

**UNITED  
NATIONS**



International Residual Mechanism  
for Criminal Tribunals

Case No. MICT-13-38-PT

Date: 30 November 2020

Original: English

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**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***

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**FURTHER DECISION CONCERNING IN-PERSON VISITS  
BETWEEN FÉLICIEN KABUGA AND HIS DEFENCE TEAM**

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**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;<sup>1</sup>

**RECALLING** that Mr. Félicien Kabuga was arrested on 16 May 2020 in France and transferred to the United Nations Detention Unit (“UNDU”) at the Hague Branch of the Mechanism on 26 October 2020 for a detailed medical assessment,<sup>2</sup> and that his initial appearance took place on 11 November 2020;<sup>3</sup>

**RECALLING** that, on 4 November 2020, I dismissed Kabuga’s request to be allowed to meet his Counsel in-person at the UNDU in order to prepare for the initial appearance, on the basis that the need to protect the health and safety of the Accused and other detainees in the context of the COVID-19 pandemic warranted, at that stage, reasonable restrictions on in-person visits;<sup>4</sup>

**RECALLING FURTHER** that I nonetheless required the Registry to ensure that Kabuga had in-person access to his Counsel on the day of the initial appearance on 11 November 2020, in accordance with safety protocols and subject to any medical recommendations;<sup>5</sup>

**BEING SEISED OF** a confidential motion filed by the Defence on 17 November 2020 requesting that the Registrar be ordered to make the necessary arrangements so that Kabuga and members of his Defence team can have confidential and in-person meetings on a regular basis, either at the UNDU or on the premises of the Mechanism;<sup>6</sup>

**NOTING** Defence submissions that the in-person meeting prior to the initial appearance allowed counsel and Kabuga to communicate effectively while Kabuga has repeatedly had difficulties communicating via video-teleconference and the Defence’s position that meeting in this manner does not protect his right to counsel;<sup>7</sup>

<sup>1</sup> 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 (“Order of 29 October 2020”), p. 1.

<sup>2</sup> See, e.g., *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Decision on Félicien Kabuga’s Motion to Amend the Arrest Warrant and Order for Transfer, 21 October 2020, paras. 2, 3; Order of 29 October 2020, p. 1.

<sup>3</sup> See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Order Scheduling an Initial Appearance, 8 November 2020 (“Order of 8 November 2020”), p. 3; Transcript 11 November 2020 pp. 1-47.

<sup>4</sup> See *Prosecutor v. Félicien Kabuga*, Case No. MICT-13-38-I, Decision on Urgent Motion for In-Person Visits Between Félicien Kabuga and His Defence Counsel, 4 November 2020 (“Decision of 4 November 2020”), pp. 1-3. See Decision of 4 November 2020, p. 3.

<sup>5</sup> See Decision of 4 November 2020, p. 3; Order of 8 November 2020, p. 3.

<sup>6</sup> Request for Félicien Kabuga to Be Able to Have Confidential and In-Person Meetings with Members of His Defence Team on a Regular Basis, 24 November 2020 (confidential; original French version filed on 17 November 2020) (“Motion”), para. 18, p. 4.

<sup>7</sup> Motion, paras. 4, 5, 8-10, 17.

**NOTING FURTHER** the Defence submissions that: (i) access to a lawyer is a fundamental right and must be guaranteed in practice;<sup>8</sup> (ii) the Defence must keep Kabuga informed of developments in the case, including in relation to the amendment of the indictment, the evidence disclosed, and the strategy to be adopted;<sup>9</sup> (iii) the Scheveningen Detention Unit does not limit Dutch lawyer's access to their clients despite the COVID-19 epidemic;<sup>10</sup> and (iv) the Defence is ready to comply with any health measures as necessary, such as those adopted during the in-person meeting on 11 November 2020;<sup>11</sup>

**NOTING** the submissions filed by the Registrar on 20 November 2020, wherein he “strongly advise[s] against granting any exemptions” to the current regime of restrictions at the UNDU and emphasizes that the Mechanism has the duty to take into account the specific requirements of the UNDU population, which is at an increased risk in view of the detainees’ advanced age and vulnerability;<sup>12</sup>

**NOTING**, in particular, the Registrar’s submissions that: (i) the UNDU regime of restrictions, including the suspension of all in-person visits, has been implemented since March 2020 with the sole purpose of protecting its vulnerable detainees; (ii) while contamination risks during in-person meetings may be mitigated by preventative measures, they cannot be entirely eliminated; (iii) granting any exemptions to the regime of restrictions would risk compromising the health and safety of Kabuga and the other detainees; and (iv) special arrangements have been made to facilitate privileged telephone and video-teleconference meetings between Kabuga and his Defence, which require no functional or technical capability on the part of Kabuga;<sup>13</sup>

**NOTING** that, on 18 November 2020, the Prosecution informally indicated that it will not file a response to the Motion;

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<sup>8</sup> Motion, para. 11.

<sup>9</sup> Motion, paras. 6-8.

<sup>10</sup> See Motion, para. 16.

<sup>11</sup> Motion, paras. 12-14. These measures included: (i) Kabuga being protected behind a plexiglas screen; (ii) all the participants wearing masks; and (iii) maintaining social distancing. See Motion, para. 13.

<sup>12</sup> Registrar’s Submission in Relation to the Defence Motion of 17 November 2020 Regarding In-Person Visits Between the Defence Team and Félicien Kabuga, 20 November 2020 (confidential and *ex parte*; confidential redacted version filed on the same day) (“Registrar Submission”), paras. 21, 24.

<sup>13</sup> Registrar Submission, paras. 14-23. The Registrar submits that the Defence’s reliance on the practice of the Dutch authorities gives insufficient consideration to the recent spike in COVID-19 cases observed since September 2020 and that the UNDU’s detainees are particularly vulnerable and at an increased risk because of their advanced age. See Registrar’s Submission, para. 21. He further cautions that in-person meetings on the Mechanism premises would expose Kabuga to additional contamination risks from contact with escort personnel and staff at the Hague Branch. See Registrar’s Submission, para. 23.

**CONSIDERING** that Kabuga was temporarily transferred to The Hague for medical reasons, upon request from the Defence, and that the assessment of his health and fitness based on further medical examinations is on-going;<sup>14</sup>

**CONSIDERING** that, in view of the particular vulnerabilities of Kabuga and the other UNDU detainees in the context of the current COVID-19 pandemic in the Netherlands, it remains essential to maintain the highest standards of health protocol and to defer to the Registrar's evaluation of contamination risks associated with in-person visits at the UNDU or the Mechanism's premises;

**CONSIDERING** nonetheless that, while telephone and video-teleconference communications on a privileged basis sufficiently protect Kabuga's fair trial rights as a general matter in the near term given the early phase of the case,<sup>15</sup> the absence of in-person consultation may frustrate case preparation in the longer term;

**FINDING**, nonetheless, that it would be appropriate for the Registry to facilitate an in-person consultation between Kabuga and his counsel subject to appropriate health and safety measures at the UNDU or the Mechanism's premises, if necessary, in the first two weeks of December 2020 in order to allow appropriate follow-up and consultations on matters that arose at the initial appearance and will be the subject of litigation and discussion in the first part of 2021;

**FINDING FURTHER** that it is in the interests of justice to invite the Registrar to continue to closely monitor the situation and to identify solutions that will allow in-person consultations between Kabuga and his Defence at the UNDU or the Mechanism's premises on a periodic basis, subject to any appropriate safety protocols and health measures;

**FOR THE FOREGOING REASONS,**

**HEREBY GRANT** the Motion, in part;

**AUTHORIZE** an in-person consultation between Kabuga and his counsel subject to appropriate health and safety measures at the UNDU or the Mechanism's premises, if necessary, in the first two weeks of December 2020; and

**INSTRUCT** the Registrar to monitor continuously the situation and identify solutions that will allow periodic in-person consultations between Kabuga and his Counsel on a planned basis, subject

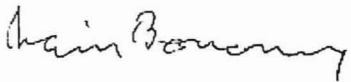
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<sup>14</sup> See, e.g., Decision of 4 November 2020, p. 2; Order Following Initial Appearance, 25 November 2020, pp. 2, 3.

to any appropriate safety protocols and health measures, to provide an interim report on any matters of concern arising out of the aforementioned in-person consultation by Tuesday, 15 December 2020, and to file a submission with a proposal on-going in-person consultations by Monday, 18 January 2021 under Rule 31(B) of the Rules.

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

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

  
\_\_\_\_\_  
Judge Iain Bonomy  
Pre-Trial Judge

[Seal of the Mechanism]

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<sup>15</sup> See, e.g., Decision of 4 November 2020, p. 3. The Defence submissions as to Kabuga's difficulties communicated through video-teleconference are undeveloped do not demonstrate that this means of communication necessarily infringes his right to counsel.



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