

UNITED
NATIONS



International Residual Mechanism
for Criminal Tribunals

Case No.: MICT-24-131-I
Date: 17 September 2024
Original: English

BEFORE A SINGLE JUDGE

Before: Judge Yusuf Aksar
Registrar: Mr. Abubacarr M. Tambaou
Decision of: 17 September 2024

IN THE MATTER OF FRANÇOIS NGIRABATWARE

PUBLIC

DECISION ON THE SUITABILITY OF REFERRAL OF THE CASE

Amicus Curiae

Mr. Robert L. Herbst

Counsel for Mr. François Ngirabatware

Mr. Jean Gakwaya

Government of the Kingdom of Belgium

I, YUSUF AKSAR, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Single Judge assigned to conduct the proceedings in this case and to determine whether this case should be referred to the authorities of a state;¹

NOTING that, on 29 April 2024, a Single Judge of the Mechanism: (i) issued an order in lieu of indictment, charging Mr. François Ngirabatware (“Accused”) with contempt of the Mechanism pursuant to Article 1(4) of the Statute of the Mechanism (“Statute”) and Rule 90(A) of the Rules of Procedure and Evidence of the Mechanism (“Rules”) for knowingly and wilfully interfering with the administration of justice by submitting fraudulent documents in proceedings before the Mechanism; and (ii) directed the appointed *amicus curiae* (“*Amicus Curiae*”) to prosecute the matter in accordance with Rule 90(D)(ii) of the Rules;²

NOTING that, according to the Order in Lieu of Indictment, the Accused submitted three fraudulent documents before the Mechanism with the intention to deceive the Mechanism in his litigation to release funds from bank accounts in the Kingdom of Belgium (“Belgium”) – which were allegedly frozen at the request of the Prosecutor of the International Criminal Tribunal for Rwanda (“ICTR”) – including a letter allegedly created by the Accused, falsely presenting it as coming from a representative at a bank in Belgium, whose signature he forged;³

RECALLING that Article 1(4) of the Statute provides, in relevant part, that, before proceeding to try persons for contempt, the Mechanism shall consider referring the case to the authorities of a state in accordance with Article 6 of the Statute, taking into account the interests of justice and expediency;⁴

RECALLING that, pursuant to Article 6(2) of the Statute, a Single Judge shall determine whether the case should be referred to the authorities of a state: (i) in whose territory the crime was committed; (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case;⁵

¹ Order Assigning a Single Judge to Consider a Matter, 8 May 2024, p. 1.

² Decision Issuing Order in Lieu of Indictment, 29 April 2024 (confidential; public redacted version filed on the same day), pp. 1-3 (appending the “Order in Lieu of Indictment”). See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-R90.1, Decision on Allegations of Contempt, 29 April 2024 (confidential; public redacted version filed on the same day), paras. 20-22, 24, 25, 44.

³ Order in Lieu of Indictment, paras. 1, 3-8.

⁴ See also *Prosecutor v. Vojislav Šešelj et al.*, Case No. MICT-23-129-I, Decision on Referral of the Case to the Republic of Serbia, 29 February 2024 (“*Šešelj et al.* Decision of 29 February 2024”), para. 9; *In the Case Against Petar Jojić and Vjerica Radeta*, Case No. MICT-17-111-R90, Decision on *Amicus Curiae*’s Appeal Against the Order Referring a Case to the Republic of Serbia, 12 December 2018 (“*Jojić and Radeta* Decision of 12 December 2018”), para. 11.

⁵ See also Article 12(1) of the Statute; Rule 2(C) of the Rules.

RECALLING that Article 6(4) of the Statute provides that the Mechanism “may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out”;

NOTING the confidential and *ex parte* report filed by the *Amicus Curiae* on 6 April 2023, indicating, *inter alia*, that, a number of states could be considered as a state of referral pursuant to Article 6(2) of the Statute, including Belgium;⁶

RECALLING that on 13 May 2024, I ordered the *Amicus Curiae* to file a written submission – and allowed any response from the Accused thereto – on the suitability of referring the case to a state, including those identified in the *Amicus Curiae* Report, and whether such referral would serve the interests of justice and expediency of the proceedings, as well as respect the right of the Accused to a fair trial;⁷

NOTING the *Amicus Curiae*’s submission filed on 24 May 2024, stating that the Mechanism is best placed to conduct the proceedings in this case and that referring the case to a state is not suitable and would not serve the interests of justice or expediency of the proceedings, considering, *inter alia*, that: (i) Articles 1 and 6 of the Statute “seem clearly to have been designed for referral to foundational states – Rwanda for the ICTR, and Serbia and the other States which made up the former Yugoslavia for the [International Criminal Tribunal for the former Yugoslavia (“ICTY”)]”; (ii) none of the states identified in the *Amicus Curiae* Report has a “real relation to or interest in the matter at hand”; (iii) the Mechanism is prepared to try the case now and has the commitment and means to see the case through to vindicate its interest, while “[t]here is no telling how long it would take” if proceedings are conducted in the identified states; and (iv) there is “an unresolved legal and jurisprudential issue” concerning the alleged conduct and the reading of Rule 90(A) of the Rules that the Mechanism should resolve on its own;⁸

NOTING the Accused’s view expressed in a confidential letter from his counsel to the Registrar of the Mechanism (“Registrar” or “Registry”), dated 9 July 2024, that as a Belgian national living in

⁶ *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-R90.1, Report of the *Amicus Curiae* Robert L. Herbst Appointed Pursuant to the Order of 19 April 2022, 6 April 2023 (confidential and *ex parte*) (“*Amicus Curiae* Report”), paras. 209, 210. *See also Amicus Curiae* Report, para. 211, n. 56.

⁷ Order for Submissions, 13 May 2024 (“Order of 13 May 2024”), p. 2.

⁸ Submission of the *Amicus Curiae* on the Suitability of Referring this Case to a State, 24 May 2024, paras. 2-7.

Belgium, “he would like the consideration of the case to be entrusted to the relevant Belgian courts”;⁹

RECALLING that on 25 July 2024, to facilitate the determination, in accordance with Articles 1(4) and 6 of the Statute, as to whether referring the case to Belgium would serve the interests of justice and expediency of the proceedings, I invited Belgium to provide written submissions on its jurisdiction, willingness, and preparedness to accept this case for trial;¹⁰

NOTING Belgium’s submission filed on 21 August 2024, submitting that: (i) the conduct charged against the Accused could *prima facie* be classified as forgery and the use of forged documents pursuant to Articles 196 and 197 of the Belgian Criminal Code; (ii) in principle, the Belgian courts have jurisdiction to prosecute these offences when committed in Belgium and/or by a Belgian national; and (iii) while it prefers that this case be tried by the Mechanism, Belgium is prepared to institute proceedings against the Accused;¹¹

NOTING that, in response, the *Amicus Curiae* contends that the Belgium Submission supports his view that a referral is not suitable and asserts that it is apparent that Belgium sees no interest in spending resources on investigating and prosecuting this matter;¹²

CONSIDERING that the Mechanism may only exercise jurisdiction after it has considered whether the case can be transferred to a national jurisdiction for trial and that there is a strong

⁹ Letter from Mr. Jean Gakwaya to the Chief Registrar of the Mechanism, dated 9 July 2024, filed on 12 July 2024 (originally filed in French, English translation filed on 16 July 2024) (confidential) (“Letter of 9 July 2024”), p. 1. *See also* Order for Submissions, 25 July 2024 (“Order of 25 July 2024”), p. 2 (exercising my discretion to consider the Letter of 9 July 2024, which was filed untimely and not in accordance with the Order of 13 May 2024).

¹⁰ Order of 25 July 2024, p. 3.

¹¹ Letter from Head of Central Authority for Cooperation with International Criminal Tribunals of the Kingdom of Belgium to the Registrar of the Mechanism concerning the Mechanism’s Request for Submissions on Possible Legal Proceedings against François Ndirabatware, 21 August 2024 (originally filed in French, English translation filed on 29 August 2024) (“Belgium Submission”), pp. 2, 3. Specifically, Belgium submits that it has jurisdiction to prosecute offences committed in Belgium pursuant to Article 3 of the Belgian Criminal Code or those committed abroad by a Belgian national pursuant to Article 6 of the Preliminary Title of the Belgian Code of Criminal Procedure. *See* Belgium Submission, p. 2. Belgium submits that in the latter case, proceedings shall only be initiated at the request of the Public Prosecutor, if the Accused is in Belgium, and must be preceded by a formal notice from the Mechanism to the Belgian authorities. *See* Belgium Submission, pp. 2, 3. Belgium emphasises that while, in principle, it has jurisdiction over the offences, trying the case in Belgium would require reopening the investigation and a trial judge is at liberty to reclassify the acts, to hold that they do not constitute offences, or to find that the judge does not have jurisdiction. *See* Belgium Submission, p. 3.

¹² Response of the *Amicus Curiae* to Belgium’s Submission on Referring this Case, 4 September 2024 (“*Amicus Curiae* Submission of 4 September 2024”), para. 4 (wherein the *Amicus Curiae* asserts that Belgium is willing to institute proceedings only if a trial by the Mechanism is not an option, and that it makes no commitment to conduct an investigation or try the Accused in any particular time frame, nor does it consent to the Mechanism monitoring its proceedings). I note that the *Amicus Curiae* Submission of 4 September 2024 was filed untimely. *See* Order of 25 July 2024, p. 3 (allowing the parties to file responses, if any, within 10 days of the filing of Belgium’s submission). I hereby remind parties to strictly adhere to timelines set out in the Rules or by judicial order. Nevertheless, considering the importance of first considering whether to refer a contempt case to a state prior to trying it before the Mechanism, I will exercise my discretion to consider the *Amicus Curiae* Submission of 4 September 2024.

preference for referring a case to a national jurisdiction if all relevant conditions of Article 6 of the Statute are met;¹³

CONSIDERING that the decision on whether or not to refer the case to a state falls within my discretion;¹⁴

CONSIDERING that I am satisfied that Belgium has: (i) an adequate legal framework criminalising the Accused's conduct charged in the Order in Lieu of Indictment as forgery and the use of forged documents pursuant to Articles 196 and 197 of the Belgian Criminal Code; and (ii) jurisdiction, and is willing and prepared, to institute proceedings against the Accused – a Belgian national living in Belgium;

CONSIDERING that while the charge against the Accused concerns the submission of fraudulent documents in proceedings before the Mechanism, the institution of proceedings in Belgium against the Accused for forgery and the use of forged documents may vindicate the Mechanism's interests in remedying the alleged interference with its administration of justice;

CONSIDERING that the prohibition of death penalty is guaranteed by the Constitution of Belgium;¹⁵

CONSIDERING the Accused's expressed willingness to submit to the Belgian courts and that neither the Accused nor the *Amicus Curiae* raised – and the information before me does not suggest – any concerns over fair trial rights should the case be referred to Belgium;

CONSIDERING that the Mechanism will ensure that the safeguards applicable to the case are guaranteed throughout the proceedings against the Accused with the assistance of a monitoring mechanism pursuant to Article 6(5) of the Statute and Rule 14(A)(iv) of the Rules;

CONSIDERING that, in the case of referral, if the conditions of referral are no longer met, a deferral may be sought in the interests of justice;¹⁶

¹³ *Šešelj et al.* Decision of 29 February 2024, para. 9; *Jojić and Radeta* Decision of 12 December 2018, para. 11.

¹⁴ *See Šešelj et al.* Decision of 29 February 2024, para. 10; *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-PT, Decision on Suitability of Referral of the Case, 7 December 2018, p. 4.

¹⁵ *See* Article 14*bis* of the Constitution of Belgium, as amended on 2 February 2005 (Belgian Official Gazette 17 February 2005).

¹⁶ *See* Article 6(6) of the Statute; Rule 14(C) of the Rules; *Šešelj et al.* Decision of 29 February 2024, para 18; *Jojić and Radeta* Decision of 12 December 2018, para. 20 (wherein the Appeals Chamber of the Mechanism considered that it was reasonable for the Single Judge, in deciding whether to refer the case to Serbia, to take into account the availability of revocation procedures under Rule 14 of the Rules and that a request for deferral may be sought if conditions of referral of the case are no longer met – “[n]amely, if the Accused are not brought to trial within a reasonable time, or if

CONSIDERING that Belgium’s intention to reopen the investigation does not necessarily preclude the referral of the case to Belgium at this stage and that providing Belgium access to all material supporting the Order in Lieu of Indictment may assist Belgium in its investigation and serve the interest of expediency;

FINDING that, on balance, the above considerations weigh in favour of referring the case to Belgium;

FOR THE FOREGOING REASONS,

PURSUANT to Articles 1(4), 6(2), and 6(4) of the Statute and Rule 14 of the Rules,

HEREBY ORDER that the case against the Accused (Case No. MICT-24-131-I) to be referred to the authorities of Belgium for trial;

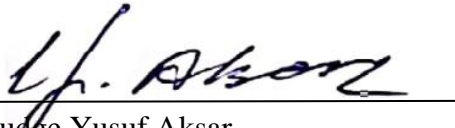
ORDER the *Amicus Curiae* to transfer to the Prosecutor’s Office of Belgium, as soon as possible, all information relating to this case that he considers appropriate including, in particular, all materials supporting the Order in Lieu of Indictment;

INVITE Belgium to seek by application filed before the President of the Mechanism (“President”) any variation of protective measures as may be necessary pursuant to Rule 86 of the Rules; and

ORDER the Registry to take appropriate measures, as soon as practicable, for an effective monitoring mechanism to be implemented in accordance with Article 6(5) of the Statute and Rule 14(A)(iv) of the Rules and to report to the President.

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

Done this 17th day of September 2024,
At Arusha,
Tanzania



Judge Yusuf Aksar
Single Judge

[Seal of the Mechanism]

a competent Serbian court determines that it does not have jurisdiction to prosecute the Accused for contempt of the ICTY as alleged in the Order in Lieu of Indictment”) and references cited therein.



I - FILING INFORMATION / INFORMATIONS GÉNÉRALES

To/ À :	<input type="checkbox"/> IRMCT Registry/ Greffe du MIFRTP	<input checked="" type="checkbox"/> Arusha/ Arusha	<input type="checkbox"/> The Hague/ La Haye			
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II - TRANSLATION STATUS ON THE FILING DATE/ ÉTAT DE LA TRADUCTION AU JOUR DU DÉPÔT

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<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and requests the Registry to translate/ La partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction : (Word version of the document is attached/ La version Word du document est jointe)
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