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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before: Judge Dennis C.M. Byron, Presiding
Judge Gberdao Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date: 15 March 2011

THE PROSECUTOR

v.

Félicien KABUGA

Case No. ICTR-98-44B-R71bis

JUDICIAL SECTION
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**DECISION ON THE PROSECUTOR'S REQUEST FOR PRESERVATION OF
EVIDENCE BY SPECIAL DEPOSITION FOR A FUTURE TRIAL
(Pursuant to Rule 71 bis)**

Office of the Prosecutor:

Mr. Hassan B. Jallow
Mr. Richard Karegyesa
Mr. Bill Egbe
Mr. Peter Tafah
Mr. Disengi Mugeyo
Mr. Sharifah Adong

For the Accused:

Mr. Bahame Tom Nyanduga (Duty Counsel)

INTRODUCTION

1. On 7 February 2011, the Prosecution filed a motion for the preservation of evidence by special deposition for a future trial, pursuant to Rule 71 *bis* of the Rules of Procedure and Evidence (the "Rules").¹ On 18 February 2011, the Chamber decided to hear the Parties in writing and issued an Order directing the Registrar to appoint a Duty Counsel to represent the interests of the fugitive Accused.² The Chamber also ordered the Parties to file submissions, under confidential cover, within 14 days of the appointment of a Duty Counsel and to file any responses within three days of the filing of the submissions. On the same date, 18 February 2011, the Chamber rendered a Decision granting the Prosecution's request to place under seal Annexure "A" of the Motion, which contains the names and pseudonyms of the proposed Prosecution witnesses.³

2. The Registrar appointed a Duty Counsel on 18 February 2011.⁴ Fourteen days later, in compliance with the Chamber's Order for Submissions, both the Prosecution and the Duty Counsel filed written submissions addressing the issues raised in the Motion.⁵ On 7 March 2011, the Prosecution filed a response to the Duty Counsel's Submissions.⁶ The Duty Counsel has not made any additional submissions. Having heard the Parties, the Chamber now decides the Motion.

DELIBERATIONS

3. This is only the second time, since the adoption of Rule 71 *bis* at the Plenary Session in May 2009, that a Trial Chamber at this Tribunal is addressing the issue of the preservation of evidence by special deposition for a future trial.⁷

¹ *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-71*bis*, The Prosecutor's Request for Preservation of Evidence by Special Deposition for Future Trial (Pursuant to Rule 71 *bis*), dated 5 February 2011, filed on 7 February 2011 (the "Motion").

² *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-71*bis*, Order for Submissions, 18 February 2011 ("Order for Submissions").

³ *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-71*bis*, Decision on the Prosecutor's Request for an Order to Place Under Seal Annexure "A" of his Motion for Preservation of Evidence by Special Deposition for Future Trial (Pursuant to Rule 71 *bis*), 18 February 2011.

⁴ See *Summons to a Duty Counsel for purposes of representing the interests of Mr. Félicien Kabuga before the International Criminal Tribunal for Rwanda*, Ref. ICTR-JUD-11-5-2-11-189-LW, 18 February 2011.

⁵ *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-71*bis*, Prosecutor's Submissions Pursuant to Rule 71 *bis* (D) of the Rules of Procedure and Evidence, 4 March 2011 ("Prosecution's Further Submissions"); and Submission by Duty Counsel Representing the Interest of Félicien Kabuga in Respect of Prosecutor's Request for Preservation of Evidence by Special Deposition for Future Trial – Rule 71 *bis*; Pursuant to the Order for Submissions dated 18 February 2011 ("Duty Counsel's Submissions").

⁶ *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-71*bis*, Prosecutor's Response to Defence Submissions Pursuant to Rule 71 *bis* (D) filed on 4 March 2011, 7 March 2011 ("Prosecution Response").

⁷ The first such decision was in *The Prosecutor v. Protais Mpiranya*, Case No. ICTR-00-56A-71*bis*, Decision on Motion for the Preservation of Evidence by Special Deposition for a Future Trial (Rule 71 *bis* of the Rules of

4. Rule 71 *bis* (A) provides that, if within a reasonable time, a warrant of arrest has not been executed, the Prosecutor may submit a request to the President that evidence relating to the indictment be preserved for a future trial by special deposition recorded in a proceeding conducted by a single Judge. Upon receiving such a request, the President is required, under Rule 71 *bis* (C), to refer the matter to a Trial Chamber. If the accused is not represented by Counsel, the President is also required to instruct the Registrar to appoint Duty Counsel to represent the interests of the accused.

5. Pursuant to Rule 71 *bis* (E), the Chamber may grant the Prosecutor's request if the Chamber is satisfied that:

- (i) Reasonable efforts have been made to execute the warrant of arrest;
- (ii) The execution of the warrant of arrest is not likely to take place within a reasonable time; and
- (iii) It is in the interests of justice to do so.

The Chamber will now assess the Parties' submissions in light of these criteria.

Whether reasonable efforts have been made to execute the warrant of arrest

6. The Prosecution submits that, since November 1997, the Tribunal has issued three separate warrants for the arrest of the Accused, Félicien Kabuga, and that despite reasonable efforts, the warrants remain unexecuted.⁸ According to the Prosecution, the Intelligence and Tracking Unit of the Office of the Prosecutor (OTP) has, since 1997, "conducted intensive investigations in the search for Félicien Kabuga in several countries around the world."⁹ These efforts have so far resulted in the arrest of 14 other fugitives and the surrender of two more, but Kabuga, "who is known to possess numerous *aliases* and travel documents has managed to evade arrest by reason of his wealth and a network of loyal supporters."¹⁰ The Prosecution also submits that, despite the establishment by the United States government of a "Rewards for Justice" programme offering up to US\$ 5,000,000 for information leading to the arrest of Kabuga,¹¹ and the intensification of cooperation between OTP Investigators and the Kenyan Police, the warrants of arrest have not yet been executed.¹²

Procedure and Evidence), 3 March 2011. [The Duty Counsel in that case did not oppose the Prosecution request.]

⁸ The Motion, paras. 2-5.

⁹ The Motion, paras. 10-11.

¹⁰ The Motion, paras. 12-14.

¹¹ The Motion, para. 15.

¹² The Motion, paras. 16-18.

7. The Duty Counsel appears to challenge the entire basis of Rule 71 *bis* "including the propriety of assigning Duty Counsel to represent an absentee accused"¹³ and whether the special deposition procedure for the preservation of evidence "is consistent with the rights of the accused person."¹⁴ Nevertheless, the Chamber will distil from his submissions the material that is relevant to the evaluation criteria set out in Rule 71 *bis* (E).

8. The Duty Counsel submits that, in spite of the passage of many years since the first Indictment against Kabuga was confirmed, and six years since the last Amended Indictment was confirmed, "no reasonable efforts have been deployed, to arrest Felicien Kabuga."¹⁵ He argues that the OTP has not exhaustively implemented the mandatory requirements of Rule 60; that no adequate publicity has been made in regard to the Indictment; and that the efforts allegedly made by the Prosecution "do not constitute reasonable efforts."¹⁶ According to the Duty Counsel, the Prosecution must "discharge the burden of proof by convincing the Trial Chamber that the efforts it deployed were reasonable under all the circumstances."¹⁷

9. The Chamber notes that the Duty Counsel does not directly refute the Prosecution's claim that it has made reasonable efforts to execute the warrant of arrest against Kabuga, nor has the Duty Counsel demonstrated that the Prosecution's efforts so far are unreasonable. The Chamber has considered the Prosecution's submissions and, in particular, the various steps taken by the OTP Investigators and different law enforcement agencies around the world to apprehend the Kabuga.¹⁸ The Chamber is satisfied that these constitute reasonable efforts within the meaning of Rule 71 *bis* (E)(i) and that, despite these reasonable efforts, the warrants of arrest issued against Kabuga remain unexecuted.

Whether the execution of the warrant is not likely to take place within a reasonable time

10. The Prosecution also submits that, whereas Kabuga is believed to have been "legally domiciled in Kenya up to at least 2008," he is now thought to have left Kenya "although no proof of departure has been availed by the Kenyan authorities."¹⁹ According to the Prosecution, the Kenyan government's "lack of diligence and cooperation" in facilitating the arrest of Kabuga has "on numerous occasions been brought to the attention of the United Nations Security Council," resulting in a number of resolutions enjoining Kenya to cooperate

¹³ Duty Counsel's Submissions, paras. 4-8.

¹⁴ Duty Counsel's Submissions, paras. 9-25.

¹⁵ Duty Counsel's Submissions, para. 46.

¹⁶ Duty Counsel's Submissions, para. 47.

¹⁷ Duty Counsel's Submissions, para. 48.

¹⁸ The Parties' submissions were filed under confidential cover and cannot be fully discussed in this public Decision.

¹⁹ The Motion, para. 17.

with the Tribunal.²⁰ The Prosecution concludes that despite all the legal and diplomatic efforts it has made so far, “there is no reasonable expectation that the execution of the pending arrest warrant against Félicien Kabuga will take place within a reasonable time.”²¹

11. The Duty Counsel questions the assertion that the execution of the arrest warrant is unlikely to take place within a reasonable time. He points to the Prosecution’s claim that Kabuga has extensive investments in Kenya, including real estate holdings, commercial ventures and numerous bank accounts,²² and asks how Kabuga has managed to evade arrest in the face of so much “credible information” about his whereabouts and activities. He also refers to the various Security Council resolutions enjoining Kenya to cooperate with the Tribunal and challenges the Prosecution to explain why these efforts are unlikely to be successful.²³ Furthermore, the Duty Counsel submits that if the Prosecution could identify the individuals in Kenya who have thwarted the Tribunal’s efforts to apprehend Kabuga, those individuals could be held in contempt of the Tribunal or otherwise persuaded to stop shielding Kabuga.²⁴ Therefore, the Duty Counsel is of the view that the second criterion has not been met.

12. The Chamber takes the Duty Counsel’s reservations very seriously. However, the Chamber recalls that according to the Prosecution, Kabuga is alleged to have left Kenya in 2008 and that his current whereabouts are unknown. Under the circumstances, it is reasonable to conclude that Kabuga is aware of the outstanding warrants for his arrest and that he will continue, “by reason of his wealth and a network of loyal supporters,” to evade arrest. The Chamber is satisfied that the Prosecution has shown reasonable diligence in its search for Kabuga, but notes that an arrest can only be made by national authorities. The Chamber therefore finds that the execution of the warrant of arrest against Kabuga is not likely to take place within a reasonable time.

Whether it is in the interests of justice to grant the Motion

13. The Prosecution advances a number of reasons why it would be in the interests of justice to preserve the evidence against Félicien Kabuga for potential use at a later date, should he be arrested and brought to trial. These include the fact that Kabuga is a high-profile fugitive whose apprehension and trial would be important to the many victims of his alleged

²⁰ The Motion, para. 19.

²¹ The Motion, para. 20.

²² Duty Counsel’s Submissions, para. 51.

²³ Duty Counsel’s Submissions, para. 54.

²⁴ Duty Counsel’s Submissions, paras. 57-58.

crimes, for the legacy of this Tribunal, and for national reconciliation in Rwanda. The Prosecution also argues that, as Kabuga continues to evade arrest and trial, crucial evidence may be lost or may deteriorate due to the passage of time, or due to the death, incapacity or unavailability of witnesses later on.²⁵ It asserts that some of the witnesses have died since the confirmation of the initial Indictment in 1997; that others are under medical supervision "because of their precarious health conditions;" and that the further decline in the condition of more witnesses over time would result in the further loss of evidence establishing Kabuga's criminal responsibility for the acts alleged in the Indictment.²⁶

14. The Duty Counsel submits that, while he does not deny that the preservation of evidence would be in the interests of justice—as the same evidence could subsequently prove the innocence of the accused person—he is opposed to the manner in which the preservation is being undertaken pursuant to Rule 71 *bis*.²⁷ According to the Duty Counsel, the special depositions procedure is essentially an *ex-parte* proceeding, which denies the Accused the right to take part in this aspect of the pre-trial proceedings and is, therefore, not in the interests of justice.²⁸ He urges the Chamber to base its decision to grant the request not on sentiments, but "on sound legal principles" including respect for the rights of the accused and the presumption of innocence.²⁹ He argues that Rule 71 *bis* constitutes a denial of the rights of the accused guaranteed under Article 20 of the Statute of the Tribunal and prays the Chamber to reject the Motion or, in the alternative, to "define and clarify the role of Duty Counsel representing the rights of the accused under Rule 71 *bis*."³⁰

15. The Chamber takes note of the Duty Counsel's concerns and points out that the objective of Rule 71 *bis* is to ensure that evidence relating to the indictment can be preserved for a future trial. The Rule seeks to prevent fugitive accused from avoiding effective prosecution and obstructing the proper administration of justice. In the Chamber's view, it needs to be clearly emphasized that the Rule 71 *bis* procedure does not amount to a trial *in absentia*. An important distinction between this procedure and a trial is that the single Judge presiding over these proceedings will not have the power to enter a verdict of guilt or innocence, and cannot make decisions regarding the admissibility or the weight of the deposition evidence. It will be for a future Trial Chamber, acting within the confines of Rule

²⁵ The Motion, paras. 21-23.

²⁶ The Motion, paras. 24-27.

²⁷ Duty Counsel's Submissions, para. 61.

²⁸ Duty Counsel's Submissions, para. 61.

²⁹ Duty Counsel's Submissions, para. 63.

³⁰ Duty Counsel's Submissions, para. 65.

71 *bis* (O), to decide on the admissibility of evidence recorded and preserved through the Rule 71 *bis* procedure.

16. Although Rule 71 *bis* does appear to impose some limitations in the accused's fair trial rights, it is worth noting that a future Trial Chamber will be able to assess the relevance and probative value of the preserved evidence, taking into consideration the rights of the accused and the fact that the Duty Counsel cross-examining the witnesses during the special depositions did not receive instructions from the accused and was not the Counsel of the accused's choice.³¹ Rule 71 *bis* does not affect the ordinary Rules governing the admission and evaluation of evidence at trial. The Chamber is alive to the principle of proportionality and is satisfied that the restrictions placed on Kabuga's rights are in service of a sufficiently important objective and impair his rights no more than is necessary to accomplish the objective.³²

17. Furthermore, the Chamber is mindful of Kabuga's position as a high-profile fugitive and has considered the importance of his apprehension and trial to the many victims of his alleged crimes. The Chamber is also mindful of the increased risk of deterioration of the evidence with the passage of time, as well as the possibility of the further loss of evidence resulting from the demise of Prosecution witnesses. Under these circumstances, the Chamber concludes that it is in the interests of justice that evidence relating to the Indictment be preserved for a future trial by special deposition.

CONCLUSION

18. In light of the submissions of the Parties, the Chamber is satisfied that reasonable efforts have been made to execute the warrant of arrest against Félicien Kabuga; that the execution of the warrant of arrest is not likely to take place within a reasonable time; and that it is in the interests of justice to grant the Prosecution's request for the preservation of evidence by special deposition.

19. The Chamber also recalls that the Prosecution, in its Further Submissions of 4 March 2011,³³ requests a variation of the Confirming Judge's Order of 26 November 1997.³⁴ The

³¹ See the Report of the ICTR Rules Committee on Proposed Rule 71 *bis* (May 2009).

³² See *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 14; *Slobodan Milosevic v. The Prosecutor*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 13.

³³ *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-98-44B-71*bis*, Prosecutor's Submissions Pursuant to Rule 71 *bis* (D) of the Rules of Procedure and Evidence, 4 March 2011 ("Prosecution's Further Submissions").

³⁴ *The Prosecutor v. Félicien Kabuga*, Case No. ICTR-97-22-I, Decision Confirming the Indictment, 26 November 1997.

Chamber agrees that, in view of the Rule 71 *bis* proceedings, it is necessary to vary the Order and to authorise the disclosure of Prosecution witness statements in redacted form at least 60 days before the date set for the commencement of the special depositions, and in non-redacted form no later than 21 days before the said date.

FOR THE FOREGOING REASONS, THE CHAMBER

- I. **GRANTS** the Motion;
- II. **ORDERS** the taking of the evidence of the Prosecution witnesses via special deposition pursuant to Rule 71 *bis*;
- III. **ORDERS** that all the proceedings shall be held *in camera*;
- IV. **VARIES** the Order of the Confirming Judge, pursuant to Rules 53 (B) and (C), dated 26 November 1997;
- V. **ORDERS** the Prosecution to disclose its witness statements in redacted form by **16 March 2011**, and in non-redacted form no later than 21 days before the date set for the commencement of the special depositions.
- VI. **REQUESTS** the Registrar, pursuant to Rule 71 *bis* (G)(i), to issue a public notice of the present Decision and the arrest warrant against the Accused; and
- VII. **REQUESTS** the Registrar, pursuant to Rule 71 *bis* (G)(ii), to assign to the Counsel representing the interests of the Accused such staff as the Registrar deems necessary.

Arusha, 15 March 2011, done in English.

Dennis C.M. Byron
Presiding Judge

Gberdao Gustave Kam
Judge

Vagh Joensen
Judge

[Seal of the Tribunal]

