (“Amended Indictment”).

seven counts of genocide and crimes against humanity, arising from the allegations in the Amended Indictment that he co-founded the *Radio télévision libre des mille collines* (“RTLM”), a radio station whose broadcasts incited genocide, that he supported the provision of arms and training to *Interahamwe* militiamen, including his own private militia who killed thousands of civilians, and that he incited the killing of Tutsis at mass rallies.⁷ The operative arrest warrant was issued by the Mechanism by Judge Vagn Joensen on 29 April 2013 and ordered Mr. Kabuga’s transfer to the Arusha Branch of the Mechanism for trial.⁸

4. The United Nations World Health Organization declared a global pandemic in relation to COVID-19 on 11 March 2020, and this resulted in travel and movement restrictions in nearly all countries, which are evolving and subject to change.⁹ Against this backdrop, the Prosecutor has requested the modification of the Arrest Warrant and Order for Transfer to direct French authorities to temporarily transfer Mr. Kabuga to the Hague Branch of the Mechanism to alleviate practical challenges due to pandemic related restrictions in France and Tanzania.¹⁰ The Prosecutor contends that this amendment would ensure Mr. Kabuga’s immediate transfer into the Mechanism’s custody and mitigate any delay arising from potential litigation before French courts as to the feasibility of a transfer to Tanzania during the pandemic.¹¹

II. DISCUSSION

5. In accordance with Article 3 of the Statute: “[t]he Mechanism shall have two branches, one branch for the [International Criminal Tribunal for the former Yugoslavia (“ICTY”)] and one branch for the ICTR, respectively. The branch for the ICTY shall have its seat in The Hague. The branch for the ICTR shall have its seat in Arusha.”¹² The Rules reflect that accused persons indicted by the ICTR, such as Mr. Kabuga, will be transferred to and detained at the Arusha Branch of the Mechanism and that proceedings will be conducted there.¹³

⁷ See Amended Indictment, paras. 16-28, 44-53, 66-71, 81-84.

⁸ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38, Warrant of Arrest and Order for Transfer Addressed to All States, 29 April 2013 (“Arrest Warrant and Order for Transfer”), pp. 1-3.

⁹ See U.N. General Assembly Resolution 74/270 on Global Solidarity to Fight the Coronavirus Disease 2019, U.N. Doc. A/Res/74/270, 2 April 2020, p. 1. See also World Health Organization Director-General’s Opening Remarks at the Media Briefing on COVID-19 of 11 March 2020 (last accessed on 27 May 2020 at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>).

¹⁰ Motion, paras. 3, 5.

¹¹ Motion, para. 5.

¹² See also U.N. Security Council Resolution 1966, U.N. Doc. S/Res/1966, 22 December 2010, Annex 2, Transitional Arrangements, Article 1(4).

¹³ See, e.g., Rules 57(E) and (G), 59(A), 64(A), and 67 of the Rules. Cf. Rules 78(B) and 87(I) of the Rules. There are limited exceptions to this general legal framework providing for Mr. Kabuga’s detention and trial at the Arusha Branch after he is in the Mechanism’s custody. Rule 67 of the Rules allows for an accused person after his or her transfer to the

6. Arrest warrants and orders for transfer – or any modifications thereto – are issued by judges acting in their judicial capacity.¹⁴ Accordingly, only a judge can amend such a warrant or order. This case has not yet been assigned to a Trial Chamber, and, therefore, Article 12(2) of the Statute and Rule 28 of the Rules provide me with authority to modify the Arrest Warrant and Order for Transfer. In taking this decision, I am guided by Article 18(1) of the Statute and Rule 55 of the Rules, which mandate judges conducting a case to ensure it is fair and expeditious and in conformity with the Rules and to issue such orders, warrants, and transfer orders as may be necessary for the preparation or conduct of the trial. In exercising this authority, I consider that the requested variation of the Arrest Warrant and Order for Transfer should be carefully scrutinized given the general mandate that detention upon remand and proceedings in this case be done in Arusha and that any variation to this mandate should be exceptional.¹⁵

7. At the outset, and notwithstanding the Motion’s designation as “urgent”, history has shown that those indicted by the ICTR and arrested in France have been detained and processed there between three and eight months prior to transfer to Arusha, Tanzania,¹⁶ and nothing in the Motion suggests that the conclusion of Mr. Kabuga’s process in France is imminent. Furthermore, the Motion is premised on unspecified “practical challenges” related to Mr. Kabuga’s transfer from

Mechanism to be detained outside of the host country of the relevant branch in “exceptional circumstances”, and Rule 4 of the Rules allows for a Chamber to exercise its functions away from the seat of its relevant branch if it is “in the interests of justice”.

¹⁴ Rules 55 and 57(A) of the Rules. *See also Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55, Decision on Motion for Disqualification and Motion Challenging Jurisdiction, 28 October 2019, para. 10 (“The President, when acting as a President, is performing functions as the administrator of the Mechanism and not as a Single Judge or a member of a bench sitting on a case [...]”).

¹⁵ *See supra* para. 5. *See also The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-2005-86-I, Order for Special Detention Measures, 13 August 2005, pp. 2, 3 (granting the Prosecutor’s request to have an ICTR accused temporarily detained in the Netherlands *after his initial appearance in Arusha* in view of, *inter alia*, security risks presented by detention in Arusha, the accused’s request to be detained in the Netherlands, and the Netherlands’s agreement to his detention); *Prosecutor v. Augustin Ndirabatware*, Case No. MICT-12-29-R, Order for Oral Hearing, 21 December 2016, p. 2 (ordering that an oral hearing on a motion in the absence of the accused be held at the Hague Branch in view of the urgency of the matter and the recent transition of the Mechanism branch in Arusha to new facilities); *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-99-54A-A, The President’s Authorisation to Hold Appeals Hearing Away from the Seat of the Tribunal, 6 September 2005 (at the request of the Presiding Judge, the ICTR President authorized the Appeals Chamber of the ICTR to render its Judgement in The Hague to avoid significant delays to the proceedings); *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, The President’s Authorisation to the Appeals Chamber to Hold Hearings Away from the Seat of the Tribunal, 3 October 2001, p. 3 (at the request of the Presiding Judge, the ICTR President authorized the Appeals Chamber of the ICTR to hold hearings in The Hague in order to significantly reduce expenses and avoid delays that were not in the interests of justice).

¹⁶ *See The Prosecutor v. Augustin Nindiliyimana et al.*, Case No. ICTR-00-56-T, Judgement and Sentence, 17 May 2011, Annex A, para. 11 (François-Xavier Nzuwonemeye was arrested in France on 15 February 2000 and transferred to the ICTR on 23 May 2000); *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Judgement and Sentence, 3 August 2010, Annex A, para. 2 (Dominique Ntawukulilyayo was arrested in France on 17 October 2007 and transferred to the ICTR on 5 June 2008); *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A-T, Judgement, 22 January 2004, para. 8 (Jean de Dieu Kamuhanda was arrested in France on 26 November 1999 and transferred to the ICTR on 7 March 2000).

France to Arusha due to pandemic related restrictions.¹⁷ However, the Motion's cursory submissions neither clearly identify the current restrictions in an accessible manner,¹⁸ nor, if in place, account for the likely length of proceedings in France in relation to Mr. Kabuga's transfer and the possibility of such restrictions being lifted when transfer is appropriate. Fundamentally, the Motion does not presently demonstrate that Mr. Kabuga's anticipated transfer to the Arusha Branch – as dictated by the Arrest Warrant and Order for Transfer – is an actual or likely impediment to his transfer into the custody of the Mechanism.

8. Moreover, the Motion provides no information indicating that France will not adhere to the Arrest Warrant and Order for Transfer at the appropriate time so long as travel to Arusha remains possible.¹⁹ Indeed, the Arrest Warrant and Order for Transfer was issued pursuant to Chapter VII of the United Nations Charter and France's international obligations to effect Mr. Kabuga's transfer to the Mechanism under the terms of this order prevail over national law.²⁰ Relatedly, the Motion's reliance upon "potential" litigation before French courts opposing Mr. Kabuga's transfer to Arusha, which the Prosecutor asserts might delay it, is not a sufficiently compelling basis to modify the Arrest Warrant and Order for Transfer at this time.²¹

9. In view of the above, the Motion is not sufficiently supported. If transfer to the Arusha Branch is not possible at the relevant time, appropriate relief may be sought.

III. DISPOSITION

10. For the foregoing reasons, I **DISMISS** the Motion.

¹⁷ See Motion, para. 3. Not only are the "practical challenges" unspecified in the Motion, practical hurdles to Mr. Kabuga's transfer to the Hague Branch – *i.e.* whether the Netherlands has agreed to Mr. Kabuga's detention within its boundaries – are not addressed. *Cf.* Rule 59(A) of the Rules (reflecting that transfer of an accused into the custody of the Mechanism necessarily requires cooperation with the host country). This omission is glaring given that the Mechanism's Statute and Rules as well as the Arrest Warrant and Order for Transfer provide for Mr. Kabuga's detention upon remand at the Arusha Branch.

¹⁸ To the contrary, the Motion appears to ignore that Tanzania, the seat of the Arusha Branch, has recently lifted international travel restrictions resulting from the COVID-19 pandemic. See Travel Advisory No. 3 issued by the Government of Tanzania on 18 May 2020 (last accessed on 27 May 2020 at <https://www.moh.go.tz/en/covid-19-info>).

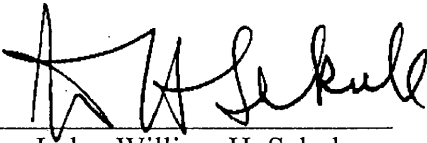
¹⁹ See Motion, paras. 3-5, n. 10.

²⁰ Article 28(2)(e) of the Statute provides that States shall comply without undue delay with, *inter alia*, any order issued by a Single Judge, including the surrender and transfer of the accused to the Mechanism. Furthermore, Rule 60 of the Rules asserts that the obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused to the Mechanism that may exist under the national law or treaties of the State concerned.

²¹ See Motion, para. 5.

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

Done this 27th day of May 2020,
At Arusha,
Tanzania



Judge William H. Sekule
Duty Judge

[Seal of the Mechanism]



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