

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No. MICT-13-38-PT

Date: 9 March 2021

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Abubacarr Tambadou

Order of: 9 March 2021

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC WITH PUBLIC AND CONFIDENTIAL ANNEXES

**ORDER REGARDING COMMENCEMENT AND CONDUCT
OF THE STATUS CONFERENCE**

Office of the Prosecutor:

Mr. Serge Brammertz

Counsel for Mr. Félicien Kabuga:

Mr. Emmanuel Altit

THE TRIAL CHAMBER of the International Residual Mechanism for Criminal Tribunals (“Trial Chamber” and “Mechanism”, respectively);¹

RECALLING that, following Mr. Félicien Kabuga’s arrest in France on 16 May 2020, he was temporarily transferred on 26 October 2020 to the United Nations Detention Unit at the Hague Branch of the Mechanism (“UNDU”) for a detailed medical assessment to determine whether and under what circumstances he may be safely transferred to the Arusha Branch of the Mechanism for trial;²

RECALLING that Kabuga’s initial appearance took place in-person on 11 November 2020 at the Hague Branch and that the Presiding Judge entered a plea of not guilty on his behalf pursuant to Rule 64(A)(iv) of the Rules of Procedure and Evidence (“Rules”);³

CONSIDERING that, pursuant to Rule 69(A) of the Rules, a status conference shall be convened within 120 days of the initial appearance of the accused, and thereafter within 120 days of the last status conference, to organize exchanges between the parties, review the status of the case, and to allow the accused the opportunity to raise issues in relation thereto, including their mental and physical condition;

RECALLING the order of 13 January 2021 scheduling the status conference before the full Trial Chamber on Wednesday, 3 February 2021;⁴

RECALLING that, on 26 January 2021, the status conference was postponed to no later than 11 March 2021 in light of stringent lockdown measures and travel restrictions to combat the spread of COVID-19 imposed by the Netherlands, which included a flight ban from countries where two of the three judges reside;⁵

OBSERVING that, on 4 March 2021, the Netherlands extended the flight ban until 1 April 2021;⁶

CONSIDERING that, in this context, the Defence and the Prosecution were informally presented with the option of proceeding with the status conference virtually or by way of written procedure

¹ See Order Assigning a Trial Chamber, 1 October 2020, p. 1.

² See Decision on Félicien Kabuga’s Motion to Amend the Arrest Warrant and Order for Transfer, 21 October 2020, paras. 2, 11-18.

³ See Order Scheduling an Initial Appearance, 8 November 2020, p. 3; Transcript 11 November 2020 p. 39.

⁴ Order Scheduling a Status Conference, 13 January 2021, p. 2.

⁵ Order Postponing the Status Conference, 26 January 2021, p. 1.

⁶ See <https://www.government.nl/topics/coronavirus-covid-19/visiting-the-netherlands-from-abroad/dutch-flight-ban-and-docking-ban> (last accessed on 9 March 2021). On 9 March 2021, the flight ban from the United Kingdom was lifted. <https://www.government.nl/topics/coronavirus-covid-19/news/2021/03/08/further-easing-of-restrictions-not-yet-possible> (last accessed on 9 March 2021). However, the flight ban from Uruguay remains.

and that both expressed a preference of proceeding in writing until an in-person status conference can be held;⁷

CONSIDERING FURTHER the report of 5 March 2021 from the UNDU's Medical Officer, which advises that Kabuga is unable to attend a status conference in person or via video-teleconference on or before 11 March 2021 in light of recent developments related to his health;⁸

CONSIDERING that, pursuant to Rule 55 of the Rules, a Judge may issue such orders as may be necessary for the preparation or conduct of trial;

CONSIDERING that, in view of the: (i) the health risks related to in-person gatherings and travel restrictions imposed in relation to the COVID-19 pandemic; (ii) the Accused's present inability to participate in a status conference due to his health;⁹ (iii) the parties' agreement to participate in a status conference through written procedure;¹⁰ and (iv) the proven ability and efficacy of the court, counsel, and the Registry to exchange views on relevant issues,¹¹ a status conference in the spirit of Rule 69 of the Rules which will address all the requirements of Rule 69 may take place through written procedure;

EMPHASIZING that an in-person status conference will be convened as soon as it is feasible, safe, and appropriate to do so bearing in mind all relevant circumstances;

CONSIDERING that the annexes to this Order will facilitate the anticipated written exchanges;

REMINING the parties to adhere to applicable confidentiality orders and protective measures and that any confidential submissions may be advanced in a confidential annex to the written submissions in response to this Order as set forth below;

⁷ The informal exchanges between the Chamber's Senior Legal Officer on behalf of the Bench, the Prosecution, and Defence counsel occurred on Thursday, 4 March 2021 by way of email.

⁸ Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 5 March 2021 (public, with confidential Annex) ("Registrar's Submission of 5 March 2021"), Annex, Registry pagination ("RP.") 1054.

⁹ See *supra* n. 8.

¹⁰ See *supra* n. 7.

¹¹ See, e.g., *Prosecutor v. Maximilien Turinabo et al.*, Case No. MICT-18-116-PT, Order Regarding the Status Conference and Submissions on Any Prospective Decisions Taken Under Rules 81(C), (D), and/or (E), 21 September 2020, p. 1.

FOR THE FOREGOING REASONS,

ORDERS that the next status conference will be held between the parties in the spirit of Rule 69 of the Rules in writing;

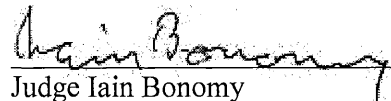
ORDERS that the written exchanges shall be conducted as follows:

- (i) The Prosecution, Counsel for the Accused, and the Registrar shall file written submissions, if any, by Monday, 15 March 2021;
- (ii) The Prosecution and Counsel for the Accused shall file responsive submissions, if any, by Friday, 19 March 2021; and
- (iii) The Trial Chamber shall, if necessary, file thereafter a written order or decision taking due note of submissions received and issue any orders and decisions that may be necessary; and

INSTRUCTS the parties and the Registrar to review the annexes to this Order for the purposes of facilitating the anticipated exchanges.

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

Done this 9th day of March 2021,
At Arusha,
Tanzania


Judge Iain Bonomy
Presiding

[Seal of the Mechanism]

ANNEX A (PUBLIC)

1. The Trial Chamber would like to thank the parties for their willingness to conduct a status conference by way of written procedure. While the Trial Chamber's clear preference is to hold an in-person status conference in the presence of the Accused, the grave risks posed by the COVID-19 pandemic, resulting in the current flight ban to the Netherlands, as well as the Accused's current state of health demand this alternative that will nonetheless respect his fundamental rights and facilitate trial preparations in the spirit of the Rules.

2. As concerns procedural updates since Kabuga's initial appearance, the Trial Chamber, on 24 February 2021, issued a decision granting the Prosecution's request to amend the operative indictment,¹² and the Prosecution, in accordance with that decision, filed a public second amended indictment with a confidential schedule on 1 March 2021.¹³ Kabuga's request to file preliminary challenges under Rule 79 of the Rules was extended until 30 days after a decision on the Prosecution's request to amend the indictment¹⁴ and, consequently, any such motion is due by Monday, 29 March 2021.¹⁵

3. The Trial Chamber continues to consider overlapping litigation related to Kabuga's representation.¹⁶ However, further clarification is necessary, and the Registrar has recently been requested to share additional information.¹⁷

4. The Trial Chamber has been closely following reports on Kabuga's health and has issued necessary decisions and orders to advance litigation related to it.¹⁸ Recent developments in

¹² Decision on Prosecution Motion to Amend the Indictment, 24 February 2021 ("Decision of 24 February 2021"), para. 22.

¹³ See Prosecution's Second Amended Indictment, 1 March 2021 (public, with public and confidential annexes) ("Indictment"), RP. 1009-994, Confidential Schedule to Second Amended Indictment, RP. 993, 992.

¹⁴ See Decision on Defence Motion for Extension of Time to File Preliminary Motions, 23 December 2020, p. 2.

¹⁵ Although filed on 24 February 2021, the Registry distributed the Decision of 24 February 2021 the following day and the Defence shall have 30 days from receipt of the decision to file its preliminary motions.

¹⁶ See Request from Defence for Félicien Kabuga to Benefit from the Provisions Under Article 11 of the "Directive on the Assignment of Defence Counsel" to Ensure Fairness of the Proceedings, 8 January 2021 (confidential, with five confidential annexes; original French version filed on 3 January 2021); Request Pursuant to Rule 43(G) of the Rules of Procedure and Evidence, 25 January 2021 (confidential and *ex parte*, with confidential redacted version filed on 25 January 2021; original French version filed on 21 January 2021); Request for Remuneration of the Defence Team for Work Completed During Phase Two of the Pre-Trial Stage, in Accordance with Legal Aid Policy, 24 February 2021 (confidential and *ex parte*, with two confidential and *ex parte* annexes; original French version filed on 17 February 2021).

¹⁷ See Order for Further Submissions Related to Representation, 4 March 2021, p. 2. See also Order for Submissions Related to Representation, 29 January 2021, p. 2.

¹⁸ See, e.g., Decision on Defence Motion to Share Confidential Medical Reports, 20 January 2021, pp. 1, 2; Order for Submissions Related to Health, 29 January 2021 (confidential), pp. 1, 2; Decision on Further Defence Motion to Share Confidential Medical Materials, 4 March 2021, pp. 1, 2.

Kabuga's condition,¹⁹ however, mandate that the parties and the Trial Chamber await further medical submissions before adjudicating the pending litigation as to which independent medical experts under Rule 84 of the Rules should be engaged to assist in evaluating Kabuga's fitness to travel to the Arusha Branch of the Mechanism and his fitness to stand trial.²⁰

5. Bearing the above in mind, the Defence is invited to make any submissions given the purpose of a status conference as set forth in Rule 69(A) of the Rules.

6. The Trial Chamber further notes that the Defence has previously raised concerns about its need to obtain confidential material from other cases, and the Defence is accordingly invited to submit as soon as practicable a motion for access to confidential information in relevant cases and, if a legitimate forensic purpose is demonstrated, access will be granted.

7. The Prosecution should also make any submissions with respect to the preparation of this case for trial. The Prosecution should, in particular, update the Trial Chamber on its disclosure of exculpatory material under Rule 73 of the Rules. The Trial Chamber is also presently considering deadlines for the Prosecution's filings under Rule 70(E) of the Rules, the completion of disclosure under Rule 71(A)(ii) of the Rules, disclosure of expert information and material under Rule 116 of the Rules, and the deadline for filing motion(s), if any, to take judicial notice of adjudicated facts under 115(B) of the Rules. While this case has been pending before the Mechanism or the International Criminal Tribunal for Rwanda ("ICTR") for more than two decades, significant components of the Indictment have formed part of other major ICTR cases, special depositions were taken by the ICTR to preserve evidence in this case, and nearly a year has elapsed since Kabuga's arrest. Bearing this in mind and the need to bring this case to a swift conclusion once commenced, the Trial Chamber considers that the Prosecution should be in a position to make the aforementioned filings within a reasonably short period of time following the adjudication of any challenges to the Indictment, which is expected in the first half of this year. To this end, the Trial Chamber invites the Prosecution to indicate if any impediments to achieving this goal are envisaged and the anticipated time-frame for overcoming them, before setting dates for these obligations.

¹⁹ See generally Registrar's Submission in Relation to the "Order for Submissions Related to Health" of 29 January 2021, 10 February 2021 (strictly confidential and *ex parte*); Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 22 February 2021 (public, with confidential Annex) ("Registrar's Submission of 22 February 2021"); Registrar's Submission in Relation to the "Order Following Initial Appearance" of 25 November 2020, 2 March 2021 (public, with confidential Annex) ("Registrar's Submission of 2 March 2021"); Registrar's Submission of 5 March 2021.

²⁰ Defence Motion Seeking an Order for an Expert Medical Assessment Pursuant to Rule 84 of the Rules of Procedure and Evidence, 2 February 2021 (confidential, with public redacted version filed on 5 February 2021; original French version filed on 22 January 2021).



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